

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA ex rel. its
DEPARTMENT OF
CORRECTIONS,

Appellant,

vs.

JOSE MIGUEL NAVARRETE, an
individual,

Respondent.

Electronically Filed
May 10 2021 08:11 p.m.

Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No: 82113
District Court Case No: A-19-797661-J

APPELLANT'S OPENING BRIEF

AARON D. FORD

Attorney General

MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)

Supervising Senior Deputy Attorney General

Nevada Office of the Attorney General

555 E. Washington Ave. #3900

Las Vegas, Nevada 89101

(702) 486-3268 (phone)

(702) 486-3773 (fax)

malanis@ag.nv.gov

TABLE OF CONTENTS

I.	JURISDICTIONAL STATEMENT	1
II.	ROUTING STATEMENT	1
III.	STATEMENT OF THE ISSUES PRESENTED	2
IV.	STATEMENT OF THE CASE	3
V.	STATEMENT OF THE FACTS	4
	A. Employment with NDOC	4
	B. Misconduct.....	6
	C. Random Search of Inmates	13
	D. Restraining and Inmate and Using Force	14
	E. Accurate and Truthful Report Writing.....	20
	F. Disciplinary Process	22
	G. Appeal Hearing	24
VI.	SUMMARY OF ARGUMENT.....	32
VII.	LEGAL ARGUMENT	34
	A. Standard of Review	34
	B. The Hearing Officer's Reliance on NDOC AR 339 was a Clear Error of Law and it was Clear Error of Law for the District Court Not to Rule on this Issue.	36

C. The Hearing Officer Violated Statutory Provisions and Committed Clear Error when He failed to Consider Whether Employee Violated NAC 284.650 (1), (10) and (21) and it was Clear Error of Law for District Court Not to Rule on this Issue	38
D. Both the District Court and the Hearing Officer Clearly Erred When They Used the Preponderance of the Evidence Standard	40
E. The Hearing Officer’s Decision was Arbitrary and Capricious, an Abuse of Discretion and Clearly Erroneous in View of the Reliable, Probative, and Substantial Evidence on the Whole Record	46
1. Violation of NAC 284.650(1)	48
2. Violation of NAC 284.650(10)	51
3. Violation of NAC 284.650(21)	55
F. It was Clear Error and an Abuse of Discretion for the Hearing Officer to Reply on his “Soul Searching” to Determine if the Employee was Dishonest.	58
VII. CONCLUSION	58
CERTIFICATE OF COMPLIANCE	60
CERTIFICATE OF SERVICE	62

TABLE OF AUTHORITIES

CASES

<i>Allied-Signal, Inc. v. Nuclear Reg. Comm'n,</i> 988 F.2d 146 (D.C. Cir. 1993).....	48
<i>Bisch v. Las Vegas Metro. Police Dep't,</i> 129 Nev. 328, 302 P.3d 1108 (2013).....	36
<i>Campbell v. Nevada Tax Com'n,</i> 109 Nev. 512, 853 P.2d 717 (1993).....	35
<i>Clark Cnty. Educ. Ass'n v. Clark Cnty. Sch. Dist.,</i> 122 Nev. 337, 131 P.3d 5 (2006).....	46
<i>City Plan Dev., Inc. v. Office of Labor Com'r,</i> 121 Nev. 419, 117 P.3d 182 (2005).....	35
<i>Dykema v. Del Webb Communities, Inc.,</i> 132 Nev. Adv. Op. 82, 385 P.3d 977 (2016).....	35
<i>Elizondo v. Hood Mach., Inc.,</i> 129 Nev. 780, 312 P.3d 479 (2013).....	34
<i>Gandy v. State ex rel. Div. Investigation,</i> 96 Nev. 281, 607 P.2d 581 (1980).....	35
<i>Holohan v. Massanari,</i> 246 F.3d 1195 (9th Cir. 2001)	48

<i>Meadow v. Civil Service Bd. Of LVMPD,</i>	
105 Nev. 624, 781 P.2d 772 (1989).....	35
<i>Nassiri v. Chiropractic Phys. Bd.,</i>	
130 Nev. 245 (2014).....	41, 42, 43
<i>NDOC v. Ludwick,</i>	
135 Nev. 99, 440 P.3d 43 (2019).....	33, 36, 39, 43
<i>Nevada Dep’t of Motor Vehicles v. Adams,</i>	
133 Nev. 1077, (Nev. App. 2017)	43
<i>O’Keefe v. Dep’t. of Motor Vehicles,</i>	
134 Nev. 752, 431 P.3d 350 (2018).....	1,2, 37, 41, 41, 43, 46, 47
<i>Richardson v. Perales,</i>	
402 U.S. 389 (1971).....	42, 46
<i>Robertson Transp. Co. v. P.S.C.,</i>	
39 Wis.2d 653, 159 N.W.2d 636 (1968)	43
<i>State Indus. Ins. System v. Khweiss,</i>	
108 Nev. 123, 825. P.2d 218 (1992).....	35
<i>Southwest Gas Corp. v. Vargas,</i>	
111 Nev. 1064, 901 P.2d 693 (1995).....	42
<i>State, Emp. Sec. Dep’t v. Hilton Hotels,</i>	
102 Nev. 606, 792 P.2d 497 (1986).....	42, 46

Turk v. Nevada State Prison,

94 Nev. 101, 575 P.2d 599 (1978).....49

United States v. Dierckman,

201 F.3d 915 (7th Cir. 2000)48

Whalen v. Welliver,

60 Nev. 154, P.2d 188 (1940).....42

STATUTES

NRS 209.11149

NRS 209.13149

NRS 233B.0103, 34

NRS 233B.13534, 35, 38, 46

NRS 284.38347

NRS 284.3902, 3, 24, 39, 42, 58

OTHER AUTHORITIES

NAC 284.650passim

NAC 284.65322, 48

NAC 284.65638

NAC 284.73822, 48

NAC 284.79438

NAC 284.79842

I.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Nev. R. App. P. 3A(b)(1) and NRS 233B.150. The Eighth Judicial District Court (District Court) of Clark County, Nevada's Order Denying Petition For Judicial Review (Order) was entered on October 12, 2020. Joint Appendix ("JA") Vol. VII, 1513-1517. The Notice of Entry of Order was electronically served on October 13, 2020. JA, Vol. VII, 1518-1524. The Notice of Appeal was timely filed on November 12, 2020. JA, Vol. VII, 1525-1534.

This appeal is from the District Court's final Order denying Appellant's Petition for Judicial Review.

II.

ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals under NEV. R. APP. P. 17(b)(10) as it relates to an administrative agency case not involving tax, water, or public utilities commission determinations. However, this Court should retain the appeal as this case would clarify the standard a hearing officer uses to review discipline in the first step of the three-step process outlined in *O'Keefe v. Dep't of Motor Vehicles*, 134 Nev. 752, 431 P.3d 350 (2018). The first step requires the hearing officer to review de novo whether the employee in fact committed the

alleged violation but does not expressly state the standard to be applied. This matter raises an issue of statewide public importance as it affects every appeal filed by state employees pursuant to NRS 284.390.

III.

STATEMENT OF THE ISSUES PRESENTED

1. Was the hearing officer's reliance on NDOC AR 339 a clear error of law and was it clear error for the district court not to rule on this issue?
2. Was the hearing officer's decision in violation of statutory provisions and a clear error of law when he failed to consider whether Employee violated NAC 284.650(1), (10), and (21) and was it clear error for the district court not to rule on this issue?
3. Did the hearing officer clearly err when he used a preponderance of the evidence standard rather than substantial evidence to determine whether employee engaged in misconduct under the first step of *O'Keefe*?
4. Were the findings and/or decisions of the district court and the hearing officer clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, arbitrary and capricious or an abuse of discretion?
5. Was it clear error of law and an abuse of discretion for the hearing officer to rely on his "soul searching" rather than the evidence?

IV.

STATEMENT OF THE CASE

This case involves the termination of Respondent, Jose Miguel Navarrete (Employee) from his employment as a senior correctional officer with Respondent, Nevada Department of Corrections (NDOC). NDOC dismissed Employee for allowing unauthorized and excessive use of force on an inmate in violation of law and NDOC policies and dishonesty stemming from Employee's report of the use of force. JA, Vol. V, 1114-1175.

Employee appealed his dismissal to the Department of Administration Personnel Commission hearing officer pursuant to NRS 284.390. JA, Vol. VI, 1416-1418. After a two-day hearing, the hearing officer reversed Employee's dismissal and restored him to his position with back pay and benefits in accordance with the prior stipulation of the parties. JA Vol. IV, 0852-861, JA Vol. VI, 1426-1427.

NDOC filed a Petition for Judicial Review pursuant to NRS 284.390(9) and NRS 233B.010, et. seq. JA Vol. 1, 0001-14. After the matter was fully briefed, the district court heard oral argument on the petition for judicial review. JA Vol. VII, 1539-1587. The district court denied judicial review. JA Vol. VII, 1513-1517 A timely Notice of Appeal was filed. JA, Vol. VII, 1525-1534. NDOC appeals the District Court's order as NDOC's substantial rights have been prejudiced.

V.

STATEMENT OF FACTS

A. Employment with NDOC

NDOC hired Employee on May 5, 2008, as a correctional officer trainee. JA Vol. II, 365-366, JA Vol. V, 1116. After one year, Employee advanced to a correctional officer and in 2013, Employee was promoted to senior correctional officer. JA Vol. II, 366. Throughout his career, Employee worked at Southern Desert Correctional Center (SDCC). *Id.*

As a senior correctional officer, Employee had increased responsibility because he was the first line supervisor for other staff present and was responsible for training junior staff. JA Vol. IV, 760, 770. A senior officer can make snap decisions on the spot when a sergeant is not present and even sometimes may have to serve as an acting sergeant. JA Vol. IV, 760.

At all relevant times, Employee was assigned to the Search and Escort post. JA Vol. II, 0382. On the day in question, Employee was the Lead Search and Escort Officer. JA Vol. II 370, JA Vol. V 1126. A Lead Search and Escort Officer takes lead in the Search and Escort operations and missions for the day. JA Vol. II 369-370, JA Vol. IV, 769. The Lead Search and Escort Officer directs other officers' activities, trains other officers, and has a duty to ensure officers comply with NDOC policies. JA Vol. II 0295-296.

Employee read and signed his Work Performance Standards for the senior correctional officer position on November 18, 2014. JA Vol. V 1196-1198. Employee understood job element one - custodial responsibilities - included complying with Administrative Regulations and NDOC procedures for control on inmate activities, assuring proper supervision of inmates, ensuring safety for staff and inmate population, and submitting written documentation of any deficiencies. JA Vol. II 0454, JA Vol. V 1196-1198. Employee understood job element two - training - included serving as a lead worker for subordinate officers and provides on the job training to subordinate officers on duties of assigned areas. JA Vol. II 0454-455, JA Vol. V 1197. Employee further understood job element three - legal responsibilities - included reporting and documenting all violations. JA Vol. II 0455, JA Vol. V 1197. Employee understood job element ten - work ethic - included using available resources. *Id.*, JA Vol. V, 1198. Lastly, employee understood job element thirteen - professionalism - included displaying a professional demeanor at all times when interacting with staff and inmates. JA Vol. II 0455-456, JA Vol. V, 1198.

Employee also read and signed his Administrative Regulations Acknowledgment, which acknowledges he must read and familiarize himself with the regulations listed, including AR 339, Code of Ethics; Employee Conduct; Prohibitions and Penalties and AR 340, Employee Complaint Reporting and Investigation. JA Vol. II, 0452-453, JA Vol. V, 1194.

B. Misconduct

On October 9, 2016, Employee was the lead Search and Escort Officer on day shift. JA Vol. II 0370, JA Vol. V 1016, 1115, 1126. Employee was working with Correctional Officer Paul Valdez (Valdez). JA Vol. II 0392, JA Vol. V 1016, 1115. Employee had worked with Valdez for about one year. JA Vol. II, 0463. Search and Escort duties include monitoring inmate movement during the morning meal and conducting random pat down searches for contraband. JA Vol. II 0386-388, JA Vol. III 0704. That day in particular, Employee and Valdez were informed to “crack down” on any contraband coming out of the culinary. JA Vol. II, 0382.

The incident in question occurred during the breakfast service outside of the SDCC culinary. JA Vol. III 0610, JA Vol. IV 0852, JA Vol. V, 783. Employee and Valdez were randomly searching inmates leaving the culinary for contraband, which was a common practice in Search and Escort. JA Vol. III 0704-0705, JA Vol. V 1078, 1107, 1126, 1130. The usual process includes randomly pulling an inmate out of line, placing the inmate on the wall with their hands against the wall and legs spread, and patting him down. JA Vol. III 0613-619, JA Vol. III 0706. Once the pat down is complete, “then normally [the officers] just send them on their way after that.” JA Vol. III 0706. The entire process is expedient and takes no more than a couple of minutes. JA Vol. III 0706, 716, JA Vol. V, 1080. One at a time, every inmate aside from one was pulled out of line, searched and released. JA Vol. III,

0615-0618, JA Vol. IV 0853, JA Vol. V 1107. The exception was inmate Rickie Norelus who was searched but not released. *Id.* Instead, Norelus was required to stand facing the wall, with his arms above his head on the wall for approximately eleven minutes. JA Vol. III, 0615-0618, JA Vol. IV 0853, JA Vol. V 1107.

A video camera mounted on the wall outside of the culinary recorded the entire incident; however, there is no audio. JA Vol. V 1107¹. The video starts with several inmates leaving the culinary, a few inmates on the wall and Employee conducting random pat searches. JA Vol. V 1107 at 00:01. Employee was the correctional officer wearing a black hat. *Id.* Valdez is towards the top of the video randomly pulling inmates out of line for a pat search. *Id.* When the video starts, **Norelus was already on the wall** and becomes more visible at approximately eleven seconds into the video. *Id.* at 00:11. At approximately 1:47 minutes, Employee completes the pat down search of Norelus, who is now the only inmate remaining on the wall. *Id.* at 1:47. Despite the pat down being complete, Employee did not release Norelus. *Id.* At approximately 1:59, both Employee and Valdez turn around with their backs towards Norelus and walk away from him. *Id.* at 1:59. At approximately 2:44, Valdez begins to swing his arms back and forth repeatedly. *Id.* at 2:44. During this time, no other inmates are randomly selected for a pat down

¹ JA, Vol. V, 1107 is the video of the incident, which the hearings division delivered to the Court on CD for review. *See* JA Vol. VII 1588-1589.

search despite several of them leaving the culinary. *Id.* At approximately 3:17, Valdez walked towards Norelus, grabbed what appears to be a lunch sack, and threw it in the trash. *Id.* Norelus was found to have had extra food in his lunch sack, which is considered contraband. JA Vol. II, 0401-402, JA Vol. V, 1052. For the next couple of minutes, Norelus remains on the wall, Valdez continued to swing his arms, and other inmates leave the culinary, but neither Employee nor Valdez conduct any other pat searches. JA Vol. V 1107 at 3:17-6:14. Based on the body language depicted, there are conversations between Employee, Valdez and Norelus. *Id.* Other inmates also seem to be talking as they walk by. *Id.* From about two to six minutes into the recording, Navarrete did not search any other inmates and continued to keep Norelus on the wall despite that being one of his duties as a search and escort officer. *Id.* at 2:00-6:00. At approximately 6:15, Correctional Officer David Wachter (Wachter) exits the culinary and shuts the door. *Id.* Wachter walks by and then goes out of view. *Id.* At this juncture, about four and a half minutes have passed since Employee completed Norelus' random search; yet he kept Norelus on the wall. *Id.* at 6:15. During the four and a half minutes, Employee and Valdez did not search other inmates. *Id.* From the time Valdez pulled the last inmate for a random search at 00:08 in the video to the time Wachter shut the culinary door at 6:19, **over 120 inmates walked out but neither Employee nor Valdez randomly selected** a single one of those inmates for a random search. JA Vol. V 1107, 00:08 to 6:19 (emphasis added).

Under the instruction to “crack down on contraband,” Valdez and Navarrete should have randomly selected anywhere from 10 to 40 inmates out of the approximate 120 inmates that exited culinary in the six-minute span. JA Vol. III, 0705.

At about 6:58, Wachter walks over towards Employee and Valdez. JA Vol. V 1107. At approximately 7:23, in the upper right corner of the video, other inmates have started to walk towards the culinary. *Id.* At approximately 7:50, Wachter begins to walk away. *Id.* Throughout the last couple of minutes, Valdez continues to swing his arms. *Id.* At approximately, 8:12, Norelus is moving his head from side to side, but keeps his hands on the wall. *Id.* At approximately 9:50, Norelus appears fidgety but does not remove his hands from the wall or show any signs of physical threat to the officers. *Id.* Valdez continues to swing his arms. *Id.* From approximately 10:39 to 10:45, Norelus looks at his left wrist about three times. *Id.* At approximately 10:49, with Employee leaning on the wall nearby, watching, Valdez walks toward Norelus and, using both hands, pushes Norelus into the wall. *Id.* Valdez then puts his right arm around Norelus’ neck, pulls him back and whips him around to the ground. *Id.* At about 10:57, Norelus is on his back on the ground and does not appear to be resisting the officers. *Id.* At about 11:03, Employee and Valdez roll Norelus over onto his stomach and restrain him with no incident. *Id.* For the next three minutes, Norelus is face down on the ground in wrist restraints while Employee and Valdez wait for the sergeant and medical officer to arrive. *Id.* At approximately

15:20, the golf cart arrives with the sergeant and medical officer. *Id.* The video concludes at 16:36 with the cart driving away. *Id.* The take down or force used by Valdez was not any accepted methodology taught by NDOC. JA Vol. III, 0626-629, 0715, JA Vol. IV 0808, JA Vol. V 1129.

Employee never contacted the shift sergeant during the almost 11 minutes the inmate was on the wall. JA Vol. II 0464. Employee could restrain an inmate if the inmate was noncompliant. JA Vol. II 0465-0466. Once an inmate is in restraints, he could be taken to the on-duty shift sergeant or the shift sergeant could come to where the inmate has been restrained. JA Vol. II 0466. Employee did not restrain the inmate. *Id.* Employee did not have the sergeant come to him or take the inmate to the sergeant. *Id.*

Following the incident, the shift sergeant reported to the scene with the correctional officer assigned to medical. JA Vol. II 0466-467. Once the medical officer arrived on scene, he recorded the interaction with the inmate while transporting him to the infirmary. During this time, Norelus states, "I hadn't made any threatening moves, whatsoever. Your officers here grabbed me by the throat and slammed me down...thank you buddy, you probably paid my son's education. This was unwarranted, my hands did not leave the wall whatsoever." JA Vol. 111 0682. All the witnesses testified that inmates regularly mouth off and will try to bait the officers. JA Vol. III 0690, 0707, JA Vol. IV 0782, 0812-813. Wachter testified

inmates will make inappropriate verbal comments, use foul language, and escalate the comments all of the time in an attempt to get under the officer's skin. JA Vol. III 0707. Wachter testified NDOC trains officers on how to effectively deal with inmates who mouth off. JA Vol. III 0707-708.

Wachter also worked with Valdez. JA Vol. III 0710-711. Wachter testified, in his experience working with Valdez, Valdez always had to get in the last word with the inmates, even if the inmate was complying, Valdez would make a remark that would get the inmate more riled up. JA Vol. III 0718. Wachter further testified he had previously counseled Valdez it is his job to deescalate and quell situations with the inmates, not rile them up. *Id.*

As Associate Warden (AW) of Operations at SDCC, Minor Adams (Adams) was required to review reports in the Nevada Offender Tracking Information System (NOTIS). JA Vol. IV 0753. Adams worked at NDOC for 32 years and was the AW of SDCC for four years. JA Vol. III 0752. This case came across Adams' desk a couple days later because Norelus filed a grievance. JA Vol. IV 0774-0776. As a result, Adams' reviewed all the reports and the video footage. JA Vol. IV 0776. After reviewing the video and comparing it to the officer's reports, Adams' believed there were discrepancies. JA Vol. IV 0779. Both Valdez's and Employee's report stated while Valdez was *attempting to restrain* Norelus, he resisted and/or moved. JA Vol. V 1016, 1020. (emphasis added). However, when Adams watched the video, he said,

“restraints were never attempted to be applied until the guy was on the ground in the dirt.” JA Vol. IV 0779. Adams also testified Valdez’s body language showed he is agitated because he was swinging his arms back and forth. JA Vol. IV 0781. A trained officer would recognize Valdez was agitated throughout the 11 minutes Norelus was on the wall and Employee, as the senior officer, should have seen Valdez’s demeanor, intervened, handcuffed the inmate, and taken him to the sergeant. JA Vol. IV 0781-782. Norelus was against the wall facing away from the officers at all times, so he could not have been a physical threat. JA Vol. IV 0786. Valdez’s use of both his hands to push the inmate into the wall was not authorized because only one hand is needed. JA Vol. IV 0808. Putting an arm around the inmate’s neck or using a chokehold is not authorized. *Id.*

After reviewing the video of the incident, Adams referred the case for an internal investigation with the Inspector General’s office because, in his experience, the reports did not “look right.” JA Vol. IV 0780, JA Vol. V, 1078.² While officers often may need to use force to gain compliance at the prison, in Adams’ opinion,

² NDOC also referred this incident to the Inspector General’s office for a criminal investigation. JA Vol. V 1072-1085. Supervisor David Molnar conducted the criminal investigation. *Id.* Unlike the internal administrative investigation, the Investigator in the criminal investigation makes findings and recommendations. *Id.* at 1082-1084. Molnar recommended Employee and Valdez be charged with Oppression under the Color of Office, Battery, and False Report by Public Officer. *Id.* at 1084.

what occurred in the video with Norelus was unauthorized and/or excessive force and did not happen often. JA Vol. IV 0782.

C. Random Search of Inmates

Searching and placing an inmate on the wall is part of Employee's job duties. JA Vol. II 0390. Employee testified by conducting random searches he will find contraband because inmates always try to push the system. *Id.* He stated it is part of his job to search and it is in the very title of his position - "Search" and Escort officer. *Id.* Yet, from the time Employee completed the random search of Norelus at 1:47 to the time Wachter shut the culinary door at 6:19, there were approximately 50 inmates who walked out of culinary, but neither Employee nor Valdez randomly searched a single one of those inmates. JA Vol. V 1107 from 1:47 to 6:19. Instead, Employee and Valdez were solely focused on Norelus. *Id.*

Wachter testified when an inmate is told to get on the wall, they have to put their hands on the wall and spread their legs apart to make sure they are not going to make any sudden movements. JA Vol. III 0706. The officer will then ask for the inmate's information such as ID so the officer can get an idea of what kind of inmate they are dealing with. *Id.* Then the officer will conduct a pat search on the inmate and send them on their way. *Id.* If the officer finds something in the sack lunch, then the officer instructs the inmate to take the item out and throw it away. *Id.* The officer will write up the inmate for the violation and give them a "Notice of Charges." *Id.*

An officer who conducts a pat search would normally be the **same officer** to release the inmate from the wall. JA Vol. III 0735. Wachter stated this process takes about 3-4 minutes if nothing is found and 4-5 minutes if something is found. JA Vol. III 0716. Wachter testified having an inmate on the wall for 11 minutes, even if the inmate had extra food in his sack, is excessive. JA Vol. III 0716, 729. During the hearing, Wachter watched the video again and noted Employee completed the random pat down of Norelus at two minutes into the video, which is less than he estimated. JA Vol. III 0731-732. Wachter testified after the pat down was complete, there was no reason to keep an inmate on the wall unless the officer would counsel the inmate but even then, it would be no more than a couple more minutes. JA Vol. III 0733. An officer does not have time to counsel for ten minutes when there are other duties to attend to, including maintaining safety and security of the prison. *Id.* Wachter further testified as a senior officer present at the scene, Employee could have intervened and taken over if he observed Valdez was keeping the inmate on the wall for too long. JA Vol. III 0717-718.

D. Restraining an Inmate and Using Force

Officers are trained on use of force at the Peace Officers Standard and Training (POST) Academy. JA Vol. IV 0757-758. Thereafter, officers receive a yearly refresher on use of force and AR 405. JA Vol. IV 0758. Use of Force training

does not include a chokehold technique. *Id.* A chokehold is not authorized and is illegal. JA Vol. IV 0759.

AR 405, Use of Force, provides NDOC's policy on the use of force permitted by correctional staff. JA Vol. V 1177-1192. AR 405 defines excessive force as "the use of more force than an objective [sic] trained and competent correctional peace officer faced with similar facts and circumstances would use to subdue an attacker, overcome resistance, affect custody or gain compliance with a lawful order." JA Vol. V 1177. AR 405 further defines reasonable force as "force which is objectively reasonable based on the totality of the circumstances and the facts known to the officer at the time to subdue an attacker, overcome resistance, affect custody, or gain compliance with a lawful order." JA Vol. V 1178. AR 405.03 states staff may use force to protect himself or any other individual from physical harm by an inmate and will be proportionate to the threat exhibited by the inmate. JA Vol. V 1179, JA Vol. IV 0762-0764. AR 405.03 further states any staff witnessing a Use of Force that is either excessive or unnecessary is **required to immediately report their observations** to the shift supervisor both verbally and, subsequent to the incident, in a written report. *Id.* (emphasis added). Employee was familiar with AR 405 and understood force must be proportionate to the threat. JA Vol. II 0458.

SDCC Operational Procedure (OP) 405 similarly provides SDCC policies on use of force by correctional staff. JA Vol. IV 0911³. Specifically, OP 405 authorizes employees to use as much force as is reasonably necessary to perform their duties and protect themselves from harm, with the amount of reasonable force depending on the circumstances of a particular incident. *Id.* at 2. The controlling factors are the degree of force threatened or used by the individual such as whether they possess a weapon, the employee's reasonable perception of the danger of death or serious physical injury, and the alternatives available to control the situation or defuse the conflict without the use of force. *Id.* at 2-3. Employee was familiar with OP 405 and understood his job duties required he comply with its policies and procedures. JA Vol. II 0456.

SDCC OP 407 provides SDCC policies on use of handcuffs and restraints. JA Vol. IV 0914-0917. Handcuffs are the standard items of restraint and the only restraint used unless authorization is obtained for additional restraint. JA Vol. IV 0915. Employee was also familiar with OP 407 and understood his job duties required compliance with the policies and procedures in OP 407. JA Vol. II 0458.

A Post Order is a breakdown of what the duties are for a specific post. JA Vol. IV 0756. Officers are required to read the post order when they first take that

³ OP 405 is confidential and the hearing officer admitted the document under seal. The hearings division delivered a hard copy of OP 405 to the Court. *See* JA Vol. VII 1588-1589 Any citations to OP 405 will include a page number.

particular post and sign the acknowledgment. JA Vol. IV 0768. Thereafter, every time the officer resumes that post he is required to review the post order and look for any changes. *Id.* Employee was also familiar with and understood his job duties required compliance with the Search and Escort Post Order. JA Vol. II 0459. Employee understood the Post Order required Employee to be familiar and comply with all rules, regulations, and orders of the institution. JA Vol. II 0460, JA Vol. IV 0918-0919, OP at 3. Employee also understood he was to avoid turning minor problems into major confrontations. *Id.* The Post Order required Employee to restrict use of force to the minimum degree necessary to regain control or to repel an attack. JA Vol. II 0461. **The Post Order further required Employee to notify a shift supervisor and obtain appropriate back up if an inmate refuses to comply.** JA Vol. II 0460 (emphasis added). On the date of the incident with Inmate Norelus, Employee signed and acknowledged Search and Escort Post Order, which governed his job duties that day. JA Vol. II 0462.

The Post Order provides Search and Escort officers will enforce all rules, regulations, and procedures and counsel inmates in a **discreet and timely manner**. JA Vol. IV 0918-0919, Post Order at 4 (emphasis added). The Post Order further states use of force will be restricted to the minimum degree necessary to regain control. JA Vol. IV 0918-0919, Post Order at 14. If an inmate refuses to comply with an order, the shift supervisor will be notified and appropriate back up obtained. *Id.*

Wachter testified if an inmate gets mouthy and moves his hands while on the wall, the officer may place the inmate in restraints and take the inmate to operations to talk to shift command. JA Vol. III 0708. Wachter testified when he restrains an inmate who is already on the wall, he would have **one hand** on the inmate's back to feel any movements, use his other hand to take out his restraints, and then help the inmate bring his arms behind his back into the restraints. JA Vol. III 0709, 0743-0744. (Emphasis added). He further testified he uses one hand to apply some pressure so he can better feel the inmate's movements. JA Vol. III 0710. Wachter further testified he was not trained to put his arm around an inmate's neck and it is not an approved NDOC technique. JA Vol. III 0715, 0719. Wachter said Valdez approaching the inmate with both hands and pushing him up against the wall was not how to restrain an inmate. JA Vol. III 0719. Wachter testified based on his review of the video, Valdez used unnecessary force. JA Vol. III 0717. He further testified Employee **could have deescalated and quelled** the situation with inmate Norelus, including intervening. JA Vol. III 0718, 0725, 0736 (emphasis added). Wachter was surprised there was a commotion between Valdez and Norelus because he did not recall hearing anything that made the situation seem like it was agitated. JA Vol. III 0719. Typically, when an inmate is agitated, they get loud and irate, move in an agitated manner, and could pose a physical threat. JA Vol. III 0719-0721. Wachter further testified when an inmate is a physical threat, he would not walk away from

the inmate as Employee did in the video. JA Vol. III 0731-732. Wachter noted that the inmate's movements in the video were not agitated. JA Vol. III 0736. Wachter testified Valdez's actions in the video do not show he is using his restraints and it did not appear Valdez was restraining the inmate. JA Vol. III 0746. Even if the inmate was non-compliant, Valdez's response to use two hands and push the inmate on the wall was unnecessary and not restraining the inmate. *Id.*

Supervisory Criminal Investigator Rod Moore conducted the internal administrative investigation. JA Vol. III 0635. At the hearing, Moore testified he had restrained an inmate three months prior to the hearing. JA Vol. III 0634. Moore testified when an officer restrains an inmate or is about to restrain an inmate, the officer would have his restraints out and would tell the inmate, "I am going to put restraints on you." *Id.* Moore further testified in this case with both officers nearby after verbally notifying the inmate they would be restraining him, they would grab the inmate's right hand, the other officer grabs the left hand and they bring both hands to the inmate's back for handcuffing. JA Vol. III 0699. Restraining does not include pushing an inmate into a wall or putting an arm around the inmate's neck. *Id.*

Adams testified officers use a spontaneous use of force in an emergency, such as an inmate trying to escape, inmate assault on another inmate, or inmate assault on staff. JA Vol. IV 0762. It is used in a situation where an officer is required to act

immediately and does not have time to stop, think, and formulate a plan. JA Vol. IV 0762-764. If an officer believes there is resistance when restraining an inmate, Adams stated, “the least amount of force would be to lay your shoulder into his shoulders and push him against the wall and cuff him.” JA Vol. IV 0815. Adams further testified “[i]f there’s an issue or what have you, [a senior officer on scene] should intervene, intercede and say, you know, hey, this is what’s happening or you’re not doing this. Why don’t you take a break and I’ll deal with this inmate myself...then if he can’t deal with the situation or he can’t resolve it then he takes the inmate down to the Sergeant’s office.” JA Vol. IV 0770.

E. Accurate and Truthful Report Writing

Employee was taught how to write a report in the academy and had refresher training every year through POST. JA Vol. II 0367-0368. Following the incident, Employee prepared the following report in NOTIS:

On October 9, 2016 I, Senior Correctional Officer Navarrete was assigned to Search and Escort at Southern Desert Correctional Center. At approximately 06:45 hours inmate Norelus #1104257 **came off the Culinary wall while C/O Valdez was attempting to restrain him resulting in a spontaneous use of force.** When 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.

JA Vol. V, 1141 (Emphasis added).

Adams testified correctional officers have an obligation to report any kind of use of force whether it is authorized, unauthorized, or excessive. JA Vol. IV 0810. When completing a report, an officer is required to include **as much detail as possible**, particularly when reporting a use of force. *Id.* In Employee's report, there was no reference to the 11 minutes prior to the use of force. JA Vol. V, 1141, JA Vol. IV 0812.

Current SDCC Warden Jerry Howell testified the officers have an obligation to report violations. JA Vol. II 0291. Howell testified NDOC has to be able to believe an officer's report and if an officer loses credibility it decreases the effectiveness of the institution because they have to take the report on its face as true and believe the officers are truthful. JA Vol. II 0298. Having an untruthful officer affects the whole workforce. JA Vol. II 0299-300. He further testified Employee's report contained omissions on how did the officer attempt to restrain and why was the inmate being restrained. JA Vol. II 0294. Howell further noted there was nothing on the video to indicate the officers were attempting to restrain the inmate. *Id.*

Wachter testified based on his review of the video, it did not look as though the inmate came off the wall and did not look like Valdez was trying to restrain the inmate. JA Vol. III 0747-749. Wachter testified Norelus was not a physical threat to the officers. JA Vol. III 0721. Moore testified in his experience after he gathered all

of the facts in this investigation, he believed Employee's report and the video were two different versions of the event. JA Vol. III 0633.

Warden Perry Russell testified that as an officer, particularly a senior officer, Employee had an obligation to be honest and put forth a correct report and to alert supervisory staff of what had occurred. JA Vol. IV 831. Russell further testified NDOC relies on officers to adhere to rules and procedures and NDOC has to be able to rely on the reports prepared by the officers. JA Vol. IV 832. Russell sustained the recommendation of termination because the report said Norelus was resisting while being restrained but he did not see any of that on video, which spoke to the integrity of the officer. JA Vol. IV 0832-834, JA Vol. V 1111.

F. Disciplinary Process

On March 16, 2017, NDOC served Employee with a Specificity of Charges (SOC), which recommended Employee's dismissal from State service for the following violations:

NAC 284.650 Causes for disciplinary action

(1) Activity which is incompatible with an employee's conditions of employment established by law or which violates a provision of NAC 284.653 or NAC 284.738 to 284.771, inclusive.

(10) Dishonesty.

(21) Any act of violence which arises out of or in the course of the performance of the employee's duties,

including without limitation, stalking, conduct that is threatening or intimidating, assault, or battery.

Nevada Department of Corrections Administrative Regulations

AR 339.07 CLASS OF OFFENSE GUIDELINES

AR 339.07.9 FALSE OR MISLEADING STATEMENTS

A. Knowingly providing false or misleading statements, including omissions, either verbally or in written reports or other documents, concerning actions related to the 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 proceeding. CLASS 5

AR 339.07.17 UNAUTHORIZED USE OF FORCE

A. Willfully employing or permitting the use of unnecessary, unauthorized, or excessive force. CLASS 4-5

JA Vol. V, 1114-1175.

A Pre-Disciplinary Review took place on April 17, 2017. JA Vol. V, 1110-1111. Warden Perry Russell, then Associate Warden of High Desert State Prison, served as the Pre-Disciplinary Officer. JA Vol. IV 0824, JA Vol. V, 1110-1111. Russell reviewed the SOC, the investigation and the video. JA Vol. IV 0824. At the Pre-Disciplinary Review, the Employee presented his side of the events and any mitigating factors. JA Vol. IV 0825, JA Vol. V, 1110-1111. After reviewing the SOC and hearing from Employee, the Pre-Disciplinary Review Officer prepared a

report and concurred with the recommended discipline of dismissal from State service. JA Vol. IV 0828, JA Vol. V, 1110-1111. The Pre-Disciplinary Review Officer found Employee “completed and submitted a report documenting the events of the Use of Force that were not compatible or consistent with what is viewed in the video.” *Id.* The Pre-Disciplinary Review Officer concluded it would be in the best interest of the State for Employee to be dismissed because the Employee allowed excessive force and wrote a report that did not accurately depict what occurred. *Id.* On April 19, 2017, Director James Dzurenda notified Employee of NDOC’s decision to dismiss Employee effective April 21, 2017. JA Vol. V 1109.

G. Appeal Hearing

Employee appealed his dismissal pursuant to NRS 284.390 on May 11, 2017. JA VI 1416-1418.⁴ During the Appeal Hearing in this matter, NDOC called the following witnesses to testify: Moore, Wachter, Adams, Russell, Howell, and Employee. JA Vol. II 0272-0501, JA Vol. III 0502-0752, JA Vol. IV 0753-0851.

⁴ NDOC also dismissed Valdez from State service and Valdez appealed his discipline. JA Vol. VI 1369-1379. Hearing Officer Gentile also presided over Valdez’s hearing but upheld the dismissal. *Id.* Hearing Officer Gentile found that Valdez engaged in unnecessary, unauthorized and excessive force. *Id.* Hearing Officer Gentile found that Valdez provided false and misleading statements because the report is contradicted by the video. *Id.* at 1377. Interestingly enough, Valdez also described that he “attempted to place [Norelus] in restraints” and “when attempting to place inmate Norelus #114527 in restraints [he] turned aggressively towards me.” *Id.* at 1372. Gentile found those statements were not supported by the video. *Id.* at 1377.

Additionally, during the hearing significant documents were admitted into evidence, including but not limited to, the investigative file, which included the criminal investigation report and summary of witness interviews with inmates Norelus, Michael White, Lawrence Williams, and Ralph Jackson, all of whom were randomly searched that day. JA Vol. IV 0998-1002, JA Vol. V 1003-1198. Despite this evidence, the Decision is devoid of any specific mention of the testimony of Moore, Wachter, Adams, Russell, or Howell, and all the inmates who provided statements in the criminal investigation. JA Vol. IV 0852-0861. Additionally, at the hearing, NDOC AR 405, Use of Force, OP 405, OP 407 and Search and Escort Post Order were admitted into evidence. JA Vol. III 0555-0556, JA Vol. IV 0911-0919, JA Vol. V 1177-1192. Yet, there was no discussion about these pertinent policies in the hearing officer's decision. JA Vol. IV 0852-0861.

The hearing officer found there were no signs Valdez actually had his handcuffs in hand and the inmate's "hands remain on the wall." JA Vol. IV 0854. The hearing officer further found Valdez's conduct "upon close review of the enhanced video, continues to appear unjustified." *Id.* The hearing officer found there is no rule on the length of time an inmate could be kept on the wall. JA Vol. IV 0858. Yet, as noted above, the hearing officer heard testimony from multiple witnesses that there was no reason for Norelus to have been on the wall for over ten minutes. The Post Order also said to counsel inmates in a discreet and timely manner. Despite this

evidence, the hearing officer found Employee did not permit the use of unauthorized force. JA Vol. IV 0858.

As stated above, the hearing officer **found the inmate's hands remained on the wall and there was no evidence Valdez was restraining the inmate.** JA Vol. IV 0854 (emphasis added). However, despite these findings, the hearing officer did not find Employee's statement that the "inmate... came off the wall while C/O Valdez was attempting to restrain him" to be dishonest. JA Vol. IV 0859-860. Instead, the hearing officer after "much soul searching" found the report to be factually accurate. JA Vol. IV 0859.

Despite the substantial evidence in the record, the hearing officer found "NDOC has not met its burden of proving, by a preponderance of the evidence, that Mr. Navarrete willfully employed or permitted the use of unauthorized force" and "NDOC has not met its burden of proving, by a preponderance of the evidence, that Mr. Navarrete knowingly and intentionally submitted a report with false or misleading information." JA Vol. IV 0860.

In the investigative file, Norelus stated Employee and Valdez **routinely singled him out** for random pat searches for two weeks and routinely called him names. JA Vol. V 1080 (emphasis added). On the day in question, Norelus stated Employee and Valdez called him "fag" and "bitch" and told him "I can't believe no one's beat your ass yet." *Id.* Norelus agreed, saying "Ya, I'm a fag," which he

believed made Valdez angry. *Id.* Norelus stated he did nothing to provoke Valdez into using excessive force. *Id.*

Inmate White was identified in the video and stated Employee and Valdez **were always** “going at it” with Norelus. JA Vol. V 1080 (emphasis added). White stated he heard the officers call Norelus gay words. *Id.* White further stated he told the officers in the past Norelus had mental issues, but they continued to harass Norelus. *Id.*

Inmate Williams stated Norelus had mental issues. JA Vol. V 1080. On the day of the incident, Williams saw Employee and Valdez had Norelus on the wall for an **extended period**. *Id.* (emphasis added). He also overheard one of the officers say “I am surprised no one has beat your ass yet.” *Id.*

Inmate Jackson stated on the day in question he overheard an officer say, “I’m surprised no one has whooped your ass yet because you have a smart-assed mouth.” JA Vol. V 1080. Jackson also prepared a letter, which alleged staff as SDCC were **targeting** African American inmates and forcing them to stand on the wall for extended periods of time. *Id.* at 1080-1082.

Evidence was admitted showing inmate Norelus was small in stature with mental health issues. JA Vol. V 1080, 1104. Evidence was also admitted that Valdez and Employee had previously engaged in name-calling and singling Norelus out. JA Vol. V 1080. Furthermore, Wachter testified he had to counsel Valdez on his

interactions with inmates and said “our job is to quell situations, not get them riled up.” JA Vol. V 1082. Employee admitted he had worked with Valdez for over one year. JA Vol. II, 0463, JA Vol. V 1126. Employee likely knew of Valdez’s negative interactions with inmates.

Employee admitted the inmate’s movements were slight. JA Vol. II 0472. Employee further admitted the last time the inmate looked at his wrist was at 10:45 in the video and by 10:50 Valdez was behind the inmate with his hands on his back. JA Vol. II 0473. Employee admitted the last movement the inmate made was at least five seconds before Valdez approached from behind. *Id.*

Employee testified he believed the inmate’s movements to be threatening. JA Vol. II 0478. Yet, despite this “perceived” threat, Employee turned his back on the inmate and walked away several times during the 11 minutes the inmate was on the wall. *Id.* at 0478-0479. Employee claimed he had to walk away to perform other duties, yet at about 6:49, Employee walks away from the inmate when there are no other duties or inmates around. JA Vol. II 0479. Furthermore, for the last several minutes in the video, no other inmates are searched. JA Vol. V 1107.

Moore believed Employee and Valdez singled out Norelus. JA Vol. III 0615. Moore testified “[t]hey pat him down. They physically put his hands higher up on the wall. And then they knowingly and intentionally turned their back on him and walk away from him.” *Id.* Moore also testified this was significant to him as the

investigator because it showed Employee did not believe the inmate to be a threat or did not believe him to be non-compliant because of Employee's informal approach and Employee turned and walked away. JA Vol. III 0615-0616. Moore testified, "[t]hat's not something you would do with an agitated inmate or somebody that's a threat." JA Vol. III 0616. Moore also testified Employee and Valdez singled out Norelus because, in his experience, there were several inmates released but this one inmate was left on the wall and now all the other inmates exiting culinary and walking by can observe the inmate who has remained on the wall and start "jawing back" at him or the officers. JA Vol. III 0618-0619.

Moore testified keeping an inmate on the wall for seven minutes was not customary. JA Vol. III, 0621. Moore acknowledged Norelus was slightly moving and was likely talking back to the officers, but despite the slight movement by Norelus, nothing portrayed in the video should have resulted with Valdez pushing Norelus into the wall and grabbing the inmate by the neck. JA Vol. 0626. Moore testified Norelus did not "come off the wall." JA Vol. III, 0693. Norelus' fingers were still on the wall while his palms came off and, even if his hands came off the wall an inch or two, Norelus did not make a furtive movement to strike an officer. *Id.* If Norelus was noncompliant and moved his hands thirteen times, as presented by Employee, Valdez and Employee should not have waited that long and should have handcuffed the inmate right away. *Id.* The technique used by Valdez –right arm

around the neck- was not an NDOC approved technique. JA Vol. III 0626, 629. Valdez was not using his restraints until the inmate was down on the ground. JA Vol. III 0627.

Moore testified a correctional officer's job is to deescalate and contain every situation. JA Vol. III 0632, 0687. Moore testified if Norelus had extra food the officers should have taken the food, gotten the inmate's ID number, and written the inmate up for the infraction. JA Vol. III, 0687. He further testified if the inmate is non-compliant then he could go on the wall or maybe be subject to a more thorough search or could have been placed in restraints and taken to the sergeant's office so a supervisor could handle it. *Id.* at 0687-0688. Moore testified the culinary is the most volatile place in a prison, and by keeping the inmate on the wall for an extended period of time with both officers' attention on one inmate instead of the culinary was not justified and impacted security because "two officers sets of eyes" are taken off culinary. JA Vol. III, 0687-0688. Moore testified:

The putting an inmate's hands up against the wall, singling them out in front of other inmates for that amount of time, you're going to agitate that inmate. You're not going to deescalate it. You're going to escalate it. And if the inmate was verbally abusive and he kept on being verbally abusive, it's because he was singled out and he was put on the wall for that amount of time. For no other reason than to just single him out. JA Vol. III 0632-0633.

During the investigation, Valdez stated on a scale of one to ten, with ten being agitated, Norelus was at a ten. JA Vol. V, 1054-1055. However, Moore noted what

was depicted in the video did not show Norelus being at a ten. JA Vol. III 0634-0635. Moore testified if Norelus was at a ten and highly agitated, Employee would not be casually leaning against the wall next to the inmate and the officer would likely not have kept the inmate on the wall for over ten minutes, as the inmate would have become violent and acted out. *Id.*

Adams, with over 30 years' experience in NDOC and as the associate warden of operations, stated in his opinion as a senior officer, Employee permitted unnecessary force to occur which was a violation of NDOC policies. JA Vol. IV, 0809-0810. Further, Employee's reporting that the inmate came off the wall while Valdez was attempting to restrain him was not an accurate report, also in violation of NDOC policies. *Id.*

Russell testified he concurred with Employee's dismissal because the inmate was on the wall for 10 minutes before Valdez walked up from behind, grabbed the inmate around the neck and tumbled to the ground. JA Vol. IV, 0830. Russell testified Employee as the senior officer had a responsibility and obligation during that 10-minute period to do something different and to do anything from preventing a use of force. *Id.* Russell testified "at no time did I see [Norelus] resist and according to the-the report, he was resisting when he was trying to be restrained and I didn't see any of that in the report [sic], which spoke to the integrity of both officers." *Id.*

In explaining why, he noted Employee's report was missing facts, Russell explained:

Because omission is a deception. I mean, none of that was brought forth and it should've been. After reviewing the video and the investigation, that report should've included at least that the inmate was on the wall for 10-15 minutes or 15-16 minutes. And that the officer then pushed the inmate forward. There was no resistance, grabbed around the neck and threw to the ground, which is not what the training is taught...It was an assault basically. JA Vol. IV, 0831-0832.

Russell testified Employee's report not only included false and misleading statements but also omissions. JA Vol. IV, 0832. Russell further testified the misconduct at issue is egregious because he relies on the officers to adhere to NDOC rules and regulations. JA Vol. IV, 0833. Russell expected a senior officer to prevent the use of force from occurring in that 10-minute period, let supervisory staff know of what occurred, and report it accurately. JA Vol. IV, 0832-0833. Russell testified any of the violations alone was enough to support Employee's dismissal. *Id.*

VI.

SUMMARY OF ARGUMENT

The hearing officer's decision substantially violated the rights of NDOC because the decision was in violation of constitutional or statutory provisions, affected by other error of law, clearly erroneous in view of the reliable, probative and substantial evidence of the whole record and arbitrary and capricious. First, the

hearing officer erroneously relied on AR 339 following the Nevada Supreme Court's ruling in *Ludwick* that AR 339 is invalid and it is clear error for the hearing officer to rely on AR 339 for *any* purpose. Second, the hearing officer violated statutory provisions and committed clear error when he failed to consider whether Employee violated NAC 284.650(1), (10) and (21) as identified in Employee's Specificity of Charges. Third, the hearing officer erred when he used a preponderance of evidence standard to determine whether misconduct occurred when the correct standard is substantial evidence. Fourth, the hearing officer's decision to reverse NDOC's decision to dismiss Employee was arbitrary, capricious, and clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. NDOC presented both documentary evidence and testimony demonstrating Employee violated law and NDOC policies by failing to intervene in an incident that resulted in a use of unauthorized and excessive force and that Employee was dishonest in his report. NDOC further presented evidence showing the misconduct was serious and in violation of both the law and NDOC regulations and policy. The substantial evidence in the record supported the misconduct occurred, the discipline imposed on Employee was proper, and NDOC had just cause for imposing the dismissal on an employee who they believe allowed unauthorized, excessive use of force on an inmate and who subsequently was dishonest in reporting the use of the force and the circumstances leading up to the incident. Accordingly, the Decision must be set

aside in whole as the substantial rights of NDOC were prejudiced by requiring NDOC to reinstate an employee who engaged in such egregious misconduct.

VII.

LEGAL ARGUMENT

A. Standard of Review.

This Court's role in reviewing a petition for judicial review of an administrative agency's decision is identical to the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). The standard of review by which this Court evaluates a hearing officer's decision is governed by the Administrative Procedure Act, NRS 233B.010. NRS 233B.135(3) provides, in pertinent part, as follows:

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

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

Appellate courts “review the evidence presented to the administrative body and ascertain whether that body acted arbitrarily or capriciously, thus abusing its discretion.” *Gandy v. State ex rel. Div. Investigation*, 96 Nev. 281, 282, 607 P.2d 581, 582 (1980). “To be arbitrary and capricious, the decision of an administrative agency must be in disregard of the facts and circumstances involved.” *Meadow v. Civil Service Bd. Of LVMPD*, 105 Nev. 624, 627, 781 P.2d 772, 774 (1989).

The Court may decide pure legal questions *de novo* but a hearing officer’s “conclusions of law which are closely related to the agency’s view of the facts are entitled to deference” if supported by substantial evidence. *State Indus. Ins. System v. Khweiss*, 108 Nev. 123, 126, 825 P.2d 218, 220 (1992). A hearing officer abuses its discretion when it applies an incorrect legal standard. *See Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 506 (2007). A hearing officer’s conclusions of law—like questions of statutory interpretation—are reviewed *de novo*. *See City Plan Dev., Inc. v. Office of Labor Com’r*, 121 Nev. 419, 426, 117 P.3d 182, 187 (2005); *Dykema v. Del Webb Communities, Inc.*, 132 Nev. Adv. Op. 82, 385 P.3d 977, 979 (2016)(statutory interpretation).

Generally, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on a question of fact. NRS 233B.135(3). In reviewing questions of fact, this court is limited to determining whether substantial evidence exists in the record to support the administrative agency’s decision. *See Campbell v.*

Nevada Tax Com'n, 109 Nev. 512, 515, 853 P.2d 717, 719 (1993). Substantial evidence is evidence that “a reasonable person would accept as adequate to support a conclusion.” *Bisch v. Las Vegas Metro. Police Dep’t*, 129 Nev. 328, 334, 302 P.3d 1108, 1112 (2013). In determining whether substantial evidence exists, the court is limited to review the record as it existed before the administrative agency. *Id.* at 334, 1112-1113. If the decision lacks substantial evidentiary support, the decision is unsustainable as being arbitrary or capricious. *Id.*

B. The Hearing Officer’s Reliance on NDOC AR 339 was a Clear Error of Law and it was Clear Error of Law for the District Court Not to Rule on this Issue.

The hearing before the hearing officer concluded on April 16, 2019. On May 2, 2019, prior to the hearing officer issuing his Decision, this Court issued its Opinion in *NDOC v. Ludwick*, holding NDOC Administrative Regulation (AR) 339 is “invalid and of no legal effect for purposes of employee discipline” because AR 339 has not been approved by the Personnel Commission. *NDOC v. Ludwick*, 135 Nev. 99, 103, 440 P.3d 43, 47 (2019). *Ludwick* held it was “**a clear error of law warranting remand**” for a hearing officer to rely on AR 339 “for any purpose” since AR 339 was invalid. *Id.* at 104, 47. (emphasis added). *Ludwick* further held the hearing officer must address whether the employee’s actions constitute violations of NAC 284.650 as listed in the specificity of charges without any reliance on AR

339. *Id.* at 104, 48. If the hearing officer finds the employee violated the relevant NAC provisions, the hearing officer must then apply the remaining two steps outlined in *O’Keefe*⁵ to determine whether those violations warranted termination as a first-time disciplinary action. *Id.* (emphasis added).

On May 2, 2019, Employee filed a Supplemental Brief Regarding Change of Law, advising the hearing officer he could not rely on AR 339 for employee discipline and doing so would be a clear error of law. JA Vol. IV 0866-0879. On May 3, 2019, NDOC filed its Response noting while AR 339 was invalidated, the hearing officer was required to address whether the Employee violated NAC 284.650 as charged in the SOC and could rely on other NDOC administrative regulations, including AR 405, OP 405 and OP 407, as well as the Post Order for the Search and Escort Unit, which do not require approval of the Personnel Commission. JA Vol. IV 0862-0865.

Despite this change in law and direction from the Nevada Supreme Court, the hearing officer did not address whether Employee’s actions violated NAC 284.650. Instead, the hearing officer made factual findings, using the specific language found in AR 339.07.9(A) and AR 339.07.17(A). JA Vol. IV 0860. Accordingly, the

⁵ A hearing officer must apply a three-step review process with respect to employee terminations: (1) a *de novo* review of whether the violation occurred; (2) a deferential review of whether the violation was “serious”; and (3) a deferential review of whether termination is for the “good of the public service.” *See O’Keefe v. Nevada Department of Motor Vehicles*, 134 Nev. 752, 759, 431 P.3d 350, 356 (2018).

hearing officer's analysis and reliance on both AR 339.07.9(A) and AR 339.07.17(A), which formed the sole basis for his Decision, was legal error.

This argument was raised in NDOC's petition for judicial review before the district court. JA Vol. VI 1431-1464. However, the district court did not actually rule on this issue, make relevant factual findings or otherwise acknowledge this legal error in its order. JA Vol. VII, 1511-1512, 1513-1517. Instead, the district court summarily concluded NDOC failed to prove the hearing officer's decision violated NDOC's substantial rights under NRS 233B.135(2) under any of the bases listed to reverse the hearing officer's decision. JA Vol. VII, 1513-1517.

Because the hearing officer improperly relied on AR 339, the hearing officer clearly erred and the matter should have been remanded for the hearing officer to determine whether Employee violated NAC 284.650.

C. The Hearing Officer Violated Statutory Provisions and Committed Clear Error when He Failed to Consider Whether Employee Violated NAC 284.650 (1), (10) and (21) and it was Clear Error of Law for the District Court Not to Rule on this Issue.

NAC 284.794(1) specifically instructs "the hearing officer shall determine the evidence upon the charges and specifications as set forth by the appointing authority in the appropriate documents . . ." In accordance with NAC 284.656(3)(c), NDOC served Employee with a Specificity of Charges on March 16, 2017, recommending

his dismissal from state service for having violated NAC 284.650(1), NAC 284.650(10), NAC 284.650(21), AR 339.07.9(A) and AR 339.07.17(A). JA Vol. V, 1114-1175. It was upon this basis Employee was later dismissed from state service on April 21, 2017. JA Vol. V 1109. Employee then appealed his dismissal and generally disputed his violation of the above-noted regulations. JA, Vol. VI, 1416-1418. Not only were Employee's violations of NAC 284.650(1), NAC 284.650(10) and NAC 284.650(21) specifically stated in the SOC, but they were also discussed in NDOC's Prehearing Statement, testimony was elicited from Howell on these violations, and even the Decision recognized that these violations were at issue. JA Vol. II, 0286-0300, JA Vol. III, 00243-248, JA Vol. IV 0855, 0984-996. Nevertheless, the hearing officer failed to rule on (or even consider) whether Employee violated NAC 284.650(1), NAC 284.650(10) and/or NAC 284.650(21). JA Vol. IV 0852-0861. In doing so, the hearing officer neglected his statutory duty to rule on all the contested violations at issue. *See* NRS 284.390(1); *see also* NRS 284.390(7). The hearing officer's failure to even consider these NAC 284.650 violations is even more significant following the *Ludwick* decision, where this Court emphasized a hearing officer must rule on the *valid* NAC provisions listed in the specificity of charges. *Ludwick* at 104, 48.

Moreover, the hearing officer's failure to consider these NAC 284.650 violations was not harmless error, since substantial evidence showed Employee

violated: NAC 284.650(1) by permitting the use of unnecessary, unauthorized or excessive force against an inmate in direct violation of the 8th Amendment, AR 405, SDCC OP 405 SDCC OP 407 and Search and Escort Post Order; NAC 284.650(21) by permitting an act of violence, including intimidation, assault or battery, to occur in the performance of his duties; and NAC 284.650(10) by submitting a report containing false and/or misleading statements as well as omissions. Employee reported “[Norelus] came off the Culinary wall while C/O Valdez was attempting to restrain him.” JA Vol. V 1141. As stated above, the hearing officer found the inmate’s hands **remained on the wall** and there was no evidence Valdez was restraining the inmate. JA Vol. IV 0854. However, despite these findings, the hearing officer did not find that Employee was dishonest in violation of NAC 284.650(10).

As such, the hearing officer committed clear legal error by disregarding his statutory obligations and by failing to rule on all the charges at issue, especially since these charges under NAC 284.650 were supported by substantial evidence in the record.

D. Both the District Court and the Hearing Officer Clearly Erred When They Used the Preponderance of the Evidence Standard

Both the district court and the hearing officer erred and acted arbitrarily and capriciously thereby abusing their discretion when they used a preponderance of the

evidence standard. The correct standard for the hearing officer to make a de novo determination if Employee engaged in misconduct under step one of *O'Keefe* is substantial evidence.

The district court held that since the hearing officer reviews the facts, the applicable standard for this review is the preponderance of the evidence standard citing *Nassiri v. Chiropractic Phys. Bd.*, 130 Nev. 245, 251 (2014). JA Vol. VII1516. The hearing officer also found pursuant to *Nassiri* the “preponderance of evidence is the standard of proof for an agency to take disciplinary action against an employee.” JA Vol. IV, 0857. The hearing officer goes on to hold that NDOC did not establish by a preponderance of the evidence Employee permitted or employed the use of unauthorized force. JA Vol. IV, 0857-0860. The hearing officer further held NDOC did not meet its burden by a preponderance of evidence that Employee submitted a report with false or misleading information. *Id.* at 0860.

However, *Nassiri* did not involve an agency taking a disciplinary action against an employee or application of the O’Keefe three step process. *Nassiri v. Chiropractic Physician’s Board of Nevada*, 130 Nev. 245, 327 P.3d 487 (2014). Instead, *Nassiri* held the standard of proof in an agency’s occupational license revocation hearing in absence of a governing statute is a preponderance of the evidence standard of proof. *Id.* at, 251, 491.

Pursuant to NAC 284.798, a hearing officer shall be guided in his decision by the weight of the evidence as it appears to him at the hearing. This regulation does not set a standard but simply states to weigh the evidence. Yet, despite having numerous witnesses testify and admitting documentary evidence, the hearing officer did not weigh the evidence supporting NDOC's conclusion that the Employee engaged in misconduct. The hearing officer seemed to only give weight to the Employee's testimony without making any findings as to the other numerous and credible witnesses.

The standard of proof in a hearing conducted under NRS and NAC Chapter 284 is substantial evidence of "just cause." NRS 284.390(7). "Just cause" is synonymous with "legal cause." *Whalen v. Welliver*, 60 Nev. 154, 104 P.2d 188, 191 (1940). "A discharge for 'just' or 'good' cause is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) *supported by substantial evidence*, and (2) reasonably believed by the employer to be true." *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 1078, 901 P.2d 693, 701 (1995) (emphasis added). Substantial evidence has been defined as that which "a reasonable mind could accept as adequately supporting an agency's conclusions." *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 248, 327 P.3d 487, 489 (2014); *see also, State, Emp. Sec. Dep't v. Hilton Hotels*, 102 Nev. 606, 608, 792 P.2d 497, 498 (1986), citing *Richardson v. Perales*, 402 U.S. 389 (1971). Substantial evidence was

well defined in *Robertson Transp. Co. v. P.S.C.*, 39 Wis.2d 653, 159 N.W.2d 636, 638 (1968):

[S]ubstantial evidence [does] not include the idea of this court weighing the evidence to determine if a burden of proof was met or whether a view was supported by the preponderance of the evidence. Such tests are not applicable to administrative findings and decisions. We [equate] substantial evidence with that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion. And, in this process, sec. 227.20(1)(d) Stats. providing that the decision of an agency may be reversed if ***unsupported by substantial evidence in view of the entire record as submitted does not permit this court to pass on credibility or to reverse an administrative decision because it is against the great weight and clear preponderance of the evidence, if there is substantial evidence to sustain it.*** [Emphasis added.]

Recent Nevada Supreme Court and Nevada Court of Appeals opinions outlining the role of hearing officers confirm the standard is substantial evidence. *See O'Keefe v. Dep't. of Motor Vehicles*, 134 Nev. 752, 431 P.3d 350 (2018) (noting a discharge for just cause is one that is supported by substantial evidence) and *Dep't of Corr. v. Ludwick*, 135 Nev. 99, 440 P.3d 43 (2019). *See also Nevada Dep't of Motor Vehicles v. Adams*, 133 Nev. 1077, at fn. 2 (Nev. App. 2017) (unpublished) (noting *Nassiri* may have caused confusion because it noted the standard of proof was by a preponderance of the evidence, but that was in relation to the agency's determination for its [occupational] licensing [revocation]

proceedings; *“substantial evidence” is the proper standard of review to be used during the hearing officer's review*).

Here, the hearing officer made findings of fact that NDOC did not meet its burden of proving by *preponderance of the evidence* that the Employee permitted use of force or knowingly and intentionally submitted a report with false or misleading information. The district court similarly held since the hearing officer reviewed the facts, the applicable standard of review is the preponderance of the evidence standard. JA Vol. VII 1516. The hearing officer and the district court used a burden not supported by state law or the recent Nevada Supreme Court and Nevada Court of Appeals opinions outlining the role of the hearing officers. Instead, the hearing officer should have determined whether the substantial evidence in the record proved Employee engaged in the misconduct.

In this case, NDOC's factual determinations were reasonably supported by evidence of sufficient quality and quantity. In making its decision to dismiss Employee, NDOC reviewed the reports and video evidence, and conducted an investigation, which included interviews of several inmates and the officers present on the scene. All the evidence showed Employee and Valdez singled out Norelus. The video of the incident clearly shows while Employee and Valdez focused their attention on Norelus they did not search any other inmate leaving the culinary despite that being their job duties. NDOC witnesses testified that keeping Norelus on the

wall for 10 to 11 minutes with his hands above his head was improper and excessive and that the Norelus did not pose a threat. The evidence showed Employee could have taken other steps to deescalate the situation but instead required the inmate to stay on the wall long after his pat search was over while Valdez continued to get more and more agitated. The evidence showed Valdez was not attempting to restrain the inmate and Employee's report that the inmate came off the wall while being restrained was not true. NDOC reasonably believed the evidence to support the violations in the SOC. Additionally, NDOC Wardens and Associate Wardens involved in the disciplinary matter testified on why the evidence they reviewed demonstrated egregious misconduct, warranting dismissal. Under the appropriate evidentiary standard of substantial, it is clear substantial evidence showed Employee violated policies, was dishonest, and allowed an assault to occur.

Thus, it was clear error for both the district court and the hearing officer to use preponderance of the evidence rather than substantial evidence when determining if a violation occurred. This Court should reverse and remand for the hearing officer to determine whether substantial evidence supported a determination that Employee violated NAC 284.650(1), (10), and (21).

///

///

E. The Hearing Officer’s Decision was Arbitrary and Capricious, an Abuse of Discretion and Clearly Erroneous in View of the Reliable, Probative, and Substantial Evidence On the Whole Record

The district court may set aside a final decision by a hearing officer where the final decision is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.” NRS 233B.135(3)(e). Substantial evidence has been defined as that which “a reasonable mind might accept as adequate to support a conclusion.” NRS 233B.135(4); *State, Emp. Sec. Dep’t v. Hilton Hotels*, 102 Nev. 606, 608, 792 P.2d 497, 498 (1986), citing *Richardson v. Perales*, 402 U.S. 389 (1971). A decision is arbitrary, capricious, or unsupported, if it is not “supported by substantial evidence in the record.” *Clark Cnty. Educ. Ass’n v. Clark Cnty. Sch. Dist.*, 122 Nev. 337, 342, 131 P.3d 5, 9 (2006).

In *O’Keefe v. Dep’t. of Motor Vehicles*, the Supreme Court established the correct three-part review hearing officers should conduct when evaluating a dismissal. 134 Nev. 752, 431 P.3d 350 (2018). First, the hearing officer reviews de novo whether the employee in fact committed the alleged violation(s). *O’Keefe* at 759,356. The hearing officer applies a substantial evidence standard when determining if a violation occurred. *See id.* at 354-355, 757-758 (explaining the reasonableness standard is the substantial evidence standard of review); *id.* at 355, 758 (noting a discharge for just cause is one that is supported by substantial

evidence); *id.* at 354-355, 757-758 (noting that substantial evidence supported the appointing authority's decision). Second, the hearing officer determines whether the violation is serious enough to support dismissal as a first-time disciplinary action. *See O'Keefe* at 356, 759; NRS 284.383(1). "If the agency's published regulations prescribe termination as an appropriate level of discipline for a first-time offense, then that violation is necessarily 'serious' as a matter of law." *Id.* Third, "the hearing officer applies a deferential standard of review to the agency's determination that termination will serve 'the good of the public service.'" *Id.* The appointing authority must merely demonstrate a "rational connection between the facts found and the choice made[.]" *Id.* at 356, 760 (internal citation omitted). This constitutes the just cause analysis.

Here, the hearing officer only reached step one under *O'Keefe*. The hearing officer determined Navarrete did not commit the alleged violations. JA Vol. IV 0852-0861. However, the hearing officer's Decision was arbitrary, capricious, and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The substantial evidence in the record demonstrates NDOC's decision to dismiss Employee was reasonable and based on just cause. The substantial evidence in the record does not support the hearing officer's findings and conclusions.

Agencies must provide the “essential facts upon which the administrative decision was based.” *United States v. Dierckman*, 201 F.3d 915, 926 (7th Cir. 2000). Agencies must explain what justifies their determinations with actual evidence beyond a “conclusory statement.” *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993). An Administrative Law Judge “must specifically identify the testimony she or he finds not to be credible and must explain what evidence undermines the testimony.” *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001).

Here, the hearing officer failed to explain the evidence which justified his conclusions. The hearing office failed to identify the testimony he found not to be credible. Instead the hearing officer made conclusory statements that Employee did not engage in the violations when the substantial evidence in the record supported Employee engaged in misconduct.

1. Violation of NAC 284.650 (1)

NDOC charged Employee with violating NAC 284.650(1), activity which is incompatible with an employee’s conditions of employment established by law or which violates a provision of NAC 284.653 or NAC 284.738 to 284.771. These conditions of employment include Employee’s compliance with the 8th Amendment as well as NDOC administrative regulations including AR 405, Use of Force and its corresponding operational policies and procedures.

NRS chapter 209 gives the NDOC Director and the Board of State Prison Commissioners the authority to create and implement regulations with respect to the management of the prison and prisoners including Use of Force, Restraints and Operational Procedures. *See* NRS 209.111(3); NRS 209.131(6). Those rules, mandated by the legislature and adopted in accordance with statutory procedures, have the force and effect of law. *Turk v. Nevada State Prison*, 94 Nev. 101, 104, 575 P.2d 599, 601 (1978).

Employee's actions of singling out inmate Norelus, patting him down but not releasing him, keeping him on the wall for an excessive amount of time with his hands raised and allowing a situation to escalate resulting in Valdez using unnecessary force, was incompatible with his conditions of employment. A chokehold is not authorized and unlawful. JA Vol. IV 0759. Russell testified that Norelus was assaulted. JA Vol. IV 0831-0832.

The evidence showed AR 405.03 states staff may use force to protect himself or any other individual from physical harm by an inmate and will be proportionate to the threat exhibited by the inmate. JA Vol. V 1179. The hearing officer found there was no sign of physical resistance by Norelus and he was not a physical threat to the officers. JA Vol. IV, 0858.

AR 405.03 further states any staff witnessing use of force that is either excessive or unnecessary is **required to immediately report their observations** to

the shift supervisor both verbally and in a written report. *Id.* (emphasis added). Employee was familiar with AR 405 and understood force must be proportionate to the threat. JA Vol. II, 0458. Furthermore, Employee understood he was required to follow operational procedures and post orders. JA Vol. II 0456, 0458, 0460. Employee also understood he was to avoid turning minor problems into major confrontations. *Id.* The post order required Employee to restrict use of force to the minimum degree necessary to regain control or to repel an attack. JA Vol. II 0461. The post order further required Employee to **notify a shift supervisor and obtain appropriate back up if an inmate refuses to comply**. JA Vol. II 0460 (emphasis added). The post order provides Search and Escort officers will enforce all rules, regulations, and procedures and counsel inmates in a **discreet and timely manner**. JA Vol. IV 0918-0919.

Employee searched Norelus but kept him on the wall because he was allegedly “non-compliant.” Yet, Employee’s decision to keep Norelus on the wall for an extended period time was contrary to the policies governing his post. Employee was required to notify a shift supervisor and obtain appropriate back up for non-compliance. Instead, Employee kept Norelus on the wall, allowing Valdez to get riled up and letting the situation escalate to the point where Valdez used excessive force. Wachter testified Valdez often had to get the last word in with inmates. Certainly, Employee, who had worked with Valdez for one year, recognized Valdez

liked to escalate situations. Employee further failed to comply with the conditions of his employment when he submitted a report that contained misleading statements and omissions regarding the incident. This was incompatible with Employee's conditions of employment and a violation of NAC 284.650(1).

2. Violation of NAC 284.650(10)

NDOC charged Employee with violating NAC 284.650(10), dishonesty. As a peace officer, Employee is expected to adhere to a high level of honesty. The hearing officer held Employee did not knowingly and intentionally submit a report with false or misleading information. JA Vol. IV 0860. This holding is contradictory to the hearing officer's other findings and the evidence in the record. Specifically, the hearing officer found there were no signs that Officer Valdez actually had his handcuffs in hand. JA Vol. IV 0854. Yet, the hearing officer found Employee's report that the inmate "came off the Culinary wall while C/O Valdez was **attempting to restrain** him resulting in a spontaneous use of force" to be honest. JA Vol. IV 0859-0860. Wachter, Moore, Adams, Howell, and Russell testified the evidence did not show Valdez was attempting to restrain the inmate. The testimony of Adams, Howell and Russell stated Employee's report was not only false and misleading but contained glaring omissions regarding the events leading up to the use of force. The hearing officer disregarded this undisputed testimony and relied on the testimony of Dean Willett, the direct supervisor who was on duty that day but not present at the

incident with inmate Norelus. Willet testified when he reviewed Employee's report, he believed it to be sufficient. JA Vol. II 0412-0413. However, Willett also testified his main objective when reviewing a report is whether it flows, it is written properly, and that grammar's correct. *Id.* at 0413. Willett did not review Employee's report in conjunction with watching the video. *Id.* at 0416. Willett said the **description of the force, such as putting an arm around the inmates' neck, should be in the report.** *Id.* at 0419. However, Willett was not reviewing the report for violations of NAC 284.650. In fact, Adams oversaw reviewing the reports in NOTIS and saw concerns with the video and report and referred for investigation. Willett was not involved in the investigation, adjudication, or determination of discipline. JA Vol. II, 0420-0421. The testimony from Moore, Wachter, Adams, Russell and Howell supported NDOC's conclusion that Employee's report was not accurate or truthful. Despite this overwhelming evidence, the hearing officer after "much soul searching" found Employee's report factually accurate. JA Vol. IV 0859. Soul searching is not the standard to be used by the hearing officer to weigh the evidence to determine if a violation occurred. This reference alone shows clear error and that the hearing officer did not properly weigh the evidence before him.

As stated at length above, there was significant testimony and evidence admitted supporting that the Employee committed the alleged violations. The video of the use of force in this case was admitted into evidence. The video clearly shows

inmate Norelus was singled out to stay on the wall for over ten minutes after his pat down search was complete. While the video shows inmate Norelus fidgeting some, the video clearly shows the inmate was not acting in a threatening manner to the officers. In fact, the hearing officer found the inmate “did not appear to be a physical threat.” JA Vol. IV, 0858.

Additionally, evidence showed Valdez and Employee had previously engaged in name-calling and singling Norelus out. JA Vol. V 1080. Wachter testified he had to counsel Valdez on his interactions with inmates and said “our job is to quell situations, not get them riled up.” *Id.* at 1082.

Several witnesses, including Adams, Moore, Wachter, Howell and Employee testified NDOC does not train their officers to use the manner of force as was used on inmate Norelus (arm around inmate’s neck or choke hold). Additionally, several of the same witnesses testified that a non-compliant inmate can be restrained and an officer placing his arm around the inmate’s neck is not an appropriate or trained method to restrain an inmate. These witnesses further testified it would be appropriate to restrain the inmate and contact the sergeant to advise that the inmate was not complying.

Several supervisory witnesses, including Adams, Russell and Howell, testified the report written by Employee was dishonest. Particularly, several witnesses testified the statement that “inmate Norelus #1104257 came off the

Culinary wall while C/O Valdez was attempting to restrain him resulting in a spontaneous use of force” was both misleading and false because the video evidence does not support that Officer Valdez was restraining or attempting to restrain the inmate.

The hearing officer found there were no signs that Officer Valdez had his handcuffs in hand and that the inmate’s “hands remain on the wall.” The hearing officer further found that Valdez’s conduct appears to be “unjustified.” *Id.* The hearing officer found there is no rule on the length of time an inmate could be kept on the wall. *Id.* at 7. Yet, the hearing officer heard ample testimony there appeared to be no reason for Norelus to have been on the wall for over ten minutes. Despite this evidence, the hearing officer found Employee did not permit the use of unauthorized force.

As stated above, the hearing officer found the inmate’s hands remained on the wall and there was no evidence that Valdez was restraining the inmate. However, despite these findings, the hearing officer also did not find Employee’s statement that the “inmate... came off the wall while C/O Valdez was attempting to restrain him” to be false or misleading. Instead, the hearing officer after “much soul searching” found the report to be factually accurate.

The hearing officer’s determination that Employee did not permit unauthorized force and Employee was not dishonest when he wrote his incident

report is contrary to the reliable, probative, and substantial evidence in the whole record. Furthermore, the hearing officer's reference that he came to a conclusion after "soul searching" is an abuse of discretion, arbitrary and capricious, and in error in light of the reliable, probative, and substantial evidence in the record. The hearing officer's personal opinions and soul-searching are not a basis for determining if the Employee engaged in misconduct.

3. Violation of NAC 284.650(21)

NDOC charged Employee with violating NAC 284.650(21) - any act of violence, which arises out of or in the course of the performance of the employee's duties, including, without limitation, stalking, conduct that is threatening or intimidating, assault, or battery. While NDOC was not charging Employee with placing hands on Norelus, NDOC was charging him for allowing/permitting the situation to escalate and allowing Valdez, a subordinate officer, to use excessive force.

The hearing officer held Employee did not willfully employ or permit the use of unauthorized force. JA Vol. IV 0858. This holding contradicts the hearing officer's other findings and the evidence in the record. Specifically, the hearing officer found a random pat search typically is completed in a minute or so. JA Vol. IV 0853. The hearing officer further found, although the pat down was completed less than two minutes into the incident, Norelus was kept on the wall because he was

not complying, verbally abusive, and agitated. JA Vol. IV 0853-0854. The video evidence of the event does not support this finding. Additionally, at the hearing, Moore, Wachter, Adams, Russell and Howell testified that Norelus, while fidgety, was not agitated, did not pose a physical threat, and even if not complying should not have stayed on the wall for over ten minutes. The post order requires counseling to be discreet and timely. The hearing officer goes on to find Employee's "testimony was that Officer Valdez verbally told the inmate he was going to cuff him and take him to the sergeant, **yet, there was no signs that Officer Valdez actually had his handcuffs in hand.**" JA Vol. IV 0854 (emphasis added). Indeed, the testimony from at least five other witnesses supported NDOC's conclusion Valdez was not attempting to restrain the inmate until after the force was used and Valdez's actions on the video did not conform to NDOC's policies and training on restraining an inmate. Interestingly enough, the hearing officer found Valdez's conduct continues to appear unjustified. Yet, despite the substantial evidence that Employee as a senior officer is held to a higher standard and had an obligation to intervene, and the evidence that Employee could have restrained the inmate immediately and taken the inmate to the on duty sergeant, rather than keep him on the wall for an extended period of time, the hearing officer concluded Employee did nothing wrong. The Decision completely ignores the testimony provided by five witnesses from NDOC ranging in rank from officer to warden. The hearing officer found Employee had the

discretion to keep the inmate on the wall for the extended period and there is no rule to immediately bring a non-compliant inmate to the sergeant. JA Vol. IV 0858.

NDOC AR 405 Use of Force, OP 405 Use of Force, OP 407 Use of Restraints, Search and Escort Post Order were all admitted into evidence. These policies and procedures are substantial evidence that the force used was not a spontaneous use of force, because there was no emergency. These policies and procedures further exhibited the force used was not reasonable and was in fact excessive because Norelus was not a physical threat to the officers and the testimony of other NDOC staff stated the force used was not reasonable in light of the circumstances. Additionally, the policies and procedures, as well as the substantial evidence and testimony, show that Valdez was not “attempting to restrain” Norelus. Valdez did not have his handcuffs out and did not approach the inmate in a way to indicate he was going to restrain him. In fact, the hearing officer found there were no signs Valdez actually had his handcuffs in hand. JA Vol. IV 0854. The testimony of Wachter, Moore, Adams, Russell and Howell further showed Employee’s actions were in violation of policy and custom and he should have taken different action and should not have kept the employee on the wall.

///

///

F. It was Clear Error and an Abuse of Discretion for the Hearing Officer to Rely on his “Soul Searching” to Determine if Employee was Dishonest.

NRS 284.390(6) provides, after the hearing and consideration of the evidence, the hearing officer shall render a decision in writing, setting forth the reasons therefor. The hearing officer is not to consider his own personal feelings or soul searching. The hearing officer concluded, “My conclusion, after much soul searching and many reviews of the video and the statement is that Mr. Navarrete’s report is brief and essentially, factually accurate given what he reasonably could have been expected to perceive at the time.” JA Vol. IV, 858. It was clear error for the hearing officer to soul search for his findings and conclusions rather than rely on the reliable, probative and substantial evidence in the record that Employee was dishonest.

VIII.

CONCLUSION

The District Court’s Order denying NDOC’s Petition for Judicial Review and affirming the hearing officer’s Decision must be reversed. The substantial rights of NDOC were prejudiced by the hearing officer’s decision because the hearing officer exceeded his statutory authority, acted in clear error of law, abused his discretion, and issued a decision that was arbitrary and capricious and clearly erroneous in view of the reliable, probative and substantial evidence of the record. The hearing officer

committed clear error by relying on AR 339 and failed to determine whether Employee violated NAC 284.650(1), (10), and (21). The hearing officer used the wrong standard in making his decision. The substantial evidence in the record demonstrates NDOC had just cause to terminate Employee for violating NAC 284.650(1), (10), and (21). Finally, the hearing officer improperly relied on “soul searching” rather than the evidence. Therefore, Appellant respectfully requests this Court reverse the District Court’s Order and the hearing officer’s Decision.

DATED May 10, 2021.

AARON D. FORD
Attorney General

By: /s/ Michelle Di Silvestro Alanis
Michelle Di Silvestro Alanis
Nevada Bar No. 10024
Suprv. Senior Deputy Attorney General
Attorneys for Appellant,
State of Nevada ex rel. Department of
Corrections

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:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 pt. Times New Roman; or

☐ This brief has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ Proportionately spaced, has a typeface of 14 points or more, and contains 13,995 words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

☐ Does not exceed 30 pages.

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 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

///

///

the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED May 10, 2021.

AARON D. FORD
Attorney General

By: /s/ Michelle Di Silvestro Alanis
Michelle Di Silvestro Alanis
Nevada Bar No. 10024
Suprv. Senior Deputy Attorney General
Attorneys for Petitioner
State of Nevada ex rel. Department of
Corrections

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELLANT’S OPENING BRIEF** with the Clerk of the Court by using the electronic filing system on the 10th day of May, 2021.

I certify that the following participants in this case are registered electronic filing systems users and will be served electronically:

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

Via Email to:

Mark Gentile
Hearing Officer
Hearings Division
nrann@admin.nv.gov

I further certify that on May 12th, 2021 the foregoing will be mailed by United States Mail to the following:

Mark Gentile
Hearing Officer
Hearings Division
Department of Administration
2200 S. Rancho Dr. Ste. 220
Las Vegas, NV 89102

/s/ Anela Kaheaku

Anela Kaheaku, an employee of the
Office of the Nevada Attorney General