

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,  
DEPARTMENT OF  
TRANSPORTATION,

Appellant,

vs.

JOHN BRONDER,

Respondent.

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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 5 OF 5**

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11 IN AND FOR CARSON CITY

12 STATE OF NEVADA DEPARTMENT  
13 OF TRANSPORTATION,

Case No. 19 OC 00066 1B

Dept. No. I

14 Petitioner,

15 vs.

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

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

22 DEPARTMENT OF TRANSPORTATION OPENING MEMORANDUM OF  
23 POINTS AND AUTHORITIES IN SUPPORT OF ITS PETITION FOR JUDICIAL  
24 REVIEW  
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DEPARTMENT OF TRANSPORTATION OPENING MEMORANDUM OF  
POINTS AND AUTHORITIES IN SUPPORT OF ITS PETITION FOR JUDICIAL  
REVIEW

I.

**STATEMENT OF JURISDICTION**

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

II.

**STATEMENT OF ISSUES**

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

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

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

III.

**STATEMENT OF THE CASE**

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

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

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

15  
16  
17 <sup>2</sup> NAC 284.374(4) reads:

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

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

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

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

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

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

22 The evidence also clearly indicates that Bonder's release from probation was due to  
23 concerns about his ability to step up to the responsibilities of the position in the  
24 Construction Division and was in no way the result of concerns about his raising questions  
25 about the contract costs. ROA 150 ll. 3-6. Finally, there was substantial, reliable  
26 evidence that showed the erroneous removal of Bronder's name from the interview list was  
27

28 <sup>3</sup> This is apparent because Bronder sat in on negotiations of this particular contract  
and, according to his own testimony, he said nothing during those negotiations about the  
high costs or other terms of the contract which were being negotiated. ROA 55.

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

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

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

#### 25 IV.

#### 26 STATEMENT OF THE FACTS

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

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

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

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

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

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

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

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

28 ///



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 not eligible for whistleblower protections). ROA 558-596. The motion was denied. ROA  
2 470-495.

3 A hearing on the merits of Bronder's appeal followed in January 2019. On March  
4 9, 2019, the hearing officer entered his decision and order finding that, "[t]here was no  
5 rational or legitimate basis for rejection of Bronder's probation ... based on the testimony  
6 of NDOT witness Sharon Foerschler, the appointing authority for the Construction  
7 Division in Carson City." ROA 13. He further found that the NDOT's proffered reasons  
8 for releasing Bronder from probation were pretext and that his dismissal from probation  
9 was in reprisal for his reports of waste, all the while ignoring evidence in contemporaneous  
10 emails outlining Foerschler's concerns regarding Bronder's job performance. ROA 26, 11.  
11 12-15; 363-366.

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

20 The Hearing Officer went on to find that "no evidence suggests HR engaged in  
21 reprisal or retaliatory action" in removing Bronder from the eligibility list in October of  
22 2017." ROA 13. In his legal analysis, the hearing officer went further. He erroneously  
23 determined that NRS 281.641(1) provided a 2-year period from the date of the disclosure  
24 of improper governmental action within which an appeal may be filed, when, in fact, a  
25 plain reading of the statute reveals a 2-year window of protection against reprisal, with  
26 procedural requirements for filing an appeal within 10 work-days of the alleged act of  
27 reprisal, as set forth in regulations NAC 281.305 and NAC 281.315.

28 ///

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

3 V.

4 SUMMARY OF THE ARGUMENT

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

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

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

1 VI.

2 ARGUMENT

3 A. Standard of Review

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

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

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

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

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

1 Purely legal questions are reviewed *de novo*. *Garcia v. Scolari's Food & Drug*, 200  
2 P.3d 514, 520, 125 Nev. 48, 56 (2009) citing *Riverboat Hotel Casino v. Harold's Club*, 113  
3 Nev. 1025, 1029, 944 P.2d 819, 822 (1997). However, in reviewing questions of fact, the  
4 court is prohibited from substituting its judgment for that of the agency. NRS  
5 233B.135(2); *Garcia*, 200 P.3d at 520, 125 Nev. at 56. Therefore, on factual issues, the  
6 court is limited to determining whether there is substantial evidence in the record to  
7 support the agency's decision. *Id.* "Substantial evidence is evidence that a reasonable  
8 mind might accept as adequate to support a conclusion." *Garcia*, 200 P. 2d at 520, 125 Nev.  
9 at 56 (citing *Grover C. Dils Med. Ctr. V. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097  
10 (2005)).

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

17 **i. Timeliness**

18 The Hearing Officer erred when he ignored the specific limitations period imposed  
19 by statute and regulation on State personnel who appeal an employment action on the  
20 basis of alleged reprisal. Instead, he applied more generalized limitations periods  
21 applicable to civil tort or civil rights actions. *Williams v. State Department of Corrections*,  
22 2017 WL 4456980, 402 P.3d 1260, 1265 (Nev. 2017); *Piroozi v. Eighth Jud. Dist. Ct.*, 131  
23 Adv. Op. 100, 363 P.3d 1168 (Nev. 2015) ("Where a general and a special statute, each  
24 relating to the same subject, are in conflict and they cannot be read together, the  
25 special statute controls.") quoting *Laird v. State Publ Emps. Ret. Bd.*, 98 Nev. 42, 45 639  
26 P.2d 1171, 1173 (1982).

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

///

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

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

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

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

13 a. Plain Text of Statute Applies.

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

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

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

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

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

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

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

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

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

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

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

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

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

27 ///

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

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

4 i. Report Made Within Organization

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

28 ///

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

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

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

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

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

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


7 **CONCLUSION**

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

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

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

22 **ARRON D. FORD**  
23 **Attorney General**

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

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**AFFIRMATION**

**Pursuant to NRS 239B.030**

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

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


AARON D. FORD  
Attorney General

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

CERTIFICATE OF SERVICE

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

Thomas J. Donaldson  
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Carson City, NV 89703  
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Sally A. Bullard, LS II  
An employee of the Office of Attorney General

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5 *Attorneys for Respondent JOHN BRONDER*

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

10  
11 STATE OF NEVADA DEPARTMENT  
OF TRANSPORTATION, )

12 Petitioner, )

13 vs. )

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

17 Respondents. )  
18

CASE NO.: 19 OC 00066 1B

DEPT NO.: 1

19  
20 **RESPONDENT JOHN BRONDER'S POINTS AND AUTHORITIES**  
**IN OPPOSITION TO PETITION FOR JUDICIAL REVIEW**

21 COMES NOW Respondent, JOHN BRONDER ("Bronder" or "Employee"), by and through  
22 his counsel, Dyer Lawrence, LLP, and Thomas J. Donaldson, Esq., and pursuant to  
23 NRS 233B.133(2), NRAP 28, and the Court's Order for Briefing Schedule dated April 9, 2019,  
24 hereby files his Memorandum of Points and Authorities in Opposition to the Petition for Judicial  
25 Review filed by Petitioner, STATE OF NEVADA DEPARTMENT OF TRANSPORTATION  
26 ("NDOT" or "Employer").

27 ///

28 ///

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

**AFFIRMATION**

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

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

DYER LAWRENCE, LLP

By: 

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JOHN BRONDER



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## JURISDICTIONAL STATEMENT

(A) The instant matter was initiated by Employer filing a Petition for Judicial Review ("Petition") pursuant to NRS 284.390(8) and NRS 233B.010 *et seq* on or about April 8, 2019, in the above-entitled Court, which is the same county where the underlying agency proceeding occurred. Petition; ROA 031.<sup>1</sup>

(B) The Petition was filed thirty-one (31) days after service of the Decision and Order on Whistleblower Appeal ("Decision") dated March 7, 2019, by Respondent STATE OF NEVADA, DEPARTMENT OF ADMINISTRATION, HEARINGS DIVISION ("Hearings Division") Hearing Officer Paul H. Lamboley, Esq., in Appeal No. 1802330-PHL.

(C) The Decision is a final decision of the agency, which is the Hearings Division, and this matter is properly before the Court pursuant to NRS 233B.130 *et seq*.<sup>2</sup>

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the Decision is:

- (a) In excess of the statutory authority of the agency;
- (b) Affected by other error of law;
- (c) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or,
- (d) Arbitrary or capricious or characterized by abuse of discretion.<sup>3</sup>

## STATEMENT OF THE CASE

This is a judicial review proceeding initiated by Employer pursuant to NRS 284.390(8) and NRS 233B.130 *et seq*. Employer is seeking to have the Court overturn the Decision granting Employee's whistleblower appeal, reversing Employer's termination of Employee because NDOT's

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<sup>1</sup> Citations to the Record on Appeal ("ROA") filed on or about May 7, 2019, will include Bates number(s) and, if applicable, line numbers, *e g* , "ROA 12:4-11."

<sup>2</sup> Respondent Hearings Division (and Hearing Officer Lamboley) did not file a timely notice of intent to participate in the instant judicial review proceeding pursuant to NRS 233B.130(3). Thus, this is the proverbial "Battle of David versus Goliath" with Employee, alone, left to oppose NDOT's Petition and to defend the Hearing Officer's Decision in this matter at his own expense with no provision for an award of attorney's fees in NRS 233B.130 *et seq*.

<sup>3</sup> Not surprisingly, Employer alleged all six (6) grounds under NRS 233B.135(3) in the Petition as bases for the Court to set aside the Decision. Petition, p. 2. However, Employer's Opening Brief only mentions the four (4) grounds identified above. Opening Brief, p. 2

1 rejection of Employee from probation was a reprisal or retaliatory action, and reinstating Employee  
2 to his former probationary status and employment with NDOT with accrued benefits previously  
3 earned. ROA 28. Employer filed a motion for a temporary stay of the Decision pending appeal,  
4 which was not opposed by Employee and, thus, granted by the Court in its Order dated April 9, 2019.  
5 *The Hearing Officer's Decision is deemed reasonable and lawful until reversed or set aside in whole*  
6 *or in part by this Court in accordance with NRS 233B.135(2).*

### 7 STATEMENT OF THE FACTS

8 The underlying administrative proceeding concerns a whistleblower appeal filed on or about  
9 January 16, 2018, by Employee pursuant to NRS 281.611 *et seq.* ROA 605-634. Employee was hired  
10 as a Manager I (Grade 43, Step 8) by NDOT in Elko, Nevada, on June 6, 2016. ROA 040, 053:17-18,  
11 430, 496. The position has a one (1) year probationary period. ROA 065:10-13. On or about  
12 February 13, 2017, Mr. Bronder accepted a lateral transfer to the same position in Carson City.  
13 ROA 040, 430, 496. In addition to his regular job duties and responsibilities, Mr. Bronder was  
14 directed immediately to assist with rewriting NDOT's Construction Manual and to learn the job duties  
15 of another Manager I, who was retiring in May, 2017. ROA 061-062, 430, 496-497.

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

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

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

1 better feel for what's going on because we see at least two or three of these every  
2 month for former employees working as consultants. (Emphasis added.)

3 ROA 046-046, 439.

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

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

16 On September 8, 2017, Mr. Bronder was hired as a Professional Engineer (Grade 40, Step 1)  
17 by the Nevada Department of Conservation and Natural Resources, Division of State Parks.  
18 ROA 053.7-16.

19 On October 10, 2017, NDOT posted a job vacancy notice for Resident Engineer (Grade 43)  
20 in Elko. ROA 054-055, 610. On October 24, 2017, Mr. Bronder applied for the Resident Engineer  
21 ///

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24 <sup>4</sup> NRS 284 340(2) provides, "[e]ach appointing authority **shall . . . [f]ile reports with the**  
25 **Administrator on the performance, during the probationary period, of each of the employees of the appointing**  
26 **authority who holds a position in the classified service A report must be filed at the end of the 2nd and 5th**  
27 **months of employment if the probationary period is 6 months, or at the end of the 3rd, 7th and 11th months**  
28 **of employment if the probationary period is 12 months."** (Emphasis supplied.)

<sup>5</sup> Former Director Malfabon was present throughout the underlying administrative hearing on  
January 17, 2019, but did **not** testify to rebut any of Employee's claims or testimony. ROA 033, 036:1-8.

1 position and was ranked #1 on the list. ROA 055-056, 442. However, rather than interviewing (and  
2 hiring) Mr. Bronder, NDOT withdrew the job posting on October 31, 2017. ROA 431, 610.

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

6 On January 16, 2018, Mr. Bronder filed the instant Whistle-Blower Appeal. ROA 605-606.  
7 On or about May 1, 2018, NDOT filed a Motion to Dismiss ("Motion") the appeal, which was fully  
8 briefed. On July 13, 2018, the Hearing Officer conducted a hearing regarding the Motion based upon  
9 the parties' Stipulated Facts and subsequently issued his Decision and Order ("Order") denying  
10 NDOT's Motion dated October 6, 2018. ROA 470-501. The Order determined:

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

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

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

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

23 ROA 010-011.

24 Hearing Officer Lamboley also properly determined:

25 Moreover, the criteria for whistleblower protected speech is *not* whether the  
26 content or action of expressed concern is *in fact or proven to be* true or correct, or is  
27 a violation of law, or is *not considered as such* by the employer, but rather the criteria  
28 is whether the employee disclosure *in good faith, reasonably believed* there may be  
improper governmental action. *Simonian v. Univ. and Cmt. Coll. Sys*, 122 Nev. 187,  
128 P.3d 1057 (Nev. 2006); also *Allum v Valley Bank of Nevada*, 114 Nev. 1313,  
1323-24, 970 P.2d 1062, 1068 (Nev. 1998) (tortious discharge); cf. *International*

1 *Game Technology v. Dist. Court*, 124 Nev. 193, 179 P.2d 556 (Nev. 2008) (false  
2 claims statutory protection) and *International Game Tech v. Dist. Court*, 122 Nev.  
132, 127 P.3d 1088 (Nev. 2006), J Maupin dissenting.

3 ROA 011-012 (emphasis in original).

4 Additionally, the Hearing Officer appropriately established:

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

13 ROA 018:8-14.

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

22 Ultimately, the Hearing Officer granted Employee's whistleblower appeal due to NDOT's  
23 reprisal or retaliatory actions, reversed NDOT's termination (rejection from probation) of Employee,  
24 reinstated Employee to his former probationary status and employment with NDOT as a Manager I,  
25 Grade 43, Step 8, and restored Employee's accrued benefits previously earned. ROA 028.  
26 NDOT argues in its Opening Brief various ways that the Hearing Officer allegedly erred in the  
27 Decision. Employee will show below that all of these arguments are without merit.  
28

#### 29 SUMMARY OF ARGUMENT

30 Employer alleges in its Petition all six (6) grounds set forth in NRS 233B.135(3) for the Court  
31 to set aside the Hearing Officer's Decision. Petition, p. 2. However, as noted above, NDOT's  
32 Opening Brief only discusses the Decision allegedly being "in excess of [the Hearing Officer's]



1 statutory authority,” “affected by clear error of law,” “clearly erroneous in view of the reliable,  
2 probative and substantial evidence in the entire record,” “arbitrary [or] capricious” and “characterized  
3 by an abuse of discretion.” Opening Brief, p. 2. As explained below, Employer, as the party  
4 attacking the Decision, has failed to carry its burden of proof by not establishing by substantial  
5 evidence any of the grounds alleged in its Petition. Thus, there is no legal reason to set aside the  
6 Hearing Officer’s Decision and, therefore, Employer’s Petition must be denied.

## 7 ARGUMENT

### 8 I.

#### 9 STATEMENT OF THE APPLICABLE STANDARD OF REVIEW

10 Judicial review of a final decision of an agency must be conducted by the Court without a  
11 jury, and confined to the record on appeal.<sup>6</sup> NRS 233B.135(1). The final decision of the agency shall  
12 be deemed reasonable and lawful until reversed or set aside in whole or in part by the Court. NRS  
13 233B.135(2). The burden of proof is on the party attacking or resisting the decision to show that the  
14 final decision is invalid pursuant to grounds set forth in NRS 233B.135(3). *Id.*

15 The Court shall not substitute its judgment for that of the agency as to the weight of evidence  
16 on a question of fact. NRS 233B.135(3). The Court may remand or affirm the final decision or set  
17 it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final  
18 decision of the agency is:

19 \* \* \*

20 (b) In excess of the statutory authority of the agency;

\* \* \*

21 (d) Affected by other error of law;

22 (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the  
whole record; or

(f) Arbitrary or capricious . . . .

23 *Id.*

24 The Nevada Supreme Court has made it clear that the findings and ultimate decisions of  
25 hearing officers **must not be disturbed unless they are clearly erroneous or otherwise amount**

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26  
27 <sup>6</sup> In cases concerning alleged irregularities in procedure before an agency that are not shown  
28 in the record, the court may receive evidence concerning the irregularities. NRS 233B.135(1). However,  
Employer has not alleged that the Decision was “made upon unlawful procedure.” Opening Brief, p. 2.  
Thus, there is no need for the Court to accept any supplemental evidence.

1 to an abuse of discretion. *State, Dep't of Motor Vehicles & Public Safety v. Root*, 113 Nev. 942,  
2 947, 944 P.2d 784 (1997). The hearing officer's conclusions of law, which are necessarily closely  
3 related to the hearing officer's view of facts, are **entitled to deference and will not be disturbed** if  
4 they are supported by substantial evidence. *State, Dep't of Motor Vehicles & Public Safety v.*  
5 *Frangul*, 110 Nev. 46, 51, 867 P.2d 397 (1994). "Substantial evidence" is that which a reasonable  
6 mind might accept as adequate to support a conclusion. *State, Dep't of Transp. v. Barsy*, 113 Nev.  
7 712, 719, 941 P.2d 971 (1997).

## 8 II.

### 9 EMPLOYEE'S CONTENTIONS

#### 10 A. There Is No Basis to Set Aside the Hearings Officer's Decision.

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

##### 15 1. Employee's whistleblower appeal was timely filed.

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

20 Initially, the Nevada Legislature specifically declared that it is the public policy of this State  
21 that State officers and employees are encouraged to disclose, to the extent not expressly prohibited  
22 by law, improper governmental action, and it is the intent of the Legislature to protect the rights of  
23 a State officer or employee who makes such a disclosure. NRS 281.621. Additionally, a State officer  
24 or employee shall not directly or indirectly use or attempt to use the official authority or influence of  
25 the officer or employee to intimidate, threaten, coerce, command, influence or attempt to intimidate,  
26 threaten, coerce, command or influence another State officer or employee in an effort to interfere with  
27 or prevent the disclosure of information concerning improper governmental action. NRS 281.631(1).  
28 The use of "official authority or influence" includes taking, directing others to take, recommending,

1 processing or approving any personnel action such as an appointment, promotion, transfer,  
2 assignment, reassignment, reinstatement, restoration, reemployment, evaluation or other disciplinary  
3 action. NRS 281.631(2).

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

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

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

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

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

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

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

27 4. The Personnel Commission may adopt **rules of procedure for conducting**  
28 **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.

(Emphasis supplied.)<sup>7</sup>

"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  
among other things, a gross waste of public money. NRS 281.611(1)(e).

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<sup>7</sup> NRS 284.390 to NRS 284.405 concern a hearing to determine the reasonableness of a  
dismissal, demotion or suspension of a State employee.

1 "Reprisal or retaliatory action" includes:

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

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

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

27 ///

28 ///

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

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

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

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

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

1 contrary to NRS 281.641. Clearly, the Hearing Officer did not err when he found that Employee's  
2 whistleblower appeal was timely.

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

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

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

10 Hearing Officer Lamboley addressed this issue in his Order dated October 6, 2018. ROA 482-  
11 484. Based upon current language of NRS 281.641(3) and its legislative history (Senate Bill 357,  
12 1995), the Hearing Officer determined:

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

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

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

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

///

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

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

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

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

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

26 ///

27 \_\_\_\_\_  
28 <sup>8</sup> The court may take judicial notice of administrative proceedings. *Mack v. Estate of Mack*,  
125 Nev. 80, 92, 206 P.3d 98, 106 (2009).

1 The Court shall not substitute its judgment for that of the agency as to the weight of evidence  
2 on a question of fact. NRS 233B.135(3). The hearing officer's conclusions of law, which are  
3 necessarily closely related to the hearing officer's view of facts, are entitled to deference and will not  
4 be disturbed if they are supported by substantial evidence. *Frangul, supra*, 110 Nev. 46, 51, 867 P.2d  
5 397 (1994). "Substantial evidence" is that which a reasonable mind might accept as adequate to  
6 support a conclusion. *Barsy, supra*, 113 Nev. 712, 719, 941 P.2d 971 (1997).

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

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

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

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

27 ROA 018:8-14

28 Ms. Foerschler, who was the "appointing authority" in this case, claimed that she came up  
with a list of reasons why she was rejecting Employee from probation, including an after-the-fact  
timeline of events. ROA 200-206, 359-362 (ER 048-051). However, it is clear from the Hearing  
Officer's questioning of Ms. Foerschler, that he did not believe her. ROA 223-242, 359-362.  
Ms. Foerschler had **no credible evidence** that Employee was not interacting with his subordinates,  
that Employee had not "sought out additional work assignments," that Employee did not work  
forty (40) hours the "week of [the] Partnering Conference" in Reno, that he "did not partake in [the]



1 Construction Manual rewrite project as assigned,” or that he did not learn the Consultant program,  
2 which was another (retiring) manager’s responsibility. *Id.*

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

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

### 15 CONCLUSION

16 In essence, Employer is attempting to attack the Hearing Officer’s Decision by challenging  
17 the factual findings that the Hearing Officer made and the resulting conclusions of law based upon  
18 those findings. However, it is clear that the Court shall not substitute its judgment for that of the  
19 Hearing Officer as to the weight of evidence on a question of fact. NRS 233B.135(3). Additionally,  
20 the Hearing Officer’s conclusions of law, which are necessarily closely related to the Hearing  
21 Officer’s view of the facts, are entitled to deference and will not be disturbed if they are supported  
22 by substantial evidence. Frangul, *supra* 110 Nev. at 51, 867 P.2d 397 (1994). Further, the Nevada  
23 Supreme Court has made it clear that the findings and ultimate decisions of hearing officers must not  
24 be disturbed unless they are clearly erroneous or otherwise amount to an abuse of discretion. Root,  
25 *supra* 113 Nev. at 947, 944 P.2d 784 (1997). Clearly, there is no legal basis upon which to set aside  
26 Hearing Officer Lamboley’s Decision in this case.

27 Initially, Employee timely filed the instant whistleblower appeal on or about January 16, 2018,  
28 in accordance with NRS 281.641(1), *i.e.*, within two (2) years of reporting improper governmental

1 action on April 10, 2017. Similarly, NRS 281.641(3) is clear that "[t]he hearing officer may not rule  
2 against the state officer or employee based on the person or persons to whom the improper  
3 governmental action was disclosed," so there is certainly no requirement that he had to report the  
4 gross waste of money to someone outside of NDOT.

5 Further, the Hearing Officer's remedy in this matter, *i.e.*, reinstatement of Employee, is  
6 consistent with NRS 281.641(2) and the only logical way to make Employee "whole" under the  
7 circumstances. Finally, the Hearing Officer's determination that NDOT's purported reasons for  
8 rejecting Employee from probation were pretextual is supported by substantial evidence in the record.

9 For all of the foregoing reasons, Employee anticipates that the Court will not conclude that  
10 the Hearing Officer did anything improper or in violation of NRS 233B.135(3) based upon the content  
11 of his Decision and the Record on Appeal in this matter. Therefore, Employee respectfully requests  
12 an order from the Court affirming the Hearing Officer's Decision dated March 7, 2019, and denying  
13 Employer's Petition in accordance with NRS 233B.135.

14 Respectfully submitted this 9<sup>th</sup> day of August, 2019.

15 DYER LAWRENCE, LLP

16  
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**CERTIFICATE OF COMPLIANCE**

I hereby certify that I have read the foregoing brief and that, to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that the brief complies with all applicable provisions of the Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record. I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 9<sup>th</sup> day of August, 2019

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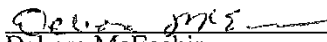
**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of Dyer Lawrence, LLP, and that on the 9<sup>th</sup> day of August, 2019, I caused a true and correct copy of the within **RESPONDENT JOHN BRONDER'S POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR JUDICIAL REVIEW**, to be delivered via U.S. Mail, first-class postage prepaid and electronic mail to the following persons:

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

16 STATE OF NEVADA DEPARTMENT  
17 OF TRANSPORTATION,

Case No. 19 OC 00066 1B

Dept. No. I

18 Petitioner,

19 vs.

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

24 Respondents,  
25 \_\_\_\_\_/

26 DEPARTMENT OF TRANSPORTATION'S REPLY MEMORANDUM OF POINTS  
27 AND AUTHORITIES IN SUPPORT OF ITS PETITION FOR JUDICIAL REVIEW  
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Respondent, State of Nevada, Department of Transportation (NDOT) through its counsel Aaron D. Ford, Attorney General and Lori M. Story, Senior Deputy Attorney General, herein replies to Respondent John Bronder's (Bronder) Points and Authorities in Opposition to Petition for Judicial Review. The reply is made pursuant to NRS 233B.130 *et seq.* and based upon the following points and authorities.

#### MEMORANDUM OF POINTS AND AUTHORITIES

I. Bronder's Arguments Do Not Refute Hearing Officer's Misapplication of Law

a. All Sections of a Statute Apply Equally.

Bronder argues that the Hearing Officer's interpretation of the limitations period imposed on filing a whistleblower appeal under NRS 281.641(1) was not in error when he determined that a state classified employee has two years within which to file an appeal of an act of reprisal suffered for reporting malfeasance by a state agency or official. Opposition Brief (Oppo), pp. 9-10. He reaches this conclusion by cherry-picking certain sections of that statute for emphasis while ignoring others.

The section he ignores, NRS 281.641(4), specifically directs the State Personnel Commission to draft regulations that are in conformity with the procedural rules governing other employee appeals as set out in NRS 284.390 to NRS 284.405. As previously argued by NDOT, NRS 284.390 specifically directs that an appeal of an action taken against an employee must be filed within 10-work days of the event or action being appealed. That same "procedural rule" applies to whistleblower appeals filed under NRS 281.641.

To argue that the reference to "hearing" in this statute limits the application of the procedural rule found in NAC 281.305 and NAC.281.315 to the proceedings on the day the evidence is presented is illogical and renders certain of those provisions meaningless – a violation of statutory and regulatory interpretation rules. The court must "avoid statutory interpretation that renders language meaningless or superfluous." *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011), and "whenever possible ... will interpret

///



1 a rule or statute in harmony with other rules or statutes," *Watson Rounds v. Eighth*  
2 *Judicial Dist. Court*, 131 Nev. —, 358 P.3d 228, 232 (2015). (quotation marks omitted).  
3 To ignore the procedural requirements for an appeal set out in NAC 281.305 also requires  
4 that you ignore subsection (4) of NAC 281.641 and the appeal procedures that are outlined  
5 in NRS 284.390, which specifically identified the 10 work-day period for filing a personnel  
6 appeal. The Legislature directed procedures in conformity with Chapter 284. This Court  
7 should uphold that directive by reversing the Hearing Officer's finding that Bronder had  
8 two years to file his appeal.

9 b. NAC 281.305 Does Not Conflict or Contradict NRS 281.641.

10 Bronder's reference to *Roberts v. State Univ. of Nevada Sys.*, 104 Nev. 33, 752 P.2d.  
11 221 (1988), etc., to support his argument that regulations cannot conflict or contradict  
12 statutes, is not applicable to these circumstances. The regulations found in NAC 281.305  
13 and NAC 281.315 do not contradict or conflict with the directive set out in NRS 281.641(4).  
14 Rather, they are in compliance with that statutory directive.

15 Moreover, the plain text of NRS 281.641(4), which directs that the hearing must be  
16 conducted in accordance with the procedures set forth in NRS 284.390 to 284.405, defines  
17 the procedural requirements that must be met in order to even obtain an appeal hearing,  
18 such as timely filing the appeal notice and request for hearing. Just as it is the Rules of  
19 Appellate Procedure that govern the timing and processes that must be followed in order  
20 to vest the court with jurisdiction over an appeal of a lower court's decision, the regulations  
21 drafted by the Personnel Commission, adopted and approved by the Legislature, govern  
22 the timing and processes that must be followed in order to appeal an adverse employment  
23 action. These hearing procedures conform to the statutory directive and are not in conflict  
24 with it. They have the force and effect of law, *Turk v. Nevada State Prison*, 94 Nev. 101,  
25 104, 575 P.2d 599, 601 (1978), and cannot be lawfully disregarded in order to obtain the  
26 desired result in a hearing decision.

27 The Hearing Officer's interpretation of NRS 281.641 is erroneous and contrary to  
28 law. When Bronder filed his appeal more than nine months after the events of which he

1 complains, pursuant to NRS 281.641(4), NRS 284.390(1) and NAC 281.305(1), the appeal  
2 was untimely and the Hearing Officer did not have jurisdiction to review the case. Thus,  
3 his actions were: (a) In violation of constitutional or statutory provisions; (b) In excess of the  
4 statutory authority of the agency; and (c) Made upon unlawful procedure. NRS 233B.135(3).

5 **II. Bronder's Report to His Supervisor Is Not Whistleblowing**

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

15 Bronder's reports were both made within the organization where the purported  
16 improper governmental action occurred – in April 2017 to the Deputy Construction  
17 Engineer and in July 2017 to the Director and Deputy Director of NDOT. Bronder did not  
18 originally intend his questions to his supervisor or to the NDOT Director to be actual  
19 whistleblowing events. Instead, it is much more likely that he was simply trying to  
20 impress these individuals with his knowledge and his expressed concern for the operations  
21 of NDOT in order to enhance his own professional standing or his chances for rehire.

22 **III. Bronder's Release From Probation Was Lawful And Based On His Unwillingness**  
23 **To Take On The Responsibilities Assigned To Him.**

24 As previously argued, the evidence given at the hearing clearly demonstrated that  
25 NDOT did not consider Bronder's reports about the contract costs to be a threat to their  
26 system or practices, nor did they consider it to be exposing any agency secrets or illegal  
27 behaviors. ROA 147-148. Contract costs were frequently discussed in public meetings  
28 of the Nevada Transportation Board and NDOT. (*see e.g.*, ROA 312-313; 318-324; 439),  
and those costs were constrained by both state and federal regulation and state policies.

1 ROA 151; 379-409. In fact, the evidence suggests that the only reason Bronder had a  
2 concern about the costs was because the Governor had asked questions about of the  
3 contract when it was up for review in a public meeting of the Nevada Transportation Board  
4 in April 2017. ROA 46, 609-611.<sup>1</sup>

5 The evidence also clearly demonstrates that Bonder's release from probation was  
6 due to concerns about his ability to step-up to the responsibilities of the position in the  
7 Construction Division and was in no way the result of concerns about his raising questions  
8 about the contract costs. ROA 150 ll. 3-6.

9 Finally, there was substantial, reliable evidence that showed the erroneous removal  
10 of Bronder's name from the interview list in October 2018 was a clerical error on the part  
11 of the Human Resources clerk and was not done at the request of any NDOT supervisor  
12 or official. ROA 271. Where there is no evidence of a motive to retaliate against Bronder,  
13 the finding that a legitimate and rational business decision was an act of reprisal is an  
14 abuse of discretion and error on the part of the Hearing Officer.

15 The Hearing Officer's reasoning is not sound. There is no requirement in the law  
16 that the probationary employee be given a reason for his or her release, nor is there any  
17 requirement that the full period of probation be expended. *See generally* NAC 284.442-  
18 284.458. Moreover, a thorough review of the appointing authority's testimony rebuts the  
19 Hearing Officer's finding that it was contradictory and inconsistent. While the Hearing  
20 Officer found that "there was no substantive discussion with Bronder of reasons for actions  
21 taken by Ms. Foerschler," (ROA 15), evidence shows that Foerschler outlined her reasons  
22 for letting Bronder go before she met with him and that she discussed those reasons with  
23 him during the meeting on May 5, 2017. ROA 200-203; 359. Stephan Lani, who sat in on  
24 the meeting also testified that Bronder was offered various reasons for his release,  
25 consistent with Foerschler's list. ROA 148-150. Moreover, Bronder admitted that he could  
26 be released from probation if he was unable to show he could do the job. ROA 65-66.

27  
28 <sup>1</sup> This is apparent because Bronder sat in on negotiations of this particular contract  
and, according to his own testimony; he said nothing during those negotiations about the  
high costs or other terms of the contract, which were being negotiated. ROA 55.

Additionally, Foerschler's conversation with Ratliff did not taint his thinking of Bronder's performance. Rather it confirmed his concerns that Bronder was not forthcoming in his reports of use of work time and his whereabouts during work hours, as well as his failure to follow-through on certain of his supervisory obligations, such as completing a write-up for a disciplinary matter. ROA 220-222. These instances of poor performance conformed to what Foerschler described as her reasons for releasing Bronder from probation.

#### IV. Conclusion

The procedural decisions made by the Hearing Officer in this matter were erroneous and in violation of statutory provisions specifically applicable to these administrative proceedings. In allowing the appeal to go forward despite its untimely filing, the Hearing Officer acted without jurisdiction and in excess of his statutory authority.

The Hearing Officer disregarded the reliable, probative and substantial evidence in the record showing that Bronder's report gave his employers no motive to retaliate. The report was not considered to be a whistleblower report and never caused NDOT concerns about public awareness of the costs of outside contracting or the legality of the process employed in negotiating those contracts. Thus, NDOT had no motive to retaliate against Bronder. Rather, it reviewed his performance in light of expectations and determined it was best to cut their losses before the expiration of Bronder's probation. In disregarding the credible, consistent, and substantial evidence provided by NDOT witnesses, the Hearing Officer acted in a capricious and arbitrary manner.

**NDOT seeks reversal of the Hearing Officer's erroneous and unsupported decisions.**

DATED this 14<sup>th</sup> day of August 2019.

ARRON D. FORD  
Attorney General

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**AFFIRMATION**

**Pursuant to NRS 239B.030**

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

DATED this 14<sup>th</sup> day of August 2019.

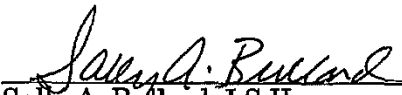
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By:   
LORI M. STORY  
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CERTIFICATE OF SERVICE

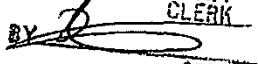
Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 14 day of August 2019, service of the NEVADA DEPARTMENT OF TRANSPORTATION'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS PETITION FOR JUDICIAL REVIEW was made this date by depositing a true copy of the same for mailing, first class mail, at Carson City, Nevada, addressed as follows:

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

10  
11 STATE OF NEVADA DEPARTMENT  
OF TRANSPORTATION,

12 Petitioner,

13 vs.

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

17 Respondents.  
18

CASE NO.: 19 OC 00066 1B

DEPT NO.: 1

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

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

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1 Findings of Fact

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

10 On or about April 10, 2017, Employee viewed NDOT's Board of Directors' meeting and, based upon  
11 then Governor Brian Sandoval's question and comments about seemingly excessive compensation of  
12 contracted consultants, immediately expressed his concerns to NDOT Assistant Construction Engineer  
13 Stephen Lani. Mr. Lani dismissed Employee's concerns of a gross waste of public money. ROA 045-046,  
14 430, 609, 615-621.

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

17 This is something that will likely be taken up at the Board of Transportation, but the **total**  
18 **amount for consultants is \$186 million.** That's a really big number. I asked yesterday, **it's**  
19 **bigger than the entire payroll of NDOT for a year.** Today is not the day to do it but I'd  
20 like you to be thinking about it – we pay \$41.93 for an employee to do it and we're paying  
21 \$134.40 for a consultant to do the same work. I think a conversation needs to be had with  
22 the amount of money that is going out the door versus what is being done internally. As I  
said, I am very surprised that we have that amount of money. We approve these consulting  
contracts piecemeal but we've never had them aggregated and this is a massive number. I  
know your bandwidth is only so wide and we have a lot of projects going on out there, but  
again, I've got to get a better feel for what's going on because we see at least two or three of  
these every month for former employees working as consultants. (Emphasis added.)

23 ROA 046-046, 439.

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

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

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

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

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

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

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

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

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

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

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

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

17 ROA 010-011.

18 Hearing Officer Lamboley also properly determined:

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

24 ROA 011-012 (emphasis in original).

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1 Additionally, the Hearing Officer appropriately established:

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

10 ROA 018:8-14.

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

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

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

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

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1 Conclusions of Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1       “Reprisal or retaliatory action” includes:

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

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

24       Here, Employee disclosed improper governmental action to Mr. Lani on April 10, 2017. ROA 045-  
25 046, 430, 609, 615-621. Two (2) weeks later on April 24, 2017, Employee received his first and only  
26 performance evaluation with an overall rating of “meets standards,” which his “appointing authority,”  
27 NDOT Chief Construction Engineer Sharon Foerschler reviewed, “agree[d]” with and signed. ROA 047-  
28 049, 215:4-15, 239-240, 623-625. NDOT rejected Employee from probation, *i.e.*, terminated his  
employment, two (2) weeks later on May 5, 2017, one (1) month before he would have completed his twelve  
(12) month probationary period on June 6, 2017. ROA 049-050, 627. Employee subsequently learned on  
January 5, 2018, that NDOT unlawfully removed his name from the interview eligibility list “per  
NAC 284.374.” ROA 056, 446. Employee filed his whistleblower appeal on or about January 16, 2018.  
ROA 605-606.

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

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

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

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

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

1 appeal was timely.

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

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

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

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

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

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

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

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

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



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

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

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

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

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

26 ///

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

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

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

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

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

14 ROA 018:8-14.

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

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

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

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

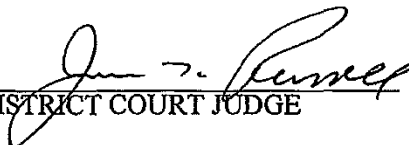
9 Order and Decision

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

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

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

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

21  
22   
DISTRICT COURT JUDGE

23 Submitted by:

24 DYER LAWRENCE, LLP


25  
26 By: \_\_\_\_\_  
27 Thomas J. Donaldson  
28 Nevada Bar No. 5283  
Attorneys for Respondent  
John Bronder

**CERTIFICATE OF MAILING**

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

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

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

  
C. McClintick  
Law Clerk, Dept. 1

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

5 *Attorneys for Respondent JOHN BRONDER*

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

10  
11 STATE OF NEVADA DEPARTMENT  
OF TRANSPORTATION, )

12 Petitioner, )

13 vs. )

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

17 Respondents. )  
18

CASE NO.: 19 OC 00066 1B

DEPT NO.: 1

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

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

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

25 DYER LAWRENCE, LLP

26  
27 By: 

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

**CERTIFICATE OF SERVICE**

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

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

Paul H. Lamboley, Esq.  
Hearing Officer  
State of Nevada Dept. of Admin. Appeals  
1050 E Williams St Ste 450  
Carson City, NV 89710  
[plw11@sbcglobal.net](mailto:plw11@sbcglobal.net)

Tasha Eaton  
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Debora McEachin

**EXHIBIT "1"**

**EXHIBIT "1"**

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5 *Attorneys for Respondent JOHN BRONDER*

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

10  
11 STATE OF NEVADA DEPARTMENT  
OF TRANSPORTATION, )

12 Petitioner, )

13 vs. )

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

17 Respondents. )  
18

CASE NO.: 19 OC 00066 1B

DEPT NO.: 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 ROA 010-011.

18 Hearing Officer Lamboley also properly determined:

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

24 ROA 011-012 (emphasis in original).

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1           Additionally, the Hearing Officer appropriately established:

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

10          ROA 018:8-14.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 "Reprisal or retaliatory action" includes:

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

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

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

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

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

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

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

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



1 appeal was timely.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 ROA 018:8-14.

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

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

28 ///

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

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

9 Order and Decision

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

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

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

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

21  
22   
DISTRICT COURT JUDGE

23 Submitted by:

24 DYER LAWRENCE, LLP


25  
26 By: \_\_\_\_\_  
27 Thomas J. Donaldson  
28 Nevada Bar No. 5283  
Attorneys for Respondent  
John Bronder

CERTIFICATE OF MAILING

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

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

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

  
C. McClintick  
Law Clerk, Dept. 1

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

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AUBREY A. JOHNSON  
BY C. COOPER  
DEPUTY

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

11 STATE OF NEVADA DEPARTMENT  
OF TRANSPORTATION,

12 Petitioner,

Case No. 19 OC 00066 1B

13  
14 vs.

Dept. No. I

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

CERTIFICATE OF SERVICE

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

19  
20 In compliance with the First Judicial District Court's Order, filed September 10,  
21 2019, I hereby certify that on the 18 day of September, 2019, I served a true and correct  
22 copy of the **Findings of Fact, Conclusions of Law and Decision Denying Petition**  
23 **for Judicial Review**, in Case No. 19 OC 00066 1B, Dept. No. 1, along with a copy of the  
24 **Decision and Order on Whistleblower Appeal**, before the Administration Hearings  
25 Division, Appeal No. 1802330-PHL, dated March 7, 2019, by depositing the same for  
26 mailing, first class mail, at Carson City, Nevada, addressed as follows:  
27  
28

1  
2 Honorable Steve Sisolak  
3 Governor of the State of Nevada  
4 Capitol Building  
5 101 N. Carson Street  
6 Carson City, Nevada 89701

7 Allison Wall  
8 Personnel Officer 3  
9 Nevada Department of Transportation, Room 115  
10 1263 S. Stewart Street  
11 Carson City, Nevada 89701

12 Thomas J. Donaldson  
13 Dyer Lawrence, LLP  
14 2805 Mountain Street  
15 Carson City, Nevada 89703  
16 *Attorneys for Respondent John Bronder*

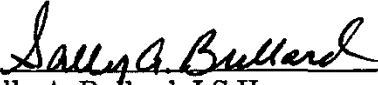
17 Paul H. Lamboley,  
18 Hearing Officer  
19 375 Forest Street, Ste. 200  
20 Reno, Nevada 89509

21  
22 **AFFIRMATION**

23 **Pursuant to NRS 239B.030/603A.040**

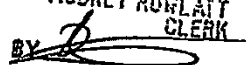
24 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding  
25 document does not contain the personal information of any person.

26 DATED this 18<sup>th</sup> day of September, 2019.

27  
28   
Sally A. Bullard, LS II  
An employee of the Office of Attorney General  
*Attorney for Petitioner*

1 THOMAS J. DONALDSON  
Nevada Bar No. 5283  
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5 *Attorneys for Respondent JOHN BRONDER*

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

10  
11 STATE OF NEVADA DEPARTMENT  
OF TRANSPORTATION, )

12 Petitioner, )

13 vs. )

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

17 Respondents. )  
18

CASE NO.: 19 OC 00066 1B

DEPT NO.: 1

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

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

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1 Findings of Fact

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

10 On or about April 10, 2017, Employee viewed NDOT's Board of Directors' meeting and, based upon  
11 then Governor Brian Sandoval's question and comments about seemingly excessive compensation of  
12 contracted consultants, immediately expressed his concerns to NDOT Assistant Construction Engineer  
13 Stephen Lani. Mr. Lani dismissed Employee's concerns of a gross waste of public money. ROA 045-046,  
14 430, 609, 615-621.

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

17 This is something that will likely be taken up at the Board of Transportation, but the **total**  
18 **amount for consultants is \$186 million.** That's a really big number. I asked yesterday, it's  
19 **bigger than the entire payroll of NDOT for a year.** Today is not the day to do it but I'd  
20 like you to be thinking about it – we pay \$41.93 for an employee to do it and we're paying  
21 \$134.40 for a consultant to do the same work. I think a conversation needs to be had with  
22 the amount of money that is going out the door versus what is being done internally. As I  
said, I am very surprised that we have that amount of money. We approve these consulting  
contracts piecemeal but we've never had them aggregated and this is a massive number. I  
know your bandwidth is only so wide and we have a lot of projects going on out there, but  
again, I've got to get a better feel for what's going on because we see at least two or three of  
these every month for former employees working as consultants. (Emphasis added.)

23 ROA 046-046, 439.

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

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

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

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

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

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

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

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

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

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

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

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

17 ROA 010-011.

18 Hearing Officer Lamboley also properly determined:

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

24 ROA 011-012 (emphasis in original).

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1        Additionally, the Hearing Officer appropriately established:

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

10       ROA 018:8-14.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 "Reprisal or retaliatory action" includes:

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

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

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

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

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

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

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

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



1 appeal was timely.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 ROA 018:8-14.

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

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

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

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

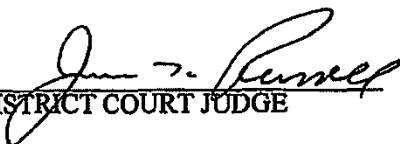
9 Order and Decision

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

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

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

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

21  
22   
DISTRICT COURT JUDGE

23 Submitted by:

24 DYER LAWRENCE, LLP


25  
26 By: \_\_\_\_\_  
27 Thomas J. Donaldson  
28 Nevada Bar No. 5283  
Attorneys for Respondent  
John Bronder

**CERTIFICATE OF MAILING**

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

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2805 Mountain Street  
Carson City, NV 89703

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5 *Hearing Officer*

6  
7 STATE OF NEVADA  
DEPARTMENT OF ADMINISTRATION  
8 HEARINGS DIVISION  
9 BEFORE THE HEARING OFFICER

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

16  
17 **DECISION AND ORDER ON WHISTLEBLOWER APPEAL**

18 **I. Background.**

19 This case was initiated by Employee JOHN BRONDER (Bronder), under NRS 281.611 et seq.,  
20 specifically NRS 281.641(1), as a whistleblower appeal of alleged reprisal or retaliatory action by  
21 Employer NEVADA DEPARTMENT OF TRANSPORTATION (NDOT).

22 On May 5, 2017, NDOT notified Bronder, a probationary employee, that his probationary  
23 status in Manager I position was rejected and his employment was terminated at the end of his  
24 shift. Bronder did not then appeal the rejection of probation and termination, of employment

25 In October 2017, an employment recruitment position was posted by NDOT, for which Bronder  
26 applied and ranked No. 1. That posting was cancelled.  
27  
28

1 On November 3, 2017, that same employment recruitment position was re-posted by NDOT for  
2 which Bronder again applied. In response to his application, Bronder learned on January 5, 2018  
3 that he was "*removed per NAC 284.374*" from the active eligibility list for employment by NDOT.

4 On January 16, 2018, Bronder filed appeal of his removal from eligible listing under NRS  
5 284.374 based on alleged whistleblower retaliation and protections under NRS 281.641(1) seeking  
6 relief to restore (a) credit for 11 months of probation as a Manager 1, (b) sick leave forfeited upon  
7 termination, and (c) compensation level to grade 43, step 8.

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

10 **II. Pre-Hearing Conference.**

11 On February 13, 2018 the HO proposed a pre-hearing conference to review procedures,  
12 discovery/exchange of information, exhibits, witnesses, confidentiality, and date/time/location of  
13 hearing. The Parties, however, decided a pre-hearing conference was not necessary, but did agree  
14 to hold a hearing on the merits of the appeal on May 31, 2018.

15 **III. Pre-Hearing and Hearing Procedures/ Motion Activity.**

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

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

21 3. On May 9, 2018 NDOT filed an email Motion to Continue Hearing set for May 31, 2018, to  
22 which on May 9 Bronder indicated no opposition, and to which on May 9 the HO granted  
23 continuance of hearing to be reset.

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

25 5. After the July 13, 2018 hearing on the MTD merits, post-hearing argument, and post-hearing  
26  
27  
28

1 supplement, a Decision and Order was issued and served October 8, 2018 denying NDOT's MTD  
2 based on statutory and constitutional whistleblower protections.

3 6. After denial of NDOT's MTD, a new Hearing Schedule and Procedure for hearing on the  
4 merits of the appeal regarding alleged reprisal or retaliatory conduct under NRS Chapter 284 and  
5 NAC Chapter 284 was set for Thursday, January 17, 2019, with pre-hearing briefs, lists of  
6 witnesses and exhibits due January 13, 2019.

7 **IV. Hearing.**

8  
9 On January 17, 2019 hearing was held on the merits of Bronder's whistleblower appeal.  
10 Appearing were Employee/Appellant John Bronder and his attorney Thomas J. Donaldson, Esq.,  
11 and Employer/Respondent NDOT representative Director Rudi Malfabon and NDOT's attorney  
12 Deputy Attorney General Lori M. Story, Esq..

13 Multiple witness testimony was anticipated, and the exclusionary rule was applied. Bronder's  
14 pre-hearing statement and attached exhibits were accepted into the record as Exhibits EE-1 to EE-  
15 5. NDOT's pre-hearing statement and supplement with exhibits were accepted into the record as  
16 Exhibits ER-A to ER-G and ER-1 to ER-6.

17 Exhibit ER-E was accepted into the record subject an outstanding objection for lack of  
18 foundation and underlying emails. NDOT was requested to provide the underlying emails post-  
19 hearing. On January 23, 2019 NDOT supplemented the record providing 5 emails related exhibit  
20 ER-E. Party email comments and continued objections followed and are included in the record.  
21

22 **I. Evidentiary Record and Employment History.**

23 **a. Evidentiary Record.**

24 The evidentiary record includes all exhibit documents submitted by Bronder and NDOT.

25 Bronder exhibits attached to Employee's Pre-Hearing Statement, identified as EE-1-5, are:

- 26 EE-1 Nevada Board of Examiners' minutes of meeting April 11, 2017  
27 EE-2 John Bronder's NVAAPS history as private citizen  
28 EE-3 John Bronder's NVAAPS history as State employee



1 EE-4 *Boice v. NDOT* Case No. CC-07-13-LWL (Decision dated June 26, 2014)  
2 EE-5 NAC 284.374

3 NDOT exhibits attached to NDOT's Pre-Hearing Statement, identified as ER-A-F, are:

- 4 ER-A Bronder Whistleblower Appeal Form NPD-53 with attached sub-exhibits A-E.  
5 ER-B NDOT Audit Report CV22-19, January 4, 2019 for CA Group Agreement.  
6 ER-C NDOT Emails July 11-12, 2017, Note 7.14.17, Email May 15, 2018  
7 ER-D Bronder NDOT Job Application November 3, 2017, status eligible November 29,  
8 2017  
9 ER-E S.Foerschler (SF) email April 24, 2017, SF's Bronder rationale, SF's Bronder work  
10 timesheet 02.13-05.04.17 with post-hearing supplemental April 24 emails.  
11 ER-F Bronder NVAPPS -applicant's profile information 12.06.16-01.08.18

12 NDOT's exhibit attached to NDOT's Supplement, identified as ER-G, is:

- 13 ER-G Evaluation Criteria -- related to Construction Augmentation Services of Crew 910  
14 for Project ID 73549, Project No. SPSR-0648(009).

15 Attached to NDOT's Supplemental Authorities ER-G, are exhibits ER-1-6:

- 16 ER-1 23 U.S.C. § 112 - Federal -Aid Highways: Letting of Contracts  
17 ER-2 23 C.F.R. § 172.1 -Procurement, Management, and Administration of Engineering  
18 and Design Related Services: Purpose and Applicability  
19 ER-3 23 C.F.R. § 172.5 -Procurement, Management, and Administration of Engineering  
20 and Design Related Services: Program Management and  
21 Oversight  
22 ER-4 23 C.F.R. § 172.7 -Procurement, Management, and Administration of Engineering  
23 and Design Related Services: Procurement Methods and  
24 Procedures  
25 ER-5 23 C.F.R. § 172.11 -Procurement, Management, and Administration of Engineering  
26 and Design Related Services: Allowable Costs and Oversight  
27 (with additional FHWA information @ [www.fhwa.dot.gov](http://www.fhwa.dot.gov))  
28 ER-6 *O'Keefe v. DMV*, 134 Nev. Adv. Op. 92 (December 6, 2018)

The evidentiary record also includes testimony of witnesses under oath:

For Bronder: John Bronder

For NDOT: Reid Kaiser – Deputy Administrator, NDOT Carson City  
Steve Lani – Deputy Construction Engineer, NDOT Carson City  
Sharon Foerschler – Chief Construction Engineer, NDOT Carson City  
Boyd Ratliff - District Manager, NDOT Elko (by telephone)  
Tonya Sieben – Human Resource Officer, NDOT Carson City

**b. Employment History.**

Bronder was employed by NDOT June 6, 2016 as a Manager I P.E. position in Elko, NV at a

1 Grade 43 which requires a 12-month probationary period. On February 13, 2017, Bronder  
2 transferred to a Manager I position in NDOT Construction Division in Carson City, NV, also a  
3 Grade 43 position. The Manager I position in Carson City was a position with different job specs,  
4 duties and responsibilities, and which also included the additional assignment to learn the job  
5 duties of another soon-departing Construction Division employee. Being the same classification,  
6 the transfer was deemed a lateral transfer and Bronder's initial 12-month probationary period  
7 continued unchanged and not extended for this new role.  
8

9 Bronder's first and only employee evaluation was April 24, 2017 during the 10<sup>th</sup> month of his  
10 probationary period and occurring hours prior to his planned vacation leave. The Employee  
11 Appraisal & Development Report NDP-15, NDOA-7, concluded that Bronder "meets standards"  
12 overall for the listed 12 Job Elements evaluated, although 2-elements, #2 and #6, noted need for  
13 improvement. The evaluation was based solely on Bronder's time as Manager I in the  
14 Construction Division, Carson City from February 13, 2017.  
15

16 Returning to work from vacation leave on May 5, 2017, Bronder was informed by Construction  
17 Division appointing authority, Sharon Foerschler, that his probation was rejected and employment  
18 would be terminated effective at end of his shift that day.

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

20 Bronder did not previously appeal rejection of probation or his termination.

## 21 **V. Issues and Positions of the Parties.**

### 22 **A. Issues.**

23 Whistleblower appeals present primary and secondary issues under NRS 281.641 and NAC  
24 281.315.

25 On the merits of this appeal the evidence must procedurally address the following issues:

- 26 (1) Whether Bronder was a state officer or employee on the date of the alleged reprisal or  
27 retaliation action:  
28

1 (2) Whether Bronder disclosed information concerning improper governmental action:

2 (3) Whether the alleged reprisal or retaliatory action was taken against Bronder within 2  
3 years after the date he disclosed the information concerning improper governmental  
4 action.

5 (4) If Bronder factually establishes (1)-(3) above, the NDOT's evidence must address  
6 whether NDOT did not engage in the alleged reprisal or retaliatory action or whether  
7 the action was taken for a legitimate business purpose and was not the result of the  
8 disclosure of information concerning improper governmental action.

9 (5) If NDOT establishes a legitimate business purpose for the alleged reprisal or retaliatory  
10 action. Bronder may introduce evidence to demonstrate whether the stated business  
11 purpose is a pretext for the reprisal or retaliatory action.  
12

13 For Bronder the primary issue is whether he is entitled to whistleblower protection and use of  
14 appeal procedures for relief under applicable provisions of NRS and NAC for NDOT's alleged  
15 reprisal or retaliatory action for the termination of his probationary status and employment, and the  
16 denial of active eligibility status on the NDOT interview list for reporting his concerns to his  
17 supervisors for improper governmental action in the potential gross waste of public money  
18 occurring in a construction bid/contract award procedure.  
19

20 For NDOT the primary issue is whether this case qualifies for whistleblower protection and is  
21 eligible to utilize appeal procedures for relief under applicable provisions of NRS and NAC.  
22 NDOT raises issues contesting the timeliness of Bronder's appeal and the content of his disclosure  
23 as "government wrongdoing".

24 NDOT suggests a secondary issue that Bronder as a *probationary* employee may be dismissed  
25 at any time during probation without cause if NDOT complies with applicable regulations and is  
26 for lawful reason.

27 Both Parties raise issues regarding the *scope of remedy* related to the relief requested.  
28

1       **B. Positions of the Parties.**

2       **1. Bronder.**

3       Bronder relies on the applicable provisions of NRS 281.611-.671, NAC 281.305-.315, and NRS  
4       284.390-.405, and additionally, NAC 274.374, for whistleblower appeal and relief requested for the  
5       alleged reprisal or retaliatory action taken against him for his expressed concerns and reasonable  
6       belief that cost elements in a construction bid/contract award were potentially a "gross waste of  
7       public money" and "improper governmental action".

8       Bronder argues: (a) his use of NPD-53 for whistleblower protection appeal is proper as it  
9       expressly allows a "former state officer or employee" to use; (b) his whistleblower protection  
10      appeal is timely under 2-year period in the governing statute NRS 281.641(1) not the inconsistent  
11      10-day period in regulation adopted in NAC 281.305; (c) he can properly use the whistleblower  
12      appeal process to challenge his rejection from probation and termination as the scope of "reprisal  
13      or retaliatory action" is not limited to examples included in NRS 281.611(5)(a)-(m) which are not  
14      exhaustive or exclusive; (d) he can properly use the whistleblower appeal process to challenge his  
15      rejection from probation and termination, and the denial of eligibility status on interview list *per*  
16      NAC 284.374 as the desist and refrain remedy in NRS 281.641(2) is not a limited, exclusive  
17      remedy, and (e) his relief request is within the scope of remedy and statutory authority of a Hearing  
18      Officer, citing *Boice v. NDOT*, Case No. CC-07-13-1.WL (June 26, 2014) for Bronder's requested  
19      restoration of "*11 months of probation served as Manager I, sick leave forfeited upon termination,*  
20      *and compensation level to Grade 43, step 8.*"

21      Bronder asserts there can be no serious doubt that the consultant criticisms and construction  
22      bid/contract cost concerns he expressed internally to his supervisors were legitimate concerns over  
23      the potential for the *gross waste of public money* which qualifies as *improper governmental action*  
24      under NRS 281.611(1) (e).

1 Bronder contends the record evidence satisfies his required burden of proof and establishes all  
2 essential elements necessary for relief under Nevada's statutory whistleblower protection.

3 **2. NDOT.**

4 NDOT relies on the same statutory and regulatory provisions as does Bronder.

5 NDOT urges: (a) Bronder's appeal is untimely; (b) Bronder misuses the whistleblower appeal  
6 process to challenge rejection from probation and termination; and (c) Bronder improperly seeks  
7 remedy through this appeal for requested relief to restore his pay grade, sick leave or lost time in  
8 PERS because the relief requested is beyond the authority of Hearing Office which is limited by  
9 NRS 281.641(2).  
10

11 NDOT also urges: (a) Mr. Bronder's construction bid/contract costing concerns reported to his  
12 supervisory chain do not qualify as whistleblowing because the content of the disclosures were not  
13 considered complaints of improper governmental action or wrongdoing by his supervisors because  
14 the contract bid award issues raised by Bronder were in fact compliant with all applicable State and  
15 Federal protocols, and ultimately, with NDOT's final audit; (b) Bronder was properly and legally  
16 released from probation and terminated because he had not shown he was able to do the work  
17 assigned, did not follow instruction not fostering productive and effective relationships with  
18 subordinates and not shown initiative in improving the construction contracting process - in  
19 essence, he was not a good fit within the Construction Division; (c) the reason for declining to  
20 interview him and removing him from interview eligibility list "per NAC 284.374" cannot be  
21 deemed an act of reprisal or retaliation listed in NRS 281.641 for a position where he has already  
22 proven himself ineffective, and in fact that occurred due to a clerical error by a NDOT Human  
23 Resource person; (d) Bronder was not harmed as he in fact interviewed for various positions and  
24 was hired by the State; and (e) the hearing officer must give deference to the decisions of the  
25 appointing authority citing *O'Keefe v. DMV*, 134 Nev. Adv. Op. 92 ( December 6, 2018).  
26

27 **IV. Discussion.**  
28

1       **A. Jurisdiction, Procedures and Criteria.**

2       This case presents issues underlying protections available to employees alleging retaliation for  
3       whistleblowing in the public sector workplace. The protections for public employee  
4       whistleblowers are both statutory and constitutional. As a consequence, whistleblower protections  
5       in public sector employment are distinguished from and contrasted with that of at-will private  
6       sector employment without statutory or constitutional protections.

7  
8       **1. Statutory Protections.**

9       The primary statutory policy for whistleblower protection is NRS 281.621, which provides:

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

13       Additionally, NRS 281.631 states:

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

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

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

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

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

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

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

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

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

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

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

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

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

19 To whom an employee makes a disclosure or statement, albeit to a party within or without the  
20 employee's employment setting, is neither relevant nor material under NRS 281.641(3). Whether  
21 retaliation occurred is the primary issue.

## 22 2. Constitutional Protections.

23 Supporting whistleblower protections in U.S. and Nevada Constitutions need not and will not  
24 be reviewed as the primary focus and determinative issues are statutory provisions.

## 25 3. Factual Predicate for Protection Satisfies Statutory Criteria – Review

### 26 a. Bronder's Expressed Concerns as Protected Disclosures.

27 As presented, Bronder's case essentially rests on the facts that (a) after a March 6, 2017  
28 negotiation meeting with consultant for CA Group Contract 3660 and then hearing cost concerns  
expressed during the April 10, 2017 Transportation Board meeting on Contract 3660, Bronder  
expressed his views on consultants, contract costing and similar concerns internally to Assistant  
Construction Engineer Stephen Lani on April 10, 2017 on contract bid/award practices and fees  
Bronder believed to be a gross waste of public money; (b) shortly after Bronder's April 10  
disclosure, on May 5, 2017 his probation status was rejected and his employment was terminated.

1 notwithstanding the fact that his only employee evaluation report on April 24-27, 2017 was that he  
2 "meets standards" for his new role and job as a Manager I in NDOT's Construction Division in  
3 Carson City; and (c) his name was later removed from NDPT's active eligible interview list "*per*  
4 N.C. 284.374." which he learned of January 5, 2018, notwithstanding his prior interview eligibility.

5 The fact that Bronder also made similar disclosure to Director Rudy Malfabon and Assistant  
6 Director of Operations Reid Kaiser on July 14, 2017 after his termination would have arguable  
7 relevance to his subsequent removal from eligibility on the NDOT interview list first learned of  
8 January 5, 2018.

9 There is no serious question that Bronder's statements involved matters of public concern over  
10 what may be properly termed "gross waste of public money". i.e. taxpayer money, regarding  
11 consultants and construction contract awards that include concern for excessive cost allowances  
12 and considered improper governmental action for which NDOT admittedly has an interest in, is  
13 responsible for, and is able to critically evaluate and remedy if need be. NDOI witnesses  
14 acknowledged that similar cost concerns were expressed in Transportation Board meetings, and  
15 testified that those concerns were not new to staff, but existed and studied for a number of years,  
16 and recently have been addressed in adopting new costing adjustments.

17 Bronder's statements may not have been within his ordinary job description, responsibilities or  
18 duties, and he had overlapping concerns: (1) that of an employee's ordinary citizenry concern for  
19 the agency approach to awarding construction contracts, and (2) that as well of an employee's  
20 knowledgeable, best-shared legitimate and loyalty concern with and for his employer's mission,  
21 integrity and performance as a state agency in expending public money in the award of  
22 construction contracts. Bronder's stated concerns as citizen and employee are complementary and  
23 consistent.

24 Moreover, the criteria for whistleblower protected speech *is not* whether the content or action  
25 of expressed concern *is in fact or proven to be* true or correct, or *is* a violation of law, or *is not*



1 considered as such by the employer, but rather the criteria is whether the employee disclosure in  
2 good faith, reasonably believed there may be improper governmental action. *Simonian v. Univ.*  
3 *and Cmty. Coll. Sys.*, 122 Nev. 187, 128 P.3d 1057 (Nev. 2006); also *Allum v. Valley Bank of*  
4 *Nevada* 114 Nev. 1313, 1323-24, 970 P.2d 1062, 1068 (Nev.1998)(tortious discharge); cf.  
5 *International Game Technology v. Dist. Court*, 124 Nev. 193, 179 P.2d 556. (Nev. 2008)(false  
6 claims statutory protection) and *International Game Tech v. Dist. Court*, 122 Nev. 132, 127 P.3d  
7 1088. (Nev. 2006). J. Maupin dissenting.

8  
9 In a whistleblower appeal, a hearing officer is neither authorized nor required to determine the  
10 merits or correctness of disclosures believed to be improper government action, and the role is only  
11 to determine whether the employee has engaged in protected activity and if reprisal or retaliation  
12 occurred as a result of that activity. *Simonian*, supra.

13 NDOT's position on this threshold issue is simply wrong. The view framed by the NDOT is  
14 that Bronder is not entitled to whistleblower protection because his expressed concerns were not  
15 considered by his supervisors as expression of "improper governmental action" and thus was not  
16 protected speech or disclosure. That view is not supported by fact, statutory policy, or case law.

17  
18 **b. Reprisal or Retaliatory Action by NDOT.**

19 The primary underlying factual and legal issues in this case necessarily focus on whether  
20 NDOT engaged in reprisal or retaliatory action adverse to employment as a result of Bronder's  
21 expressed concerns which were protected speech.

22 Bronder's January 16, 2018 appeal is predicated on the information learned January 5, 2018  
23 that his name was removed from NDOT's eligible employee interview list "per NAC 284.374".  
24 NDOT's initial response on appeal was that removal was based on the rejection of his probation  
25 which demonstrated Bronder lacked any of the preliminary requirements established for the  
26 position or employment for which the applicant applied. NAC 284.374(1)(f). NRS 284.240(1).

27 Later on appeal, NDOT stated the removal actually occurred as a result of a "clerical error" by  
28

1 an NDOT HR person. Tonya Sieben, who testified that, in response to an inquiry from another HR  
2 person, she mistakenly thought and responded that rejection of probation was similar to a  
3 disciplinary action under NAC 284.374(4), and thus a legitimate basis for Bronder's removal.  
4 NDOT asserts there was no reprisal or retaliatory intent in the removal only a mistaken  
5 interpretation of statute or regulation.

6 Inadvertent and innocent as a clerical error as NDOT suggests, the removal was in fact an  
7 incompetent HR action, taken without proper research or supervisory inquiry, and intentionally  
8 done without regard to employment consequences. While no evidence suggests HR engaged in  
9 reprisal or retaliatory action, the HR failure was absolute and without legitimate reason or excuse.  
10

11 However, that action becomes more suspect because during appeal NDOT's evidence  
12 demonstrates there was no rational or legitimate basis for rejection of Bronder's probation and  
13 termination of his employment based on the testimony of NDOT witness Sharon Foerschler, the  
14 appointing authority for the Construction Division in Carson City.

15 For the first time on appeal, Ms. Foerschler's testimony provides insight into the decision-  
16 making to reject Bronder's probation and terminate his employment for which she was responsible  
17 as appointing authority and personally took actions necessary to not only reject probation and  
18 terminate Bronder, but to also effectively prevent his requested transfer back to Elko, his prior  
19 place of NDOT employment as a Manager I.  
20

21 On April 27, 2017 Ms. Foerschler, as appointing authority, commented, approved and signed  
22 Bronder's Employee Appraisal & Development Report (NPD-15), which evaluated him as "meets  
23 standards" for performance of duties and responsibilities based on his time as Manager I in  
24 NDOT's Construction Division in Carson City since February 13, 2017.

25 During appeal hearing and in post-hearing supplement, NDOT offered evidence to suggest Ms.  
26 Foerschler actually did not approve of Bronder's performance in an attempt to backtrack and avoid  
27 her April 27 signed approval of NPD-15. NDOT's Exhibit ER-E includes a series of April 24  
28

1 emails between Ms. Foerschler and Jeffrey Freeman, Bronder's immediate supervisor, regarding  
2 Freeman's April 24 NPD-15 evaluation of Bronder as follows:

3  
4 On Apr 24, 2017, at 12:08 PM, Freeman, Jeffrey A <[JFreeman@dot.nv.gov](mailto:JFreeman@dot.nv.gov)> wrote:

5 Sharon,

6 I have attached the review for John. I have overall a standard(1.85) but have downgraded him  
7 in the post construction reviews and doing plan reviews His improvement plan is to take a few  
8 projects to learn constructability and to develop a process/plan for the post construction  
9 reviews.

10 Jeffrey Freeman, P.E.

11  
12 On April 24 at 2:55 pm Foerschler, Sharon L <[SFoerschler@dot.nv.gov](mailto:SFoerschler@dot.nv.gov)> wrote:

13 Jeff,

14 Looks ok for a first run but please expand with more content. I really want him to get the gist  
15 that we are not happy with his lack of non interaction with his staff including not seeking out  
16 opportunities to interact with his staff. In short, I'd like him to get the idea that we have  
17 concerns about his performance.

18  
19 On April 24, 2017at 4:06 pm Freeman, Jeffrey A <[JFreeman@dot.nv.gov](mailto:JFreeman@dot.nv.gov)> wrote:

20 I had him sign that version, but we had a long discussion about needing to interact with the  
21 constructability group and with Mark. I asked him to be more interactive, take over the tracking  
22 of who has what job. Hold a staff meeting and be the one in charge. I asked him to look at  
23 projects side by side and start interacting with the group and when he sees the group spit  
24 balling with a designer to start listening in and join the conversation. As for post construction  
25 reviews we are starting down the process to identify the deficiencies, he noted that they are  
26 not timely and that causes the lack of info. I gave him my ideas for relaying the info back to  
27 Design and constructability. I have asked that he works with Mark comes up with a game plan  
28 and report back. Just to give him more guidance in the future I plan on a weekly Monday  
morning discussion of what is going, I have already put it on our calendars and plan to make it  
a regular meeting. I think that I just need to give guidance on a regular basis and set his  
priorities for him. Overall I think things went very well and he is just not the type to be set free  
and occasionally reeled back in but he requires direction and followup.

I will leave you the evaluation for your signature on your desk.

21 Thank you,

22 Jeff

23  
24 On Apr 24, 2017, at 6:33 PM, Foerschler, Sharon L <[SFoerschler@dot.nv.gov](mailto:SFoerschler@dot.nv.gov)> wrote:

25 Jeff,

26 Oh my gosh, are you kidding me??? We need to talk, I did not want him to  
27 sign his evaluation as you had written it! You have now put us in a bad situation as I want him  
28 to know we are unsatisfied with his performance to date.

Why would you proceed with that evaluation for his signature when you knew  
about my concerns??? I am not happy with your decision to move forward with  
this when you knew I had serious concerns, you made a bad decision.

Call me in the morning.

1 Ms. Foerschler's conduct and events thereafter on April 25 or 26 are not evident in the record.  
2 What is evident, however, is that notwithstanding her prior expressed concerns, on April 27 Ms.  
3 Foerschler did read, review, and with written comment sign Paragraph 13 approving Bronder's  
4 NPD-15 evaluation of "meets standards", which Bronder and Freeman had previously approved  
5 and signed on April 24.<sup>1</sup> ER-A, sub-exhibit C.

6 Following the April 24 performance evaluation Bronder went on vacation. On his May 5 return  
7 to work, Bronder was called into Ms. Foerschler's office and advised his probation was rejected  
8 and employment terminated at the end of his shift. ER-A, sub-exhibit D. At that meeting there  
9 was no substantive discussion with Bronder of reasons for actions taken by Ms. Foerschler. There  
10 was no instruction or form provided regarding potential for appeal, other than to state "[i]his notice  
11 was provided in accordance with Nevada Administrative Code 284.458". May 5, 2017 was one  
12 month prior to completion of Bronder's 12-month probation June 5, 2017  
13

14 Referring to a sheet of reasons at hearing, ER-E, Ms. Foerschler testified that she rejected  
15 Bronder's probation and terminated employment because (1) he failed to interact with employees  
16 he is responsible for in (a) constructability, (b) scheduling, and (c) has not actively become  
17 involved in the office, has not sought out additional work assignments, has not initiated making  
18 improvements to current processes (post-construction reviews, constructability, as directed when  
19 hired; (2) his inability to follow direction - (a) flexing time-off during week of Partnering  
20 Conference, (b) did not participate in Construction Manual rewrite as assigned, and (c) did not  
21 follow direction with learning consultant program, disappeared for 1.5 hours; and (3) at Manager I  
22 level expect "above standard" performance, more effective integration into Construction Office.  
23

24  
25  
26 <sup>1</sup> Bronder objected to both the initial and supplemental emails in NDOT Exhibit ER-F as lacking foundation and  
27 incomplete as records available from the State's central IT system. Although ER-E may be incomplete, because the  
28 exhibit emails are relevant, the objection is overruled, and emails are admitted as material evidence of Ms. Foerschler's  
conduct regarding Bronder's NPD-15 performance evaluation on April 24 and 27.

1 Evident on the record, Bronder transferred to Carson City Construction Division on February  
2 13, 2017 into a Manager I position which was a totally new and substantially different job than  
3 Manager I in Elko. Based on knowledge and experience gained over his 25 years of NDOT  
4 service, Mr. Lani's testimony provided a broad review of the Construction Division's mission,  
5 functions and protocols. Mr. Lani made clear Bronder's job had a significant learning curve with  
6 many facets, nuances and dynamics of change.

7  
8 Mr. Lani stated his discussions with Bronder, including that on April 10, were never negative  
9 but intended to be and were positive, essentially being an educational opportunity and learning  
10 experience for Bronder to better know and understand Construction Division activities and the  
11 range of applicable State and Federal regulations related to the complex procurement procedures  
12 for construction bids, qualifications, consultants, awards and audits. Lani stated he reported  
13 Bronder's April 10 comments and ensuing discussion to Ms. Foerschler.

14 Bronder's April 24, 2017 NPD-15 performance evaluation was based only on his time in  
15 Carson City since February 13, 2017. In the NPD-15 Freeman reviewed the 12 objective and  
16 subjective elements related to Bronder's job performance which Freeman concluded overall "meets  
17 standards" with recommendations on 2 elements. Freeman's evaluation included written Rater's  
18 Comments, Para. 15, and Development Plan & Suggestions, Para. 16, as well as a verbal discussion  
19 with Bronder, all of which addressed many concerns and consistent with the Freeman/Foerschler  
20 April 24 email exchanges. The NPD-15 concluded that Bronder "meets standards", which Ms.  
21 Foerschler approved on April 27.

22  
23 In contradiction at hearing, Ms. Foerschler testified the reason for her rejection of Bronder's  
24 probation and his termination was that she actually held Bronder to a different, "exceeds standards"  
25 performance level, an evaluation level for which there was no basis in law or agreement to impose.  
26 Ms. Foerschler's was without authority to impose an "exceeds standards" view on Bronder and that  
27 was expressly contrary to the "meets standards" level she approved on April 27.  
28

1 As additional reason, Ms. Foerschler provided ER-E and testimony that Bronder failed to attend  
2 the Friday weekly conferences on the Construction Manual re-write. On review of the supporting  
3 timesheet in ER-E, Ms. Foerschler conceded that of the 6 scheduled conferences, Bronder in fact  
4 attended 5 of the 6, and was excused from 1 of the 6 for being on sick leave.

5 ER-E contains other generalized and subjective reasons offered by Ms. Foerschler for her  
6 rejection of probation and termination of Bronder. It was evident that several elements were  
7 addressed by Mr. Freeman in NPD-15 and in discussion with Bronder on April 24, but not by Ms.  
8 Foerschler on May 5.

9 It is evident that Ms. Foerschler's reasons were discussed as negative on Bronder's request to  
10 transfer back to Elko when she spoke with Boyd Ratliff, Bronder's former supervisor and acting  
11 appointing authority in NDOT's Elko office. It is evident from Ratliff's testimony that he would  
12 have otherwise accepted Bronder's re-transfer *but for* the evident strongly negative statements  
13 about Bronder made by Ms. Foerschler. Ms. Foerschler's statements effectively prevented  
14 Bronder's re-transfer to Elko, and deprived him of opportunity for continued NDOT employment  
15 in Elko.<sup>2</sup>

16 Mr. Ratliff also testified Bronder was a good manager of staff and competent employee. Ratliff  
17 acknowledged he had not formally evaluated Bronder prior to his transfer to Carson City because  
18 Bronder was doing his job. Ratliff also acknowledged that Bronder called regarding the October  
19 2107 job posting, and when Bronder appeared on the applicant list, Ratliff called HR to confirm  
20 eligibility which prompted the HR review and decision to remove Bronder "per NAC 284.374".

21 While a probationary employee, Bronder had limited employment rights, he did have the right  
22 to have any rejection of probation and termination of employment based on or complicit with  
23 lawful reason NAC 284.458(1). Reprisal or retaliatory action does not qualify as lawful.<sup>3</sup>

24 Of course, had the hearing-developed information been known earlier, there could have been

25  
26 <sup>2</sup> On further investigation, Ms. Foerschler's use of her official authority or influence to prevent Bronder's transfer  
to Elko could arguably violate NRS 281.631.

27 <sup>3</sup> Just as there is constitutional protection for public employee speech in whistleblower cases, there is also  
28 constitutional protection for public employment opportunity as a liberty interest. See *Loudermill v. Cleveland Board of  
Education*, 470 U.S. 532 (1985). Not being raised, its application will not be considered.

1 reason for Bronder to appeal the rejection of probation and termination of employment. In  
2 whistleblower cases, however, the underlying reasons for action taken are rarely self-evident or  
3 necessarily apparent prior to a hearing. In this case, the sequence of events coupled with staff  
4 testimony and evidence overall, and the inconsistent and contradictory testimony of Ms. Foerschler  
5 in particular, regarding Bronder's job performance as Manager I in Carson City, do not provide a  
6 smoking gun of reprisal or retaliatory action, but the reasons for NDOT's action appear to be  
7 pretextual and an *ex post facto* rationale offered by the action-responsible appointing authority.

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

15 **c. Appeal Issues - Substantive and Procedural.**

16 **1. Timeliness.**

17 Bronder concedes no direct appeal was taken following his May 5, 2017 rejection from  
18 probation or employment termination. He stated he was without information or understanding

19 The appeal initially filed by Bronder on January 16, 2018 as an appeal of NDO1's removal of  
20 his name for interview eligibility list "per NAC 284.374" first learned on January 5, 2018 raised no  
21 dispute as timely within the 10-day period of NAC 281.305(1)(a). However, Bronder's appeal as  
22 developed on the record raises timeliness in another context related to the requested relief for  
23 reinstatement of probation and employment, which requires review of timeliness under 2-year  
24 statutory provision in NRS 281.641(1), and the 10-day regulatory provision in NAC 281.305(1)(a).

25 Bronder and NDO1 take opposite views on the appeal timeliness applicable to the requested  
26 relief. Relying on statute, NRS 281.641(1), Bronder contends appeal is timely within the 2-year  
27 period provided. Relying on regulation, NAC 281.305(1)(a), NDO1 contends appeal is not timely  
28

1 within the 10-day period required. The differing views of the timeliness issue depend on whether  
2 Bronder's January 16, 2018 appeal is actually based on the revocation of probation and termination  
3 of employment occurring May 5, 2017, and not an appeal based on denial of interview and removal  
4 from eligibility list for an employment opportunity "per NAC 284.374", now apparently moot.

5 Understandably, NDOT's position is based on the reinstatement relief Bronder requests, which  
6 NDOT argues is contrary to stated statutory remedy in NRS 281.641(2). Bronder's remedy request  
7 does not foreclose whistleblower speech protection and was not determinative on MTD, but  
8 becomes significant when reprisal or retaliatory action and relief therefor are at issue.

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

13 In evaluating conflicts between statute and regulation, the plain statutory language controls and  
14 regulation must be consistent with statute. NRS 281.641(1) provides: *If any reprisal or retaliatory*  
15 *action is taken against a state officer or employee who discloses information concerning improper*  
16 *governmental action within 2 years after the information is disclosed, the state officer or employee*  
17 *may file a written appeal with a hearing officer of the Personnel Commission for a determination*  
18 *of whether the action taken was a reprisal or retaliatory action* NRS 281.641(4) further provides  
19 that the *Personnel Commission may adopt rules of procedure for conducting a hearing pursuant to*  
20 *this section that are not inconsistent with the procedures set forth in NRS 284.390 to 284.405,*  
21 *inclusive.*

22 On its face, NRS 281.641(1) appears to authorize adoption of procedural rules for hearing  
23 consistent with hearing procedures in NRS 284.390-405, rather than authority to adopt a  
24 jurisdictional, substantive time period limitation to initiate appeal for whistleblower protection.  
25 Bronder argues the 10-day regulatory provision adopted in NAC 281.305 is not consistent with the  
26 2-year statutory period in NRS 281.641(1) applicable to specific appeals based on statutory  
27 constitutional speech protections for public employee whistleblowers. T  
28



1 The statutory referenced hearing procedures in NRS 284.390-.404 include a 10-day appeal  
2 filing time to initiate hearing *to determine reasonableness of dismissal, demotion or suspension*.  
3 Adverse employer action such as reprisal or retaliation is not similar to the disciplinary predicate  
4 generally involved in dismissal, demotion or suspension and the pre-action procedures leading to  
5 those actions - a error HR staff admittedly made in this case regarding Bronder's removal from the  
6 interview eligibility list "per NAC 284.374".<sup>4</sup>

7 Positions on the timeliness issue rest more on argument than support from legislative or  
8 regulatory history or case-law to aid decision.<sup>5</sup> While NDOT's action and reasons therefor were  
9 not known prior to the January 16, 2018 appeal, the NDOT's hearing evidence on appeal provided  
10 notice and basis for appeal. What is factually clear is that NDOT's alleged reprisal or retaliatory  
11 action occurred within a 2-year period after Bronder's disclosures at issue. What is legally clear is  
12 case law that holds when time for administrative appeal is stated in statute, for purposes of  
13 timeliness of appeal that time is deemed jurisdictional, not procedural. *Seino v. Employers Ins*  
14 *Co. of Nevada* 121 Nev. 146, 111 P.3d 1107 (Nev. 2005); *SIIS v. Partlow-Hursh*, 101 Nev. 122,  
15 696 P.2d 462 (Nev.1985). Statutory appeal time is jurisdictional and mandatory, not procedural  
16 and excusable by "unique circumstances" or "equitable tolling". *Seino*, supra.

17 The 2-year time in NRS 281.641(1) is a specific statutory time applicable to whistleblower  
18 protection on appeal of a state employer's alleged reprisal or retaliatory action, and is  
19 jurisdictional, not procedural.<sup>6</sup> By contrast the 10-day time in NAC 281.305(1)(a) is regulatory  
20 time applicable to appeal hearing procedures to determine reasonableness of employer's  
21

22  
23 Apart from administrative appeal here at issue, a 2-year statute of limitation under NRS 11 190(4)(c) could  
24 apply to a judicial action for a whistleblower's claim for reprisal or retaliation. Actions under NRS Chapter 357,  
Nevada's False Claim Act, have other longer limitations depending on who initiates the action. See NRS 357.170.  
Other administrative whistleblower protection is also available within 30-day timeline under NRS Chapter 618,  
Nevada OSHA office.

25 On the scope of relief, Bronder cites *Boice v. NDOT*, EE-4, a whistleblower case based on a 10-day appeal taken.  
26 On status of regulation, NDOT cites *Turk v. Nev. State Prison*, 94 Nev. 101, 575 P.2d 599(1978) for the proposition  
that adopted regulation is entitled to the "force and effect of law", which however presumes consistency with statutory  
authorization.

27 If it were procedural, factual circumstances and equitable tolling might otherwise be available to excuse failure to  
28 appeal May 5, 2017 actions before January 16, 2018. *Seino*, supra. The content of this appeal hearing record provides  
a basis for that review under criteria in *Seino*.

1 disciplinary dismissal, demotion, or suspension under NRS 284.390-.405, and is not consistent with  
2 authority grant under NRS.281.641(4) for whistleblower free speech protection. Under NAC  
3 281.315 hearing requirements, the evidence focuses on the 2-year time period relative to alleged  
4 reprisal or retaliatory action at issue under NRS Chapter 281.641(1) procedure. Bronder's appeal  
5 is timely for the relief requested.

6 **2. Standing.**

7 Again, statute and regulation present a potential issue on Bronder's standing on appeal.

8 For purposes of appeal, NRS 281.641(1) authorizes appeal by state employee. For purposes of  
9 evidentiary hearing, NAC 281.315(4)(c)(1) requires appellant to establish that *he or she was a state*  
10 *officer or employee on the date of the alleged reprisal or retaliatory action.* Form NPD-53  
11 expressly states that a former employee is eligible to file an appeal. Bronder was an NDOT  
12 employee at the time of disclosures April 10, 2017.

13 In relation to NDOT actions at issue, Bronder was a NDOT employee when probation and  
14 termination events occurred May 5, 2017 and was a former NDOT employee when subsequent  
15 denial of interview and removal events occurred in October and November 2017.

16 NDOT contends appeal is not available to Bronder for the May 5, 2017 rejection of probation  
17 and termination because a probationary employee has no such right under NAC 284.458(1), or for  
18 the later withdrawal of employment recruitment notice or employment interview opportunity  
19 because such action is not reprisal or retaliatory action as defined in NRS 281.611(5).

20 Although NAC 284. 458(1) and (2) may preclude appeal of rejection of probation, it is not clear  
21 that such prohibition applies in the context of retaliatory action for a whistleblower's protected  
22 speech and remedy under NRS 281.611 or applicable constitutional provisions. NAC 284.458(1)  
23 allows rejection for any *lawful reason*. As noted, reprisal or retaliation would not qualify as lawful  
24 reason.

25 In defining reprisal or retaliatory action, NRS 281.611(5)(j) and (k) include dismissal and  
26 transfer as adverse employment action.

1 Whether taking actions to effectively deny a requested transfer, as evident in hearing, would  
2 seem to raise a similar reprisal or retaliation action issue.<sup>7</sup>

3 NDOT contends that rejection of probation and resulting termination are not included in items  
4 listed as reprisal and retaliatory action in NRS 281.611(5)(a)-(m). NDOT views that statutory  
5 listing as all-inclusive to the exclusion of any other conduct. The statute employs the broad term  
6 "includes" which logically implies that there is more than what is listed. The listed acts in NRS  
7 281.611(5) do not foreclose other conduct as qualifying for being reprisal or retaliatory action.

8 The initially offered, generalized statement that Bronder just "wasn't a good fit" seemed to be  
9 the only reason initially provided for NDPT's May 5 rejection of probation and termination.  
10 October denial of an interview, or November removal from eligibility list "per NAC 284.374".  
11 Prior to rejection of probation and termination on May 5, Bronder's only reported and evident  
12 performance evaluation was that of April 24-27 that was overall "meets standards". Rejection from  
13 probation and employment termination on May 5 provided no reasons except as those offered *ex*  
14 *post-facto* by Ms. Foerschler during appeal hearing.

15 NDOT's action of failure to interview in October 2017 was retaliation for prior speech in April  
16 10 and/or July 14 meetings is an issue without sufficient evidence of reprisal or retaliation in the  
17 record developed. On removal from interview list in November 2017 Bronder had standing to  
18 initially appeal but it should be noted Bronder's claims related to NDOT's removal from eligibility  
19 removal "per NAC 284.374", the issue of reprisal or retaliatory action appears to have been mooted  
20 as a result of testimony in the hearing. However, on the record developed on hearing provides  
21 sufficient standing for appeal of the rejection of probation and resulting termination of Bronder.

### 22 3. Relief

23 For relief NRS 281.641(2) provides: *If the hearing officer determines that the action taken*  
24 *was a reprisal or retaliatory action, the hearing officer may issue an order directing the proper*  
25

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

1 person to desist and refrain from engaging in such action. The hearing officer shall file a copy of  
2 the decision with the Governor or any other elected state officer who is responsible for the actions  
3 of that person.

4 Bronder requests an order determining that (a) NDOT's actions taken against him was reprisal  
5 or retaliatory action, (b) NDOT should desist and refrain from such action, and (c) NDOT should  
6 reinstate his employment in order to grant appeal relief requested (1) restore credit for 11 months'  
7 probation, (2) restore sick leave forfeited upon termination and (3) restore compensation level to  
8 grade 43, step 8. In support of requested relief addressing reinstatement of probationary status and  
9 transfer issues, Bronder cites *Boice v. NDOT*, Case No. CC-07-13-LWL (June 26, 2014).

10 NDOT submits Bronder's request for relief is contrary to statute, except for the desist and  
11 refrain instruction, and exceeds the hearing officer's authority to grant.

12 The statutory desist and refrain provision for whistleblower protection and relief from reprisal  
13 or retaliatory action may seem potentially an imperfect remedy and otherwise inconsistent remedy  
14 for statutory defined reprisal or retaliatory action in violation of NRS 281.611(5) which includes  
15 reprisal or retaliatory actions of employment dismissal or transfer.

16 However, the desist and refrain remedy for dismissal based on reprisal or retaliatory action  
17 must logically and necessarily include reinstatement to the position from which the employee was  
18 dismissed, for if not, the operative phrase "desist and refrain" would be meaningless, and there  
19 would be no relief from such employer action other than an admonition to the employer not to do  
20 that again. Further, nothing suggests this remedy should only apply to permanent employee status  
21 and not to probationary employee status when dismissal is based on reprisal or retaliatory action.

22 Dismissal of a probationary employee must be based on a *lawful reason*. NAC 284.458(1). If  
23 reprisal or retaliatory action do not qualify as lawful reason, the desist and refrain remedy for  
24 dismissal is reinstatement. Although no citation is included in *Boice v. NDOT, supra*, for the  
25 remedy of reinstatement of probationary status and transfer, the decision reversing rejection of  
26 probation and transfer is fact-based, rational and logically consistent with the remedy in NRS  
27 281.641(2), i.e. *directing the proper person to desist and refrain from engaging in such action*.

1 Boice supports determination that due to NDOT reprisal or retaliatory action that occurred here,  
2 the desist and refrain remedy requires reinstatement of Bronder's probation and his employment  
3 with acquired benefits.

4 **4. Deference.**

5 NDOT offers a recent Nevada Supreme Court decision, *O'Keefe v. DMV*, 134 Nev. Adv. Op.  
6 92 (December 6, 2018) as support for the proposition that the Hearing Officer must give *deference*  
7 *to the decisions of the appointing authority as to what steps will serve the public service*

8 NDOT overstates the *O'Keefe* decision regarding the statutory "good of public service"  
9 provision in NRS 284.385(1)(a). Nothing in that decision related to review of disciplinary action  
10 under NRS Chapter 284 which has a specific "good of the public service" factor, suggests the  
11 application of deference is appropriate on review of an employment decision by an appointing  
12 authority taken as reprisal or retaliatory action for a public employee's exercise of a  
13 whistleblower's protected free speech under statutory policy and procedures in NRS 281.611-.671.

14 Deference would undermine independent, de novo review, and is not consistent with the  
15 substantive policy and procedural due process provided in statutory and constitutional protections  
16 applicable to public employment, and public employee speech in particular.

17 **V. Findings of Fact.**

18 Based on the based on credible, substantial, and probative evidence of record, as to matters of  
19 fact, I find as follows:

- 20
- 21 1. On June 6, 2016, Bronder was hired to fill a permanent Manager I position in Elko with  
the Department of Transportation.
  - 22 2. Brander's Manager I position was classified as a grade 43 position which requires a 12-  
month probationary period.
  - 23 3. Bronder transferred from the Elko position to a Manager I position in NDOT's  
Construction Division in Carson City on February 13, 2017, also a grade 43 and lateral  
24 transfer retaining the initial 12- month probationary period unchanged.
  - 25 4. In Carson City, in addition to regular duties, Bronder was directed to participate in  
the Construction Manual rewrite work sessions by Assistant Construction Engineer  
26 Steve Lani on February 24, 2017 which lasted all-day on 6 Fridays, including additional  
review/editing responsibilities.
  - 27
  - 28

- 1 5. Bronder was also directed to learn the job duties of another Manager I in the Division by  
2 Jeff Freeman in the week beginning February 27, 2017 in order to assume those duties  
3 upon the manager's retirement on May 5, 2017.
- 4 6. Bronder viewed an April 10, 2017 Transportation Board Meeting online from his office  
5 and then reported Governor Sandoval's questions and concerns raised at that meeting to  
6 Stephen Lani in his office on April 10, 2017 and discussed his own concerns.
- 7 7. Lani considered the April 10 conference positive and a learning experience for Bronder.
- 8 8. Lani reported the fact and content of the April 10 conference with Bronder to Sharon  
9 Foerschler, the Division's appointing authority.
- 10 9. Bronder received his first and only employee evaluation, NPD-15, on April 24, 2017  
11 from Mr. Freeman, just prior to Bronder leaving for his planned vacation.
- 12 10. The 12 element evaluation in Bronder's NPD-15 was "meets standard" overall, but  
13 items Nos. 2 and 6 were "does not meet standard" with needed improvement in  
14 Freeman's written Rater's comment in Para. 15 and Development Plan & Suggestions  
15 in Para. 16., which were also reviewed and discussed by Freeman with Bronder.
- 16 11. The NPD-15 was reviewed and approved by Bronder and Freeman on April 24, 2017  
17 and was reviewed, and with comment approved and signed by Ms. Foerschler on April  
18 27, 2017.
- 19 12. On Bronder's May 5, 2017 return to work from vacation, he was called into Mrs.  
20 Foerschler's office and told that his probation was rejected and his employment  
21 terminated at the end of his shift that day, which was 1 month prior to completion of his  
22 12-month probationary period.
- 23 13. No reasons were given on May 5 for the action taken by Ms. Foerschler, the appointing  
24 authority, and there was no substantive discussion or review of reasons for that action.
- 25 14. Bronder asked if he could re-transfer back to his Manager I position in Elko.
- 26 15. Ms. Foerschler called Boyd Ratliff, Bronder's former supervisor and now acting  
27 appointing authority at Elko about Bronder's request to re-transfer.
- 28 16. Bronder's request to re-transfer back to Elko was denied after Ms. Foerschler telephone  
conversation with Mr. Ratliff who would have otherwise accepted Mr. Bronder's re-  
transfer but for the negative report and comments of Ms. Foerschler which prevented  
Bronder's re-transfer back to Elko.
- 17 Bronder applied for a position at the Department of Conservation and Natural Resource  
and interviewed on July 14, 2017.
- 18 Bronder met with Director of NDOT Rudy Malfabon and Assistant Director of  
Operations, Reid Kaiser on July 14, 2017 and reported the same concerns and questions.
- 19 A position for Resident Engineer in District III was posted on October 10, 2017.
- 20 Bronder was hired by the Department of Conservation and Natural Resources on  
October 23, 2017.
- 21 Bronder applied for an NDOT position in Elko on October 24, 2017, was determined  
eligible and was ranked #1 on the list.
- 22 On October 31, 2017, the NDOT posting was withdrawn.
- 23 In November 2017 a new NDOT recruitment was posted for the same position.
- 24 Bronder applied for the position and was identified as eligible, but did not obtain an  
interview, and his name was removed from NDOT's list of eligible interviewees "per  
NAC 284.374." by an NDOT HR staffer.
- 25 Bronder seeks restoration of his 11 months of probation, restoration of sick leave  
forfeited upon termination and restoration of a compensation level to grade 48, step 8

26. In the July 14, 2017 meeting, Bronder stated his belief that his prior statements were the reason he was dismissed during probation, in response Reid Kaiser stated he was told that Bronder "wasn't a good fit".
27. Bronder's statements concerning gross waste of public money for fees NDOT allowed in the award of construction contracts are not within his ordinary job description, responsibilities or duties.
28. Bronder's expressed concerns disclosed April 10 and July 14 regarding procurement construction costs, consultants, bids, awards believed to be a gross waste of public money and improper governmental action were protected speech under NRS 281.611, consequently the alleged NDOT reprisal or retaliatory action may be considered as adverse employment action of governmental wrongdoing impacting Bronder's NDOT employment and NDOT employment opportunities.
29. Bronder's appeal of NDOT's November 2017 action denying Bronder future NDOT employment interview opportunity "per NAC 284.374", first learned of January 5, 2018, was not challenged as untimely when filed January 16, 2018 to invoke whistleblower protection and appeal procedures under NRS 281.611-.671.
30. Bronder's alleged NDOT's reprisal or retaliatory action initially focused on his removal from the eligible interview list but later became focused on rejection of his probation and termination by the appointing authority when facts became first known from the evidence developed during appeal hearing.
31. NDOT's evidence of reasons for rejection of Bronder's probation and termination of his employment are inconsistent and contradictory, are not coherent, cogent or credible as offered in ER-E and testimony of Sharon Foerschler, appointing authority for NDOT's Construction Division, Carson City, and are a pretextual, after-the-fact rationale.
32. Bronder's appeal is timely regarding NDOT's rejection of his probation and termination of employment on May 5, 2017 based on alleged reprisal or retaliatory action learned of during hearing as such alleged NDOT's action occurred within the 2-year period after Bronder's April 10 disclosures at issue for which appeal is allowed under applicable statute NRS 281.641(1).
33. Bronder has standing to appeal rejection of probation and termination as reprisal or retaliatory action under NRS 281.641(5)(a)-(m) which includes other actions than listed.
34. Bronder has standing for the relief requested on appeal as an appropriate remedy from NDOT's adverse employment reprisal or retaliatory action under NRS 281.611-.671.
35. Bronder is entitled to reinstatement of his NDOT probationary status and employment with acquired benefits as meaningful relief under the "desist and refrain" remedy in NRS 281.641(2).

#### VI. Conclusions of Law.

Based on the above Findings of Fact and credible, substantial, and probative evidence of record, as conclusions of law I conclude as follows:

1. Bronder was a public employee when he made statements of concern on April 10, 2017 to Assistant Construction Engineer Steve Lani regarding what Bronder believed to be excessive labor costs allowed in NDOT's award of construction contracts.

2. Bronder's statements on April 10, 2017 were statements of improper governmental action alleging gross waste of public money as defined in NRS 281.611(1)(e).
3. Bronder's public employee statements made April 10, 2017 regarding improper government action is speech entitled to statutory protection under NRS 281.621.
4. Bronder's public employee statements made April 10, 2017 is speech entitled to constitutional protections under Nevada and US Constitutions as matters of general public concern and US Supreme Court decisional tests.
5. Under NRS 281.641(3) Bronder's statements do not lose statutory protection because they were to a supervisor or in the chain of command.
6. Bronder's statements do not lose statutory protection because the statements were not considered by NDOT supervisors as expressions of concern over improper governmental action as the criteria for protected speech is not the employer's view but is whether the employee reasonably believed the expressions related to improper governmental action, as held in *Simonian v. Univ. and Cmty. Coll. Sys.*, 122 Nev. 187, 128 P.3d 1057 (Nev. 2006); also *Allum v. Valley Bank of Nevada*, 114 Nev. 1313, 1323-24, 970 P.2d 1062, 1068 (Nev. 1998) (tortious discharge); cf. *International Game Technology v. Dist. Court*, 124 Nev. 193, 179 P.2d 556, (Nev. 2008) (false claims statutory protection) and *International Game Tech v. Dist. Court*, 122 Nev. 132, 127 P.3d 1088, (Nev. 2006), J. Maupin dissenting.
7. Bronder's appeal based on removal from NDOT's eligible interview list "per NAC 284.374" first learned of January 5, 2018 was timely filed on January 16, 2018.
8. Bronder first learned of evidentiary reasons for NDOT's rejection of his probation and termination of his employment during the appeal hearing.
9. Bronder's appeal based on alleged reprisal or retaliatory action by NDOT for rejecting his probation and terminating his employment on May 5, 2017 is timely since appeal is allowed under NRS 281.641(1) if NDOT's alleged reprisal or retaliatory action is taken within a 2-year period after Bronder's April 10 disclosures at issue.
10. Timeliness case law holds that when time for administrative appeal is stated in statute, for purposes of timeliness of appeal that time is deemed jurisdictional, not procedural. *Seino v. Employers Ins. Co. of Nevada*, 121 Nev. 146, 111 P.3d 1107 (Nev. 2005); *SIS v. Partlow-Hursh*, 101 Nev. 122, 696 P.2d 462 (Nev. 1985).
11. Bronder has standing to appeal rejection of probation and termination as reprisal or retaliatory action under NRS 281.641(5)(a)-(m) which includes other actions than listed.
12. Bronder has standing for the relief requested on appeal as an appropriate remedy from NDOT's adverse employment reprisal or retaliatory action under NRS 281.641(1).
13. Dismissal of a probationary employee must be based on a *lawful reason* under NAC 284.458(1) and because reprisal or retaliatory action does not qualify as lawful reason, the desist and refrain remedy for dismissal is reinstatement under NRS 281.641(2).
14. *Boice v. NDOT Case No. CC-07-13-LWT*, (Decision dated June 26, 2014) supports determination that due to NDOT reprisal or retaliatory action that occurred here, the desist and refrain remedy requires reinstatement of Bronder's probation and his employment at NDOT with acquired benefits.
15. Nothing in *O'Keefe v. DMI*, 134 Nev. Adv. Op. 92 (December 6, 2018) related to review of disciplinary action under NRS Chapter 284 which has a specific "good of the public service" provision, suggests the application of deference is appropriate on hearing officer's review of an employment decision of an appointing authority undertaken as reprisal or retaliatory action for a public employee's exercise of a whistleblower's protected free speech under statutory policy and procedures in NRS 281.611-.671.



1 **VII. Decision and Order.**

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

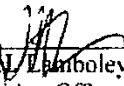
5 Based on the forgoing reasoned review, Findings of Fact, and Conclusions of Law, and good  
6 cause appearing therefore,

7  
8 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that (1) the whistleblower appeal  
9 of John Bronder should be, and hereby is, granted; (2) the Nevada Department of Transportation's  
10 (NDOT) reprisal or retaliatory actions to reject the probation of John Bronder and terminate his  
11 employment should be, and hereby are, reversed; and (3) John Bronder should be reinstated by  
12 NDOT to his former probationary status and employment with NDOT as Manager I, Grade 43,  
13 Step 8, with restoration of accrued benefits previously earned.

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

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

18 Dated the 7<sup>th</sup> day of March 2019 by \_\_\_\_\_

19   
20 Paul M. Lamboley  
Hearing Officer

21 **NOTICE:** Pursuant to NRS 233B.130, should any Party desire to appeal the final determination of  
22 the Hearing Officer, a Petition for Judicial Review must be filed with the District Court within Thirty  
23 (30) days after service by mail of this Decision and Order.

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b) and N.E.F.C.R. 9, I HEREBY CERTIFY that on the 8<sup>th</sup> day of March 2019 true copies of the foregoing document were served as follows:

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

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*Attorney for Employer-Respondent*

And with *original* to NDOA for service as follows:

Tasha Eaton  
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Nevada Department of Administration, Hearings Division  
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Paul J. Lamboley

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3 LORI M. STORY,  
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12 *Attorneys for Petitioner*

REC'D & FILED  
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CLERK  
BY  
C. COOPER DEPUTY

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

15 STATE OF NEVADA DEPARTMENT  
16 OF TRANSPORTATION,

Case No. 19 OC 000661B

Dept. No. 1

17 Petitioner,

18 vs.

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

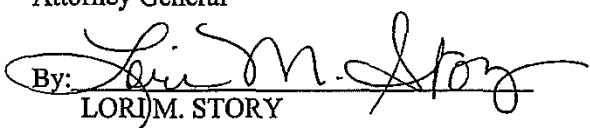
23 Respondents.

24 NOTICE OF APPEAL

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

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

AARON D. FORD  
Attorney General

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

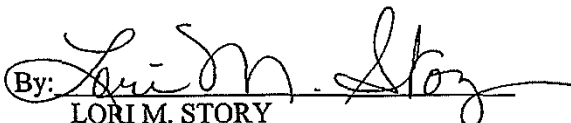
**AFFIRMATION**

**Pursuant to NRS 239B.030**

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

*DATED: September 20, 2019.*

AARON D. FORD  
Attorney General

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

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**CERTIFICATE OF SERICE**

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

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

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