IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, *ex rel.* its DEPARTMENT OF TRANSPORTATION, Appellant, v. JOHN BRONDER, Respondent.	Case No. 79695 District Court No. 19 OC 00066 1B

Appeal from Order Dismissing Petition for Judicial Review

First Judicial District Court

APPELLANT'S REPLY BRIEF

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

Attorneys for Appellant

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A. Standard Of Review

Bronder asserts that this matter involves only the review of the hearing officer's findings of fact and conclusions of law, and that this Court must not disturb them "unless they are clearly erroneous or otherwise amount to an abuse of discretion." Answering Brief, p. 9. While this case does involve review of the clearly erroneous findings and conclusions of both the hearing officer and the district court, the issues in this case primarily involve legal questions of statutory interpretation, which are reviewed *de novo*. *State v. Lucero,* 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (citing *State v. Catanio,* 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004)).

B. The Plain Language Of The Relevant Statutes And Regulations, And The Substantial Evidence In The Record, Clearly Demonstrate That The District Court Erred By Denying NDOT's Petition For Judicial Review And Affirming The Hearing Officer's Decision

Bronder's Answering Brief fails to set forth persuasive analysis or argument regarding interpretation of the plain language of the statutes and regulations relevant to this case. Instead, Bronder's Brief is mostly a recitation of the hearing officer's and/or district court's decisions. The relevant statutes and regulations[1] are clear on their face and, when read collectively and harmoniously, conclusively demonstrate

[1] NRS 281.641, NRS 284.390, NAC 281.305.

that the district court erred in its interpretation and in its decision to affirm the hearing officer's decision.

1. The District Court Clearly Erred In Finding That NAC 281.305(1)(A) Conflicts With Or Is Contrary To NRS 281.641(1) And Is Invalid.

In his Answering Brief, Bronder asserts that, "[i]n essence, Appellant is arguing that the ten (10) business day deadline for filing a whistleblower appeal in NAC 281.305(1)(A) is consistent with the 2-year whistleblower protection period specified in NRS 281.641(1)." Answering Brief, p. 9. Bronder's assertion distorts NDOT's position and highlights the apparent difficulty he, the hearing officer and the district court have in recognizing that the ten-day appeal deadline and the two-year protection period are distinct temporal concepts. A thorough analysis of this distinction and the validity of the 10-day deadline is set forth in NDOT's Opening Brief.

Bronder further repeats, in substance, the district court's erroneous conclusion that "since NRS 281.641 does not require a whistleblower appeal to be filed 'within 10 working days," the regulation (NAC 281.305(1)(A)) setting forth a 10 working day deadline is inconsistent with or contrary to NRS 281.641 and therefore "invalid." Answering Brief, pp. 7 and 13. This conclusion ignores the fact that the regulation was adopted in accordance with the express legislative authority granted by NRS 281.641. Moreover, the district court's interpretation leads to the absurd result that

a whistleblower appeal may be filed at any time following a reprisal or retaliatory action, with no limitation, as long as the action occurred within two years of the disclosure.[2]

No employer should be faced with the uncertainty of unlimited employee appeals, and this is certainly not the intent of the Legislature demonstrated by its enactment of the clear provisions of NRS 281.641(1) (hearing must be conducted in accordance with NRS 284.390 *et seq.*), NRS 281.641(5) (rules may be adopted for hearing procedures that are not inconsistent with NRS 284.390 *et seq.*), and NRS 284.390 (hearing must be requested within 10 working days after action).

In compliance with the mandate set forth in NRS 281.641(1) and (5), the Personnel Commission adopted NAC 281.305, providing a ten working day deadline, consistent with NRS 284.390. NAC 281.305 was adopted through the legislative authority granted by NRS 281.641(5) and in accordance with the express terms of NRS 281.641(1) and (5). It logically follows that NAC 281.305 is therefore neither contrary to NRS 281.641 nor invalid.

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[2] "'[T]his court has a duty to construe statutes as a whole, so that all provisions are considered together and, ... will seek to avoid an interpretation that leads to an absurd result.'" *Clark County Office of Coroner/Medical Examiner v. Las Vegas Review-Journal,* 458 P.3d 1048, 1052-53 (2020) (quoting *Smith v. Kisorin USA, Inc.,* 127 Nev. 444, 448, 254 P.3d 636, 639 (2011) (internal quotation marks omitted)). Under the hearing officer's and district court's theory, for example, if an employee makes a protected disclosure on January 1, 2021, and is subjected to reprisal or retaliatory action on December 1, 2022 (i.e., within the two-year protection period), he or she could file an appeal 5, 15, 20+ years later, which is absurd.

The district court clearly erred in finding that NAC 281.305(1)(A) conflicts with or is contrary to NRS 281.641(1) and is invalid.

2. The District Court Clearly Erred In Finding That Respondent Bronder's Appeal Was Timely.

Apparently due to his theory that there is no deadline for filing a whistleblower appeal, Bronder does not directly address NDOT's position that Bronder's appeal was untimely. Instead, he directs the Court's attention to "Appellant's other retaliatory act" of removing Bronder's name from the interview eligibility list for the vacant position of Manager I, which allegedly occurred within the 10-day period prior to the filing of his Appeal. Even if Bronder's Appeal was timely as to his removal from the list, and even if substantial evidence supports a finding that the removal was retaliation for alleged disclosure of improper governmental action,[3] Bronder was not entitled to the remedy of reinstatement to his former position for removal of his name. At the very most, the hearing officer had only the authority to order NDOT to desist and refrain from removing his name from the list. *See* NRS 281.641(2)(a).

However, Bronder argues that "fil[ing] his whistleblower appeal within ten (10) days of NDOT unlawfully removing his name from the interview eligibility list ... allowed the hearing officer to consider ALL of NDOT's alleged retaliatory acts,

[3] NDOT denies taking any reprisal or retaliatory action against Bronder.

including Respondent's termination in May, 2019," which occurred over eight months prior to the filing of the Appeal. Answering Brief, p. 14 (emphasis added). Bronder cites no authority to support this wild theory. Furthermore, this theory contradicts his equally unsupported argument that there is no 10-day appeal deadline.

Bronder asserts that "the hearing officer addressed the applicability of 'equitable tolling' in this case." *Id.* Citing to two workers compensation cases,[4] the hearing officer found that "[t]he 2-year time in NRS 281.641(1) is a specific statutory time applicable to whistleblower protection on appeal of a state employer's alleged reprisal or retaliatory action, and is jurisdictional, not procedural." AA 000035. In a footnote, he states, "if it were procedural, factual circumstances and equitable tolling might otherwise be available to excuse failure to appeal May 5, 2017 actions before January 16, 2018." *Id.* Again, the hearing officer clearly confuses the two-year protection period (and the *right to request* an appeal) with the *deadline for filing* such an appeal. Regardless, the hearing officer made no analysis of the factors to determine whether equitable tolling is appropriately applied,[5] and no assertion has been made that any of those factors apply here. Lastly, the doctrine

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[4] *Seino v. Employers Ins. Co. of Nevada,* 121 Nev. 146, 111 P.3d 1107 (2005), and *SIIS and Partlow-Hursh,* 101 Nev. 122, 696 P.2d 462 (1985).

[5] *See Copeland v. Desert Inn Hotel,* 99 Nev. 823, 826, 673 P.2d 490, 492 (2983).

of equitable tolling does not apply to time limitations that are mandatory and jurisdictional. *Seino v. Employers Ins. Co. of Nevada,* 121 Nev. 146, 153, 111 P.3d 1107, 1112 (2005).

Failure to timely file an appeal fails to vest jurisdiction in the hearing officer. *See Fitzpatrick v. State, Dep't of Commerce, Ins. Div.,* 107 Nev. 486, 488, 813 P.2d 1004, 1005 (1991). The hearing officer should have dismissed Bronder's untimely appeal for lack of jurisdiction (at least as to the May 5, 2017, termination), and the district court committed clear error in affirming the hearing officer's decision and dismissing NDOT's petition for judicial review.

3. The District Court Clearly Erred In Finding That Respondent Bronder Disclosed Information Concerning Improper Governmental Action.

Bronder makes no effort to refute NDOT's position that Bronder's appeal fails to establish he is a protected whistleblower because the substantial evidence in this case demonstrates he did not make a disclosure. Rather, Bronder confirms that he simply communicated the Governor's publicly expressed "questions and comments about seemingly excessive compensation of contracted consultants" to NDOT Assistant Construction Engineer Steve Lani. Answering Brief, p. 2.

Bronder again just echoes the hearing officer, who found that Bronder's statements to Mr. Lani "involved matters of public concern." Answering Brief, p. 5. The question here is not whether the cost of consultant contracts is a matter of

public concern;[6] rather, the question is whether Bronder "*disclosed*" *improper governmental action delineated in NRS 281.611(1).* A manager, after listening to a public meeting, who then goes to a supervisor and says something to the effect of "Hey Steve, the Governor has questions and comments about the high cost of the consultant contracts you approved" has not *disclosed* anything other than the Governor's questions or comments.

Bronder's appeal failed to establish he is a protected whistleblower, and the district court clearly erred by dismissing NDOT's petition for judicial review and affirming the hearing officer's decision granting Bronder's whistleblower appeal.

C. Appellant NDOT Is Entitled To Recoup Unwarranted Back Pay

Bronder argues that NDOT "is not entitled to recoup any back pay even in the unlikely event that this Court concludes that Respondent's termination was proper." Answering Brief, p. 15. This appeal is not about the merits of Bronder's rejection from probation. This appeal is about the hearing officer's and district court's incorrect statutory interpretation and the hearing officer's lack of jurisdiction to hear Bronder's whistleblower appeal.

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[6] Whether the employee spoke out on a "matter of public concern is an element of *a First Amendment retaliation claim.*" *Eng v. Cooley,* 552 F.3d 1062, 1070 (9th Cir. 2009). Not all matters of potential public concern necessarily fall within the improper governmental actions listed in NRS 281.611, and the phrase "matter of public concern" appears nowhere in NRS 281.

Under NRS 233B.135(3), a district court may set aside a hearing officer's decision "in whole or in part." Here, the hearing officer's decision included an order for "restoration of accrued benefits previously earned." Had the district court properly set aside the hearing officer's decision in whole, it would reasonably have included the portion of the decision awarding accrued benefits.

NDOT moved the district court for a stay in this case, arguing irreparable harm would result from payment of unwarranted back pay to Bronder. Without conducting any analysis, the district court found that NDOT would not be irreparably harmed and denied the motion. NDOT is safe from irreparable harm in this case only if it is able to recoup unwarranted back pay in the event NDOT prevails on appeal.

CONCLUSION

As has been thoroughly demonstrated in the briefs, Bronder's whistleblower appeal was untimely, Bronder did not disclose information concerning improper governmental action, and the district court erred in (1) denying NDOT's Petition for Judicial Review, (2) affirming the hearing officer's decision and (3) reinstating Bronder to his employment with NDOT.

Therefore, this Court should (1) reverse the district court's order denying the Petition for Judicial Review, (2) reverse the hearing officer's decision, (3) dismiss Bronder's whistleblower appeal, and (4) order Bronder to repay any and all

unwarranted back pay and benefits paid to him in accordance with the hearing officer's and district court's orders.

DATED this 24th day of April, 2020.

AARON D. FORD
Attorney General

By: */s/ Cameron P. Vandenberg*
CAMERON P. VANDENBERG
NV Bar No. 4356
Chief Deputy Attorney General

Attorneys for Appellant
State of Nevada *ex rel.* Department of Transportation

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable

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DATED this 24th day of April, 2020.

AARON D. FORD
Attorney General

By: */s/ Cameron P. Vandenberg*
CAMERON P. VANDENBERG
NV Bar No. 4356
Chief Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on April 24, 2020, I electronically filed the foregoing document via this Court's electronic filing system. I certify that the following participants in this case are registered electronic filing systems users and will be served electronically and by U.S. Mail first class postage prepaid:

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

/s/ Kahra Stenberg
Employee of the State of Nevada,
Office of the Attorney General