

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

State of Nevada Department of Corrections

V.

Jose Miguel Navarrete; State of Nevada ex
rel. its Department of Administration,
Personnel Commission, Hearing Officer,

Respondent.

No. 82113

Electronically Filed
Dec 10 2020 05:29 p.m.

DOCKETING STATEMENT
CIVIL APPEALS
Elizabeth A. Brown
Clerk of Supreme Court

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District 8th Department XVI _____
County Clark Judge Timothy C. Williams _____
District Ct. Case No. A-19-767661-J _____

2. Attorney filing this docketing statement:

Attorney Michelle Di Silvestro Alanis Telephone 702-486-3268 _____
Firm Nevada Attorney General _____
Address 555 E. Washington Ave
Suite 3900
Las Vegas, Nevada 89101
Client(s) Nevada Department of Corrections (NDOC) _____

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

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

Attorney Daniel Marks Telephone 702-386-6812 _____
Firm Law Office of Daniel Marks _____
Address 610 S. Ninth Street
Las Vegas, Nevada 89101
Client(s) Jose Navarrete _____

Attorney _____ Telephone _____
Firm _____
Address _____
Client(s) _____

(List additional counsel on separate sheet if necessary)

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

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

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

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

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

N/A

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

N/A

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

Appellant, NDOC, terminated Respondent, Jose M. Navarrete (Employee), a senior correctional officer, effective April 21, 2017, for various acts of misconduct, including dishonesty and allowing the use of excessive force or an act of violence to occur on an inmate against NDOC policy. Employee appealed his termination to the Department of Administration Personnel Commission pursuant to NRS 284.390. A hearing was held on April 2, 2019 and April 16, 2019 before Hearing Officer Mark Gentile. On May 30, 2019, the hearing officer entered his Findings of Fact, Conclusions of Law Decision and Order (Decision) finding that NDOC did not prove by a preponderance of the evidence that Employee engaged in the misconduct. The hearing officer set aside Employee's termination and reinstated him to his position with full back pay and benefits for the period of dismissal subject to the party's previous stipulation.

NDOC filed a Petition for Judicial Review with the District Court. The District Court denied judicial review and affirmed the Hearing Officer's ruling. NDOC now appeals the District Court's denial of judicial review and affirmance of the hearing's officer decision to reverse the discipline.

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

The Decision substantially violated the rights of NDOC and this Court must determine:

Was the hearing officer's reliance on NDOC AR 339 a clear error of law following *Dep't of Corr. v. Ludwick*, 135 Nev. 99, 440 P.3d 43 (2019)?

Was the hearing officer's decision in violation of statutory provisions (NRS 284.390 and NAC 284.794) and a clear error of law (*Ludwick*) when he failed to consider whether Employee violated NAC 284.650(1), (10), and (21)?

Did the hearing officer clearly err when he used a preponderance of the evidence standard instead of a substantial evidence standard under step one of *O'Keefe v. Dep't of Motor Vehicles*, 134 Nev. 752, 431 P.3d 350 (2018)?

Was the hearing officer's decision clearly erroneous in view of the reliable, probative and substantial evidence on the whole record and arbitrary and capricious or an abuse of discretion?

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

I do not believe there are any pending cases in this court that are similar.

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

☒ N/A

☐ Yes

☐ No

If not, explain:

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

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

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

☐ A substantial issue of first impression

☒ An issue of public policy

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

☐ A ballot question

If so, explain:

This case involves the application of law from recent Nevada Supreme Court cases: *O'Keefe v. Dep't of Motor Vehicles*, 134 Nev. 752, 431 P.3d 350 (2018) and *Dep't of Corr. v. Ludwick*, 135 Nev. 99, 440 P.3d 43 (2019). This Court provided a three-part test under *O'Keefe*. Under step one of *O'Keefe*, a hearing officer is to determine whether the employee committed the alleged violation using a substantial evidence standard.

Here, the hearing officer used a preponderance of evidence standard and determined that a senior correction officer did not engage in dishonesty and did not allow improper use of force to occur. These issues affect public policy and a state agency's ability to rely on the substantial evidence supporting that an employee engaged in misconduct and to dismiss an employee for violating its policies and procedures.

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

Pursuant to NRAP 17(b)(10) this case is presumptively assigned to the Nevada Court of Appeals. However, this case should be retained by the Supreme Court pursuant to NRAP 17(a)(11) because it involves step one under *O'Keefe* which is of statewide importance in state agency employment matters.

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

Was it a bench or jury trial? N/A

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

No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from 10/13/20

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

17. Date written notice of entry of judgment or order was served 10/13/20

Was service by:

☐ Delivery

☒ Mail/electronic/fax

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

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

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

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

(b) Date of entry of written order resolving tolling motion _____

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

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed 11/12/20

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

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

NRAP 4(a)(1)

SUBSTANTIVE APPEALABILITY

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

(a)

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

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

NRAP3A(b)(1): The District Court's order denying the petition for judicial review was a final judgment adjudicating all issue presented in the judicial review proceeding commenced in that court pursuant to NRS 233B.130, et. seq.

NRS 233B.150: The District Court's order denying the petition for judicial review was a final judgment of a district court reviewing a final decision of an agency of the Executive Department of the State of Nevada within the meaning of NRS Chapter 233B which aggrieved the Appellant.

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

(a) Parties:

Nevada Department of Corrections

Jose Navarrete

Nevada Department of Administration, Personnel Commission Hearing Officer (did not participate in the appeal before the District Court)

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

N/A

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

Appellant sought judicial review of the hearing officer's decision. This was the only claim involved.

The date of formal disposition was October 13, 2020.

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

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

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

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

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

N/A

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

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

VERIFICATION

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

State of Nevada, ex rel. Department of Corrections

Michelle Di Silvestro Alanis

Name of appellant

Name of counsel of record

December 10, 2020

/s/ Michelle Di Silvestro Alanis

Date

Signature of counsel of record

Nevada, Clark County

State and county where signed

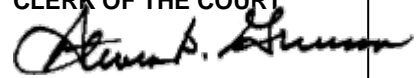
CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on December 10th, 2020, I electronically filed the foregoing completed DOCKETING STATEMENT via this Court's electronic filing system. Parties that are registered with this Court's electronic filing system will be served electronically. For those parties not registered, service was made by depositing a copy for mailing first-class postage prepaid at Las Vegas, Nevada to the following:

Dan Marks, Esq.
Law Offices of Daniel Marks
610 S. 9th St.
Las Vegas, NV 89101

(Email to:office@danielmark.net)

/s/ Anela Kaheaku
An employee of the Office of Attorney General



NEOJ
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(702) 386-0536; FAX (702) 386-6812
Attorneys for Respondent Jose Navarrete

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel. its
DEPARTMENT OF CORRECTIONS,

Case No.: A-19-797661-J
Dept. No.: XVI

Petitioner,

vs.

JOSE MIGUEL NAVARRETE, an individual;
STATE OF NEVADA ex rel., its
DEPARTMENT OF ADMINISTRATION,
PERSONNEL COMMISSION, HEARING
OFFICER,

Respondents.

**NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER ON PETITION FOR JUDICIAL REVIEW**

TO: STATE OF NEVADA ex rel, DEPARTMENT OF PUBLIC SAFETY, Petitioner; and

TO: MICHELLE DI SILVESTRO ALANIS, Deputy Attorney General, Attorney for Petitioner:

1 **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW,**
2 **AND ORDER ON PETITION FOR JUDICIAL REVIEW**

3 PLEASE TAKE NOTICE that an Order was entered in the above-entitled action on the 12th day
4 of October 2020, a copy of which is attached hereto.

5 DATED this 12th day of October 2020.

6 LAW OFFICE OF DANIEL MARKS

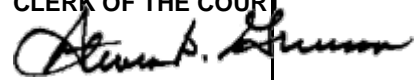
7 /s/Adam Levine, Esq.
8 DANIEL MARKS, ESQ.
9 Nevada State Bar No. 002003
10 office@danielmarks.net
11 ADAM LEVINE, ESQ.
12 Nevada State Bar No. 004673
13 alevine@danielmarks.net
14 610 South Ninth Street
15 Las Vegas, Nevada 89101
16 (702) 386-0536: FAX (702) 386-6812
17 *Attorneys for*

18 **CERTIFICATE OF SERVICE BY ELECTRONIC MEANS**

19 I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 12th
20 day of October 2020, pursuant to NRCP 5(b) and Administrative Order 14-2, I electronically
21 transmitted a true and correct copy of the above and foregoing NOTICE OF ENTRY OF FINDINGS
22 OF FACT, CONCLUSIONS OF LAW, AND ORDER ON PETITION FOR JUDICIAL REVIEW by
23 way of Notice of Electronic Filing provided by the court mandated E-file & Serve system, to the e-mail
24 address on file for:

25 Michelle Di Silvestro Alanis, Esq.
 Deputy Attorney General
 ATTORNEY GENERAL'S OFFICE
 Attorney for Petitioner
 e-mail: malanis@ag.nv.gov
 akaheaku@ag.nv.gov

/s/ Joi E. Harper
 An employee of the
 LAW OFFICE OF DANIEL MARKS_____



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Attorney for Respondent Jose Navarrete

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel, DEPARTMENT
OF CORRECTIONS,

Case No.: A-19-797661-J
Dept. No.: XVI

Petitioner,

v.

JOSE MIGUEL NAVARRETE, an individual;
STATE OF NEVADA ex rel; its
DEPARTMENT OF ADMINISTRATION
PERSONNEL COMMISSION, HEARING
OFFICER,

Respondents.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON PETITION FOR
JUDICIAL REVIEW**

This matter having come on for hearing on the 9th day of June, 2020, on Petitioner's
Petition for Judicial Review, filed on June 28, 2019. Petitioner State of Nevada appearing by and
through its counsel, Michelle Di Silvestro Alanis, of the Attorney General's Office; and
Respondent Jose Navarrete appearing by and through his counsel Daniel Marks, Esq., of the Law
Office of Daniel Marks; the Court having reviewed the papers and pleadings on file, including
Petitioner's Opening Brief, filed on November 27, 2019; Respondent's Answering Brief, filed on
February 26, 2020; and Petitioner's Reply Brief, filed on May 15, 2020; having heard the
arguments of counsel, and good cause appearing:

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////

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<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Motion to Dismiss by Deft(s)	<input type="checkbox"/> Judgment of Arbitration

1 **A. Findings of Fact**

2 THE COURT HEREBY FINDS that the hearing officer's factual conclusions are
3 supported by substantial evidence. *See Nassiri v. Chiropractic Phys. Bd.*, 130 Nev. 245, 249-50
4 (2014).

5 Respondent Jose Navarrete ("Navarrete") was terminated for an incident involving
6 another correction officer, Paul Valdez ("Valdez"), and inmate Rickie Norelus ("Norelus") at
7 Southern Desert Correctional Center ("SDCC"). (ROA 583.)

8 On October 9, 2016, during the breakfast service, Navarrete and Valdez "were randomly
9 searching inmates leaving culinary for contraband." (ROA 583-84.) This search, as well as other
10 searches, are "a common occurrence" at SDCC. (ROA 583.) A surveillance video recorded the
11 incident from a single perspective with no audio. (ROA 583.)

12 During the hearing at issue, Hearing Officer Mark Gentile ("Gentile") was provided an
13 enhanced and slow motion video of the crucial moments of this incident. (ROA 584, 709-11 &
14 1150-51.) Navarrete also provided comprehensive testimony regarding what occurred during
15 each stage of the encounter. (ROA 584.) Gentile found Navarrete credible. (ROA 584.)

16 Gentile also found, "without question":

17 that Mr. Norelus was acting differently than the other inmates when placed on the
18 wall for a pat down. He was clearly agitated and his hands were not in the proper
19 position. He appears to be continually looking around anxiously. There is,
20 unfortunately, no audio and one cannot determine what is being said by the
21 officers or the inmates - yet, the head and body movements of all reflect, without a
22 doubt, that there was continual chatter by inmate Norelus. The testimony by Mr.
23 Navarrete was that Mr Norelus was being uncooperative and verbally abusive
24 throughout the encounter.

25 (ROA584.) These findings support Navarrete's testimony that Norelus was noncompliant.

26 With regard to this incident, Gentile found:

27 As Officer Valdez abruptly approaches the inmate from behind, the inmate does
28 move backward slightly off the wall and looks over his left shoulder. You can see
the inmate's left arm and shoulders slightly moving backwards, but the hands
remain on the wall. Officer Valdez then pushes the inmate into the wall, grabs the
inmate's neck with his right arm, and wrestles him to the ground.

(ROA 585.)

////

1 This all “occurred in a matter of a few seconds.” (ROA 585.) Valdez immediately cuffed
2 Norelus once on the ground, and Navarrete came over to assist. (ROA 585.) Gentile found that
3 even with the enhanced video, Valdez’ conduct was unjustified. (ROA 585.)

4 With regard to the post-incident video, that includes audio, Gentile found that while
5 Norelus is leaving the area he is “laughing at the officers and claiming they will ‘put his kids
6 through college.’” (ROA 586.) He also “does not appear injured and his conduct makes it seem
7 as if he may have been baiting the officers to some extent, which according to the testimony is a
8 common occurrence” at SDCC. (ROA 586.)

9 Navarrete later submitted an informational report, which states:

10 On October 9, 2016 I, Senior Correctional Officer Navarrete was assigned to
11 Search and Escort Southern Desert Correctional Center. At approximately 06:45
12 hours inmate Norelus #1104257 came off the Culinary wall while C/O Valdez
13 was attempting to restrain him resulting in the spontaneous use of force. When
14 inmate Norelus came off the wall he was resisting and both he and C/O Valdez
went to the ground. I then assisted in holding the inmates upper body down so that
C/O Valdez could restrain him. I notified supervisors and called medical so that
they could respond to the scene. Medical responded and inmate Norelus was
escorted to the infirmary to be further evaluated.

15 (ROA 586.)

16 With regard to Navarrete’s involvement in this incident, Gentile specifically found that
17 NDOC failed to establish “factually by a preponderance of the evidence, that [] Navarrete
18 willfully employed or permitted the use of unauthorized or excessive force” and that “there is
19 absolutely no evidence to reflect that he personally utilized excessive force.” (ROA 588.) This is
20 because Valdez’ use of force “was quite sudden and was over in a matter of a few seconds.”
21 (ROA 589.) Gentile specifically found Navarrete could not have anticipated, nor prevented,
22 Valdez’s spontaneous use of force. (ROA 589.)

23 With regard to the charge of dishonesty in relation to Navarrete’s use of force report,
24 Gentile found, as follows:

25 Navarrete wrote the report without the benefit of reviewing any video - he was
26 trying to assimilate and explain this unexpected event he saw occur literally in a
27 matter of second. The reality is Mr. Navarrete saw this event (the physical use of
28 force by Officer Valdez) take place in a matter of 2-3 seconds, from a side
perspective. He saw it only one time.

1 (ROA 590.) He then concluded:

2 Navarrete's report is brief and, essentially, factually accurate given what he
3 reasonably could be expected to have perceived at the time. From his testimony,
4 and even in his pre-hearing interviews, it is clear that he believed, initially, Officer
5 Valdez was intending to restrain the inmate. While this was happening, a
6 spontaneous use of force situation occurred. Norelus did come off the wall as
7 Officer Valdez was either properly or improperly attempting to restrain him, but I
8 do not think Mr. Navarrete could be fairly called up to conclude from his 2-3
9 second perception whether Officer Valdez' actions were appropriate or not, or
10 whether the take down was initiated by the wrongful conduct of the inmate or of
11 Officer Valdez. The inmate did rock backwards just prior to physical contact. I do
12 not believe that Mr. Navarrete was in the position to know what Officer Valdez
13 perceived or why this ended as it did. Mr. Navarrete's report is a bland statement
14 of events which are, essentially, true. "When he came off the wall he was
15 resisting." They did end up about 15 feet away - inmate Norelus didn't just flop to
16 the ground. Both officers, ultimately, had to restrain the inmate. Once again, this
17 appears, to me, to be a plain statement that appears, essentially true.

18 (ROA 590-91.)

19 Based on these factual findings, and NDOC's failure to prove otherwise by a
20 preponderance of the evidence, Gentile concluded that Navarrete's dismissal from NDOC be
21 reversed with restoration to his prior position with back pay and benefits. (ROA 591.)

22 **B. Conclusions of Law**

23 NRS 233B.135 sets forth the rules of judicial review district courts must follow. Along
24 with NRS 233B.135, the Court finds that *O'Keefe v. Dept. of Motor Veh.*, 134 Nev. 752 (2018),
25 and *Nassiri v. Chiropractic Phys. Bd.*, 130 Nev. 245, 251(2014) provide guidance that aids the
26 district court's review on the instant petition. Under the review process found in *O'Keefe*, a
27 hearing officer must first determine whether the employee in fact committed the alleged
28 violation. *O'Keefe*, 134 Nev. at 759. When a hearing officer's conclusions of law are closely
related to the findings of fact, those legal conclusions must also be afforded deference and may
not be disturbed if supported by substantial evidence. *Jones v. Rosner*, 102 Nev. 215, 719 P.2d
805 (1986).

Since the hearing officer reviews the facts, the applicable standard for this review is the
preponderance-of-the-evidence standard. See *Nassiri v. Chiropractic Phys. Bd.*, 130 Nev. 245,
251(2014) (holding that in absence of a specific governing statute, the preponderance of the
evidence standard should be applied, as it is the minimum standard to guarantee due process).

1 The hearing officer ultimately concluded, under step one of *O'Keefe* and the preponderance of
2 the evidence standard, that Navarrete did not commit the alleged violations.

3 Petitioner failed to prove the hearing officer's decision violated Petitioner's substantial
4 rights under NRS 233B.135(2). To meet this burden, the petitioner must prove the agency's
5 decision (1) violates the constitution or other statutory provisions, (2) exceeds the agency's
6 statutory authority, (3) is based on an unlawful procedure, (4) constitutes legal error, (5) clearly
7 erroneous based on "reliable probative and substantial evidence on the whole record," or (6)
8 "arbitrary and capricious or characterized by abuse of discretion." NRS 233B.135(2). Petitioner
9 failed to prove any of these bases to reverse the hearing officer's decision.

10 **C. Order**

11 IT IS HEREBY ORDERED ADJUDGED AND DECREED that the hearing officer's
12 ruling is hereby AFFIRMED.

13 DATED this 9th day of October, 2020.

14 
15 DISTRICT COURT JUDGE ZJ

16
17 Respectfully submitted:

18 DATED this 2nd day of October, 2020.

19 LAW OFFICE OF DANIEL MARKS

20 /s/ Nicole M. Young

21 DANIEL MARKS, ESQ.

22 Nevada State Bar No. 002003

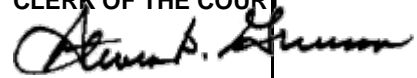
23 NICOLE M. YOUNG, ESQ.

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26 Las Vegas, Nevada 89101

27 Attorneys for Respondent/Employee
28



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Attorney for Respondent Jose Navarrete

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel, DEPARTMENT
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JOSE MIGUEL NAVARRETE, an individual;
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PERSONNEL COMMISSION, HEARING
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Respondents.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON PETITION FOR
JUDICIAL REVIEW**

This matter having come on for hearing on the 9th day of June, 2020, on Petitioner's
Petition for Judicial Review, filed on June 28, 2019. Petitioner State of Nevada appearing by and
through its counsel, Michelle Di Silvestro Alanis, of the Attorney General's Office; and
Respondent Jose Navarrete appearing by and through his counsel Daniel Marks, Esq., of the Law
Office of Daniel Marks; the Court having reviewed the papers and pleadings on file, including
Petitioner's Opening Brief, filed on November 27, 2019; Respondent's Answering Brief, filed on
February 26, 2020; and Petitioner's Reply Brief, filed on May 15, 2020; having heard the
arguments of counsel, and good cause appearing:

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<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Motion to Dismiss by Deft(s)	<input type="checkbox"/> Judgment of Arbitration

1 **A. Findings of Fact**

2 THE COURT HEREBY FINDS that the hearing officer's factual conclusions are
3 supported by substantial evidence. *See Nassiri v. Chiropractic Phys. Bd.*, 130 Nev. 245, 249-50
4 (2014).

5 Respondent Jose Navarrete ("Navarrete") was terminated for an incident involving
6 another correction officer, Paul Valdez ("Valdez"), and inmate Rickie Norelus ("Norelus") at
7 Southern Desert Correctional Center ("SDCC"). (ROA 583.)

8 On October 9, 2016, during the breakfast service, Navarrete and Valdez "were randomly
9 searching inmates leaving culinary for contraband." (ROA 583-84.) This search, as well as other
10 searches, are "a common occurrence" at SDCC. (ROA 583.) A surveillance video recorded the
11 incident from a single perspective with no audio. (ROA 583.)

12 During the hearing at issue, Hearing Officer Mark Gentile ("Gentile") was provided an
13 enhanced and slow motion video of the crucial moments of this incident. (ROA 584, 709-11 &
14 1150-51.) Navarrete also provided comprehensive testimony regarding what occurred during
15 each stage of the encounter. (ROA 584.) Gentile found Navarrete credible. (ROA 584.)

16 Gentile also found, "without question":

17 that Mr. Norelus was acting differently than the other inmates when placed on the
18 wall for a pat down. He was clearly agitated and his hands were not in the proper
19 position. He appears to be continually looking around anxiously. There is,
20 unfortunately, no audio and one cannot determine what is being said by the
21 officers or the inmates - yet, the head and body movements of all reflect, without a
22 doubt, that there was continual chatter by inmate Norelus. The testimony by Mr.
23 Navarrete was that Mr Norelus was being uncooperative and verbally abusive
24 throughout the encounter.

25 (ROA584.) These findings support Navarrete's testimony that Norelus was noncompliant.

26 With regard to this incident, Gentile found:

27 As Officer Valdez abruptly approaches the inmate from behind, the inmate does
28 move backward slightly off the wall and looks over his left shoulder. You can see
the inmate's left arm and shoulders slightly moving backwards, but the hands
remain on the wall. Officer Valdez then pushes the inmate into the wall, grabs the
inmate's neck with his right arm, and wrestles him to the ground.

(ROA 585.)

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1 This all “occurred in a matter of a few seconds.” (ROA 585.) Valdez immediately cuffed
2 Norelus once on the ground, and Navarrete came over to assist. (ROA 585.) Gentile found that
3 even with the enhanced video, Valdez’ conduct was unjustified. (ROA 585.)

4 With regard to the post-incident video, that includes audio, Gentile found that while
5 Norelus is leaving the area he is “laughing at the officers and claiming they will ‘put his kids
6 through college.’” (ROA 586.) He also “does not appear injured and his conduct makes it seem
7 as if he may have been baiting the officers to some extent, which according to the testimony is a
8 common occurrence” at SDCC. (ROA 586.)

9 Navarrete later submitted an informational report, which states:

10 On October 9, 2016 I, Senior Correctional Officer Navarrete was assigned to
11 Search and Escort Southern Desert Correctional Center. At approximately 06:45
12 hours inmate Norelus #1104257 came off the Culinary wall while C/O Valdez
13 was attempting to restrain him resulting in the spontaneous use of force. When
14 inmate Norelus came off the wall he was resisting and both he and C/O Valdez
15 went to the ground. I then assisted in holding the inmates upper body down so that
16 C/O Valdez could restrain him. I notified supervisors and called medical so that
17 they could respond to the scene. Medical responded and inmate Norelus was
18 escorted to the infirmary to be further evaluated.

19 (ROA 586.)

20 With regard to Navarrete’s involvement in this incident, Gentile specifically found that
21 NDOC failed to establish “factually by a preponderance of the evidence, that [] Navarrete
22 willfully employed or permitted the use of unauthorized or excessive force” and that “there is
23 absolutely no evidence to reflect that he personally utilized excessive force.” (ROA 588.) This is
24 because Valdez’ use of force “was quite sudden and was over in a matter of a few seconds.”
25 (ROA 589.) Gentile specifically found Navarrete could not have anticipated, nor prevented,
26 Valdez’s spontaneous use of force. (ROA 589.)

27 With regard to the charge of dishonesty in relation to Navarrete’s use of force report,
28 Gentile found, as follows:

Navarrete wrote the report without the benefit of reviewing any video - he was
trying to assimilate and explain this unexpected event he saw occur literally in a
matter of second. The reality is Mr. Navarrete saw this event (the physical use of
force by Officer Valdez) take place in a matter of 2-3 seconds, from a side
perspective. He saw it only one time.

1 (ROA 590.) He then concluded:

2 Navarrete's report is brief and, essentially, factually accurate given what he
3 reasonably could be expected to have perceived at the time. From his testimony,
4 and even in his pre-hearing interviews, it is clear that he believed, initially, Officer
5 Valdez was intending to restrain the inmate. While this was happening, a
6 spontaneous use of force situation occurred. Norelus did come off the wall as
7 Officer Valdez was either properly or improperly attempting to restrain him, but I
8 do not think Mr. Navarrete could be fairly called up to conclude from his 2-3
9 second perception whether Officer Valdez' actions were appropriate or not, or
10 whether the take down was initiated by the wrongful conduct of the inmate or of
11 Officer Valdez. The inmate did rock backwards just prior to physical contact. I do
12 not believe that Mr. Navarrete was in the position to know what Officer Valdez
13 perceived or why this ended as it did. Mr. Navarrete's report is a bland statement
14 of events which are, essentially, true. "When he came off the wall he was
15 resisting." They did end up about 15 feet away - inmate Norelus didn't just flop to
16 the ground. Both officers, ultimately, had to restrain the inmate. Once again, this
17 appears, to me, to be a plain statement that appears, essentially true.

18 (ROA 590-91.)

19 Based on these factual findings, and NDOC's failure to prove otherwise by a
20 preponderance of the evidence, Gentile concluded that Navarrete's dismissal from NDOC be
21 reversed with restoration to his prior position with back pay and benefits. (ROA 591.)

22 **B. Conclusions of Law**

23 NRS 233B.135 sets forth the rules of judicial review district courts must follow. Along
24 with NRS 233B.135, the Court finds that *O'Keefe v. Dept. of Motor Veh.*, 134 Nev. 752 (2018),
25 and *Nassiri v. Chiropractic Phys. Bd.*, 130 Nev. 245, 251(2014) provide guidance that aids the
26 district court's review on the instant petition. Under the review process found in *O'Keefe*, a
27 hearing officer must first determine whether the employee in fact committed the alleged
28 violation. *O'Keefe*, 134 Nev. at 759. When a hearing officer's conclusions of law are closely
related to the findings of fact, those legal conclusions must also be afforded deference and may
not be disturbed if supported by substantial evidence. *Jones v. Rosner*, 102 Nev. 215, 719 P.2d
805 (1986).

Since the hearing officer reviews the facts, the applicable standard for this review is the
preponderance-of-the-evidence standard. See *Nassiri v. Chiropractic Phys. Bd.*, 130 Nev. 245,
251(2014) (holding that in absence of a specific governing statute, the preponderance of the
evidence standard should be applied, as it is the minimum standard to guarantee due process).

1 The hearing officer ultimately concluded, under step one of *O'Keefe* and the preponderance of
2 the evidence standard, that Navarrete did not commit the alleged violations.

3 Petitioner failed to prove the hearing officer's decision violated Petitioner's substantial
4 rights under NRS 233B.135(2). To meet this burden, the petitioner must prove the agency's
5 decision (1) violates the constitution or other statutory provisions, (2) exceeds the agency's
6 statutory authority, (3) is based on an unlawful procedure, (4) constitutes legal error, (5) clearly
7 erroneous based on "reliable probative and substantial evidence on the whole record," or (6)
8 "arbitrary and capricious or characterized by abuse of discretion." NRS 233B.135(2). Petitioner
9 failed to prove any of these bases to reverse the hearing officer's decision.

10 **C. Order**

11 IT IS HEREBY ORDERED ADJUDGED AND DECREED that the hearing officer's
12 ruling is hereby AFFIRMED.

13 DATED this 9th day of October, 2020.

14 
15 DISTRICT COURT JUDGE ZJ

16
17 Respectfully submitted:

18 DATED this 2nd day of October, 2020.

19 LAW OFFICE OF DANIEL MARKS

20 /s/ Nicole M. Young

21 DANIEL MARKS, ESQ.

22 Nevada State Bar No. 002003

23 NICOLE M. YOUNG, ESQ.

24 Nevada State Bar No. 012659

25 610 S. Ninth Street

26 Las Vegas, Nevada 89101

27 Attorneys for Respondent/Employee

1 The video begins as Officer Valdez and Senior Officer Navarrete had a number of inmates
2 leaving culinary place their hands on a wall, so that they could be searched. The testimony reflected
3 that the usual procedure is for inmates to be pulled out of line at random as they were leaving, placed
4 with their hands against a wall, and submitted to a brief pat down search. The entire process,
5 typically, is completed in a minute or so, although, there is no set time frame for each specific
6 encounter.

7 Every inmate pulled out of line on October 9, 2016 was subjected to this process and every
8 inmate, aside from one, was searched and released in a matter of a minute or so. The exception to
9 this was inmate Rickie Norelus. The video evidence reflected he was on the wall for approximately
10 ten (10) minutes before he was contacted physically by Officer Valdez, taken to the ground, and then
11 restrained by both officers. During this hearing, I was afforded enhanced video and slow motion
12 video of crucial moments of this encounter, which were not part of evidence at the Valdez hearing.
13 I also was provided an after-the-fact video of inmate Norelus as he was leaving the area and making
14 disparaging comments to the correction officers, which I had not considered before. I also, for the
15 first time, considered the testimony of Mr. Navarette, whom I found to be credible.

16 I have repeatedly reviewed the tape of inmate Norelus' actions as he was placed on the wall.
17 Petitioner's Exhibit 8 provides key snippets of video from the ten (10) minutes. Mr. Navarette
18 testified comprehensively as to what was occurring during each stage of the encounter. It does
19 appear, without question, that Mr. Norelus was acting differently than the other inmates when placed
20 on the wall for a pat down. He was clearly agitated and his hands were not in the proper position.
21 He appears to be continually looking around anxiously. There is, unfortunately, no audio and one
22 cannot determine what is being said by the officers or the inmates - yet, the head and body
23 movements of all involved reflect, without a doubt, that there was continual chatter by inmate
24 Norelus. The testimony by Mr. Navarette was that Mr. Norelus was being uncooperative and
25 verbally abusive throughout the encounter.

26 At the 1:50 minute mark of the tape, he was searched by senior Officer Navarrete and no
27 apparent contraband was found. The tape again shows that after this search was completed, he,
28 again, took his hands off the wall and was not complying. Arguably, the decision to keep him on

1 the wall at this point was related to his failure to comply with procedures and the direction of the
2 officers. There was no sign of physical resistance by the inmate or of any physical threat to the
3 officers, the testimony was that he continued to be verbally abusive and agitated. Although
4 equivocal, this is supported by the tape.

5 Between minutes 2 and 3 of the tape, inmate Norelus is the only inmate at the wall. His
6 hands were raised and you can detect that he and Officer Navarrete were communicating. There is
7 no sign of any physical threat to the officers. The testimony was that he continued to be verbally
8 abusive and agitated.

9 Between minutes 3 and 6 on the tape, inmate Norelus is the only inmate on the wall. There
10 is a lot of movement by inmate Norelus and what appears to be a lot of communication between the
11 inmate and the officers. The testimony was that he was verbally abusive and agitated.

12 Between minutes 6 and 9 on the tape, this situation remains, essentially, the same. It appears
13 that the talking continues. Officer Navarrete positions himself alongside the inmate and it does
14 appear he is trying to de-escalate the situation, which is what he described. Inmate Norelus does
15 appear to be less agitated, although, there is still a lot of head movements and animated conversation.

16 At minute 10:40 on the tape, inmate Norelus takes his hand off the wall and looks at his
17 wrist. He appears to be continually talking. Shortly thereafter, Officer Valdez approaches the inmate
18 from behind. Unfortunately, there is no audio. The testimony was that Officer Valdez verbally told
19 the inmate he was going to cuff him and take him to the sergeant, yet, there was no signs that Officer
20 Valdez actually had his handcuffs in hand. As Officer Valdez abruptly approaches the inmate from
21 behind, the inmate does move backward slightly off the wall and looks over his left shoulder. You
22 can see the inmate's left arm and shoulders slightly moving backwards, but the hands remain on the
23 wall. Officer Valdez then pushes the inmate into the wall, grabs the inmate's neck with his right
24 arm, and wrestles him to the ground.

25 The physical aspects of this are rather shocking and appear unexpected. All of this occurred
26 in a matter of a few seconds. Once on the ground, he was immediately handcuffed by Officer Valdez
27 and Senior Officer Navarrete, who came over to assist. Officer Valdez' conduct seems abrupt and
28 unanticipated and, upon close review of the enhanced video, continues to appear unjustified.

1 The video of inmate Norelus leaving the area in a cart to head to the infirmary has him
2 laughing at the officers and claiming that they will "put his kids through college." He does not
3 appear injured and his conduct makes it seem as if he may have been baiting the officers to some
4 extent, which according to the testimony, is a common occurrence in this environment.

5 Following the incident, Officer Navarette authored an informational report (Petitioner's
6 Exhibit 1). This report reads, in pertinent part, as follows:

7 On October 9, 2016 I, Senior Correctional Officer Navarette was assigned to Search
8 and Escort at Southern Desert Correctional Center. At approximately 06:45 hours,
9 inmate Norelus #1104257 came off the Culinary wall while C/O Valdez was
10 attempting to restrain him resulting in a spontaneous use of force. When inmate
11 Norelus came off the wall he was resisting and both he and C/O Valdez went to the
ground. I then assisted in holding he inmates upper body down so that C/O Valdez
could restrain him. I notified supervisors and called medical so that they could
respond to the scene. Medical responded and inmate Norelus was escorted to the
infirmary to be further evaluated.

12 On March 16, 2017, Officer Navarette was served with a specificity of charges. He was cited
13 for the following violations:

14 NAC 284.650:

- 15 1. Activity which is incompatible with an employee's conditions of employment
16 established by law or which violates a provision of NAC 284.653 or 284.738 to
284.771, inclusive.
- 17 10. Dishonesty.
- 18 21. Any act of violence which arises out of or in the course of the performance of the
19 employees duties, including without limitation stalking, conduct that is intimidating,
assault or battery.

20 He was also charged with the following:

21 AR 339.07.9 False or Misleading Statements

- 22 A. Knowingly providing false or misleading statements, including omissions, either
23 verbally or in written reports or other documents, concerning actions related to the
24 performance of official duties. Or knowingly providing false or misleading
statements, including omissions, in response to any question or request for
information in any official investigation, interview, hearing or judicial process.
(Class 5)

25 AR 339.07.17 Unauthorized Use of Force

26 Wilfully employing or permitting the use of unnecessary, unauthorized or excessive force.
27 (Class 4-5)

28 A pre-disciplinary hearing took place on April 17, 2017. The pre-disciplinary hearing officer

1 determined it was in the best interest of the State for the Employee to be dismissed because he
2 allowed the use of excessive force as a Senior Officer and wrote a report that did not accurately
3 depict what occurred.

4 On April 19, 2017, Director James Dzurenda notified Mr. Navarette of NDOC's decision to
5 terminate his employment effective April 21, 2017. Mr. Navarette appealed this determination on
6 May 8, 2017.

7 **2. LEGAL AUTHORITY**

8 Mr. Navarette's appeal to the undersigned Administrative Hearing Officer of the Nevada
9 State Department of Administration was timely filed and the determination of the merits of the
10 appeal is properly within the jurisdiction of the Department.

11 In *O'Keefe v. Department of Motor Vehicles*, 134 Nev Adv. Op. 92, 431 P.3d 350 (2018),
12 the Nevada Supreme Court clarified the nature and scope of a hearing officer's review. *O'Keefe*
13 expressed the standard of review as follows:

14 When a classified employee requests a hearing to challenge an agency's decision to
15 terminate her as a first time disciplinary measure, the hearing officer "determines the
16 reasonableness" of the agency's decision by conducting a three step review process.
17 NRS 284.390 (1).

18 First the hearing officer reviews de novo whether the employee in fact
19 committed the alleged violation. See NAC 284.798.

20 Second, the hearing officer determines whether that violation is a "serious
21 violation" of law or regulations such that the "severe measure of termination is
22 available as a first time disciplinary action. NRS 294.383(1). If the agency's
23 published regulations prescribe termination as an appropriate level of discipline for
24 a first time offense, then that violation is serious as a matter of law. NRS 284.383(1);
25 NAC 284.646(1).

26 Third and last, the hearing officer applies a deferential standard of review to
27 the agency's determination that termination will serve the good of the public service.

28 Pursuant to NRS 284.390(1), the hearing officer is to determine the reasonableness of the
disciplinary action. Further, pursuant to NRS 284.390(6), the hearing officer is to determine if the
dismissal, demotion, or suspension was without just cause, as provided in NRS 284.385.

The Nevada Supreme Court recently held hearing officers may determine the reasonableness
of disciplinary actions and recommend appropriate levels of discipline, but only appointing
authorities have the power to prescribe the actual discipline imposed on permanent classified state

1 employee. *Taylor v. The State Department of Health and Human Services*, 129 Nev. Adv. Op. 99,
2 at 6 (December 26, 2013).

3 The employer has the burden of proof to present evidence and argument to prove the
4 allegations presented in the specificity of charges and whether there is “just cause” to discipline the
5 employee.

6 The Nevada Supreme Court recently issued a decision addressing the standard of proof in
7 these type of hearings. In *Nassiri and Johnson v. Chiropractic Physicians’ Board of Nevada*, 130
8 Nev. Adv. Op. 27 (April 3, 2014), the Court held that the standard of proof is the degree or level of
9 proof demanded to prove a specific allegation and that the preponderance of the evidence is the
10 standard of proof for an agency to take disciplinary action against an employee. The preponderance
11 of evidence standard is described as “more probable than not.”

12 In order to act arbitrarily and capriciously, an administrative agency must act in disregard of
13 the facts and circumstances involved. *Meadow v. Civil Service Bd. Of Las Vegas Metro. Police*
14 *Dept.*, 105 Nev. 624, 627, 781 P.2d 772 (1989).

15 **3. DISCUSSION**

16 I do not believe that the NDOC has established, factually by a preponderance of the evidence,
17 that Mr. Navarette wilfully employed or permitted the use of unauthorized or excessive force. There
18 is absolutely no evidence to reflect that he personally utilized excessive force. Rather, the charge
19 is that as a senior corrections officer that day, he should have acted differently, not allowed inmate
20 Norelus to be on the wall as long as he was, and prevented officer Valdez from using excessive
21 force.

22 A close review of the enhanced videotape does provide support for Mr. Navarette’s testimony
23 that inmate Norelus, which not acting violently or constituting a physical threat, was not complying
24 with the protocol and directions of the officers. While the inmate’s conduct was not egregious, it
25 was not in compliance, either. Inmate Norelus was, rather, on the edge of compliance and non-
26 compliance, almost as if he were intentionally attempting to create the situation. The conduct was
27 not bad enough to take him immediately to a sergeant, but it was enough that it could not be ignored.
28 The testimony established that there were staffing issues and that taking inmates to the sergeant for

1 every infraction was not a feasible alternative.

2 Mr. Navarette's testimony was that he attempted to de-escalate the situation at the scene. The
3 video does support his testimony of what his intentions were. He is repeatedly seen talking to the
4 inmate in a relaxed manner, in a relaxed position, seemingly trying to calm the inmate and gain
5 compliance.

6 A close review does reflect that while the inmate did not appear to be a physical threat, he
7 was continually talking, looking around, and not complying with directions. It appears that the
8 behavior of inmate Norelus is, rather, on the cusp - insufficient to immediately take him to the
9 sergeant, but such that to maintain order could not be ignored.

10 Whether it was appropriate to maintain inmate Norelus on the wall for over ten (10) minutes
11 is unclear. We had testimony and argument that the search and escort process was to perform
12 random relatively quick searches of inmates as they leave culinary. Most are completed in a matter
13 of minutes. However, assuming that inmate Norelus was agitated and not strictly complying with
14 procedures, as it appears here, the fact is that a senior correctional officer has discretion to act as he
15 did in this case. There is no regulation or rule as to the length of time an inmate can be kept on the
16 wall. Mr. Navarette testified that the unit was short staffed and that bringing him immediately to a
17 sergeant would have left the area undermanned. His plan was to keep him on the wall and talk to
18 him until he calmed down. It appears he tried this tactic for ten (10) minutes. There is no rule that
19 a correctional officer must immediately bring a non-compliant inmate to the sergeant - an officer has
20 discretion to attempt to de-escalate the situation.

21 While one, in hindsight, could question Mr. Navarette's discretion in the manner in which
22 he handled the situation as he did that day, and the length of time he allowed the situation to develop,
23 I believe it is unreasonable to conclude, on the evidence presented, that he willfully employed or
24 permitted the use of unauthorized force.

25 The use of force by Officer Valdez occurred was quite sudden and was over in a matter of
26 a few seconds. I do not believe, from the evidence, that this use of force was anticipated or could
27 have been anticipated by Mr. Navarette, or that it could have been prevented by Mr. Navarette once
28 it began.

1 The assertions that Mr. Navarette knowingly provided false or misleading statements in his
2 informational report are more difficult. We had some witnesses from NDOC testifying that the
3 report was false and misleading, that inmate Norelus never came off the wall, and when he did come
4 off the wall, he was not resisting. Officer Navarette's immediate supervisor, who reviewed the
5 report and the incident tape, felt it was accurate and appropriate.

6 It is a natural inclination to read the report and then repeatedly review the video, enhanced
7 and in slow motion, to see if what Mr. Navarette reported was precisely accurate. I feel that such
8 scrutiny is a mistake, as Mr. Navarette wrote the report without the benefit of reviewing any video -
9 he was trying to assimilate and explain this unexpected event he saw occur literally in a matter of
10 seconds. The reality is Mr. Navarette saw this event (the physical use of force by Officer Valdez)
11 take place in a matter of 2-3 seconds, from a side perspective. He saw it only one time.

12 As Officer Valdez approached, inmate Norelus did rock back and turn his head, but his hands
13 did not leave the wall. Officer Valdez pushes the inmate into the wall and his right arm goes around
14 the inmate's neck, which is the opposite side from Mr. Navarette's perspective, and which he may
15 or may not have been able to clearly see. The two came off the wall and struggled. Mr. Navarette
16 sees them going backwards and struggling, and he goes over to assist. Inmate Norelus comes to rest
17 on the ground some 15 feet or so from the wall. Is he reporting what he honestly believes he
18 perceived, or is he intentionally trying to cover up the situation?

19 My conclusion, after much soul searching and many reviews of the video and the statement,
20 is that Mr. Navarette's report is brief and, essentially, factually accurate given what he reasonably
21 could be expected to have perceived at the time. From his testimony, and even in his pre-hearing
22 interviews, it is clear that he believed, initially, Officer Valdez was intending to restrain the inmate.
23 While this was happening, a spontaneous use of force situation occurred. Norelus did come off the
24 wall as Officer Valdez was either properly or improperly attempting to restrain him, but I do not
25 think Mr. Navarette could be fairly called up to conclude from his 2-3 second perception whether
26 Officer Valdez' actions were appropriate or not, or whether the take down was initiated by the
27 wrongful conduct of the inmate or of Officer Valdez. The inmate did rock backwards just prior to
28 physical contact. I do not believe that Mr. Navarette was in the position to know what Officer

1 Valdez perceived or why this ended as it did. Mr. Navarette's report is a bland statement of events
2 which are, essentially, true. "When he came off the wall he was resisting." They did end up about
3 15 feet away - inmate Norelus just didn't just flop to the ground. Both officers, ultimately, had to
4 restrain the inmate. Once again, this appears, to me, to be a plain statement that appears, essentially,
5 true.

6 The testimony was that Mr. Navarette was taught to write clear and concise reports without
7 a lot of extraneous information. If his supervisor wanted more detail, they would ask and he would
8 supplement. I just do not believe, on the evidence presented, that NDOC has met the burden of
9 proving that Mr. Navarette knowingly and intentionally submitted a report with false or misleading
10 information.

11 **4. FACTUAL FINDINGS**

12 The evidence, documents, and testimony presented reflect as follows:

13 A. NDOC has not met its burden of proving, by a preponderance of the evidence, that
14 Mr. Navarette willfully employed or permitted the use of unauthorized force.

15 B. NDOC has not met its burden of proving, by a preponderance of the evidence, that
16 Mr. Navarette knowingly and intentionally submitted a report with false or misleading information.

17 **ORDER**

18 The decision of NDOC to dismiss Employee Jose Navarette from State Service is hereby
19 REVERSED, and

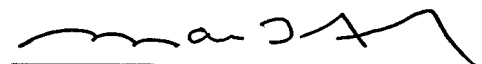
20 Employee Jose Navarette shall be restored to his prior position with back pay and benefits
21 in accord with the prior agreement of the parties.

22 DATED this 28 day of May, 2019.

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MARK L. GENTILE
Hearing Officer

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

1 CERTIFICATE OF MAILING

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

5 JOSE MIGUEL NAVARRETE
6 5917 PEARLIE MAY CT
7 N LAS VEGAS NV 89081

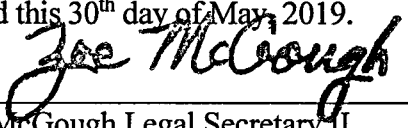
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19 Dated this 30th day of May, 2019.

20 
21 _____
22 Zoe McGough Legal Secretary II
Employee of the State of Nevada
23
24
25
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27
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