

THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
DEPARTMENT OF CORRECTIONS,

Appellant,

vs.

JOSE MIGUEL NAVARRETE, an
individual,

Respondent.

Case No. 82113

District Court No.: A-1979766-9
(Eighth Judicial District Court
Nevada)

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JOINT APPENDIX VOL. I OF VII

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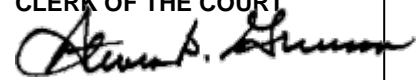
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on May 10th, 2021, I electronically filed the foregoing document via this Court's electronic filing system. I certify that the following participants in this case are registered electronic filing systems users and will be served electronically:

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/s/ Anela Kaheaku
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CASE NO: A-19-797661-J
Department 16

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel. its
DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

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

Respondents.

CASE NO:

DEPT NO:

PETITION FOR JUDICIAL REVIEW

Petitioner, STATE OF NEVADA ex rel. its DEPARTMENT OF CORRECTIONS, by and through counsel, AARON D. FORD, Attorney General of the State of Nevada and MICHELLE DI SILVESTRO ALANIS, Deputy Attorney General, pursuant to NRS 284.390(9) and NRS 233B.010 et seq., petitions the Court as follows:

1. Petitioner requests judicial review of the final decision of the State of Nevada, Department of Administration, Personnel Commission, Hearing Officer dated May 30, 2019, in Case No. 1713379-MG.
2. This Court has jurisdiction pursuant to NRS 233B.130.
3. This Petition has been filed in accordance with NRS 233B.130 (1) and (2).

- 1 4. Petitioner has been aggrieved by the final decision of the Hearing Officer attached hereto
2 as Exhibit "1," and Petitioner's rights have been prejudiced because the final decision is:
3 a) In violation of constitutional or statutory provisions;
4 b) In excess of the statutory authority of the agency;
5 c) Made upon unlawful procedure;
6 d) Affected by other error of law;
7 e) Clearly erroneous in view of the reliable, probative and substantial evidence on the
8 whole record; and/or
9 f) Arbitrary or capricious, and characterized by abuse of discretion.
10 5. Petitioner will file a Memorandum of Points and Authorities after a copy of the entire
11 record on appeal has been transmitted to the Court in accordance with NRS 233B.133.
12 6. Petitioner reserves its right to request oral argument in this matter pursuant to NRS
13 233B.133(4).

14 WHEREFORE, Petitioner prays as follows:

- 15 1. That this Court conduct a review of the final decision of the Nevada State Personnel
16 Administrative Hearing Officer pursuant to NRS 233B.135 and enter an Order reversing or setting
17 aside the decision; and
18 2. For such further and other relief as the Court deems legal, equitable and just.

19 DATED this 28th day of June, 2019.

20 AARON D. FORD
21 Attorney General

22 By: /s/ Michelle Di Silvestro Alanis
23 MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)
24 Deputy Attorney General

25 *Attorneys for Petitioner STATE OF NEVADA*
26 *ex rel. its DEPARTMENT OF CORRECTIONS*
27
28

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on June 28, 2019, I electronically filed the foregoing **PETITION FOR JUDICIAL REVIEW** via this Court's electronic filing system. Parties that are registered with this Court's electronic filing system will be served electronically. For those parties not registered, service was made by depositing a copy for mailing in the United States Mail, first-class postage prepaid at Las Vegas, Nevada to the following:

Mark Gentile
Hearing Officer
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(Via U.S. Mail and email to: office@danielmark.net,
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/s/ Anela Kaheaku
An employee of the Office of Attorney General

EXHIBIT 1

EXHIBIT 1

1 **BEFORE THE NEVADA STATE PERSONNEL COMMISSION**

2 **HEARING OFFICER**

3 JOSE MIGUEL NAVARETTE,)

4 Petitioner-Employee,)

5 v.)

6 DEPARTMENT OF CORRECTIONS,)

7 Respondent-Employer.)

Case No. 1713379-MG

FILED

MAY 30 2019

APPEALS OFFICE

8 **DECISION AND ORDER**

9
10 This matter came on for administrative hearing before the undersigned Hearing Officer for
11 the Nevada Department of Administration, Hearings Division on April 2, 2019 and April 16, 2019.
12 The hearing was held pursuant to Petitioner-Employee Jose Miguel Navarette's appeal of his
13 dismissal from State Service, effective April 21, 2017, for an incident that occurred at Southern
14 Nevada Correctional Center on October 9, 2016, and for alleged irregularities in the subsequent
15 reporting of that incident.

16 **1. PROCEDURAL AND FACTUAL OVERVIEW**

17 Petitioner-Employee Jose Miguel Navarette began his employment for the Nevada
18 Department of Corrections in May of 2008. It was established that he had no prior disciplinary
19 record.

20 The conduct at issue occurred during breakfast service at Southern Nevada Correctional
21 Center on October 9, 2016. Senior Officer, Jose Navarrete, along with Correctional Officer, Paul
22 Valdez, were randomly searching inmates leaving culinary for contraband. This activity was a
23 common occurrence at the prison.

24 This matter is somewhat unique in that there was a video camera mounted outside the
25 entrance of the culinary and the incident of October 9, 2016 was recorded on videotape.
26 Unfortunately, there is no audio and we are limited to a single perspective. The timeline of what
27 occurred is clearly demonstrated on the video. While certainly not perfect, the essence of what
28 occurred is reflected in the video. Audio of the encounter would certainly have helped put this in
a better context.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 NAC 284.650:

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

20 He was also charged with the following:

21 AR 339.07.9 False or Misleading Statements

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

25 AR 339.07.17 Unauthorized Use of Force

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

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

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

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

7 **2. LEGAL AUTHORITY**

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

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

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

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

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

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

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

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

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

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

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

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

15 **3. DISCUSSION**

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

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

1 every infraction was not a feasible alternative.

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

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

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

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

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

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

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

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

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

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

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

11 **4. FACTUAL FINDINGS**

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

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

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

17 **ORDER**

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

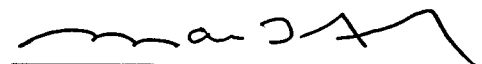
20 Employee Jose Navarette shall be restored to his prior position with back pay and benefits
21 in accord with the prior agreement of the parties.

22 DATED this 28 day of May, 2019.

23

24

25


MARK L. GENTILE
Hearing Officer

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

1 CERTIFICATE OF MAILING

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

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

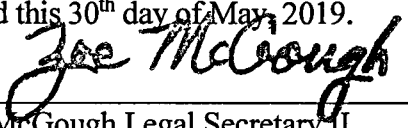
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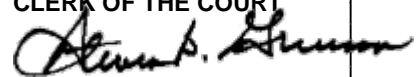
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16 MICHELLE D. ALANIS, ESQ.
17 DEPUTY ATTORNEY GENERAL
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LAS VEGAS NV 89101

19 Dated this 30th day of May, 2019.

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21 _____
22 Zoe McGough Legal Secretary II
Employee of the State of Nevada
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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel. its
DEPARTMENT OF CORRECTIONS,

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

Petitioners,

v.

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

NOTICE OF INTENT TO PARTICIPATE

Respondents.

COMES NOW, Respondent Jose Miguel Navarrete, by and through his undersigned counsel,
Daniel Marks, Esq. of the Law Office of Daniel Marks and pursuant to NRS 233B.130(3) provides
Notice of his Intent to Participate in the Judicial Review Proceedings.

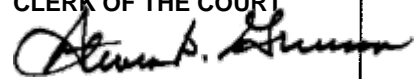
DATED this 1 day of July, 2019.

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Glenda Guo
An employee of the
LAW OFFICE OF DANIEL MARKS



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ex rel DEPARTMENT OF CORRECTIONS

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel. its
DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

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

Respondents.

CASE NO: A-19-797661-J

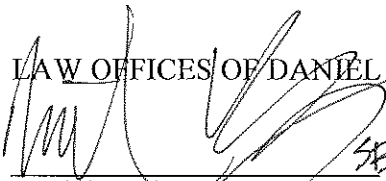
DEPT NO: XVI

ACCEPTANCE OF SERVICE

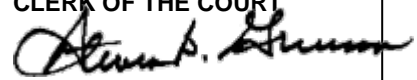
In accordance with NRCP 4.2(a), I hereby accept service of the Petition for Judicial Review in
the above action on behalf of Jose Miguel Navarrete.

DATED this 6 day of August, 2019.

LAW OFFICES OF DANIEL MARKS



SBN 12659
Daniel Marks, Esq.
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Attorney for Respondent, Jose Miguel Navarrete



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ex rel. DEPARTMENT OF CORRECTIONS

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel. its
DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

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

Respondents.

CASE NO: A-19-797661-J

DEPT NO: XVI

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on July 1, 2019, the MOTION FOR STAY and EXHIBITS was filed via this Court's electronic filing system. Parties that are registered with this Court's electronic filing system have been served electronically. For those parties not registered, service was made by depositing a copy for mailing in the United States Mail, first-class postage prepaid at Las Vegas, Nevada to the following:

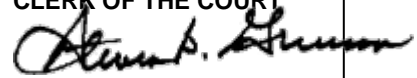
Mark Gentile
Hearing Officer
Department of Administration
2200 S. Rancho Dr., Ste. 210
Las Vegas, NV 89102

(Via U.S. mail and E-mail: zmcgough@admin.nv.gov)

1 Dan Marks, Esq.
2 Law Offices of Daniel Marks
3 610 S. 9th St.
4 Las Vegas, NV 89101
5
6

(Via U.S. Mail and email to:office@danielmark.net,
gguo@danielmarks.net)

7 /s/ Anela Kaheaku
8 An employee of the Office of Attorney General
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*Attorneys for Petitioner, State of Nevada
ex rel. Department of Corrections*

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel. its
DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

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

Respondents.

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

MOTION FOR STAY

Hearing Requested

Petitioner, STATE OF NEVADA ex rel. DEPARTMENT OF CORRECTIONS (NDOC), by and through counsel, AAROD D. FORD, Attorney General for the State of Nevada, and MICHELLE DI SILVESTRO ALANIS, Deputy Attorney General, hereby submits its MOTION FOR STAY (Motion) requesting a stay of the enforcement of the final decision of the Nevada State Personnel Commission Hearing Officer dated May 30, 2019, pending decision on the merits of NDOC's Petition for Judicial Review.

1 This Motion is made and based on upon the following memorandum of points and authorities, the
2 pleadings and papers on file herein, and oral argument to be presented by counsel at any hearing in this
3 matter.

4 Dated: July 1, 2019.

5 AARON D. FORD
6 Attorney General

7 By: /s/ Michelle Di Silvestro Alanis
8 Michelle Di Silvestro Alanis (Bar No. 10024)
9 Deputy Attorney General

10 *Attorneys for Petitioner*
11 *State of Nevada ex rel. Department of Corrections*

12 **NOTICE OF HEARING**

13 PLEASE TAKE NOTICE that the STATE OF NEVADA ex rel., its DEPARTMENT OF
14 CORRECTIONS, will bring its MOTION FOR STAY on for hearing in Department XVI at the Regional
15 Justice Center, located at 200 Lewis Avenue, Las Vegas, Nevada 89155 on the _____ day of _____,
16 2019 at ____:_____, or as soon thereafter as counsel may be heard.

17 DATED: July 1, 2019.

18 AAROD D. FORD
19 Attorney General

20 By: /s/ Michelle Di Silvestro Alanis
21 Michelle Di Silvestro Alanis (Bar No. 10024)
22 Deputy Attorney General

23 *Attorneys for Petitioner*
24 *State of Nevada ex rel. Department of Corrections*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 NDOC dismissed Respondent, Jose Miguel Navarrete (Employee), from State service effective
4 April 21, 2017, for various acts of misconduct. Employee appealed his dismissal to the Department of
5 Administration Personnel Commission pursuant to NRS 284.390. A hearing was held on April 2, 2019
6 and April 16, 2019 before Hearing Officer Mark Gentile. On May 30, 2019, the hearing officer entered
7 his Findings of Fact, Conclusions of Law Decision and Order (Decision) which reversed Employee's
8 dismissal and restored him to his prior position as a senior correctional officer with back pay and benefits
9 in accordance with the prior stipulation of the parties. *See* Decision attached hereto as **Exhibit "1."**
10 NDOC filed a Petition for Judicial Review pursuant to NRS 284.390(9) and NRS 233B.010 et. seq.
11 NDOC now respectfully requests that this Court enter an order staying the reinstatement of Employee
12 and the reimbursement of back pay and benefits.

13 **II. STATEMENT OF FACTS**

14 **A. Misconduct and Discipline**

15 At the time of his dismissal from State service, Employee was a senior correctional officer with
16 NDOC assigned to Southern Desert Correction Center (SDCC). *See* Specificity of Charges attached
17 hereto as **Exhibit "2."** The incident, which gave rise to Employee's dismissal, occurred on October 9,
18 2016, during breakfast service at SDCC. Exhibit 1, p. 1 and Exhibit 2, NDOC 118. Employee and
19 correctional officer, Paul Valdez were randomly searching inmates leaving culinary for contraband which
20 is a standard procedure at the prison. Exhibit 1, p. 1. Employee was the lead Search and Escort officer
21 that shift. Exhibit 2, NDOC 118.

22 The standard process is to pull an inmate out of line randomly and have the inmate place his hands
23 on the wall, while the officer conducts a brief pat down search. Exhibit 1, p. 2. The evidence supported
24 that this process typically takes about one minute and after the search is completed, the inmate is released.
25 *Id.*

26 There is a video camera mounted outside of the entrance to the culinary building, and the October
27 9th incident was recorded on videotape. *See* CD with video attached hereto as **Exhibit "3."**¹ This
28

¹ The CD containing the video will be provided to chambers for review. The Exhibit filed electronically will be a photocopy of the CD.

1 recording demonstrates that several inmates were placed on the wall leaving the culinary building. *Id.*
2 One at a time, every inmate aside from one was pulled out of line, searched and released. *Id.* One
3 particular inmate, Rickie Norelus, was searched, no contraband appeared to have been found on him, and
4 yet, that inmate was required to stand facing the wall, with his arms above his head for over ten minutes.
5 *Id.* During those ten minutes, Valdez is seen standing behind the inmate, talking to him, while Employee
6 walks around, and leans casually against the wall, even turning his back to the inmate. *Id.* Valdez's body
7 language becomes increasingly agitated and aggressive throughout those ten minutes. *Id.*

8 Just under 11 minutes into the video, Valdez comes up behind the inmate, pushes up against him,
9 then puts his right arm around the inmate's neck, and wrestles him to the ground. *Id.* This take down is
10 not any methodology taught by NDOC. Exhibit 2, NDOC 132. It was only after Valdez wrestled the
11 inmate to the ground that he made any attempt to reach for his handcuffs and restrain the inmate. Exhibit
12 3. There was nothing to indicate that the spontaneous use of force was warranted or required. Exhibit 2
13 and 3. Following the incident, Employee prepared a report that is not substantiated by the conduct in the
14 video. Specifically, Employee reported:

15
16 On October 9, 2016 I, Senior Correctional Officer Navarrete was assigned
17 to Search and Escort at Southern Desert Correctional Center. At
18 approximately 06:45 hours inmate Norelus #1104257 came off the Culinary
19 wall **while C/O Valdez was attempting to restrain him** resulting in a
20 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.

21 Exhibit 2, p. NDOC 144 (Emphasis added).

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

24 **NAC 284.650 Causes for disciplinary action (NRS 284.065, 284.155,**
25 **284.383). Appropriate disciplinary or corrective action may be taken**
26 **for the following causes:**

27 NAC 284.650(1) Activity which is incompatible with an employee's
28 conditions of employment established by law or which violates a provision
of NAC 284.653 or NAC 284.738 to 284.771, inclusive.

NAC 284.650(10) Dishonesty.

1 NAC 284.650(21) Any act of violence which arises out of or in the course
2 of the performance of the employee's duties, including without limitation,
stalking, conduct that is threatening or intimidating, assault, or battery.

3 **Nevada Department of Corrections Administrative Regulations**
4 **AR 339.07 CLASS OF OFFENSE GUIDELINES**

5 **AR 339.07.9 FALSE OR MISLEADING STATEMENTS**

6 A. Knowingly providing false or misleading statements, including
7 omissions, either verbally or in written reports or other documents,
8 concerning actions related to the performance of official duties. Or
9 knowingly providing false or misleading statements, including omissions,
10 in response to any question or request for information in any official
investigation interview, hearing, or judicial proceeding. CLASS 5

11 **AR 339.07.17 UNAUTHORIZED USE OF FORCE**

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

14 Exhibit 2, p. NDOC 118.

15 A Pre-Disciplinary Hearing took place on April 17, 2017. *See* Pre-disciplinary Hearing Report
16 attached hereto as **Exhibit "4."** Warden Perry Russell, then Associate Warden of High Desert State
17 Prison, served as the Pre-Disciplinary Officer. *Id.* At the Pre-Disciplinary Hearing, the Employee
18 presented his side of the events and any mitigating factors. *Id.* After reviewing the SOC and hearing from
19 Employee, the Pre-Disciplinary Hearing Officer concurred with the recommended discipline of a
20 dismissal from State service. *Id.* The Pre-Disciplinary Hearing Officer found that Employee "completed
21 and submitted a report documenting the events of the Use of Force that were not compatible or consistent
22 with what is viewed in the video." *Id.* The Pre-Disciplinary Hearing Officer concluded that it would be
23 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.
Exhibit 2.

24 **B. Appeal Hearing and Decision**

25 Employee appealed his dismissal pursuant to NRS 284.390 on May 8, 2017. Exhibit 1, p. 5.
26 During the Appeal Hearing in this matter, significant testimony was obtained from the following
27 witnesses: Senior Investigator Rod Moore, Officer David Wachter, former Associate Warden, Minor
28 Adams, Warden Russell, Warden Jerry Howell, and Employee. Additionally, during the hearing
significant documents were admitted into evidence, including but not limited to, the investigative file,

1 which included summary of witness interviews with inmates Norelus, Michael White, Lawrence
2 Williams, and Ralph Jackson. Exhibit 2, NDOC 145. Despite this evidence, the Decision is devoid of
3 any specific mention of the above referenced witnesses and inmates. Exhibit 1.

4 Additionally, at the hearing, NDOC AR 405, Use of Force was admitted into evidence. *See* AR
5 405 attached hereto as **Exhibit “5.”**² AR 405 defines excessive force as “the use of more force than an
6 objective trained and competent correctional peace officer faced with similar facts and circumstances
7 would use to subdue an attacker, overcome resistance, affect custody or gain compliance with a lawful
8 order.” AR 405 further defines reasonable force as “force which is objectively reasonable based on the
9 totality of the circumstances and the facts known to the officer at the time to subdue an attacker overcome
10 resistance, affect custody, or gain compliance with a lawful order.” AR 405 defines spontaneous force
11 as actions that staff may immediately take in response to an emergency situation. AR 405.03 further
12 provides that staff may use force to protect himself or any other individual from physical harm by an
13 inmate and will be proportionate to the threat exhibited by the inmate. AR 405.03 further states that **any**
14 **staff** witnessing a Use of Force that is either **excessive or unnecessary is required to immediately**
15 **report** their observations to the shift supervisor both verbally, subsequent to the incident, in a written
16 report.

17 Evidence was admitted showing that inmate Norelus was small in stature and had mental health
18 issues. *See* Exhibit 3; Exhibit 2, NDOC 145. Evidence was also admitted that Valdez and Employee had
19 previously engaged in name-calling and singling Norelus out. Exhibit 2, NDOC 145. Furthermore,
20 Officer David Wachter testified he had to counsel Valdez on his interactions with inmates and said “our
21 job is to quell situations, not get them riled up.” Exhibit 2, NDOC 146. Employee admitted he had worked
22 with Valdez for over one year. Exhibit 2, NDOC 129. Thus, Employee likely knew of Valdez’s negative
23 interactions with inmates.

24 At the hearing, Associate Warden Minor Adams provided testimony³ on AR 405 and OP 405 and
25 407 and testified that officers are to deescalate any situations with inmate. Several witnesses, including
26 AW Adams, Supervisory Investigator Moore, Officer Wachter, Warden Howell and Employee testified

27 ² Operational Procedure (OP) 405, Use of Force, and OP 407, Use of Handcuffs and Restraints and
28 Search and Escort Post Order were also admitted into evidence which outlined SDCC policies and procedures on
use of force and restraints but they are confidential and cannot be published.

³ As the Petition for Judicial Review was just filed, the Record on Appeal is not available yet for
citations.

1 that NDOC does not train their officers to use the manner of force as was used on inmate Norelus (arm
2 around inmate's neck or choke hold). Additionally, several of the same witnesses, testified that a non-
3 compliant inmate can be restrained and that an officer placing his arm around the inmate's neck is not an
4 appropriate or trained method to restrain an inmate.

5 Furthermore, several supervisory witnesses, including AW Adams, Warden Russell and Warden
6 Howell testified that the report written by Employee was dishonest. Particularly, these witnesses testified
7 the statement that "inmate Norelus #1104257 came off the Culinary wall while C/O Valdez was
8 attempting to restrain him resulting in a spontaneous use of force" was both misleading and false because
9 the video evidence does not support that Officer Valdez was attempting to restrain or restraining the
10 inmate. Further, the same witnesses did not believe that the inmate came off the wall until Officer Valdez
11 pushed Norelus into the wall, placed him in a "choke hold", and pulled back. Lastly, the same witnesses
12 testified that the report did not include relevant facts of the events leading up to the force, which were, in
13 their trained opinions, omissions from the report. There was substantial testimony that a noncompliant
14 inmate could be restrained and taken to the on duty sergeant rather than left on the wall for an extended
15 period of time.

16 The Hearing Officer found that there was no signs that Officer Valdez actually had his handcuffs
17 in hand and that the inmate's "hands remain on the wall." Exhibit 1, p. 3. The hearing officer further
18 found that Valdez's conduct appears to be "unjustified." *Id.* The hearing officer found that there is no
19 rule on the length of time an inmate could be kept on the wall. *Id.* at 7. Yet, the hearing officer heard
20 testimony that there appeared to be no reason for Norelus to have been on the wall for over ten minutes.
21 Despite this evidence, the hearing officer found that Employee did not permit the use of unauthorized
22 force.

23 As stated above, the hearing officer found that the inmate's hands remained on the wall and that
24 there was no evidence that Valdez was restraining the inmate. However, despite these findings, the
25 hearing officer did not find that Employee's statement that the "inmate... came off the wall while C/O
26 Valdez was attempting to restrain him" to be false or misleading. Instead, the hearing officer after "much
27 soul searching" found the report to be factually accurate. Exhibit 1, p. 8

28 Despite the substantial evidence in the record, the Hearing Officer found that "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 that “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.” Exhibit 1, p. 9.

III. LEGAL STANDARD

NRS 233B.140 governs the procedure for seeking a stay of a final administrative agency decision in Nevada. It provides as follows:

1. A petitioner who applies for a stay of the final decision in a contested case shall file and serve a written motion for the stay on the agency and all parties of record to the proceeding at the time of filing the petition for judicial review.
2. In determining whether to grant a stay, the court shall consider the same factors as are considered for a preliminary injunction under Rule 65 of the Nevada Rules of Civil Procedure.
3. In making a ruling, the court shall:
 - (a) Give deference to the trier of fact; and
 - (b) Consider the risk to the public, if any, of staying the administrative decision.

Generally, pursuant to NRS 233B.140, “the petitioner must provide security before the court may issue a stay.” However, the state or an agency of the state is not required to post security as a condition for filing such a motion. *See* NRCP 65(2)(c).

The Nevada Supreme Court has adopted specific factors to consider in determining whether a preliminary injunction (or in this case, a stay) should issue:

A party seeking the issuance of a preliminary injunction bears the burden of establishing (1) a likelihood of success on the merits; and (2) a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy.

S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 408, 23 P.2d 243, 246 (2001).

IV. LEGAL ARGUMENT

A. Likelihood Of Success On The Merits

In order for a stay to issue, NDOC will have to demonstrate a likelihood of success on the merits. NRS 233B.135 provides the grounds for granting a Petition for Judicial Review and states:

1 The court shall not substitute its judgment for that of the agency as to the
2 weight of evidence on a question of fact. The court may remand or affirm
3 the final decision or set it aside in whole or in part if substantial rights of
the petitioner have been prejudiced because the final decision of the agency
is:

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

11 NRS 233B.135 (3).

12 The authority granted the Hearing Officer under NRS 284.390(6) is to determine whether the
13 agency had just cause for the discipline “as provided in NRS 284.385.” A dismissal for “just cause is one
14 which is not for any arbitrary, capricious, or illegal reason and which is one based upon facts (1) supported
15 by substantial evidence and (2) reasonably believed by the employer to be true.” *Sw. Gas Corp. v. Vargas*,
16 111 Nev. 1064, 1077, 901 P.2d 693, 701 (1995).

17 **1. The Hearing Officer’s reliance on NDOC AR 339 was a clear error of law**

18 The hearing in this case concluded on April 16, 2019. On May 2, 2019, prior to the hearing officer
19 issuing his Decision, the Nevada Supreme Court issued its Opinion in *NDOC v. Ludwick*, holding that
20 NDOC Administrative Regulation (AR) 339 is “invalid and of no legal effect for purposes of employee
21 discipline” because AR 339 has not been approved by the Personnel Commission. *NDOC v. Ludwick*,
22 135 Nev. Adv. Op. 12, ___ P.3d ___ (May 2, 2019). The Supreme Court also found that it was “a clear
23 error of law warranting remand” for a hearing officer to rely on AR 339 “for any purpose.” *Ludwcik* at
24 9. *Ludwick* further held that the hearing officer must address whether the employee’s actions constitutes
25 violations of NAC 284.650 as listed in the specificity of charges. *Ludwick* at 9. If the hearing officer finds
26 that the employee violated the relevant NAC provisions, the hearing officer must then apply the
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1 remaining two steps outlined in *O'Keefe*⁴ to determine whether those violations warranted termination
2 as a first-time disciplinary action. *Ludwick* at 9 (emphasis added).

3 On May 2, 2019, Employee filed a Supplemental Brief Regarding Change of Law advising the
4 Hearing Officer that he could not rely on AR 339 for employee discipline and doing so would be a clear
5 error of law. *See* Supplemental Brief Regarding Change of Law attached hereto as **Exhibit "6."** On May
6 3, 2019, NDOC filed its Response noting that while AR 339 was invalidated, the hearing officer was
7 required to address whether the Employee violated NAC 284.650 as listed in the SOC and could rely on
8 other NDOC administrative regulations, including AR 405, OP 405 and OP 407 as well as the Post Order
9 for the Search and Escort Unit, which do not require approval from the Personnel Commission. *See*
10 Response to Supplemental Brief Regarding Change of Law attached hereto as **Exhibit "7."**

11 Despite this change in law and direction from the Nevada Supreme Court, the hearing officer did
12 not address whether Employee's actions violated NAC 284.650. Instead, the Hearing Officer made
13 factual findings, using the specific language found in AR 339.07.9(A) and AR 339.07.17(A). *See* Exhibit
14 1, p. 9. Accordingly, the Hearing Officer's analysis and reliance on both AR 339.07.9(A) and AR
15 339.07.17(A), which formed the sole basis for his Decision, was legal error.

16 **2. The Hearing Officer violated statutory provisions and committed clear error**
17 **when he failed to consider whether Employee violated NAC 284.650 (1), (10) and (21).**

18 NAC 284.794(1) specifically instructs that "the hearing officer shall determine the evidence upon
19 the charges and specifications as set forth by the appointing authority in the appropriate documents . . ."
20 In accordance with NAC 284.656(3)(c), NDOC served Employee with a Specificity of Charges on March
21 16, 2017, recommending his dismissal from state service for having violated NAC 284.650(1), NAC
22 284.650(10), NAC 284.650(21), AR 339.07.9(A) and AR 339.07.17(A). Exhibit 2. It was upon this basis
23 that Employee was later dismissed from state service on April 21, 2017. *Id.* Employee then appealed his
24 dismissal and generally disputed his violation of the above-noted regulations. Exhibit 1. Employee's
25 violation of NAC 284.650(1), NAC 284.650(10) and NAC 284.650(21) were noted in NDOC's
26 Prehearing Statement, testimony was elicited from Warden Howell on these violations and even the

27 ⁴ A hearing officer must apply a three-step review process with respect to employee terminations: (1) a *de*
28 *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. Adv. Op. 92, at *12–13 (Dec. 6, 2018).

1 Decision recognized that these violations were at issue. Nevertheless, the Hearing Officer failed to rule
2 on (or even consider) whether Employee violated NAC 284.650(1), NAC 284.650(10) and NAC
3 284.650(21).

4 In doing so, the Hearing Officer neglected his statutory duty to rule on all the contested violations
5 at issue. *See* NRS 284.390(1); *see also* NRS 284.390(7). Furthermore, the Hearing Officer's failure to
6 even consider these NAC 284.650 violations is even more significant following the recent *Ludwick*
7 decision, in which the Supreme Court emphasized that a hearing officer **must** rule on such violations
8 listed in the specificity of charges. *Ludwick* at 9 (emphasis added).

9 Moreover, the Hearing Officer's failure to consider these NAC 284.650 violations was not
10 harmless error, since substantial evidence confirmed that Employee violated NAC 284.650(1) by
11 permitting the use of unnecessary, unauthorized or excessive force against an inmate in direct violation
12 of AR 405, SDCC OP 405 and SDCC OP 407, while substantial evidence also confirmed that Employee
13 violated NAC 284.650(21) by permitting an act of violence, including intimidation, assault or batter, to
14 occur in the performance of his duties. Furthermore, the substantial evidence confirmed that Employee
15 was dishonest when he submitted a report containing false and/or misleading statements as well as
16 omissions. As such, the Hearing Officer committed clear legal error by disregarding his statutory
17 obligations and by failing to rule on all the charges at issue, especially since these charges under NAC
18 284.650 were supported by substantial evidence in the record.

19 **3. The Hearing Officer clearly erred when he used the preponderance of the**
20 **evidence standard.**

21 The Supreme Court recently clarified the appropriate role of a hearing officer. In *O'Keefe v.*
22 *Dep't. of Motor Vehicles*, the Supreme Court established the correct three-part test review hearing officers
23 should conduct when evaluating a termination appeal. 134 Nev. Adv. Op. 92, ___ P.3d ___ (Dec. 6,
24 2018). First, the hearing officer reviews de novo whether the employee in fact committed the alleged
25 violation. *O'Keefe* at *12; *See also* NAC 284.798. Pursuant to NAC 284.798, "the hearing officer shall
26 make no assumptions or innocence or guilt but shall be guided in his or her decision by the weight of the
27 evidence as it appears to him or her at the hearing."

28 Neither *O'Keefe* nor NAC 284.798 provide that the hearing officer should use a preponderance
of the evidence standard. Instead, *O'Keefe* supports that the hearing officer applies a substantial evidence

1 standard when determining if a violation occurred. *See id.* at *9 (explaining the reasonableness standard
2 is the substantial evidence standard of review); *id.* at *10 (noting a discharge for just cause is one that is
3 supported by substantial evidence); *id.* at *13 (noting that substantial evidence supported the appointing
4 authority's decision).

5 "A discharge for 'just' or 'good' cause is one which is not for any arbitrary, capricious, or illegal
6 reason and which is one based on facts (1) *supported by substantial evidence*, and (2) reasonably believed
7 by the employer to be true." *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 1078, 901 P.2d 693, 701
8 (1995)(emphasis added).

9 Substantial evidence has been defined as that which "a reasonable mind might accept as adequate
10 to support a conclusion," *State, Emp. Sec. Dep't v. Hilton Hotels*, 102 Nev. 606, 608, 792 P.2d 497, 498
11 (1986), citing *Richardson v. Perales*, 402 U.S. 389 (1971).

12 A substantial evidence standard of review refers to the reviewing body's inquiry of whether the
13 agency's factual determinations are reasonably supported by evidence of sufficient quality and quantity.
14 *Nassiri v Chiropractic Physicians' Bd.*, 130 Nev. __, __, 327 P.3d. 487, 490 (2014). *See also Nevada*
15 *Dep't of Motor Vehicles v. Adams*, No. 68057, 2017 WL 521774, at *2 (Nev. App. Jan. 30, 2017)
16 (unpublished) (noting that *Nassiri* may have caused confusion because it noted the standard of proof was
17 by a preponderance of the evidence, but that was in relation to the agency's determination for its
18 [occupational] licensing [revocation] proceedings; "substantial evidence" is the
19 proper standard of review to be used during the hearing officer's review.)

20 Here, the hearing officer made findings of fact that NDOC did not meet its burden of proving by
21 *preponderance of the evidence* that the Employee permitted use of force or knowingly and intentionally
22 submitted a report with false or misleading information. The hearing officer used a burden that is not
23 supported by the relevant NAC provisions or the recent Nevada Supreme Court and Nevada Court of
24 Appeals opinions outlining the role of the hearing officers. Since the Hearing Officer relied on an
25 improper burden, the hearing officer clearly erred and abused his discretion in determination that
26 Employee did not engage in the misconduct.

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1 **4. The Hearing Officer’s decision was arbitrary and capricious and clearly erroneous**
2 **in view of the reliable, probative, and substantial evidence on the whole record.**

3 In *O’Keefe v. Dep’t. of Motor Vehicles*, the Supreme Court established the correct three-part test
4 review hearing officers should conduct when evaluating a termination appeal. 134 Nev. Adv. Op. 92, ____
5 P.3d ____ (Dec. 6, 2018). First, the hearing officer reviews de novo whether the employee in fact
6 committed the alleged violation. *O’Keefe* at *12. The hearing officer applies a substantial evidence
7 standard when determining if a violation occurred. *See id.* at *9 (explaining the reasonableness standard
8 is the substantial evidence standard of review); *id.* at *10 (noting a discharge for just cause is one that is
9 supported by substantial evidence); *id.* at *13 (noting that substantial evidence supported the appointing
10 authority’s decision). Second, the hearing officer determines whether the violation is serious enough to
11 support termination as a first-time disciplinary action. *See id.* at *12; NRS 284.383(1). “If the agency’s
12 published regulations prescribe termination as an appropriate level of discipline for a first-time offense,
13 then that violation is necessarily ‘serious’ as a matter of law.” *O’Keefe* at 134 Nev. *12-13. Third, “the
14 hearing officer applies a deferential standard of review to the agency’s determination that termination
15 will serve ‘the good of the public service.’” *Id.* at *13. The appointing authority must merely demonstrate
16 a “rational connection between the facts found and the choice made[.]” *Id.* at *13 (internal citation
17 omitted). This constitutes the just cause analysis.

18 Here, the Hearing Officer only reached step one under *O’Keefe*. The hearing officer determined
19 that Navarrete did not commit the alleged violations. However, the hearing officer determination was
20 arbitrary and capricious and clearly erroneous in view of the reliable, probative, and substantial evidence
21 on the whole record.

22 As stated at length above, there was significant testimony and evidence admitted supporting that
23 the Employee committed the alleged violations. The video of the use of force in this case was admitted
24 into evidence. The video clearly shows that inmate Norelus singled out to stay on the wall for over ten
25 minutes after his pat down search was complete. While the video shows inmate Norelus acting in a fidgety
26 manner, the video clearly shows that the inmate was not a physical threat to the officers. In fact the
27 hearing officer found that the inmate “did not appear to be a physical threat.” Exhibit 1, p. 7.

28 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

1 the force used was not a spontaneous use of force, because there was no emergency. These policies and
2 procedures further exhibited that the force used was not reasonable and was in fact excessive because
3 Norelus was not a physical threat to the officers and the testimony of other NDOC staff stated that the
4 force used was not reasonable in light of the circumstances. Additionally, the policies and procedures, as
5 well as the substantial evidence and testimony show that Valdez was not “attempting to restrain” Norelus.
6 Valdez did not have his handcuffs out and did not approach the inmate in a way to indicate he was going
7 to restrain him.

8 Additionally, evidence admitted supported that Norelus was small in stature and had mental health
9 issues. *See* Exhibit 3; Exhibit 2, NDOC 145. Evidence was also admitted that Valdez and Employee had
10 previously engaged in name-calling and singling Norelus out. Exhibit 2, NDOC 145. Furthermore,
11 Officer David Wachter testified he had to counsel Valdez on his interactions with inmates and said “our
12 job is to quell situations, not get them riled up.” Exhibit 2, NDOC 146.

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

20 Furthermore, several supervisory witnesses, including AW Adams, Warden Russell and Warden
21 Howell testified that the report written by Employee was dishonest. Particularly, several witnesses
22 testified the statement that “inmate Noreulus #1104257 came off the Culinary wall while C/O Valdez
23 was attempting to restrain him resulting in a spontaneous use of force” was both misleading and false
24 because the video evidence does not support that Officer Valdez was attempting to restrain or restraining
25 the inmate.

26 The Hearing Officer found that there was no signs that Officer Valdez actually had his handcuffs
27 in hand and that the inmate’s “hands remain on the wall.” Exhibit 1, p. 3. The hearing officer further
28 found that Valdez’s conduct appears to be “unjustified.” *Id.* The hearing officer found that 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

1 testimony that there appeared to be no reason for Norelus to have been on the wall for over ten minutes.
2 Despite this evidence, the hearing officer found that Employee did not permit the use of unauthorized
3 force.

4 As stated above, the hearing officer found that the inmate's hands remained on the wall and that
5 there was no evidence that Valdez was restraining the inmate. However, despite these findings, the
6 hearing officer also did not find that Employee's statement that the "inmate... came off the wall while
7 C/O Valdez was attempting to restrain him" to be false or misleading. Instead, the hearing officer after
8 "much soul searching" found the report to be factually accurate. Exhibit 1, p. 8.

9 The Hearing Officer's determination that Employee did not permit unauthorized force and that
10 Employee was not dishonest when he wrote his incident report is contrary to the reliable, probative and
11 substantial evidence in the while record. Furthermore, the Hearing Officer's reference that he came to a
12 conclusion after "soul searching" is an abuse of discretion, arbitrary and capricious, and in error in light
13 of the reliable, probative, and substantial evidence in the record. The Hearing Officer's personal opinions
14 and soul searching are not a basis for determining if the Employee engaged in misconduct.

15 **B. Irreparable Harm**

16 The second element NDOC must establish is that it will face irreparable harm should it have to
17 reinstate Employee. As will be shown below, this element is satisfied.

18 Irreparable harm is an injury "for which compensatory damage is an inadequate remedy." *Dixon*
19 *v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029 (1987). NDOC terminated Employee when he
20 violated NAC 284.650(1), NAC 284.650(10) and NAC 284.650(21). At the hearing, NDOC had
21 substantial testimony from Warden Howell, Warden Russell, Associate Warden Adams, Correctional
22 Officer Wachter and Supervisory Investigator Moore that Employee's conduct in allowing the inmate to
23 stay on the wall for over ten minutes was improper. The testimony also supported that the supervisory
24 staff determined Employee's report to contain false or misleading statements and omissions. NDOC's
25 appointing authority deemed Employee's conduct to be a serious and that his dismissal would serve the
26 good of the public service.

27 Here, the hearing officer ordered that Employee be restored to his position as a senior correctional
28 office. The petition for judicial review could take several months before the parties receive a final
decision. If a stay is not granted, NDOC would be required to retain an employee that engaged in

1 misconduct and did not show good judgment. NDOC terminated Employee for committing serious
2 infractions. By requiring NDOC to retain Employee as a senior correctional officer, they are forced to
3 retain an employee that NDOC does not see fit for the job. Employee was dismissed from state service
4 for activity which is incompatible with his conditions of employment, dishonesty and allowing an act of
5 violence to occur during the course of employee's duties in violation of NAC 284.650 (1), (10) and (21).
6 Employee's conduct was also in violation of NDOC AR 339.07.9(A), false and misleading statements,
7 and AR 339.07.17(A), unauthorized use of force.⁵ Employee was employed in a supervisor position as a
8 senior correctional officer and was the lead search and escort officer that shift. The misconduct at issue
9 involves employee's failure to comply with NDOC's policies on use of force as found in AR 405 and
10 related SDCC operational procedures as well as employee's submittal of a dishonest incident report,
11 which contained false and/or misleading statements as well as omissions. Employee's ability to prevent
12 any use of unauthorized, unreasonable and unnecessary force is critical to his job particularly considering
13 that NDOC is attempting to avoid inmate litigation involving alleged violations of civil rights.
14 Furthermore, Employee's violations for dishonesty are a serious offense, which amount to a Class 5,
15 terminable offense. NDOC's policies are in place to maintain the integrity of the agency. The testimony
16 at the hearing explained that NDOC, as a law enforcement agency, holds their staff to high standard and
17 expects them to provide honest and complete report writing. NDOC provided significant testimony of
18 the seriousness of the offenses committed by Employee and how as a State peace officer he is expected
19 to tell the truth. NDOC does not desire the services of an employee who lies and allows unauthorized force
20 to be used on inmates. By requiring NDOC to reinstate an employee who disregarded the policies of
21 NDOC is tantamount to requiring NDOC to reinstate an employee it feels has a disregard for the
22 importance of his job and is unfit to fulfill the duties of a senior correctional officer or a peace officer
23 position. Simply stated, having Employee return to work as a senior correctional officer would negatively
24 impact NDOC, their staff, and the good of the public.

25 "[T]he critical need to maintain a high level of security within the prison system entitled the
26 appointing authority's decision deference...whenever the security concerns are implicated in an
27 employee's termination." *Dredge* 105 Nev. at 42, 769 P.2d 58. The United States Supreme Court has

28 ⁵ *Ludwick* invalidated AR 339; however, on June 21, 2019, the Personnel Commission approved Prohibitions and Penalties for NDOC which include the same violations. The false and misleading charge is still considered a Class 5 terminable offense and the unauthorized force charge has a penalty of 3-5 for a first offense.

1 long held “[t]he administration of a prison is at best an extraordinarily difficult undertaking” and the
2 safety of an institution’s inmates and employees is perhaps the most fundamental responsibility of the
3 prison administration. *Hudson v. Palmer*, 468 U.S. 517, 526-527 (1984); *Hewitt v. Helms*, 459 U.S. 460,
4 473 (1983). Based upon the unique difficulty of correctional work, prison administrators “should be
5 accorded wide-ranging deference in the adoption and execution of policies and practices that in their
6 judgment are needed to preserve internal order and discipline and maintain institutional security.”
7 *Hudson*, 468 U.S. at 526-27. Further, judicial deference should be accorded not merely because prison
8 administrations have a better grasp of correctional considerations and risks, but also because correctional
9 operations are specifically the authority of the Legislative and Executive Branches of our Government,
10 not the Judicial. *Bell v. Wolfish*, 441 U.S. 520, 547-549 (1979); *see Nev. Const. art. 5, § 21*.

11 Here, in determining that Employee should be terminated, NDOC relied on the seriousness of the
12 offense. NDOC’s appointing authority is in the best position to determine what is best for the prison’s
13 administration and did so in determining that the substantial evidence in the record warranted dismissing
14 Employee from state service. If a stay is not granted, it takes the deference that NDOC should be given
15 and substitutes the Court’s determination of whether or not NDOC would suffer irreparable harm.

16 Moreover, by requiring NDOC to keep an employee that engaged in serious misconduct, NDOC
17 could be subject to civil liability should Employee engage in similar misconduct in the future. If a stay is
18 not granted and Employee while working at NDOC, engages in or permits unauthorized force to be used
19 or writes a false and/or misleading report, which results in an inmate or staff member being injured,
20 NDOC could be subject to negligent retention for retaining Employee despite knowing his misconduct.

21 The Hearing Officer also ordered that Employee be awarded back pay and benefits for the period
22 pursuant to the parties stipulation.⁶ The relevant period of time is approximately 11 months which equates
23 to approximately \$60,000 in gross income. The purpose of this stay is to limit a windfall for the Employee
24 and limit the hardship on the NDOC if it is successful on appeal. If the hearing officer’s Decision is
25 reversed and Employee’s dismissal from State service is upheld, the award of back pay and benefits will
26 be reversed. Obviously, this means Employee will not come back to work and there will be no future
27 compensation from which the unentitled payments can be deducted. If NDOC is successful on its appeal

28 ⁶ The parties stayed the back pay pursuant to Employee’s request to continue the administrative appeal
pending his criminal trial. Therefore, pursuant to the agreement, Employee will not receive back pay from
January 26, 2018-April 1, 2019.

1 of Employee's reinstatement and yet required to pay all back pay and benefits while it's Petition for
2 Judicial Review remains pending, it is unlikely that it will be able to recover any erroneously paid money
3 and benefits. This is because there is no mechanism for the recoupment of monies erroneously paid to
4 employees in back pay. *See e.g., State of Nevada Office of the Military v. Simpson*, No. 72618, footnote
5 2 (unpublished); *Ransier v. State Indus. Ins. Sys.*, 104 Nev. 742, 766 P.2d 274 (1988) (finding that SIIS
6 could not recover overpaid workers compensation amounts from an employee after succeeding on its
7 Petition for Judicial Review). The Nevada legislature did not include a provision for a State agency to
8 recover wrongfully awarded back pay and benefits pending appeal. *See* NRS 227.150(2)(c) and (3)
9 (allowing for the recovery of overpaid amounts to State employees in certain instances not applicable
10 here). The State treasury, despite any legal remedy that may possibly exist, will never in reality or
11 practically speaking be able to recover any money wrongfully paid to Employee or otherwise receive
12 compensatory damages. NDOC may very well be without a remedy. The irreparable harm in this
13 situation is clear.

14 Employee, however, will not suffer the same harm if the Motion for Stay is granted. If the issues
15 on appeal are found in the Employee's favor, there will be no dispute that he would receive any monies
16 due to him in back pay. Simply stated, Employee can be made whole—unlike NDOC and the other staff.
17 Therefore, there is no indication that Employee will suffer any irreparable harm or serious injury.
18 Accordingly, the probability of irreparable harm clearly weighs in NDOC's favor, and for granting the
19 stay.

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1 **V. CONCLUSION**

2 Based on the foregoing, NDOC has met the criteria for a stay of the enforcement of the Hearing
3 Officer's May 30, 2019, final order reinstating Employee with full pay and benefits. NDOC requests that
4 this Court grant the stay so that the Hearing Officer's Decision be stayed until this Court makes a final
5 decision on NDOC's Petition for Judicial Review.

6 DATED: July 1, 2019.

7 AARON D. FORD
8 Attorney General

9 By: /s/ Michelle Di Silvestro Alanis
10 Michelle Di Silvestro Alanis (Bar No. 10024)
11 Deputy Attorney General

12 *Attorneys for Petitioner*
13 *State of Nevada ex rel. Department of Corrections*

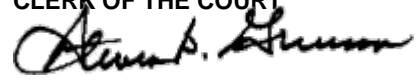


EXHIBIT 1

EXHIBIT 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 NAC 284.650:

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

20 He was also charged with the following:

21 AR 339.07.9 False or Misleading Statements

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

25 AR 339.07.17 Unauthorized Use of Force

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

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

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

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

7 **2. LEGAL AUTHORITY**

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

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

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

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

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

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

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

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

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

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

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

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

15 **3. DISCUSSION**

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

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

1 every infraction was not a feasible alternative.

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

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

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

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

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

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

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

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

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

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

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

11 **4. FACTUAL FINDINGS**

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

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

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

17 **ORDER**

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

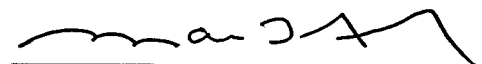
20 Employee Jose Navarette shall be restored to his prior position with back pay and benefits
21 in accord with the prior agreement of the parties.

22 DATED this 28 day of May, 2019.

23

24

25


MARK L. GENTILE
Hearing Officer

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

1 CERTIFICATE OF MAILING

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

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

8 DANIEL MARKS, ESQ.
9 LAW OFFICE OF DANIEL MARKS
610 S NINTH ST
LAS VEGAS NV 89101

10 DEPARTMENT OF CORRECTIONS
11 JAMES DZURENDA, DIRECTOR
3955 WEST RUSSELL ROAD
12 LAS VEGAS NV 89118

13 CHRISTINA LEATHERS, HUMAN RESOURCES MANAGER I
14 NEVADA DEPARTMENT OF CORRECTIONS
3955 W RUSSELL RD
15 LAS VEGAS NV 89118-2316

16 MICHELLE D. ALANIS, ESQ.
17 DEPUTY ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
18 555 E WASHINGTON AV #3900
LAS VEGAS NV 89101

19 Dated this 30th day of May, 2019.

20 
21 _____
22 Zoe McGough Legal Secretary II
Employee of the State of Nevada
23
24
25
26
27
28

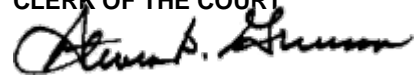


EXHIBIT 2

EXHIBIT 2

**STATE OF NEVADA
SPECIFICITY OF CHARGES**

SP-1642S

Name: Navarrete, Jose

Employee ID#: 41181

Budget Account: 3738

Current Class: Senior Correctional Officer

Grade: 34 Step: 04

Supervisor: Minor Adams, A.W.

Department: Corrections

Division: SDCC Section: Custody

Date: 3/14/17 Time: 10:45 a.m.

This is to inform you that you are alleged to have violated section 284.650 of the Nevada Administrative Code, as follows: -

Date(s)	Violation(s)
See Attached	See Attached

A recommendation has been made by: Jo Gentry
Name

Warden
Title

that it is in the best interest of the State of Nevada to take the following disciplinary action(s):

Terminated from State service

Proposed/Actual Effective Date: 4/5/17- 4/21/17

Jo Gentry
Signature (Person recommending action)

Witness!

☒ In accordance with NAC 284.656, a hearing has been scheduled on your behalf to determine whether such action is warranted. Following the hearing and prior to the proposed effective date, you will be given a copy of the finding(s) and recommendation(s), if any, resulting from the hearing and be informed in writing of the appointing authority's decision regarding the recommended action(s).

☐ In accordance with paragraph 2(b) of NAC 284.6563, the effective date of your discipline is immediate as noted above. A hearing in accordance with NAC 284.656 will follow as soon as practicable after the effective date of your discipline.

Note: If you wish to appeal your discipline, please be aware that pursuant to NRS 284.390, an appeal is deemed timely if it is postmarked within 10 working days after the proposed effective date of the disciplinary action.

The hearing will be conducted by:

4/12/17

Gabriela Garcia Perry Russell
Name Associate Warden

at 10:00 a.m.

on 3/28/17

Name High Desert State Prison

Title

22010 Cold Creek Rd, Indian Springs, NV

Time

Date

at Casa Grande Transitional Housing - 3955 W. Russell Road, Las Vegas, Nevada 89148

89070

Location (include complete address)

Pursuant to NAC 284.656, the hearing process is an informal proceeding between you and the appointing authority or his or her designated representative. Witnesses are not permitted. Each party may be accompanied by a person of his or her choice. Please refer to NAC 284.656 or direct questions concerning this notice and hearing to the appointing authority, personnel officer, or other agency personnel familiar with the procedure. (For information regarding the hearing and your right to waive the hearing, you should refer to NAC 284.6561.)

James E. Smith
Director

Signature of Appointing Authority or Designated Representative

Signature of Employee: I understand that by acknowledging receipt of this Specificity of Charges, I am neither admitting guilt nor giving up any appeal rights I may have under NRS 284.390.

Jo Navarrete
Employee's Signature

Date

3.16.17

Time

907a

Witness' Signature (Required if employee refuses to sign)

Jo Gentry Warden
Signature and Title (Person serving this notice)

Copy: Division of Human Resource Management - Central Records Service Jacket; Department; Appointing Authority; Employee.

Name: Navarrete, Jose
Title: Senior Correctional Officer
Duty Station: Southern Desert Correctional Center

I. ADMINISTRATIVE REGULATIONS AND APPLICABLE POST ORDERS, DIRECTIVES, AND CODES TO BE CHARGED:

You are considered to be in violation of the following:

A. NAC 284.650 Causes for disciplinary action (NRS 284.065, 284.155, 284.383). Appropriate disciplinary or corrective action may be taken for the following causes:

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 284.738 to 284.771, inclusive.

NAC 284.650(10) Dishonesty.

NAC 284.650(21) Any act of violence which arises out of or in the course of the performance of the employees duties, including without limitation, stalking, conduct that is threatening or intimidating, assault or battery.

B. AR 339.05 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**

BRIEF SUMMARY OF FACTS:

Senior Correctional Officer Jose Navarrete was the assigned Lead Search and Escort Officer present during the Use of Force incident that had taken place on October 9, 2016 at Southern Desert Correctional Center and was the immediate supervisor of Correctional Officer Valdez on this date.

While supervising the evening dinner meal, Senior Officer Navarrete and Officer Paul Valdez ordered Inmate Norelus to place his hands on the outside wall of the culinary dining area and ordered the inmate not to move. Senior Officer Navarrete and Officer Valdez mandated this inmate to stay in this position for approximately 15 – 16 minutes. Video recording depicts Officer Valdez approaching the inmate, placing hand/arm around the inmate's neck/throat area, and pulling the inmate's back ultimately both falling to the ground.

Name: Navarrete, Jose
Title: Senior Correctional Officer
Duty Station: Southern Desert Correctional Center

BRIEF SUMMARY OF FACTS CONTINUED

Senior Correctional Officer Navarrete knowingly completed and submitted a report documenting the events of the Use of Force that were not compatible with what was viewed in the video of the same Use of Force.

CONCLUSION AND BASIS FOR RECOMMENDATION:

Based on witness' statements, written documentation, and video recordings gathered during the investigation, there is sufficient evidence to sustain the aforementioned allegations whereas Senior Correctional Officer Navarrete failed to intervene or attempt to prevent the unauthorized use of force against Inmate Norelus.

Video recordings confirm that Senior Correctional Officer Navarrete was present during the entire incident beginning when the inmate was placed on the culinary wall up to the point when Officer Valdez grabbed the inmate's throat and pulled the inmate to the ground. The video recordings displayed no evidence of any serious threat to the safety of staff, public, inmates, and/or prison security. There was no evidence of the inmate displaying any physical threats towards the staff members. At no time during the video recording did it show Senior Correctional Officer Navarrete intervening during this incident. The video recording of this incident does not substantiate the written report entered by Senior Correctional Officer Navarrete. The video recording shows the inmate not breaking contact with the wall or moving aggressively towards any officer. The video recording does not show Officer Valdez attempting to restrain the inmate prior to using force.

The Department recommends that Senior Correctional Officer Jose Navarrete be terminated from State service.

II. **LENGTH OF EMPLOYMENT:** Hired with the Department on May 5, 2008

III. **PRIOR DISCIPLINARIES:** None

IV. **EVALUATIONS:**

Date	Rating
03-20-16	Meets Standards
03-19-15	Meets Standards
03-04-14	Meets Standards
11-05-13	Meets Standards
05-15-11	Meets Standards
05-19-10	Meets Standards
04-21-09	Meets Standards
12-07-08	Meets Standards

Name: Navarrete, Jose
 Title: Senior Correctional Officer
 Duty Station: Southern Desert Correctional Center

V. TRAINING:

Date	Hours	Topic of Training
08-22-16	40	CER
06-15	16	CER
06-14	8	CER
08-13	8	CER
05-20-13	40	BID
09-12	16	CER
10-11	16	CER
09-10	24	CER
09-18-08		Basic Training (PST)

VI. LETTER OF REFERENCE, COMMENDATION AND/OR APPRECIATION: None

VIII. EXHIBITS:

Exhibit	Date	Author	Description
A	12-8-16	Rod Moore Supervisory Criminal Investigator	Report of Personnel Complaint Investigation (IA-2016-145)
B	12-12-16	Jo Gentry Warden	Adjudication – IA-2016-0145-1
NRS 284.383, NRS 284.385			
NAC 284.650, NAC 284.646			
Administrative Regulation 339 – CODE OF ETHICS; EMPLOYEE CONDUCT; PROHIBITIONS AND PENALTIES			

Name: Navarrete, Jose
Title: Senior Correctional Officer
Duty Station: Southern Desert Correctional Center

IX. NDOC ADMINISTRATIVE REGULATIONS:

339.01 CODE OF ETHICS

1. Employees of the Nevada Department of Corrections should at all times adhere to the following Code of Ethics.

A. The Nevada Department of Corrections is committed to a code of ethics that will guide the performance, conduct and behavior of its employees. This code will ensure that our professionalism is reflected in the operation and activities of the Department and is recognized by all interested parties. In this light, the following principles are practiced:

- (1) Employees shall maintain high standards of honesty, integrity, and impartiality, free from any personal considerations, favoritism, or partisan demands.
- (2) Employees shall be courteous, considerate, and prompt when dealing with the public, realizing that we serve the public.
- (3) Employees shall maintain mutual respect and professional cooperation in their relationships with other staff members of the Department of Corrections.
- (4) Employees shall be firm, fair, and consistent in the performance of their duties. Employees should treat others with dignity, respect, and compassion and provide humane custody and care, void of all retribution, harassment, or abuse.
- (5) Employees shall uphold the tenets of the United States Constitution, its amendments, the Nevada Constitution, federal and State laws, rules, and regulations, and policies of the Department.
- (6) Whether on or off duty, in uniform or not, employees shall conduct themselves in a manner that will not tend to bring discredit or embarrassment to the Department of Corrections and the State of Nevada.
- (7) Employees shall report without reservation any corrupt or unethical behavior that could affect either inmates, employees, or the integrity of the Department of Corrections.
- (8) Employees shall not use their position for personal gain.
- (9) Employees shall maintain confidentiality of information that has been entrusted to them.
- (10) Employees shall not permit themselves to be placed under any kind of personal obligation that could lead any person to expect official favors.
- (11) Employees shall not accept or solicit from anyone, either directly or indirectly, anything of economic value, such as a gift, gratuity, favor, entertainment, or loan which is, or may appear to be, designed to influence their official conduct.
- (12) Employees shall not discriminate against any inmate, employee, or any member of the public on the basis of race, color, religion, sex, sexual orientation, age, disability, gender identity or expression, or national origin.
- (13) Employees shall not sexually harass or condone sexual harassment with or against any person, including but not limited to any inmate, employee, volunteer, vendor, or any member of the public.
- (14) Employees shall maintain the highest standards of personal hygiene, grooming and neatness while on duty or otherwise representing the Department.

Name: Navarrete, Jose
Title: Senior Correctional Officer
Duty Station: Southern Desert Correctional Center

339.02 EMPLOYEE CONDUCT ON AND OFF DUTY

1. All Department employees are responsible, at all times, to conduct themselves in an appropriate manner, with honor, integrity, and impartiality whether on or off duty, to obey and support the letter and spirit of the law, and to always exercise appropriate self-discipline in the use of the power and authority entrusted to them.
2. The penalty imposed for a violation of 339.07 Class of Offense Guidelines (18. R.), can range from a CLASS 1 – 5 violation depending upon the facts and circumstances of the particular case.
3. Under the law Peace Officers are expected to abide by the laws they are empowered to enforce. Peace Officer employees will obey all laws of the U.S., State of Nevada, and ordinances in force in their jurisdiction. Violations of law, an indictment or information filed against an officer, or a conviction can be cause for disciplinary action up to and including termination from employment, especially where off-duty conduct tends to bring the Department into public discredit or which tends to affect the employee's ability to perform assigned duties efficiently. Employees must also be careful that the authority vested in them as Peace Officers is not abused.

339.03 GOALS OF CORRECTIVE AND DISCIPLINARY MEASURES

1. Public employees have an affirmative duty to serve the public. The public trusts that the Department will operate within legal and procedural boundaries. Occasionally an employee will step beyond these boundaries, resulting in a misconduct and/or performance complaint. Each time the Appointing Authority adjudicates a complaint public trust is impacted.
2. When an allegation of misconduct and/or performance is Sustained, corrective or disciplinary action shall be applied.
3. Disciplinary action is intended to serve three purposes which are weighed carefully when making recommendations:
 - A. To modify the offending employee's behavior.
 - B. To set expectations for other employees.
 - C. To assure the public that the Department strives to maintain the public trust by holding employees accountable.
4. The offending employee's Appointing Authority is generally the best person to review and recommend the corrective or disciplinary action that will best serve to modify that employee's behavior. However, the recommendation will be superseded if it does not set consistent expectations for all employees or fails to uphold the public trust.

339.04 REPORTING COMPLAINTS OR MISCONDUCT

1. All Department employees, regardless of rank or position, who become aware of an alleged act of employee misconduct, are responsible to take immediate and appropriate action to control the situation, prevent aggravation of the incident, and notify their chain of command regarding the allegation.
2. All employees at any location must accept complaints of employee misconduct from any source, in any format. If the receiving employee is not a supervisor, a supervisor must be notified immediately.
 - A. Complaints may be based on affirmative acts or failures to act.
 - B. Any failure to comply with posted AR's, OP's, Post Orders, Unit Rules, or other procedures should be reported,
 - C. Lower level issues related to performance need not be investigated by Inspector General staff, as long as an "impartial fact-finding" process is followed.

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D. An employee who takes a complaint from an outside source may provide the complainant with a copy of the completed NOTIS entry or DOC form 028, including any documentation.

E. An employee taking a complaint should have a supervisor or another employee take over if it becomes clear that the complaint is about the employee.

F. If the complaint being received is about the employee's immediate supervisor, the employee is authorized to report the complaint to any other supervisor.

3. A supervisor who is informed of a complaint should immediately complete a NOTIS entry or DOC-028. The supervisor should make certain that any documentation is attached.

4. The Appointing Authority is responsible to make certain that reporting forms are correct and complete. Deficient reports will be returned to the Appointing Authority for corrections.

339.05 INVESTIGATIONS

1. The Appointing Authority is responsible for ensuring that allegations of employee misconduct are investigated. The Appointing Authority should request an investigation using the "refer to IG" function in NOTIS.

2. Following receipt of an investigation request, the Inspector General or designee will review the NOTIS preliminary report/DOC-028, any attachments, and any other reports related to the allegations of employee misconduct to determine if an investigation is appropriate. If an investigation is initiated, the Inspector General or designee will identify generally appropriate allegations based upon the Class of Offense Guidelines outlined below and assign the appropriate investigative body.

A. Generally, those offenses identified as Class 1 and 2 will be assigned to the involved Appointing Authority for investigation. At the discretion of the Inspector General or designee, Class 3 offenses may be assigned to the involved Appointing Authority or to an investigator within the Inspector General's Office. Generally, Class 4 and 5 offenses will be assigned to Office of the Inspector General investigators.

B. Incidents of poor or less than standard performance that do not contain an element of misconduct will be assigned to the Warden/Division Head for appropriate action without case assignment.

C. When circumstances dictate that the investigation will involve the interview of civilians or investigation outside of the institution, the investigation will be conducted by the Office of the Inspector General.

3. A preliminary inquiry will be conducted pursuant to the Office of the Inspector General – Guide for Investigators – Preliminary Investigations Section, noting that the original complaint and reports may suffice.

4. Any employee who is the focus or subject of an investigation shall be afforded all rights and protections provided by law, and by Department regulation and directive. Current requirements are in the "Office of the Inspector General – Guide for Investigators."

5. The Inspector General or designee shall review the matter to determine where the investigation will be assigned.

A. If the IG determines that a formal investigation is not necessary, the Inspector General will notify the Appointing Authority, who is then responsible to appoint an individual of the rank of Sergeant/Non-sworn supervisor or higher as an institutional investigator.

(1) If an investigation assigned to an institution subsequently yields evidence of potential criminal misconduct by an employee or others, the Appointing Authority shall immediately notify the Inspector General.

Name: Navarrete, Jose
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(2) The Inspector General shall review the matter and determine whether the investigation should continue with the Appointing Authority or be returned to the Inspector General's authority.

B. If a formal investigation is required, a case number and investigator will be assigned without delay.

(1) A formal investigation will be conducted pursuant to the Office of the Inspector General – Guide for Investigators.

(2) If it becomes necessary to conduct parallel administrative and criminal investigations regarding a complaint of employee misconduct, the Inspector General shall ensure that the investigations are bifurcated. Information developed during the administrative investigation growing out of the subject's interview shall not be shared in the criminal investigation.

(3) If additional misconduct is discovered during the course of an investigation which is related to the original misconduct, the investigator shall amend the allegations and continue with investigation. If the discovered misconduct is not related to the current investigation, the investigator should generate a new NOTIS entry and submit it for Inspector General review and assignment.

(4) The investigation will be completed within the due date assigned by the Office of the Inspector General and applicable statutes and regulations. The Inspector General's Office may grant extensions requested for reasonable cause.

(5) Where an IG investigator has determined that a polygraph examination would appropriately supplement an investigation, the procedural safeguards provided in the "Office of the Inspector General – Guide for Investigators" will be applied.

C. Upon completion of an employee misconduct investigation, the assigned investigator shall document investigative facts in a final case report according to the guidelines in the "Inspector General – Guide for Investigators."

339.06 PROHIBITIONS AND PENALTIES

1. The Chart of Corrective/Disciplinary measures ascribes an available range of Corrective/Disciplinary action for each Class of prohibited activity. This chart indicates the suggested level of discipline, from less serious to more serious, for the Class of Offense and for first, second and third offenses.

2. Penalties for prohibited activities should be assessed based upon criteria established in the Chart of Corrective/Disciplinary Sanctions.

3. Multiple Infractions - In cases involving more than one sustained violation, disciplinary action should begin with the most serious violation. Other related violations may then be considered as aggravating circumstances when determining the appropriate penalty from within the minimum and maximum recommended range, or each violation may be individually considered and the penalties cumulated.

4. Progressive Discipline - Grave acts of misconduct may warrant dismissal of an employee without previous corrective action or progressive discipline. However, less serious acts of misconduct may warrant the use of progressive discipline, i.e., lesser to greater discipline, to give the employee a chance to reform his or her conduct. The increasing level of concern expressed through progressive discipline may begin with corrective action or proceed to a written reprimand, suspension for up to 30 calendar days, demotion, or dismissal.

5. Appointing Authorities and employees must recognize that penalty schedules cannot accurately, fairly, or consistently address every situation; a comprehensive list of DOs and DON'Ts of employee conduct is not possible. Appointing Authorities must conduct an individual analysis of each employee for each incident and exercise their professional

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judgment and discretion in recommending a penalty. Training, education, actions, awards, and punishments are interrelated, not separate elements.

6. There is no requirement that charges similar in nature must result in identical penalties. Employees sometimes incorrectly equate fairness and consistency as synonyms; they are not.

A. Consistency within a disciplinary system means holding every employee equally accountable for unacceptable behavior. Unacceptable behavior for one is unacceptable behavior for all, regardless of rank, status, or tenure.

B. Fairness within a disciplinary system means understanding the numerous circumstances that could contribute to the unacceptable behavior. Disciplinary recommendations must consider these circumstances. Thus, two employees accused of the same misconduct could face different consequences.

7. Appointing Authorities and their reviewers should neither rely solely on previously imposed penalties nor quote them as an authority in penalty rationales. It must be remembered that this is a historical document of penalties. As such, it may not reflect an appropriate penalty for the misconduct. Indeed, an appropriate penalty may be higher or lower depending upon current issues and the impact of the particular misconduct on the Department and/or fellow employees.

8. Failure to report, failure to act, or failure to disclose is considered misconduct.

9. The Department has developed Class of Offense Guidelines which describe many prohibited employee actions and a Chart of Corrective/Disciplinary Sanctions which recommends penalties for inappropriate conduct.

10. Conflicting activities pursuant to NAC 284.738 include but are not limited to any activity prohibited by AR 332, Employee Reporting Responsibilities; AR 345, Unauthorized Relationships; AR 346, Nepotism; AR 347, Political Activities by Employees; and AR 355, Employee Secondary Employment.

Chart of Corrective/Disciplinary Sanctions

	First Offense		Second Offense		Third Offense	
Class	Minimum	Maximum	Minimum	Maximum	Minimum	Maximum
1	Verbal Counseling	Written Reprimand	Written Reprimand	Suspension	Suspension	Dismissal
2	Written Reprimand	Suspension	Suspension	Suspension Demotion	Suspension Demotion	Dismissal
3	Suspension	Suspension Demotion	Suspension Demotion	Dismissal	Dismissal	N/A
4	Suspension Demotion	Dismissal	Suspension Demotion	Dismissal	Dismissal	N/A
5	Dismissal	Dismissal				

STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
OFFICE OF THE INSPECTOR GENERAL

DATE: December 08, 2016

TO: Jo Gentry, Warden, Southern Desert Correctional Center

FROM: Rod Moore Supervisory Criminal Investigator, Office of the Inspector General

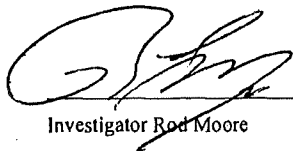
**SUBJECT: REPORT OF PERSONNEL COMPLAINT INVESTIGATION
IA-2016-145**


COMPLAINT:

**Departmental complaint alleges that Correctional officer NAVARRETE, JOSE, engaged in
UNAUTHORIZED USE OF FORCE and FALSE AND MISLEADING STATEMENTS**

ACCUSED STAFF:

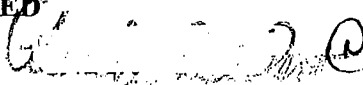
Navarrete, Jose
Senior Correctional Officer
SDCC


Investigator Rod Moore


Date

Supervisor

Date

APPROVED

Pamela Del Portillo
Inspector General

OFFICIAL USE ONLY

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Exhibit A
JA 0060

Subject:

SUMMARY:

On October 09, 2016 Correctional Officer Paul Valdez and another officer was involved in a "spontaneous use of force" with inmate Rickie Norelus 1104257. A review of video footage by the Southern Desert Correctional Center administration of the spontaneous use of force was deemed as being conducted outside the scope of the NDOC's policies relating to Use of Force. SDCC administration requested an investigation into the events that transpired on October 09, 2016.

ALLEGATION I

Departmental complaint alleges that Navarrete, Jose engaged in **UNAUTHORIZED USE OF FORCE** when on 10/09/2016 officer Valdez grabbed inmate Norelus, Rickie 1104257 around the neck and took the inmate to the ground without sufficient cause to do so and as the senior officer allowed this unauthorized use of Force without proper intervention .

ALLEGATION II

Departmental complaint alleges that Navarrete, Jose engaged in **FALSE AND MISLEADING STATEMENTS** when officer Navarrete knowingly completed and submitted a report documenting the events of the Use of Force that were not compatible with what was viewed in the video of the same Use of Force.

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AI
JA 0061

Subject:

WITNESS LIST

WITNESS	DATE/TIME INTERVIEWED	AUDIO RECORDED TAPE NUMBER AND SIDE	PAGE NUMBER
Navarrete, Jose Sr. Correctional Officer SDCC	10/27/2016	Digitally recorded	4
Valdez, Paul Correctional Officer SDCC	10/27/2016	Digitally recorded	8

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INVESTIGATION

NAVARRETE, JOSE, SENIOR CORRECTIONAL OFFICER, SOUTHERN DESERT CORRECTIONAL CENTER

On October 27, 2016 I, Supervisory Criminal Investigator {SCI} Rod Moore conducted an in person interview with Senior Correctional Officer Jose Navarrete at the Casa Grande Transitional Housing administrative offices. Officer Navarrete was issued his Notice for interview on October 21, 2016. Officer Navarrete was given his Admonition of Rights which he read and signed as well as his admonition of confidentiality. He was represented by his attorney Will Sikes.

ALLEGATION I

ALLEGATION II

Officer Navarrete said he was working on October 09, 2016 at the Southern Desert Correctional Center in a position he describes as "lead Search and Escort." He said that position is comprised of maintaining movement of inmates and maintaining security throughout the facility and search in cells. In relation to culinary operations the search and escort officer responsibilities according to Navarrete is maintaining a visual on inmates inside the culinary to ensure there are no fights or they are taking things out they are not supposed to and being the back up for the culinary officers inside as well as conducting routine pat searches on inmates coming in and out of the culinary.

Navarrete stated a scenario where an inmate would be detained and placed upon the wall and or searched could come from anything. He said they are random or if an officer sees something inside the culinary that the inmate was doing and the officer would wait until he left the culinary to stop and search him.

Navarrete stated he has been assigned to that position for approximately three months and was in a search and escort position on graveyard for about a year and a half as well. Navarrete agreed he has a large amount of experience in the search and escort position.

Navarrete stated he has worked with officer Valdez for approximately a year. He said he and Valdez do things outside of work as well such as having lunch, but nothing too involved.

Regarding the use of force incident Navarrete said, "If I remember correctly, the inmate was randomly placed on the wall with three other inmates and pat searched." In regards to inmate Norelus, he was being "non-compliant and verbally abusive" and wasn't listening to his orders and this is why he was kept on the wall longer than the other inmates.

Navarrete agreed he has the ability to restrain an inmate whenever he sees that it would necessary based on his experience as a search and escort officer. He said the reason Norelus wasn't placed in hand cuffs when he was being non-compliant and verbally abusive in the beginning of the contact was "because he didn't want to put any inmate or C/O in danger, so if the other inmates

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Subject:

are being compliant, I'll get them out of the way, and if the inmate is still irritated or non-compliant, why am I going to approach him?"

In regards to the time the inmate was placed on the wall until the use of force happened, Navarrete said the inmate was given multiple orders to stay on the wall and not to move. Navarrete continued saying "he told the inmate that any movement that was not directed by him or Valdez would be taken as a threat and multiple times he came off the wall, moved his head, moved his body, again, multiple times."

"When the use of force happened, I was actually leaning on the wall, Officer Valdez walked up to the inmate and placed his left arm on the inmate and went to what I saw, restrain the inmate and when Valdez did that, the inmate was continuously moving and given another directive not to move, and the inmates hands were coming off the wall. So once that happened, officer Valdez and the inmate came off the wall, inmate Norelus was still resisting and they fell to the ground. That's when you see me come off the wall and get control of the inmates upper body and told officer Valdez to restrain the inmate and then got on the radio and notified the Sergeant that we just had a use of force."

Medical was called nearly at the same time o they could assess the inmate for injuries and move him. The response was videotaped and they took him to the infirmary and that was it.

Navarrete's attorney asked if he could clarify something that Navarrete had stated. Mr. Sikes asked if when describing the inmate coming off the wall, was his entire body coming off the wall or just his hands and head?

Navarrete said he observed it to be mostly the inmate's hands and his head that was coming off the wall. Navarrete agreed the inmates turn was mainly form the shoulder area and not a full body turn.

According to Navarrete he estimates from the time Valdez made contact to the time they went to the ground it was "less than a minute." I explained again, "from the time Valdez touched inmate Norelus, to the time they went to the ground." Navarrete again stated, "yeah, it was a minute or so."

Navarrete stated inmate Norelus was placed and left on the wall for approximately 10-15 minutes. He said he was left there that long because Norelus wasn't being compliant and wasn't listening to orders and was agitated. Navarrete said during that time, he does recall counseling Norelus on the rules and regulations and trying to defuse the situation as well as Valdez.

Navarrete stated he has seen the video of the use of force and watched inside the culinary with officer Valdez. He said he has seen the video approximately ten times and came away with the same conclusion every time. Navarrete said he does have the video on his state e-mail and it was down loaded from the culinary with authorization from the shift Sgt.

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Navarrete said he does "somewhat" recall what was written in his report. Navarrete was allowed to review his report before continuing with questioning. He read the report out loud. I asked Navarrete if that was clear and accurate depiction of what occurred. He said "yes."

Navarrete was asked if knew what inmate Norelus' problem was that lead to all this. He said I don't know, maybe he was upset for being put up on the wall. Navarrete continued saying, maybe it was because Norelus was caught with extra food in his sack lunch that he was trying to get out of the culinary.

Navarrete said he couldn't recall what exactly Norelus was saying that was verbally abusive but there was profanity.

Navarrete said Valdez did call him when Valdez was writing his report but Navarrete did not speak to Valdez when he was writing his.

Navarrete was shown the video and asked to articulate what he and Valdez were doing and why.

While observing the video, Navarrete identifies himself and officer Valdez.

Navarrete was shown when the inmate looks at his left arm and states "it was slight" but he did come off the wall.

Navarrete agrees the inmate is in an agitated state and being verbally abusive. I pointed out Navarrete's posture of leaning up against the wall next to the inmate from about two to three feet to which Navarrete claims was not tactically wrong.

I asked him if the situation at the moment was under control or fluid and could in any direction. Navarrete responded by saying when he talks to inmates and he's in a relaxed state it give the inmate the notion that nothing is going to go wrong, were just talking.

Navarrete sated the moment Valdez starts to approach the inmate was due to the inmate being non-compliant. He said the inmate continued to "move around." Navarrette stated he could not speak for Valdez as to why he approached the inmate at that very moment.

Navarrete stated in this situation he is Valdez's superior. I asked Navarrete if he was in charge of Valdez at that moment or was he just allowing Valdez to do his own thing? He said "somewhat, but yeah, he is a senior officer, but he's technically not a supervisor."

As we continue our review of the video, we get to the point in the video where Valdez touches inmate Norelus's back and reaches around his neck. I then point out that inmate Norelus's hand can still be seen as still being on the wall and has not moved his feet. The video was played again.

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Subject:

I pointed out that there was nothing Navarrete could physically do from his standpoint due to Valdez's action being quick. I narrated that "we had a push, then around the neck, and then down they go."

When I pointed out that it was reported that Valdez was going for his restraints and in the video, "there was none of that." Navarrete said, everyone has a different way, and for him, he doesn't get out his restraints, he gains control first, and then gets out his restraints.

After covering the video and the discrepancies between the reporting versus what physically occurred, I asked Navarrete one more time if he still felt his report accurately reflected what occurred and why. Navarrete stated, "One hundred percent."

In conclusion I asked Navarrete if he was a use of force instructor to which he said, "no." I asked him if he successfully completed his yearly training in IST to include defensive tactics. He stated he has.

I then asked Navarrete if he had engaged in any defensive tactics being taught by the department that trains to initiate the force by grabbing an inmate around the neck.

Navarrete said, "no."

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Subject:

INVESTIGATION

VALDEZ, PAUL, CORRECTIONAL OFFICER, SOUTHERN DESERT CORRECTIONAL CENTER, INDIAN SPRINGS, NEVADA.

On October 27, 2016 I Supervisory Criminal Investigator Rod Moore conducted an in person interview with Correctional Officer Paul Valdez. Valdez was served his Notice for Interview on October 21, 2016. Mr. Valdez was given his Admonition of Rights {administrative} which he read and signed. He was given his admonition of confidentiality which he read and signed. Mr. Valdez was represented by Russ Goodman of the Goodman Law Firm.

Officer Valdez stated he was working as a "Search and Escort" officer at SDCC on October 09, 2016 and has been assigned to that position since July of 2016. Valdez confirmed he was working with Senior Correctional Officer Navarrete on October 09, 2016.

Valdez stated the breakfast meal starts at approximately 5:00am and ends at approximately 7:30 am depending on what is being served at breakfast.

Valdez stated that normal duties of a Search and Escort officer in relation to the culinary would make sure there are no fights or line cutting of the inmates and that inmates are actually eating and not just hanging around the culinary. He stated another duty is to ensure the inmates aren't stealing more food out of the culinary that not part of the "sack lunch" that's given to them for their afternoon meal and generally making sure the flow of inmates in and out of the culinary goes well.

Valdez stated that senior officer Navarrete would be the officer in charge of the four man Search and Escort officers.

Valdez stated he does recall a Use of force incident that occurred that morning on October 09, 2016. He said inmate Norelus's unit was leaving the culinary and they were picking random inmates for "pat downs." He said Norelus was upset he was chosen and was placed on the wall. He said extra food for discovered in his sack lunch that was very easy to see. Once on the wall Norelus was got more upset and started using foul language and showing he was going to be "non-compliant."

Valdez stated he Senior officer Navarrete told Norelus to keep his hands on the wall and he didn't listen and kept taking his hands off the wall saying, "what are you gonna do?" and being aggressive.

Valdez stated, "for the spontaneous, I went in, and it ended up being a spontaneous use of force after I put my hands on him," Norelus turned and said "what are you going to do." Norelus then made "an aggressive move" and at that point I grabbed him and I tried to put him down on the ground and he resisted and we ended up being face to face." Valdez continued saying, "he was resisting and they fell to the floor" where Valdez was able to gain control of Norelus.

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JA 0067A7

Valdez said Navareet was to his left side and when Navarrete reacted it was already over because it happened so fast. Valdez said there were only him and Navarrete dealing with inmate Norelus this entire time.

Valdez said there was about four or five other inmates there pulled out of the line for "pat downs." He said none of those inmates gave them any problems.

Valdez was asked, on a scale of 1 to 10 how bad was this inmate" Valdez stated, "probably a 10." Valdez agreed, the inmate was enough of a problem to where he had to place hands on him to gain control.

Valdez stated he did submit a report and at no time did he and Navarrete talk about their reports. Valdez was asked if he recalled what he wrote in his report. He said, "for the most part, yeah."

Valdez was given a copy of his report to review before anymore questioning.

After reviewing his report, Valdez said this was an accurate depiction of what happened that morning on October 09, 2016. Valdez said he had watched the video once or twice within the culinary. He said he does not have a copy of the video.

Valdez stated he thinks the events that are the video and what was written in his report is an accurate depiction of both.

Valdez was informed that we were going to watch the video that shows the use of force so he can articulate his actions.

Valdez identifies officer Wachter, David as being in the video but is watching inmate going into the culinary and his back facing him and Navarrete the entire time during the use of force.

Valdez articulates the he's standing on the outside of the culinary exit door. Valdez identifies, senior officer Navarrete as being close to him but in a location behind Valdez.

Valdez identifies himself and inmate Norelus.

Valdez was asked why inmate Norelus was on the wall for approximately fifteen minutes. He said we were trying to give him directives and he wouldn't listen and they were going to send him into unit "hot" and be a problem for that unit officer.

At specific time in the video just before the use of force, Norelus has both of his hands on the wall and appears to look at his watch on his left hand. Valdez stated he didn't think Norelus was looking at his watch because every time he was told to keep his hands on the wall Norelus would say, "What are you going to do?" Valdez was asked why Norelus kept challenging him. He said because Norelus was upset.

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Subject:

I pointed out that Valdez stated earlier that Norelus was 10 out of 10 in an agitated state, and Navarrete was standing with his hands in his pockets leaning on one shoulder against the wall just feet to the left of inmate Norelus and didn't seem to be worried about it. Valdez said he was more focused on Norelus than watching senior officer Navarrete.

I asked Valdez why he started walking towards Norelus. He stated because Norelus had already been warned many times and was not listening to our directives so at that point I go into, restrain him so we can defuse his actions of being a disruptive inmate. Valdez stated he told Norelus that he was approaching him and told Norelus that "he was going cuff him up and any sign of movement I'm going to take that as a sign of aggression."

Valdez stated the first move he made was leaning Norelus against the wall with his left arm so he kept it "wall body, body so Norelus has little movement as possible." Valdez agrees that Norelus then turn on him and that's when everything went bad when I was establishing Valdez's verbal accounts of what happened prior to continuing with the video.

I stated to Valdez that if I was someone who knew nothing about corrections, or control and restraint techniques I would view this video as showing him do "a push in the back, arm around the inmates throat and then dragging him back." I then explained that in his report, he wrote he attempted to hand cuff the inmate. I then stated, in the video there was no attempt of you going for your hand cuffs, nor were your hand cuffs ready. There was a push, around the neck, and then back.

I asked Valdez if he would agree to my assessment of the video. Valdez stated, "If you see the video, I push, then he leans and at that time I'm not going to pull my restraints out and allow them to become a weapon." I agreed with Valdez on that point.

Valdez pointed to the video and say if you look, he's coming off the wall after being told not to. I asked Him, Which way the inmate is facing?" Valdez said he comes off to the left. I stated, "you pulled to his left."

Continuing with the video, I showed Valdez that inmate Norelus fingers was the last thing to leave the wall and Valdez's force pulls Norelus to the left because that's the only place he can go.

We continued to watch the video literally frame by frame and there was varying opinions on whether Norelus's hands ever came off the wall or was being non-compliant.

Valdez while watching the video reiterates, "Any kind of movement is taken as a sign of aggression." I asked Valdez, "so after having Norelus on the wall for 15 minutes, and you see him lift his left hand off the wall, {while Valdez is several yards behind Norelus} your use of force continuum was to then cuff him up?" Valdez thought for a second and stated, "yes."

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Subject:

I again showed Valdez the frames of the video of him pushing Norelus against the wall, then placing his arm around Norelus's neck. I pointed out that both of Norelus's hands are still on the wall. Both Navarrete and his attorney did not completely agree with my observations.

I asked Valdez if he successfully been through all his yearly refresher training including control and restraints and his other training in the academy. He said he has. I then asked Valdez in any of that training with the Department of Corrections, had he ever been trained to grab an inmate around the neck as part of his use of force training for situations such as this one.

Valdez stated, "that situation was more of a reaction for my safety. I reacted and did what I needed to do to put him down."

I stated to Valdez, Okay, I'm going to ask you again, your report versus what we have discussed while watching the video; you're 100% accurate that your report is a true and accurate depiction of what happened."

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JA 0070 AIO

Subject:

INVESTIGATOR NOTES

1. During the review of the video, there are several other inmates who were placed upon the wall. Only inmate Norelus was left on the wall for approximately 11-14 minutes. According to testimony by officer Navarrete, Norelus was ordered to remain with his hands on the wall and not to move for this entire time.
2. During the interview process, it was stated by Navarrete that inmate Norelus was "coming off the wall and disregarding orders" repeatedly. However, the video shows inmate Norelus does not break contact or move aggressively towards any officer.
3. Once inmate Norelus is grabbed around the neck, the video still shows he has contact with both hands on the wall.
4. Inmate Norelus does manipulate his left arm in a fashion that appears he is looking at his watch. Both officers are away from him at that time and do not react to that motion. This motion appears to be the most movement Norelus does during the contact.
5. Only in a lifesaving scenario would it be appropriate to initiate a Use of Force upon an inmate in the neck or throat area and this type of hands on maneuver is not taught by any defensive tactics trainer within NDOC specific to this scenario.
6. At 1:47 into Video inmate Norelus is patted down. Officer Navarrete then assist's Norelus in placing Norelus's hands higher onto the wall.
7. During the time Norelus is on the wall {which he is the only one} Valdez and Navarrete walk around him, create distance, turn their back on him but seem to maintain a dialog.
8. There does not seem to be any apparent reason to have this inmate left on the wall for this amount of time based on the inmate's actions seen on the video.
9. Navarrete and Valdez wonder around him for approximately 9 minutes as many other inmates walk past and see Norelus left up against the wall with his hands still up.
10. At 10:40 into the video Navarrete leans up against the wall with his feet crossed. This position is not indicative to an officer attempting to maintain control of a "con-compliant and verbally abusive" inmate.
11. At 10:41 into video, inmate Norelus appears to be looking at his watch. He has been on the wall now approximately 9 minutes with his arms up.

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JA 0071 ¹¹

Subject:

INVESTIGATOR NOTES CONT.

12. At 10:48 into video, officer Valdez approaches inmate Norelus from behind as Norelus seem to be talking to Navarrete who is still against the wall. No sudden movements or turns are seen by inmate Norelus to this point.
13. Valdez places his body against Norelus's body placing Norelus's chest against the wall. {Norelus's hands are still on the wall.}
14. Valdez's first hand on move is to reach around Norelus's neck and throat area and pull Norelus back. The last thing to leave the wall is Norelus's hands.
15. Valdez pulls Norelus back and Norelus is turned to the left where him and Valdez are now face to face when they go to the ground.
16. Both officers testified and maintain they were attempting to restrain an non-compliant and verbally abusive inmate. At no time did either officer attempt to restrain inmate Norelus until he was on the ground on the sidewalk. There did not seem to be any orders for Norelus to submit to restraints.
17. No other staff was interviewed in this case as nobody was in close proximity to the Use of Force when it occurred or just prior.

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Subject:

ADDENDA

1. Available upon request, video of use of force on October 09, 2016 at SDCC by Officer Navarrete, Jose.
2. IN-2016-0313 Investigative report

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Addendum #1

Available upon request, video of use of force on
October 09, 2016 at SDCC by Officer

Navarrete, Jose

STATE OF NEVADA

DEPARTMENT OF CORRECTIONS
OFFICE OF THE INSPECTOR GENERAL

CASE NO: IN-2016-313

INVESTIGATION REPORT

Investigation Type: Oppression Under the Color of Law

Victim/Involved Person Inmate Rickie Norelus, 1104257

Address Southern Desert Correctional Center, Indian Springs Nevada

Location of Occurrence: Southern Desert Correctional Center, Indian Springs Nevada

Date & Time of Occurrence: October 9, 2016 6:45 a.m. Date Assigned: October 12, 2016

Assigned Investigator(s): David Molnar
James Jones

Case Status/Disposition: Referred to Warden () Referred to Attorney General (XX)
Referred to Outside Agency () Referred to District Attorney ()

Closed ()

By Arrest ()
(Criminal Charges Filed)

Other ()
(Criminal Charges Declined or Insufficient Evidence to Arrest/Charge)

Inmate Discipline ()
(Referred to Institution for Appropriate Action on Inmate)

No Further Action/Resolved ()
(Non-Criminal Matter Resolved)

Unfounded ()
(Investigation Disclosed Incident did not occur)

Inactive ()
(Per Director/IG or Referred to another agency for investigation)

Investigation Continues ()

Further Investigation ()

Pending Prosecution Decision ()
(By Appropriate Prosecutor's Office)

Report Date

Investigator
Office of the Inspector General

APPROVED

Supervisor

Pamela Del Porto
Inspector General

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ADDENDUM 2

#1 of 7

JA 0075

Additional Victims/Involved Persons:

David Wachter
Correctional Officer
Southern Desert Correctional Center
(702) 879-3800

Suspects:

Paul Valdez
Correctional Officer
Southern Desert Correctional Center
(702) 879-3800

Jose Navarrete
Senior Correctional Officer
Southern Desert Correctional Center
(702) 879-3800

Witness List:

Minor Adams
Associate Warden
Southern Desert Correctional Center
(702) 879-3800

David Molnar
Supervisory Criminal Investigator
Casa Grande Transitional Housing
(702) 486-9924

James Jones
Criminal Investigator
Casa Grande Transitional Housing
(702) 486-9913

Inmate Michael White
110991
Southern Desert Correctional Center

Inmate Lawrence Williams
15136
Southern Desert Correctional Center

ADDENDUM 2

#2 of 7

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JA 0076

file

Case No.IN-2014-156
Page 3 of 7

Inmate Ralph Jackson
64883
Southern Desert Correctional Center

ADDENDUM 2

#3 of 7

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JA 0077 A17

Source Of Activity:

On October 9, 2016, a spontaneous use of force occurred at the Southern Desert Correctional Center. Staff reported that during a routine pat search inmate Rickie Norelus, 1104257, turned aggressively towards staff prompting the spontaneous use of force. The incident prompted Correctional Officer Paul Valdez to administratively charge Norelus by submitting the following report;

On October 9, 2016 I CO Valdez assigned to Search and Escort from 0500-1300. At approximately 0645 during morning breakfast inmate Norelus, R 1104257 was placed on the wall. While inmate Norelus was on the wall he was told multiple times by me and SCO Navarrete to keep his hands on the wall. Inmate Norelus kept taking his hands off the wall saying "what are you going to do"? after several commands I attempted to place him restraints. When attempting to place him in restraints, I told Inmate Norelus don't move your hands. Inmate Norelus again stated "what are you going to do"? and moved his hands off the wall and turned in an aggressive manner which resulted in a spontaneous use of force. Inmate was placed in restraints medical was called and inmate was taken to the infirmary.

The incident also caused Senior Correctional Officer Navarrete to submit the following witness statement;

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.

Minor Adams, Associate Warden, obtained video footage of the incident recovered from a stationary camera mounted to the Culinary Building. Adams found the actions of the officers to be contrary to accepted practices and believing that the officers engaged in excessive use of force, requested a criminal investigation be initiated by the Office of the Inspector General.

Investigation:

On or about October 12, 2016 Supervisory Criminal Investigator David Molnar was assigned to investigate allegations of excessive use of force. Molnar reviewed the video footage provided by Adams. The video depicts correctional officers conducting random pat down searches of inmates departing the culinary after morning meal on October 9, 2016.

Random pat searches of inmates exiting dining facilities is a common practice utilized at virtually all correctional organizations. The practice is utilized to reduce the movement of dangerous contraband and deters inmates from transporting unauthorized food items into the

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ADDENDUM 2
4917
JA 0078 A18

housing units which may lead to serious health and safety issues. The searches are usually conducted in an expedient manner designed to target obvious hiding areas such as pockets, waistbands and socks. The searches also serve as a deterrent for inmates to attempt to traffic contraband.

Molnar noticed that one inmate in particular was directed to stand against the wall for an extended period of time. The inmate, later identified as Norelus, appeared to have the undivided attention of two correctional officers, later identified as Correctional Officers Valdez and Navarrete. After approximately eleven minutes, Officer Valdez approached Norelus from the rear and placed his right arm around the inmate's neck, then pulled him violently to the ground. Both Valdez and Navarrete subsequently placed Norelus in restraints and called for assistance. At no point did the inmate appear to be resisting the officers, nor did it appear that at any time he posed a physical threat as depicted in the officer's reports.

On October 13, 2016, Molnar interviewed Norelus at the Southern Desert Correctional Center. Norelus stated that Officers Valdez and Navarrete had been singling him out to be pat searched for the past two weeks. He stated the two routinely call him names which he believes was an attempt to entice him into a physical confrontation. Norelus stated that on October 9, 2016, he was once again singled out to be searched. He stated that Valdez made numerous comments, calling him "Fag" and "Bitch." Norelus stated that Valdez also stated "I can't believe no one's beat your ass yet." Norelus admitted that he also replied to Valdez' comments by agreeing with the comments made by Valdez by saying things such as "Ya, I'm a fag" and "Ya, I'm a bitch." Norelus surmised that by agreeing with Valdez' comments and not addressing the officer in a threatening manner or being physically assaultive, served to make Valdez angry. Norelus stated that Valdez subsequently attacked him from behind and threw him to the ground where Navarrete assisted in placing him in restraints. Norelus reiterated that he did nothing to provoke the use of force and did not resist the officers after being thrown to the ground. Norelus stated he did not suffer any physical injury, but that he suffers from mental disorders which he believes have been compounded by the incident.

Molnar then attempted to identify inmates portrayed in the video as witnesses to the incident. Molnar located inmate Michael White, 110991. White stated that Navarrete and Valdez were always "going at it" with Norelus. White stated that on October 9, 2016, he heard the officers calling Norelus "gay words." White also stated that he once tried to tell Navarrete and Valdez that Norelus has "a mental problem" but the officers continued to harass Norelus.

Inmate Lawrence Williams, 15136, stated that Norelus is known to have "mental issues." He stated that on October 9, 2016, he observed that Navarrete and Valdez had Norelus against the wall for an extended period of time and overheard an officer say to Norelus, "I surprised no one has beat your ass yet."

Inmate Ralph Jackson, 64883, stated that on October 9, 2016, he overheard an officer tell Norelus, "I'm surprised no one has whooped your ass yet because you have a smart-assed mouth." Jackson also had a handwritten statement that he intended to send to the prison administration. The letter alleges that staff are targeting African American inmates and forcing

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JA 0079 A19

them to stand against the wall for extended periods of time. Jackson requested administrative staff conduct a review of the practices. Jackson provided Molnar with the handwritten letter.

During Molnar's review of the incident, a third officer, David Wachter, is seen coming out of the Culinary Building, having a brief encounter with Navarrete and Valdez, then moving out of the area, presumably to monitor inmate movement into the Culinary Building.

On October 18, 2016, Molnar and Criminal Investigator, James Jones, conducted a recorded interview with Wachter at the Southern Desert Correctional Center. Wachter stated he came out of the Culinary Building and saw Officers Navarrete and Valdez with an inmate who had been placed against the wall for a pat search. Wachter stated he then went to supervise another unit entering the Culinary Building. Wachter stated he heard a commotion and turned to see Valdez involved in a use of force. Wachter stated that he had viewed the video footage prior to being interviewed and acknowledged that the inmate had been standing at the wall for an extended period of time. Wachter stated he could not hear the conversation between the inmate and the officers. Wachter stated that based on his review of the video footage, the use of force was not appropriate. Wachter also stated that he had previously counseled Valdez regarding Valdez' interactions with inmates. Wachter stated he advised Valdez that "Our job is to quell situations, not get them riled up." Wachter stated he was able to view the video footage in the culinary office.

Navarrete and Valdez were subsequently placed on Administrative Leave pending investigation.

On October 19, 2016, Molnar and Jones attempted to interview Navarrete at the Casa Grande Transitional Housing. Navarrete invoked his Miranda rights.

On October 19, 2016, Molnar and Jones attempted to interview Valdez at the Casa Grande Transitional Housing. Valdez invoked his Miranda rights.

Arrest:

N/A

Booking:

N/A

Findings:

The October 9, 2016 video footage involving Navarrete, Valdez and inmate Norelus clearly depict a well-orchestrated and apparent premeditated, unnecessary use of force against Norelus. The video depicts Norelus being directed to stand with his hands against the wall for an inordinate amount of time. The video does not depict Valdez attempting to place Norelus in restraints, nor does it depict Norelus acting in a threatening manner. Moreover, the officer's subsequent written reports do not remotely coincide with the actual events that transpired. It is

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ADDITIONAL 2

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JA 0080 A20

apparent that Navarrete and Valdez authored official reports in an attempt to shield themselves from their criminal behavior.

Based on the aforementioned facts, it is recommended that Officer Valdez be charged with Oppression Under the Color of Office, in violation of NRS 197.200, Battery, in violation of NRS200.481 and False Report by Public Officer, in violation of NRS 197.130.

It is recommended that Navarrete be charged with Oppression Under the Color of Office, in violation of NRS 197.200 and False Report by Public Officer, in violation of NRS 197.130.

Evidence:

October 9, 2016 video footage of the incident

October 9, 2016 video footage of staff response to incident

Recorded interview of Officer Wachter

Recorded interview of Navarrete

Recorded interview of Valdez

Letter authored by inmate Ralph Jackson, 64883

SDCC Incident Information File including;

Photos taken of Norelus

Medical/Injury Report

Booking Report, Norelus

Notice of Classification/Notice of Charges

SDCC Operational Procedures

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JA 0081 A21

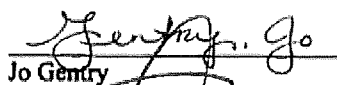
**STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
EMPLOYEE MISCONDUCT ADJUDICATION REPORT**

DATE: December 12, 2016
TO: Quentin Byrne, Deputy Director
VIA: Office of the Inspector General
FROM: Jo E. Gentry, Warden
SUBJECT: Adjudication Report – IA-2016-0145-1

Complaint by:

The complaint investigation IA-2016-0145-1 resulted in two allegations of misconduct against one Department employee:

Jose Navarrete, #41181
Senior Correctional Officer
Southern Desert Correctional Center


Jo Gentry

December 12, 2016
Date


Reviewed By

12/13/16
Date

☒ Agree ☐ Disagree

Exhibit B
JA 0082

The allegations are listed below with recommendations for classification, corrective/disciplinary action, and supporting rationales.

ALLEGATION 1

It is alleged that Navarrete, Jose engaged in UNAUTHORIZED USE OF FORCE, when on October 10, 2016 officer Valdez grabbed inmate Norelus, Rickie 1104257 around the neck and took the inmate to the ground without sufficient cause to do so and as the Senior Correctional Officer, Navarrete allowed this unauthorized Use of Force without proper intervention.

CLASSIFICATION

It is recommended that this allegation be classified as Sustained.
AR 339.07.17.A. – CLASS 4-5

RATIONALE

Based upon written documentation there is sufficient evidence to sustain this allegation. Senior Correctional Officer Navarrete was the assigned Lead Search and Escort Officer was present during the Use of Force incident that had taken place on October 10, 2016 and was the immediate supervisor of Correctional Officer Valdez on this date. While supervising the evening dinner meal, Senior Officer Navarrete and Officer Valdez ordered Inmate Norelus to place his hands on the outside wall of the culinary dining area and ordered the inmate not to move. Senior Officer Navarrete and Officer Valdez mandated this inmate to stay in this position for approximately 15 – 16 minutes. Video recording substantiates that Senior Officer Navarrete and Officer Valdez were present during this entire time. Video recordings show that Officer Navarrete is leaning against the wall with his feet crossed only a few feet away from the inmate. Video recording depicts Officer Valdez rushing to the inmate, placing hand/arm around the inmate's neck/throat area, and pulling the inmate's back ultimately both falling to the ground. There is no evidence of any serious threat to the safety of staff, public, inmates, and/or prison security within the recording. There is no evidence of the inmate displaying any physical threats towards the staff members. In fact, the inmate's hands were still on the wall when Officer Valdez pulled him from the wall. At no time during the video recording did it show Senior Correctional Officer Navarrete intervening during this incident.

ALLEGATION 2

It is alleged that Navarrete, Jose engaged in FALSE AND MISLEADING STATEMENTS, when officer Navarrete knowingly completed and submitted a report documenting the events of the Use of Force that were not compatible with what was viewed in the video of the same Use of Force.

CLASSIFICATION

It is recommended that this allegation be classified as Sustained.
AR 339.07.9.A. – CLASS 5

RATIONALE

Based upon written documentation there is sufficient evidence to sustain this allegation. Video Recording of this incident does not substantiate the written report entered by Senior Correctional Officer Navarrete. Officer Navarrete indicates that he witnessed Inmate Norelus coming “off the wall while C/O Valdez was attempting to restrain him resulting in a spontaneous use of force.” And when “Inmate Norelus came off the wall he was resisting.” Video recording of the incident indicates that Inmate Norelus did not move off the wall, in fact both his hands were still on the wall when Officer Valdez pulled him from the wall. Furthermore, the video recording did not show Officer Valdez attempting to restrain the inmate when he approached the inmate.

CORRECTIVE/DISCIPLINARY ACTION RECOMMENDATION

It is recommended that Jose Navarrete receive a Specificity of Charges – consisting of dismissal from state service resulting from sustained Class 5 allegations.

DEPUTY DIRECTOR CONCURRENCE

Quentin Byrne has reviewed this adjudication and agrees with the recommendations contained.

EMPLOYEE NOTIFICATION

On December 13, 2016 Senior Correctional Officer Jose Navarrete met with Warden Gentry and notified him concerning the outcome of the investigation. Senior Correctional Officer Navarrete was provided a copy of the “Result of Adjudication Report.”

Northern Administration
5500 Snyder Ave.
Carson City, NV 89701
(775) 887-3285

Southern Administration
3955 W. Russell Rd.
Las Vegas, NV 89118
(702) 486-9938



Brian Sandoval
Governor

James Dzurenda
Director

State of Nevada
Department of Corrections

To: **Navarrete, Jose**

From: **Jo E. Gentry, SDCC**

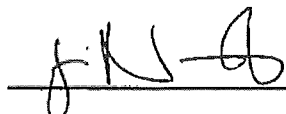
Date: **12/13/16**

Subject: **RESULT OF ADJUDICATION**

IA-2016-0145-1

The adjudication of the above referenced Personnel Misconduct Complaint investigation has been completed. The misconduct allegation was classified as Sustained. The matter is being referred for a Specificity of Charges.

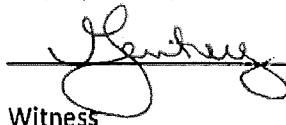
This recommendation is subject to final review and concurrence by the Department Human Resources' Office and/or Attorney General's Office.



Employee's Signature

12.13.16

Date



Witness

12-13-16

Date

^{B3}
JA 0085

NAC 284.646 Dismissals. (NRS 284.065, 284.155, 284.383, 284.385, 284.390)

1. An appointing authority may dismiss an employee for any cause set forth in NAC 284.650 if:

(a) The agency with which the employee is employed has adopted any rules or policies which authorize the dismissal of an employee for such a cause; or

(b) The seriousness of the offense or condition warrants such dismissal.

2. An appointing authority may immediately dismiss an employee for the following causes, unless the conduct is authorized pursuant to a rule or policy adopted by the agency with which the employee is employed:

(a) Intentionally viewing or distributing pornographic material at the premises of the workplace, including, without limitation, intentionally viewing or distributing pornographic material on any computer owned by the State, unless such viewing or distributing is a requirement of the employee's position.

(b) Unauthorized release or use of confidential information.

(c) Participation in sexual conduct on the premises of the workplace, including, without limitation, participation in sexual conduct in a vehicle that is owned by the State.

(d) Absence without approved leave for 3 consecutive days during which the employee is scheduled to work.

(e) The suspension, revocation or cancellation of a professional or occupational license, certificate or permit or driver's license if the possession of the professional or occupational license, certificate or permit or driver's license is a requirement of the position at the time of appointment as stated in the standards of work performance, essential functions or class specifications for the position, or in other documentation provided to the employee at the time of appointment, or required thereafter pursuant to federal or state law.

(f) Threatening another person with a deadly weapon during any time in which the employee is:

(1) On the premises of the workplace; or

(2) Conducting state business or otherwise performing any duties of employment.

(g) Stealing or misappropriating any property that is owned by the State or located on state property.

3. The rights and procedures set forth in NAC 284.655 to 284.6563, inclusive, apply to any dismissal made pursuant to this section.

4. As used in this section:

(a) "Material" has the meaning ascribed to it in NRS 201.2581.

(b) "Nudity" has the meaning ascribed to it in NRS 201.261.

(c) "Pornographic material" means material that, all or in part, contains any description or representation of nudity, sexual conduct, sexual excitement or sado-masochistic abuse which predominantly appeals to the prurient, shameful or morbid interest of adults and is without serious literary, artistic, political or scientific value.

(d) "Sado-masochistic abuse" has the meaning ascribed to it in NRS 201.262.

(e) "Sexual excitement" has the meaning ascribed to it in NRS 201.264.

[Personnel Div., Rule XII § C, eff. 8-11-73]—(NAC A by Dep't of Personnel, 10-26-84; A by Personnel Comm'n by R147-06, 12-7-2006; R063-09, 11-25-2009; R027-11, 12-30-2011)

NAC 284.650 Causes for disciplinary action. (NRS 284.065, 284.155, 284.383) Appropriate disciplinary or corrective action may be taken for any of the following causes:

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 284.738 to 284.771, inclusive.
2. Disgraceful personal conduct which impairs the performance of a job or causes discredit to the agency.
3. The employee of any institution administering a security program, in the considered judgment of the appointing authority, violates or endangers the security of the institution.
4. Discourteous treatment of the public or fellow employees while on duty.
5. Incompetence or inefficiency.
6. Insubordination or willful disobedience.
7. Inexcusable neglect of duty.
8. Fraud in securing appointment.
9. Prohibited political activity.
10. Dishonesty.
11. Abuse, damage to or waste of public equipment, property or supplies because of inexcusable negligence or willful acts.
12. Drug or alcohol abuse as described in NRS 284.4062 and NAC 284.884.
13. Conviction of any criminal act involving moral turpitude.
14. Being under the influence of intoxicants, a controlled substance without a medical doctor's prescription or any other illegally used substances while on duty.
15. Unauthorized absence from duty or abuse of leave privileges.
16. Violation of any rule of the Commission.
17. Falsification of any records.
18. Misrepresentation of official capacity or authority.
19. Violation of any safety rule adopted or enforced by the employee's appointing authority.
20. Carrying, while on the premises of the workplace, any firearm which is not required for the performance of the employee's current job duties or authorized by his or her appointing authority.
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.
22. Failure to participate in any investigation of alleged discrimination, including, without limitation, an investigation concerning sexual harassment.
23. Failure to participate in an administrative investigation authorized by the employee's appointing authority.

[Personnel Div., Rule XII § D, eff. 8-11-73]—(NAC A by Dep't of Personnel, 10-26-84; 7-22-87; 12-26-91; 7-1-94; 11-16-95; R031-98, 4-17-98; A by Personnel Comm'n by R065-98, 7-24-98; R147-06, 12-7-2006)

NRS 284.383 Use of disciplinary measures; employee entitled to receive copy of findings or recommendations; classified employee entitled to receive copy of policy explaining information relating to disciplinary action.

1. The Commission shall adopt by regulation a system for administering disciplinary measures against a state employee in which, except in cases of serious violations of law or regulations, less severe measures are applied at first, after which more severe measures are applied only if less severe measures have failed to correct the employee's deficiencies.

2. The system adopted pursuant to subsection 1 must provide that a state employee is entitled to receive a copy of any findings or recommendations made by an appointing authority or the representative of the appointing authority, if any, regarding proposed disciplinary action.

3. An appointing authority shall provide each permanent classified employee of the appointing authority with a copy of a policy approved by the Commission that explains prohibited acts, possible violations and penalties and a fair and equitable process for taking disciplinary action against such an employee.

(Added to NRS by 1979, 1353; A 1995, 233; 2011, 1495)

NRS 284.385 Dismissals, demotions and suspensions.

1. An appointing authority may:
 - (a) Dismiss or demote any permanent classified employee when the appointing authority considers that the good of the public service will be served thereby.
 - (b) Except as otherwise provided in NRS 284.148, suspend without pay, for disciplinary purposes, a permanent employee for a period not to exceed 30 days.
2. Before a permanent classified employee is dismissed, involuntarily demoted or suspended, the appointing authority must consult with the Attorney General or, if the employee is employed by the Nevada System of Higher Education, the appointing authority's general counsel, regarding the proposed discipline. After such consultation, the appointing authority may take such lawful action regarding the proposed discipline as it deems necessary under the circumstances.
3. A dismissal, involuntary demotion or suspension does not become effective until the employee is notified in writing of the dismissal, involuntary demotion or suspension and the reasons therefor. The notice may be delivered personally to the employee or mailed to the employee at the employee's last known address by registered or certified mail, return receipt requested. If the notice is mailed, the effective date of the dismissal, involuntary demotion or suspension shall be deemed to be the date of delivery or if the letter is returned to the sender, 3 days after mailing.
4. No employee in the classified service may be dismissed for religious or racial reasons.
[49:351:1953]—(NRS A 1963, 1049; 1977, 991; 1993, 2092; 2011, 1495)

**NEVADA DEPARTMENT OF CORRECTIONS
ADMINISTRATIVE REGULATION
339**

**EMPLOYEE CODE OF ETHICS AND CONDUCT,
CORRECTIVE OR DISCIPLINARY ACTION, AND
PROHIBITIONS AND PENALTIES**

Supersedes: AR 339 (06/17/12); incorporates AR 340 (08/13/10); AR 341 (08/13/10); and AR 343 (12/17/13); AR 339 (Temporary, 10/13/14); AR 339 (Temporary, 12/10/14); and AR 339 (Temporary, 12/18/14) AR 06/17/12 (Reverted back to last permanent AR on 05/19/15)

Effective date: 1/14/16

AUTHORITY

NRS 209.131, .239; NRS Chapters 284 & 289; NRS 281A.400; NAC 284.638 -.656; 284.548, 284.738 -.771, 42 U.S.C. § 15601, *et seq.* and 28 C.F.R. Part 115

RESPONSIBILITY

The Director/Designee has responsibility for administering employee discipline.

The Appointing Authorities are responsible for enforcement of this Administrative Regulation (AR), utilizing the appropriate state forms. Additionally, the primary responsibility for ensuring that complaint allegations are properly referred and investigated rests with each Warden/Division Head who becomes aware of the complaint or allegation of employee misconduct.

The Department's Human Resources Division is responsible to provide each permanent classified employee with a copy of this AR and maintain records of distribution. The Human Resources Division is also responsible for tracking disciplinary actions and maintaining employee personnel files.

All Department employees are responsible to comply with this AR at all times. This includes immediately reporting any alleged act of employee misconduct to a supervisor.

The Employee Development Manager, in conjunction with the Inspector General (IG), is responsible to develop and deliver training on this AR.

The IG is responsible for and oversees all investigations. The IG will maintain the investigative case file, including copies of related attachments associated with the complaint.

The Warden/Division Heads are responsible to review completed misconduct complaint investigations and adjudicate subordinate employee culpability, making recommendations for corrective or disciplinary action.

339.01 CODE OF ETHICS

1. Employees of the Nevada Department of Corrections should at all times adhere to the following Code of Ethics.

A. The Nevada Department of Corrections is committed to a code of ethics that will guide the performance, conduct and behavior of its employees. This code will ensure that our professionalism is reflected in the operation and activities of the Department and is recognized by all interested parties. In this light, the following principles are practiced:

(1) Employees shall maintain high standards of honesty, integrity, and impartiality, free from any personal considerations, favoritism, or partisan demands.

(2) Employees shall be courteous, considerate, and prompt when dealing with the public, realizing that we serve the public.

(3) Employees shall maintain mutual respect and professional cooperation in their relationships with other staff members of the Department of Corrections.

(4) Employees shall be firm, fair, and consistent in the performance of their duties. Employees should treat others with dignity, respect, and compassion and provide humane custody and care, void of all retribution, harassment, or abuse.

(5) Employees shall uphold the tenets of the United States Constitution, its amendments, the Nevada Constitution, federal and State laws, rules, and regulations, and policies of the Department.

(6) Whether on or off duty, in uniform or not, employees shall conduct themselves in a manner that will not tend to bring discredit or embarrassment to the Department of Corrections and the State of Nevada.

(7) Employees shall report without reservation any corrupt or unethical behavior that could affect either inmates, employees, or the integrity of the Department of Corrections.

(8) Employees shall not use their position for personal gain.

(9) Employees shall maintain confidentiality of information that has been entrusted to them.

(10) Employees shall not permit themselves to be placed under any kind of personal obligation that could lead any person to expect official favors.

(11) Employees shall not accept or solicit from anyone, either directly or indirectly, anything of economic value, such as a gift, gratuity, favor, entertainment, or loan which is, or may appear to be, designed to influence their official conduct.

(12) Employees shall not discriminate against any inmate, employee, or any member of the public on the basis of race, color, religion, sex, sexual orientation, age, disability, gender identity or expression, or national origin.

(13) Employees shall not sexually harass or condone sexual harassment with or against any person, including but not limited to any inmate, employee, volunteer, vendor, or any member of the public.

(14) Employees shall maintain the highest standards of personal hygiene, grooming and neatness while on duty or otherwise representing the Department.

339.02 EMPLOYEE CONDUCT ON AND OFF DUTY

1. All Department employees are responsible, at all times, to conduct themselves in an appropriate manner, with honor, integrity, and impartiality whether on or off duty, to obey and support the letter and spirit of the law, and to always exercise appropriate self-discipline in the use of the power and authority entrusted to them.

2. The penalty imposed for a violation of 339.07 Class of Offense Guidelines (18. R.), can range from a CLASS 1 – 5 violation depending upon the facts and circumstances of the particular case.

3. Under the law Peace Officers are expected to abide by the laws they are empowered to enforce. Peace Officer employees will obey all laws of the U.S., State of Nevada, and ordinances in force in their jurisdiction. Violations of law, an indictment or information filed against an officer, or a conviction can be cause for disciplinary action up to and including termination from employment, especially where off-duty conduct tends to bring the Department into public discredit or which tends to affect the employee's ability to perform assigned duties efficiently. Employees must also be careful that the authority vested in them as Peace Officers is not abused.

339.03 GOALS OF CORRECTIVE AND DISCIPLINARY MEASURES

1. Public employees have an affirmative duty to serve the public. The public trusts that the Department will operate within legal and procedural boundaries. Occasionally an employee will step beyond these boundaries, resulting in a misconduct and/or performance complaint. Each time the Appointing Authority adjudicates a complaint public trust is impacted.

2. When an allegation of misconduct and/or performance is Sustained, corrective or disciplinary action shall be applied.

3. Disciplinary action is intended to serve three purposes which are weighed carefully when making recommendations:

A. To modify the offending employee's behavior.

B. To set expectations for other employees.

C. To assure the public that the Department strives to maintain the public trust by holding employees accountable.

4. The offending employee's Appointing Authority is generally the best person to review and recommend the corrective or disciplinary action that will best serve to modify that employee's behavior. However, the recommendation will be superseded if it does not set consistent expectations for all employees or fails to uphold the public trust.

339.04 REPORTING COMPLAINTS OR MISCONDUCT

1. All Department employees, regardless of rank or position, who become aware of an alleged act of employee misconduct, are responsible to take immediate and appropriate action to control the situation, prevent aggravation of the incident, and notify their chain of command regarding the allegation.

2. All employees at any location must accept complaints of employee misconduct from any source, in any format. If the receiving employee is not a supervisor, a supervisor must be notified immediately.

A. Complaints may be based on affirmative acts or failures to act.

B. Any failure to comply with posted AR's, OP's, Post Orders, Unit Rules, or other procedures should be reported,

C. Lower level issues related to performance need not be investigated by Inspector General staff, as long as an "impartial fact-finding" process is followed.

D. An employee who takes a complaint from an outside source may provide the complainant with a copy of the completed NOTIS entry or DOC form 028, including any documentation.

E. An employee taking a complaint should have a supervisor or another employee take over if it becomes clear that the complaint is about the employee.

F. If the complaint being received is about the employee's immediate supervisor, the employee is authorized to report the complaint to any other supervisor.

3. A supervisor who is informed of a complaint should immediately complete a NOTIS entry or DOC-028. The supervisor should make certain that any documentation is attached.
4. The Appointing Authority is responsible to make certain that reporting forms are correct and complete. Deficient reports will be returned to the Appointing Authority for corrections.

339.05 INVESTIGATIONS

1. The Appointing Authority is responsible for ensuring that allegations of employee misconduct are investigated. The Appointing Authority should request an investigation using the "refer to IG" function in NOTIS.
2. Following receipt of an investigation request, the Inspector General or designee will review the NOTIS preliminary report/DOC-028, any attachments, and any other reports related to the allegations of employee misconduct to determine if an investigation is appropriate. If an investigation is initiated, the Inspector General or designee will identify generally appropriate allegations based upon the Class of Offense Guidelines outlined below and assign the appropriate investigative body.
 - A. Generally, those offenses identified as Class 1 and 2 will be assigned to the involved Appointing Authority for investigation. At the discretion of the Inspector General or designee, Class 3 offenses may be assigned to the involved Appointing Authority or to an investigator within the Inspector General's Office. Generally, Class 4 and 5 offenses will be assigned to Office of the Inspector General investigators.
 - B. Incidents of poor or less than standard performance that do not contain an element of misconduct will be assigned to the Warden/Division Head for appropriate action without case assignment.
 - C. When circumstances dictate that the investigation will involve the interview of civilians or investigation outside of the institution, the investigation will be conducted by the Office of the Inspector General.
3. A preliminary inquiry will be conducted pursuant to the Office of the Inspector General – Guide for Investigators – Preliminary Investigations Section, noting that the original complaint and reports may suffice.
4. Any employee who is the focus or subject of an investigation shall be afforded all rights and protections provided by law, and by Department regulation and directive. Current requirements are in the "Office of the Inspector General – Guide for Investigators."
5. The Inspector General or designee shall review the matter to determine where the investigation will be assigned.

A. If the IG determines that a formal investigation is not necessary, the Inspector General will notify the Appointing Authority, who is then responsible to appoint an individual of the rank of Sergeant/Non-sworn supervisor or higher as an institutional investigator.

(1) If an investigation assigned to an institution subsequently yields evidence of potential criminal misconduct by an employee or others, the Appointing Authority shall immediately notify the Inspector General.

(2) The Inspector General shall review the matter and determine whether the investigation should continue with the Appointing Authority or be returned to the Inspector General's authority.

B. If a formal investigation is required, a case number and investigator will be assigned without delay.

(1) A formal investigation will be conducted pursuant to the Office of the Inspector General – Guide for Investigators.

(2) If it becomes necessary to conduct parallel administrative and criminal investigations regarding a complaint of employee misconduct, the Inspector General shall ensure that the investigations are bifurcated. Information developed during the administrative investigation growing out of the subject's interview shall not be shared in the criminal investigation.

(3) If additional misconduct is discovered during the course of an investigation which is related to the original misconduct, the investigator shall amend the allegations and continue with investigation. If the discovered misconduct is not related to the current investigation, the investigator should generate a new NOTIS entry and submit it for Inspector General review and assignment.

(4) The investigation will be completed within the due date assigned by the Office of the Inspector General and applicable statutes and regulations. The Inspector General's Office may grant extensions requested for reasonable cause.

(5) Where an IG investigator has determined that a polygraph examination would appropriately supplement an investigation, the procedural safeguards provided in the "Office of the Inspector General – Guide for Investigators" will be applied.

C. Upon completion of an employee misconduct investigation, the assigned investigator shall document investigative facts in a final case report according to the guidelines in the "Inspector General – Guide for Investigators."

339.06 PROHIBITIONS AND PENALTIES

1. The Chart of Corrective/Disciplinary measures ascribes an available range of Corrective/Disciplinary action for each Class of prohibited activity. This chart indicates the suggested level of discipline, from less serious to more serious, for the Class of Offense and for first, second and third offenses.
2. Penalties for prohibited activities should be assessed based upon criteria established in the Chart of Corrective/Disciplinary Sanctions.
3. Multiple Infractions - In cases involving more than one sustained violation, disciplinary action should begin with the most serious violation. Other related violations may then be considered as aggravating circumstances when determining the appropriate penalty from within the minimum and maximum recommended range, or each violation may be individually considered and the penalties cumulated.
4. Progressive Discipline - Grave acts of misconduct may warrant dismissal of an employee without previous corrective action or progressive discipline. However, less serious acts of misconduct may warrant the use of progressive discipline, i.e., lesser to greater discipline, to give the employee a chance to reform his or her conduct. The increasing level of concern expressed through progressive discipline may begin with corrective action or proceed to a written reprimand, suspension for up to 30 calendar days, demotion, or dismissal.
5. Appointing Authorities and employees must recognize that penalty schedules cannot accurately, fairly, or consistently address every situation; a comprehensive list of DOs and DON'Ts of employee conduct is not possible. Appointing Authorities must conduct an individual analysis of each employee for each incident and exercise their professional judgment and discretion in recommending a penalty. Training, education, actions, awards, and punishments are interrelated, not separate elements.
6. There is no requirement that charges similar in nature must result in identical penalties. Employees sometimes incorrectly equate fairness and consistency as synonyms; they are not.
 - A. Consistency within a disciplinary system means holding every employee equally accountable for unacceptable behavior. Unacceptable behavior for one is unacceptable behavior for all, regardless of rank, status, or tenure.
 - B. Fairness within a disciplinary system means understanding the numerous circumstances that could contribute to the unacceptable behavior. Disciplinary recommendations must consider these circumstances. Thus, two employees accused of the same misconduct could face different consequences.
7. Appointing Authorities and their reviewers should neither rely solely on previously imposed penalties nor quote them as an authority in penalty rationales. It must be remembered that this is a historical document of penalties. As such, it may not reflect an appropriate penalty for the

misconduct. Indeed, an appropriate penalty may be higher or lower depending upon current issues and the impact of the particular misconduct on the Department and/or fellow employees.

8. Failure to report, failure to act, or failure to disclose is considered misconduct.

9. The Department has developed Class of Offense Guidelines which describe many prohibited employee actions and a Chart of Corrective/Disciplinary Sanctions which recommends penalties for inappropriate conduct.

10. Conflicting activities pursuant to NAC 284.738 include but are not limited to any activity prohibited by AR 332, Employee Reporting Responsibilities; AR 345, Unauthorized Relationships; AR 346, Nepotism; AR 347, Political Activities by Employees; and AR 355, Employee Secondary Employment.

Chart of Corrective/Disciplinary Sanctions

	First Offense		Second Offense		Third Offense	
Class	Minimum	Maximum	Minimum	Maximum	Minimum	Maximum
1	Verbal Counseling	Written Reprimand	Written Reprimand	Suspension	Suspension	Dismissal
2	Written Reprimand	Suspension	Suspension	Suspension Demotion	Suspension Demotion	Dismissal
3	Suspension	Suspension Demotion	Suspension Demotion	Dismissal	Dismissal	N/A
4	Suspension Demotion	Dismissal	Suspension Demotion	Dismissal	Dismissal	N/A
5	Dismissal	Dismissal				

339.07 CLASS OF OFFENSE GUIDELINES

1. ABSENT WITHOUT LEAVE (AWOL)

A. Unexcused tardiness. **CLASS 1**

B. Absence without approved leave for three consecutive scheduled working days.
CLASS 5

C. Any absence without approved leave short of three consecutive scheduled working days.
CLASS 2-4

2. DISCHARGE OF FIREARM DUE TO NEGLIGENCE

- A. Discharge of firearm because of negligence. **CLASS 2**
- B. Discharge of firearm due to negligence, with substantial injury/damage. **CLASS 4-5**

3. ALCOHOL ABUSE

The State of Nevada Reasonable Suspicion and Pre-Employment Drug and Alcohol Testing Program provides for the testing of employees and applicants for alcohol and drugs pursuant to NRS 284.406 through NRS 284.407; and NAC 284.880 to 284.894, inclusive.

- A. Employees under the influence of alcohol with the intent to report to duty or while on duty. First offense. **CLASS 4** Second offense within five years. **CLASS 5**
- B. Appear for duty with the odor of alcohol/intoxicant on person or breath. **CLASS 3**
- C. Purchase or consumption of alcohol while in uniform when off duty. **CLASS 3**
- D. Purchase or possess alcoholic beverage on duty. **CLASS 4**
- E. Consumption of an alcoholic beverage while on duty. **CLASS 4**
- F. Driving while under the influence of alcohol while on duty. **CLASS 4**
- G. Damaging State property while under the influence of an alcoholic beverage. **CLASS 4-5**
- H. Refusal to submit to a lawfully required alcohol test. **CLASS 5**

4. NARCOTICS/DRUGS

The State of Nevada Reasonable Suspicion and Pre-Employment Drug and Alcohol Testing Program provides for the testing of employees and applicants for alcohol and drugs pursuant to NRS 284.406 through NRS 284.407; and NAC 284.880 to 284.894, inclusive.

- A. Employees under the influence of or using a controlled substance/narcotic/drug, etc. while on duty. First offense. **CLASS 3** Second offense within five years. **CLASS 5**
- B. Peace Officers and/or those employees who come into contact with inmates as a part of their job duties, under the influence of or using a controlled substance/narcotic/drug, etc. while on duty. First offense. **CLASS 4** Second offense within five years. **CLASS 5**

C. Refusal to submit to a lawfully required controlled substance/narcotic/drug test.
CLASS 5

D. An employee driving under the influence in violation of NRS 484C.010 et seq. or of any other offense for which driving under the influence is an element of the offense, and the offense occurred while driving a state vehicle or a privately owned vehicle on state business.
CLASS 4-5

E. Unlawful manufacture, distribution, dispensing, possession, selling, or use of any controlled substance, narcotic, and/or drug at his/her place of work or on state business.
CLASS 4

F. Knowingly transport any person to buy/obtain any illegal controlled substance, narcotic, and/or drug. **CLASS 4**

G. Failure to notify a supervisor after consuming any drug, alcohol and/or substance which could interfere with the safe and efficient performance of his/her duties. **CLASS 4**

5. CRIMINAL MISCONDUCT

A. An employee who is convicted of driving under the influence in violation of NRS 484C.010 et seq. or of any other offense for which driving under the influence is an element of the offense while driving a state vehicle, or a privately owned vehicle on state business. (See NAC 284.653.) **CLASS 4-5** Second offense within 5 years. **CLASS 5**

B. An employee who is convicted of the unlawful manufacture, distribution, dispensing, possession, selling, or use of any controlled substance at his place of work or on state business. **CLASS 5**

C. Guilty plea of any type (Alford, no contest, etc.) or conviction of a felony, gross misdemeanor, or misdemeanor. **CLASS 4** Provided the conduct at issue has an adverse impact upon the Department and/or tends to bring the Department into public discredit which tends to affect the employee's ability to perform duties efficiently.

D. Reasonable belief that a felony, gross misdemeanor, or misdemeanor has been committed. **CLASS 4** Provided the conduct at issue has an adverse impact upon the Department and/or tends to bring the Department into public discredit which tends to affect the employee's ability to perform duties efficiently.

E. Domestic violence conviction. [18 U.S.C.A. §§ 917, 922 (Federal Gun Control Act of 1968) as amended, effective October 1, 1996]. **CLASS 5**

6. DISCOURTESY

- A. Discourteous or improper remark to a member of the public or a co-worker. **CLASS 2**
- B. Initiate and/or perpetuate malicious rumors regarding fellow employees. **CLASS 2**

7. DISCRIMINATION, SEXUAL HARASSMENT, AND OTHER TITLE VII VIOLATIONS

A. Title VII of the Civil Rights Act pertains to discriminatory acts in the workplace taken against applicants or employees merely on the basis of their race, color, religion, sex, sexual orientation, age, disability, or national origin.

B. NDOC is required by Title VII to ensure that no discrimination occurs in the workplace. As part of this responsibility, NDOC must provide a system for reporting, prompt investigation, and discipline of employees engaging in unlawful conduct. The goal is to ensure that the alleged harasser stops the discriminatory behavior as well as discouraging other employees who might engage in such behavior from doing so.

C. "Sexual Harassment" is defined pursuant to NAC 284.771. Therefore, depending on the nature, severity, and duration of conduct in violation of Title VII, NDOC should impose prompt disciplinary sanctions ranging from a **CLASS 3** to a **CLASS 5**.

D. "Hostile work environment" is a legal term for discriminatory conduct in violation of Title VII by employees that occurs over a period of time and by its nature changes an employee's terms and conditions of employment. It is not a work environment that is unpleasant for reasons not directly associated with Title VII discrimination, such as a grouchy supervisor or ill-mannered co-workers.

E. Refer to NAC 284.771.

(1) Discriminating against or harassing another person because of that person's race, color, religion, sex, sexual orientation, age, disability, gender identity or expression, or national origin. **CLASS 4-5**

(2) Make a prohibited discriminatory remark at work or in the work related environment. **CLASS 4-5**

(3) Display of discriminatory photographs, cartoons, jokes, or other comments of a discriminatory nature at work or in the work related environment. **CLASS 4-5** (While the NDOC cannot control your personal postings on a social networking site, any inappropriate materials from such a site re-posted in any work-related environment can lead to charges under this section. Similarly, "photo-shopping" an image of a co-worker in a discriminatory fashion can lead to charges under this section.)

8. **DISHONESTY**

- A. Theft, misappropriation, or other fraudulent activity involving Department or State funds, property, or resources, including but not limited to falsification of a timesheet. **CLASS 5**
- B. Theft of property belonging to another employee, a citizen, or an inmate. **CLASS 5**
- C. Knowingly making false statement on travel claims. **CLASS 5**
- D. Receiving travel expenses through false pretenses. **CLASS 5**
- E. Making a personal profit from State transactions. **CLASS 5**
- F. Accepting or soliciting a bribe or gratuity. **CLASS 5**
- G. Converting found, recovered or seized property to personal use. **CLASS 2-5**

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**
- B. Knowingly falsifying any State record or report. **CLASS 5**
- C. Failure to assure factual accounting and record-keeping to prohibit falsification, unauthorized alteration, or destruction of documents, log books, and other records. **CLASS 5**

10. **FRAUD IN SECURING APPOINTMENT**

- A. Willful falsification of application for employment or other personnel forms. The falsification must deal with a material fact that would have adversely affected the employee's selection. **CLASS 5**
- B. Permitting another person to take a portion of the State Service examination for the employee or for someone else or participating in such an examination for another person. **CLASS 5**

11. IMPROPER POLITICAL ACTIVITY

- A. Using or promising to use any official authority or influence for the purpose of influencing the vote or political action of any person or for any consideration. **CLASS 2**
- B. Engaging in political activity during the hours of their state employment to improve the chances of a political party or a person seeking office, or at any time engage in political activity to secure a preference for a promotion, transfer, or salary advancement. **CLASS 2**
- C. Engaging in any unauthorized political activity, except for expressing an opinion, while on duty, while in uniform, or at public expense. **CLASS 3**
- D. Soliciting and/or influencing any employee to engage or not engage in any political activities with direct or indirect use of any threat, intimidation, or coercion. This includes threats of discrimination, reprisal, force, or any other adverse consequence including loss of any benefit, reward, promotion, advancement, or compensation. **CLASS 5**
- E. Subjecting any employee who chooses not to engage in any political activity to any direct or indirect discrimination, reprisal, force, coercion or intimidation or any other adverse consequence including the loss of any benefit, reward, promotion, advancement, or compensation. **CLASS 5**

12. INSUBORDINATION

- A. Disobeying or refusing to obey a statute, regulation, written or verbal instruction, or lawful order. **CLASS 4-5**
- B. Disobeying or refusing to obey a statute, regulation, written or verbal instruction, or lawful order, involving a potential or an actual security breach, especially which leads to personal injury. **CLASS 5**
- C. Argue about the wisdom or propriety of a lawful order or decision; back-talking. **CLASS 2**
- D. Refusal to undergo a search of person or property on institutional property. **CLASS 5**
- E. Failure to provide identification or display proper I.D. **CLASS 1-2**
- F. Unauthorized service and or acceptance of legal process. **CLASS 1**
- G. Unauthorized representation of Department. **CLASS 2-5**
- H. Disobeying the State of Nevada smoking statutes and/or Department tobacco prohibition regulations. **CLASS 3**

I. Use of profane, disparaging, or abusive language directed at, with, to and/or around or to otherwise make another employee(s) aware of an attempt to embarrass, ridicule or degrade a supervisor of the institution, Department or State of Nevada Service. **CLASS 3-5**

J. Refusal to work mandatory overtime. **CLASS 3** Any subsequent refusal. **CLASS 4-5**

13. MISUSE OR UNAUTHORIZED USE OF PROPERTY

Behavior under this category may also subject the employee to civil or compensatory penalties or criminal prosecution.

A. Damage to or loss of State property or equipment due to neglect or carelessness.
CLASS 2-5

B. Failure to properly maintain State property and/or Department equipment.
CLASS 1

C. Unauthorized use, misuse, or waste of property belonging to the State or Department.
CLASS 2-5

D. Unauthorized destruction of State records. **CLASS 5**

E. Speeding or committing other traffic violations while driving a State-owned vehicle, or reckless handling of other State equipment. **CLASS 2**

F. Using Department vehicle for other than official business or for personal use and benefit.
CLASS 3

G. Deliberate waste of materials or supplies. **CLASS 2**

H. Unlawful removal of State property. **CLASS 5**

I. Improper use of Department communications or information systems. **CLASS 4**

J. Permitting inmates to use Department telephones, or be in an area unsupervised where staff telephones are accessible, except as otherwise authorized by administrative regulations.
CLASS 4

K. Intentional destruction, damage to or loss of property or State equipment. **CLASS 4-5**

L. Loss of or damage to inmate property caused by an employee of the Department which is attributable to negligence, lack of reasonable care, failure to follow proper procedures or misconduct on the part of the employee. **CLASS 2-4**

14. COMPUTER USAGE VIOLATIONS

- A. Unauthorized or improper use or copying of proprietary software, electronic file, program, or data. **CLASS 4-5**
- B. Unauthorized use or distribution of Department data or programs for other than the administration of Department duties, responsibilities, and business. **CLASS 3-5**
- C. The introduction or use of computer hardware or software to or on Department computers or systems, including but not limited to, downloading any such materials without prior authorization. **CLASS 3-5**
- D. Using another employee's password to access Department computers. **CLASS 3**
- E. Providing or exposing your password to any other person. **CLASS 3**
- F. Failure to secure your Department computer, or accessing a Department computer which has been left unsecured. **CLASS 3**
- G. Use of State or Department e-mail, intranet, or Internet system which violates any statute, regulation, Administrative Regulation, policy or procedure for purposes not directly related to Department duties or unrelated to the Department mission. This includes activities such as access to or distribution of computer games or use for private business. **CLASS 3-4**
- H. Use of State or Department equipment for gambling. **CLASS 5**
- I. Use for access to or distribution of pornographic material as defined by NAC 284.646(4). **CLASS 5**
- J. Forging a digital signature. **CLASS 5**
- K. Attempting to, or intentionally using e-mail or Internet facilities to disable, impair, overload or disrupt computer or network performance, services or equipment, or to circumvent any system intended to protect privacy or security of another user or the system or to harass other users. **CLASS 5**
- L. Unauthorized use to inappropriately seek, distribute, obtain copies of, modify, or distribute information, files, or other data that is private, confidential or not open to public inspection. **CLASS 5**
- M. Intentionally allowing an inmate to have any password protected file. **CLASS 5**
- N. Permitting an inmate to have access to privileged, confidential, or sensitive information contained on a computer. Employees should not access such information on their computer screens with inmates in the vicinity. **CLASS 4**

O. Leaving an inmate unsupervised in any area containing access to privileged, confidential, or sensitive information on an unsecured computer. **CLASS 5**

P. Improperly permitting an inmate to work on, use, or otherwise access any computer, computer system, or information system of the State or the Department so that:

(1) the inmate may be connected in any way to a modem, network or similar device which would allow communication outside a Department facility;

(2) the inmate may collect, organize, or otherwise use personal, Department, or State proprietary or confidential information; OR

(3) the inmate participates in providing technical or other assistance with a computer problem. **CLASS 5**

Q. Purposefully circumventing State or Department internet security for any reason including but not limited to accessing unauthorized internet web sites. **CLASS 3-4**

15. NEGLECT OF DUTY

A. Careless or sloppy work; frequent mistakes or errors. **CLASS 1**

B. Failure to complete work assignments. **CLASS 1**

C. Failure to complete and submit required reports to supervisor or other designated person. **CLASS 2**

D. Failure to take corrective action when warranted. **CLASS 1-2**

E. Willful failure to intervene or respond when necessary. **CLASS 3**

F. Making inappropriate recommendations. **CLASS 1**

G. Wasting time or loitering. **CLASS 1**

H. Failure to devote full time, attention and effort to assigned duties. **CLASS 2**

I. Conducting outside/personal business on State time. **CLASS 2-3**

J. Engage in unauthorized off duty employment, activity or enterprise determined to be inconsistent, incompatible, or in conflict with duties as employees of the Department. **CLASS 3**

- K. Engage in secondary employment without an approved Request for Secondary Employment Form. **CLASS 2**
- L. Failure to keep work area clean and uncluttered causing a work hazard. **CLASS 1**
- M. Misplacement of important documents or property. **CLASS 1**
- N. Disregard of safety rules. **CLASS 2-4**
- O. Intentionally initiating or causing a disruption of normal operations. **CLASS 4**
- P. Failure to make proper notification of sick leave. **CLASS 2**
- Q. Failure to maintain telephone or other method of delivering messages at residence. **CLASS 1**
- R. Failure to maintain required uniform. **CLASS 1**
- S. Failure to wear appropriate clothing consistent with assigned duties. **CLASS 1**
- T. Failure to appear for court or a hearing when duly notified or subpoenaed. **CLASS 3**
- U. Failure to comply with any court order or judgment. **CLASS 3-5**
- V. Failure to maintain personal appearance appropriate to the job. **CLASS 1**
- W. Loss of seized, found, or recovered property by negligence. **CLASS 1** Willful failure to appropriately identify and secure such property. **CLASS 2**
- X. Allowing unauthorized personnel to enter work areas. **CLASS 2**
- Y. Failure to ensure subordinate employees perform required duties. **CLASS 1**
- Z. Failure to report to a supervisor when tired or ill. **CLASS 2**
- AA. Sleeping on duty or failure to remain fully awake while on duty. **CLASS 4**
- BB. Failure to assure safety and security as part of effective job performance, employees remain alert, aware of, attentive and responsive to their surroundings while on duty. **CLASS 4**
- CC. Failure to report misconduct, or failure to report or notify supervisor concerning incidents, activities, events of immediate interest or concern, or matters impacting PREA which take place within the jurisdiction of, or which impact, the Department. **CLASS 1-5**

- DD. Failure to exercise proper supervision over offenders. **CLASS 2**
- EE. Concealing or covering-up of defective workmanship. **CLASS 2**
- FF. Failure to report an arrest or conviction of any misdemeanor, gross misdemeanor, or felony within 24 hours or before the beginning of their next shift. **CLASS 2**
- GG. Failure to report suspension or revocation of a driver's license when a valid driver's license is a requirement of the position. **CLASS 2**
- HH. Failure to report contact with law enforcement (other than in matters involving routine traffic stops, random automobile stops and road blocks, and other than in cases involving the rendering of assistance to law enforcement) or having been notified that employee is the subject of a criminal investigation, or that a criminal investigation is proceeding against employee. **CLASS 2**
- II. Preferential treatment of subordinates or offenders. **CLASS 2**
- JJ. Failure to respond to radio call. **CLASS 2**
- KK. Unauthorized possession of weapons or security equipment on State Property. **CLASS 5**
- LL. Failure to perform security functions, violation of any safety rule, or violating or endangering the security of an institution. **CLASS 4-5**
- MM. Intentional failure to discharge duties, whether custodial or other job responsibilities, provided that failure results in (a) escape of a prisoner (b) the serious physical injury (c) sexual assault or (d) death of another person. **CLASS 5**
- NN. Engaging in any act or communicating information in any fashion that could assist any individual to escape arrest, detention and/or punishment, or enables any individual to dispose of or conceal evidence. **CLASS 5**
- OO. Withholding information or concealing suspected criminal activity to shield individuals from detection, arrest, detention or punishment. **CLASS 5**
- PP. Attempting to have any formal charges dismissed, reduced, avoided or stricken from any court calendar, except as provided by law. **CLASS 4**
- QQ. Take any action that interferes with the administration of criminal justice, including intentionally interfering with the service of subpoenas, other lawful process, or the attendance or testimony of any witness at any lawful proceeding. **CLASS 5**

RR. Concealing, altering, falsifying, destroying, removing, tampering or withholding any property or evidence associated with any alleged misconduct, investigation, arrest, or other administrative or enforcement action. **CLASS 5**

SS. Removing, copying, concealing, altering, falsifying, destroying, stealing, or tampering with any record, report, or other official document maintained by the State, Department or any other criminal justice agency. (Official Department reports may be removed and/or copied only as allowed by law and Department policy/procedure.) **CLASS 5**

TT. Leaving an assigned post while on duty without authorization of a supervisor.
CLASS 5

UU. Failure to meet Peace Officer Standards & Training (POST) requirements. **CLASS 5**

VV. Failure to maintain a valid driver's license when it is a condition of employment.
CLASS 5

WW. Failure to maintain license, certification, etc. when condition of employment.
CLASS 5

XX. Introduction of a telecommunication device as described in NRS 212.165. **CLASS 5**
When the introduction of the telecommunications device is immediately self-reported by the employee, no calls have been made or received through the device during the time it has been inside the institution, and the employee has been discipline-free during the previous 12 months. **CLASS 2**

YY. Possession and/or Introduction of non-intoxicant contraband. Contraband is any item not issued by the State to properly perform job duties. An employee must obtain written approval of the Warden or designee to possess any personal items while on duty. **CLASS 4**

ZZ. Possession and/or introduction of an intoxicant contraband, including narcotics and alcohol. **CLASS 5**

AAA. Failure to cooperate with official investigations conducted by the Department or other criminal justice agencies, when such failure does not violate an accused's Constitutional self-incrimination protection. **CLASS 3**

BBB. Failure to safely operate motor vehicles while on duty – When the failure results in significant damage, bodily injury or death. **CLASS 5** When the failure results in minimal damage and/or minor injuries. **CLASS 3**

16. SEXUAL ABUSE

A. Any sexual contact including but not limited to, oral sexual contact, including kissing any body part or sexual penetration, masturbation, or physical contact with the clothed or

unclothed genitals or pubic area to arouse, appeal to or gratify sexual desires involving any individual other than an inmate on State time and/or involving State property or equipment. **CLASS 5**

B. Custodial Sexual Misconduct defined as sexual abuse is any behavior or act of a sexual nature, either consensual or non-consensual, directed toward an inmate by an employee, volunteer, contractor, official visitor, or agency representative. These acts include but are not limited to:

- (1) Unauthorized, intentional touching of the clothed or unclothed genitalia, anus, groin, breast, inner thigh, or buttocks with the intent to abuse, arouse or gratify sexual desire;
- (2) Unauthorized, intentional touching, fondling, or caressing of an inmate's person, directly or indirectly, related to a "romantic" relationship;
- (3) Completed, attempted, threatened, or requested sexual acts; or
- (4) Occurrences of indecent exposure, invasion of privacy or staff voyeurism. **CLASS 5**

Voyeurism by a staff member, contractor, or volunteer is defined as: invasion of privacy of an inmate, detainee, or resident by staff for reasons unrelated to official duties, such as peering at an inmate who is using a toilet in his or her cell to perform bodily functions; requiring an inmate to expose his or her buttocks, genitals, or breasts; or taking images of all or part of an inmate's naked body or of an inmate performing bodily functions.

C. Staff on inmate sexual harassment includes staff, volunteers, or contractors who have contact with an inmate. Prohibited conduct includes but is not limited to repeated instances of:

- (1) Verbal comments of a sexual nature to an inmate;
- (2) Demeaning references to gender;
- (3) Sexually suggestive or derogatory comments about body or clothing; or
- (4) Profane or obscene language or gestures, first offense **CLASS 3-5, second or any subsequent offense Class 5**

D. Failure to report an inmate's sexual activity. **CLASS 5**

17. UNAUTHORIZED USE OF FORCE

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

- B. Creating a situation where force must be used unnecessarily. **CLASS 4**
- C. Failing to report any use of force either as a participant or a witness. **CLASS 3-4**

18. **UNBECOMING CONDUCT**

- A. Engaging in horseplay with co-workers. **CLASS 3** With inmates. **CLASS 4-5**
- B. Gambling on State property or while on duty or gambling while in uniform. **CLASS 2**
- C. Unprofessional remark to an inmate. **CLASS 1**
- D. Providing contraband to an inmate. **CLASS 5**
- E. Abuse of sick leave. **CLASS 2**
- F. Misuse and/or abuse of supervisory authority or privilege. **CLASS 2**
- G. Any violation of AR 345 regarding unauthorized relationships. **CLASS 1-5**
- H. Divulging criminal records, medical records, or other legally protected information of one person to another, except when necessary to conduct the Department's business. **CLASS 5**
- I. Unauthorized disclosure of confidential Department matters. **CLASS 4**
- J. Compromising the confidentiality of inmate affairs. **CLASS 3-5**
- K. Conducting unauthorized transactions with an inmate or an inmate's family. **CLASS 5**
- L. Transmitting prohibited messages to or for inmates. **CLASS 3-5**
- M. Identified self, displayed badge or identification, appeared in uniform, or made improper use of your status as a Department employee other than is necessary, whether on or off duty. **CLASS 2-5**
- N. Retaliated against another employee or an inmate for reporting a complaint of misconduct, to include sexual harassment or sexual abuse of an inmate, or retaliated against another employee or an inmate who cooperates with an official PREA investigation. **CLASS 4-5**
- O. Inciting another to fight. **CLASS 4**
- P. Unauthorized use, misuse, destruction or waste of property belonging to the State of Nevada, another employee, a citizen, or an inmate. **CLASS 1-5** (Such misconduct

may subject the employee to financial liability for replacement of the property, whether attributable to negligence, lack of reasonable care, or failure to follow proper procedures.)

Q. Displaying pornographic or adult pictures, movies, videos or text to inmates, employees or to persons outside of the Department while on paid status or on State property. **CLASS 5**

R. Any conduct whether on or off duty which may negatively reflect upon the image of the State of Nevada or the Department of Corrections. **CLASS 1-5**

S. Verbal threats or display of intimidating behavior towards a staff member. **CLASS 3**

339.08 ADJUDICATION

1. After the assigned investigator or supervisor completes the final case report, the Appointing Authority will adjudicate the matter within the time assigned, designating the final applicable Class of Offense Guidelines, using the appropriate form, and in coordination with the Office of the Inspector General.

2. The Appointing Authority shall prepare the Result of Adjudication Form, DOC-1096. Thereafter, the Appointing Authority should meet with the accused employee to advise the employee of the findings and recommendations.

339.09 IMPOSING CORRECTIVE or DISCIPLINARY ACTION

1. Employee performance issues should be addressed at the lowest appropriate level of supervision beginning with verbal counseling and through Specificity of Charges.

2. Corrective action includes a verbal or written counseling, which may be recorded on the performance card, as well as a Letter of Instruction or a Written Reprimand.

3. Before issuing corrective action, the Appointing Authority should make certain that no formal investigation related to the performance or misconduct issue is still pending. While performance issues or low-level misconduct will not usually be subject to a formal investigation, the impartial fact-finding process may determine that an issue appearing to be more serious at the outset does not require discipline.

4. Except for PREA-related matters, prior to an investigation, verbal or written counseling may be used to immediately correct safety or security issues. This counseling should include an acknowledgment that further investigation leading to discipline may follow in due course.

5. Verbal or written counseling and Letters of Instruction may be used to supplement the evaluation process, between regularly scheduled reports on performance.

6. An impartial fact-finding investigation is required before imposition of a suspension, demotion, or dismissal.

7. When a suspension, demotion or dismissal is warranted, a Specificity of Charges (NPD-41) should be drafted, utilizing the appropriate format located on the Stewart shared drive.

339.10 CONFIDENTIALITY OF PERSONNEL RECORDS

1. All documents assembled or produced in support of this regulation are confidential.
2. Files may be reviewed by a subject employee pursuant to applicable sections of NRS Chapters 284 and 289.
3. Files may be copied by a subject peace officer pursuant to applicable sections of NRS Chapter 289.

A. Once an appeal has been filed, a peace officer may request a copy of the investigative file, using the DOC-1066 form.

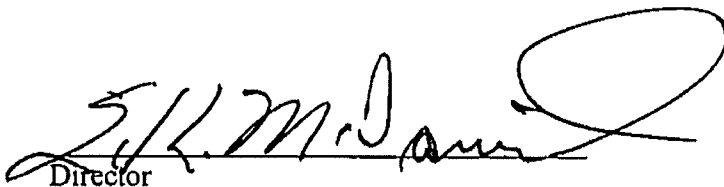
B. The DOC-1066 form is available on the shared drive and should be submitted to the Department's Human Resources Division.

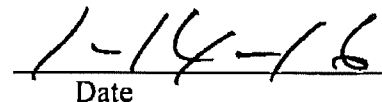
APPLICABILITY

1. This regulation applies to all employees of the Department.
2. This regulation does not require an Operational Procedure.
3. This regulation does not require an audit.

REFERENCES:

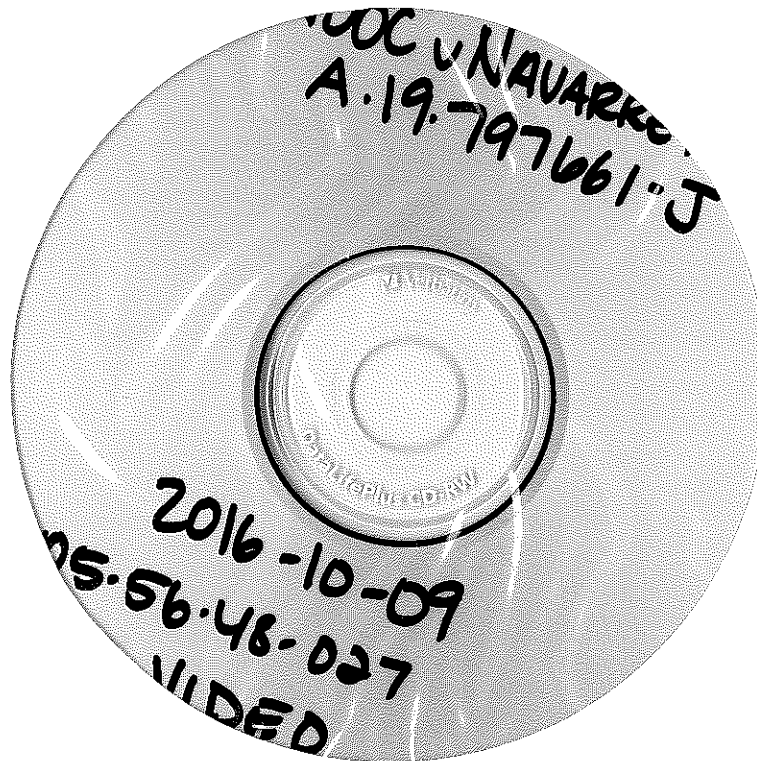
ACA Standards 4-4048, 4-4067, and 4-4069; 2008 Supplement 4-4069; 2010 Supplement 4-4069; and 2012 Supplement 4-4067 and 4-4069


Director


Date

Steven D. Grierson

EXHIBIT 3



Navarrete, Jose Miguel
Case No. A-19-797661-J

VIDEO

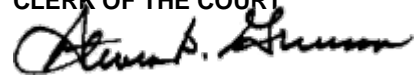
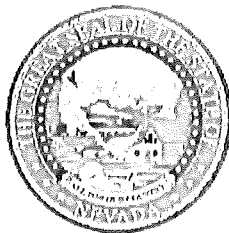


EXHIBIT 4

EXHIBIT 4

Northern Administration
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Carson City, NV 89701
(775) 887-3285

Southern Administration
3955 W. Russell Rd.
Las Vegas, NV 89118
(702) 486-9938



State of Nevada
Department of Corrections

Brian Sandoval
Governor

James Dzurenda
Director

Brian E. Williams, Sr.
Warden

MEMORANDUM

Date: April 12, 2017

To: James Dzurenda, Director, Nevada Department of Corrections

From: Perry Russell, Associate Warden *Perry Russell*

Re: Pre-Disciplinary Hearing for Senior Correctional Officer Jose Navarrete, SP-1642S

On Wednesday, April 12, 2017 at approximately 9:50 am, a pre-disciplinary hearing was held for Jose Navarrete.

Present at the hearing were:

- Jose Navarrete, Senior Correctional Officer
- William T. Sykes, ESQ., representative
- Perry Russell, Associate Warden of Programs

The purpose of the hearing was explained to S/CO Navarrete.

SC/O Navarrete made the following comments:

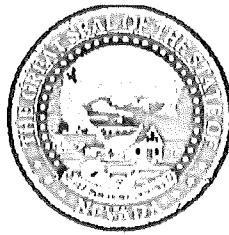
- Claims that he should not be dismissed for what occurred by another officer.
- Navarrete claims that he did not complete his report until hours later after doing other duties.
- He claims that people's memories can be faulty over a period of time. He claims that he did not intentionally write a false report, he thought that Valdez tried to restrain the inmate and was not premeditated. He claims his memory is faulty and he thought Valdez tried to restrain him and resist against Valdez.
- Navarrete claims that at no time did he know that Valdez would be involved in a Use of Force and he could not have prevented it.
- Navarrete claims that he followed procedure once the Use of Force occurred. He claims that he was not involved in the use of force.
- Navarrete has worked for the state of Nevada for nine years now, met standards every year and has not been a disciplinary problem.

Summary:

Senior Correctional Officer Jose Navarrete was assigned as Lead Search and Escort Officer present during the Use of Force incident that had taken place on October 09, 2016 at Southern Desert Correctional Center and was the immediate supervisor of Correctional Officer Valdez. While supervising the morning breakfast meal, Senior Officer Navarrete and Officer Valdez ordered Inmate Norelus to place his hands on the outside wall of the

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Warden

Culinary dining area and ordered the Inmate not to move. Senior Officer Navarrete and Officer Valdez mandated this inmate to stay in this position for approximately 15 to 16 minutes. Video recording depicts Officer Valdez approaching the inmate, placing hand/arm around the inmate's throat and pulling him back to where both ended up on the ground. Senior Correctional Officer Navarrete 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 of the same Use of Force.

Conclusion:

I concur with the recommended discipline for Senior Correctional Officer Jose Navarrete to be terminated from State Service.

Senior Correctional Officer Navarrete's termination would be in the best interest in the State of Nevada, as a representative of the state Senior Officer Navarrete allowed excessive Force and wrote his report which does not attempt to accurately depict what occurred on that date. In Senior Navarrete's report he claims that C/O Valdez was attempting to restrain inmate Norelus. Senior Navarrete claimed that when inmate Norelus came off the wall he was resisting. There is no mention of Officer Valdez pushing the inmate into the wall and grabbing the inmate around the neck to take him down after a 15 to 16 minute period where this Senior officer could have thought of alternatives for this inmate to be held there for so long. The investigation revealed that the inmate has his hands on the wall above his head for over ten minutes and is grabbed around the neck from behind by Officer Valdez and thrown back where they both fell to the ground. There was no threat to the officer from the inmate when Officer Valdez came from behind and dropped the inmate to the ground. There is no mention of anything that occurred in Senior Officer Navarrete's report. Per the investigation the inmate's hands were on the wall above his head when Officer Valdez chose to push the inmate into the wall and wrestle the inmate by the neck to the ground. There is no acceptable explanation for this incident, and Senior Navarrete had a responsibility to attempt to stop the activity and further accurately report its occurrence.

cc: Quentin Byrne, Deputy Director, Nevada Department of Corrections
David Wright, Personnel Officer 2, Nevada Department of Corrections
Jo Gentry, Warden, Southern Desert Correctional Center

PR/hs

High Desert State Prison
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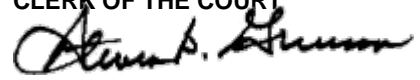


EXHIBIT 5

EXHIBIT 5

ADMINISTRATIVE REGULATION 405

USE OF FORCE

Supersedes: AR 405 (Temporary, 06/23/11) (Temporary, 03/03/16)
AR 405 (Temporary, 5/25/16) AR 405 8/16/16

Effective Date: 9/13/16

AUTHORITY: NRS 209.131, 209.161, 212.090 and 212.190

RESPONSIBILITY

1. The Warden/Division Head is responsible for the overall execution of this regulation. Direct supervision of this regulation is the responsibility of the Shift Supervisor (institutions/facilities) and/or the Transportation Lieutenant/Sergeant in regards to Central Transportation Division.
2. The Warden at each institution will ensure that all assigned staff is trained and have signed an acknowledgement statement that they have read, know and understand this regulation. A copy of their acknowledgement will be maintained in each staff members personnel file.

DEFINITIONS

Authorized Personnel – A person who has received the prescribed NDOC training in the application of Use of Force equipment or tactics, and whose qualifications are up-to-date.

Deadly Force – Any force which carries a substantial risk that it will result in death or serious physical injury.

Excessive Force – The use of more force than an objective 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.

Force – Any violence, compulsion, or constraint physically exerted by any means upon or against a person.

Less Lethal Force – any force that is neither intended nor likely to cause death or serious physical injury.

Passive Compliance Measures – Techniques/strategies used by staff to gain compliance/control of an inmate without forcible physical contact.

Planned Use of Force - The Use of Force when time and circumstances allow the opportunity for planning and consultation and approval of the Warden or Administrator On Duty (AOD)

Physical Force (Hands On) - The use of hands, other parts of the body, objects, instruments, chemical devices, firearms, or other physical methods for the purpose of overcoming the resistance to lawful authority.

Reasonable Force - That 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.

Show of Force - Movement of appropriate staff and/or equipment/weapon to an incident site for the purpose of convincing an inmate that adequate staff and measures are available and will be used to successfully resolve the situation.

Skip Shot - A live rubber round discharged from a 12 gauge shotgun that is fired at the ground one to two yards in front of the intended inmate so that the individual live rounds skip off the ground/floor striking the intended inmate(s) lower extremities.

Spontaneous Use of Force - Actions that staff may immediately take in response to an emergency situation.

Use of Force - The application of progressive levels of force to gain control of an inmate up to and including deadly force. This does not include those situations in which security restraints are used in a standard manner for arrest, escort or transport. (Use of Force will be limited to the minimal amount of force necessary to control the situation.)

405.01 USE OF FORCE GENERAL PROVISIONS

The NDOC shall operate under this use of force policy that defines staff responsibilities and limitations concerning the use of force while still allowing discretion in the appropriate application of force. The policy provides staff with the appropriate guidance on the permissible Use of Force. It ensures discipline is imposed for violations of the Use of Force policy, procedures or training.

It is the policy of the NDOC to authorize the use of physical force when and only to the extent that is reasonably believed to be necessary as specified in these rules. Staff are authorized to use that amount of force that is objectively reasonable to overcome a threat thereby minimizing the risk of injury to the officer, the threat and the public.

At no time are staff permitted to use force for punishment, retaliation or discipline.

Force shall be used only when reasonably necessary to subdue an attacker, overcome resistance, affect custody, or to gain compliance with a lawful order. It is the policy of the NDOC to accomplish the educational, treatment and supervision functions with minimal reliance on the use of force. Staff may use reasonable force as required in the performance of their duties, but unnecessary or excessive force shall not be used. If staff, at any point, determines the situation can be resolved without any further use of force, staff shall terminate the use of force.

405.02 STAFF TRAINING INVOLVING USE OF FORCE

1. All personnel will receive training and be qualified prior to being assigned to a position involving possible Use of Force and being authorized to use any force related equipment such as physical restraints, firearms, chemical agents (CS/OC), taser or similar technology or batons. A staff member employed in positions that are authorized to use force-related equipment will receive annual refresher and semi-annual firearms qualification training in the correct use of all equipment to maintain their established proficiency levels.
2. Training will include:
 - A. Techniques/strategies known as Passive Compliance Measures used by staff to gain compliance/control of an inmate without forcible physical contact such as: communications, videotaping of inmate(s), show of force.
 - B. Staff is expected to know the Continuum of Force and be able to apply the proper level and type of force needed to control an inmate's behavior. Minimum harm to staff, the public and inmates is the goal, but the overall objective is to gain compliance, control, and facility order. Force should be limited to the minimum amount necessary to control the situation. Force will not be used to punish, harass, coerce, or abuse inmates.

405.03 WHEN FORCE MAY BE USED

1. A staff member may use force to protect himself or any other individual from physical harm by an inmate.
2. Force will be proportionate to the threat exhibited by the inmate, and the force will decrease as the threat is lessened.
 - A. 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, subsequent to the incident, in a written report.
3. To prevent the escape of an inmate, staff may use reasonable force to prevent the escape if no alternative method of persuasion is effective.

4. To prevent destruction of state property.
 - A. Staff may use force to prevent state property from substantial damage by an inmate if no alternative method of persuasion is effective.
 - B. Nevada Revised Statute (NRS) 212.190 states that damaging prison property is at least a gross misdemeanor.
5. To compel an inmate's compliance with orders, force may be used if no alternative method of persuasion is effective or where the circumstances require urgency.
6. To prevent or quell a disturbance, disperse or apprehend inmates whose conduct is creating a risk of death or serious physical injury to others.
7. Levels of Force:
 - A. Planned use of force can be used at any level in the use of force continuum. Planned use of force incidents should be videotaped. Staff involved in these incidents should utilize protective equipment. An example of planned use of force is a cell extraction.
 - a. In a planned use of force, the Incident Commander in charge will assign a staff member to be in charge of recording the entire planned use of force.
 - b. The staff member assigned to recording will ensure, prior to the start of the use of force, that the recording equipment has sufficient batteries and sufficient blank recording space, such that technical issues with recording will be minimized once recording begins.
 - c. The staff member assigned to recording should not be expected to participate in the use of force and should not do so, such that they may dedicate their full attention to recording. The recording staff member should refrain from engaging in verbal comments during the recording, as staff comments will obscure the sounds being recorded. The recording staff member must also record in such a manner that the inmate is in focus as much as possible, and adjust their positions should a staff member's body position be obscuring a visual of the inmate.
 - d. All recordings of a planned use of force should be kept in a manner and location that is easily retrievable in the event review is needed. The recording must be maintained for no less than three years from the date force was used.
 - B. Spontaneous use of force may be used by staff to respond to an emergency when there is not time to formulate a plan or notify an immediate supervisor, and the situation constitutes a serious threat to the safety of staff, public, inmates and/or

prison security. Immediate use of force should be employed in a manner that poses the least risk to staff, the public and inmates.

- a. Where force was used spontaneously, regardless of injuries reported contemporaneous with the event, the area supervisor/incident commander will immediately review, if available, any unit video surveillance that may have captured the use of force.
- b. If the use of force was captured on video, from any angle on any camera, the area supervisor/incident commander will be responsible for preserving that recording in a manner and location that is easily retrievable in the event review is needed. The video must be maintained for no less than three years from the date force was used.
- c. If no cameras were operational in that unit or no cameras captured the use of force, the area supervisor/incident commander will make a notice of same in the Use of Force Incident Report.
- d. In addition to and apart from any surveillance footage from stationary cameras that may exist, video footage should also be recorded via a hand-held camera, as follows:
 - As soon as the shift supervisor becomes aware that force is being used or has been used, a staff member will be directed to immediately obtain a handheld video camera and will be ordered to the scene where force has been used.
 - Immediately upon arrival to the scene, the staff video recorder will begin recording, noting the time and date the recording begins. The staff video recorder will continue to take footage until the area supervisor/incident commander decides the incident is over and instructs the staff video recorder to cease recording.

If the Use of Force is still occurring when the staff video recorder arrives, the incidents will be recorded to capture the unfolding events while waiting for a response team, even if through windows, fences, bars, or even if far away, etc. Staff should not place themselves in any danger to capture the events.

- C. The Warden/Division head will ensure that Use of Force Operational Procedures are specific on the process for the recording of Use of Force incidents and storage of the video recordings.

405.04 AUTHORIZATION FOR THE USE OF LESS LETHAL FORCE

"Less lethal force" may be used in the following situations:

1. Self-defense;
2. Defense of others;
3. Prevention of self-injurious behavior;
4. Maintaining order and control in a facility, including prevention of damage to state property;
5. Prevention of escape from any security level;
6. Prevention of the commission of a felony by an inmate;

405.05 LESS LETHAL FORCE

1. Physical Force (Hands On) - Physical force may be used to subdue unruly inmates, to separate inmates fighting, and in defense of self or others. It may also be employed to move inmates who fail to comply with lawful orders. Includes certain self-defense and inmate control techniques or strikes to areas of the body unlikely to result in serious physical injury.
2. Chemical / Inflammatory agents may be deployed only by trained and qualified Authorized Personnel. Chemical agents items such as listed below are designed to temporarily immobilize or incapacitate the inmate through temporary discomfort caused by a chemical action.
 - CS - Ortho-chlorobenzalmalononitrile -- commonly known as tear gas or mace
 - OC - Oleoresin Capsicum -- commonly known as pepper spray
3. Electronic Control Devices (ECD), to include items such as a Taser/electronic stun gun, Remote Access Custody Control (RACC) Belt, or electronic shield, are designated to temporarily immobilize or incapacitate an inmate by delivering a non-lethal electronic charge. An ECD may only be deployed by trained and qualified Authorized Personnel.
4. Specialty Impact Devices (SID) Side handle batons or Expandable Baton or similar equipment designed to temporarily incapacitate an inmate by striking or applying a controlled take down of the inmate. These SID's may only be used by trained and qualified Authorized Personnel.
5. A 12-gauge shotgun loaded with a blank round and three (3) rubber stinger rounds to skip shoot into the inmate(s) striking the inmate(s) in their lower extremities to

temporarily incapacitate or immobilize the inmate(s). Shotguns may only be used by trained and qualified Authorized Personnel.

- A. First, a loud and clear verbal warning or order should be given. Verbal warnings should be repeated before each shot fired of any ammunition type.
- B. Second, if the first verbal warnings or orders fail to stop the prohibited activity, then a blank warning shot may be discharged.
- C. If the initial warning shot fails to stop the prohibited activity, then a rubber stinger may be discharged skip shot towards the inmates.
- D. If the rubber stinger round fails to stop prohibited activity, then a second rubber stinger round may be skip shot into the ground/floor at the problem inmates.

Caution: If there is no ability to skip shoot into the ground/floor, then live rounds will NOT be discharged unless the inmate possesses a deadly weapon or serious physical injury and/or death is imminent. In this instance refer to 405.06.

- E. The progression from the warning shot to the rubber stinger round will be dictated by the level of the threat.
 - 1) Firing of a warning shot: If the conduct or activity does not stop then you can progress to firing of the Rubber Stinger round (skip shot).
 - An inability to skip shoot will include those instances where the disturbance is occurring in an area crowded by other inmates who are already lying prone on the ground.
 - 2) If the threat increases to include;
 - More than two aggressors involved
 - Persons being over taken to the point where serious physical injury and/or death is imminent
 - Groups of inmates forming and being non-compliant
 - 3) You can then progress to firing of the additional live rubber rounds, skip shot only.
- F. No less lethal force should be used to stop verbal abuse or other non-threatening behavior.

405.06 AUTHORIZATION FOR USE OF DEADLY FORCE

Staff have the obligation and responsibility to exercise discipline, caution, restraint and good judgment when using potentially deadly force. Deadly force may be used upon the reasonable belief that staff life or safety, or the life or safety of another, is in imminent

danger of death or serious physical injury, given the totality of the circumstances known to the officer at the time of his/her action. Staff must keep in mind that the use of potentially deadly force presents a danger to the subject and to innocent parties. Only trained and qualified staff are authorized to use deadly force, and only as a last resort. Officers should consider other reasonable means of control before resorting to the use of deadly force as time and circumstances safely permit.

Deadly force is that degree of force which is likely to result in death or serious physical injury. Deadly force may be used only in the following situations:

1. To prevent death or serious physical injury to self, other staff, inmates, or other persons who are threatened;
2. To prevent the taking of hostages;
3. To prevent the escape of any prisoner who is actively attempting to flee custody from a medium or maximum security correctional institution including while being transported or being housed in the community;
4. To prevent destruction or injury to property or person(s), major damage during a disturbance within a correctional institution, if it is reasonably believed that the damage may cause death or serious physical injury to any person.
5. To prevent inmates from unlocking other inmates (seizure of keys or door controls).
6. If deadly force is to be used, staff will take reasonable actions under the following guideline - Time permitting a clear, verbal warning order, "Stop or I will shoot," will be given before each shot is discharged.
7. When the use of deadly force is warranted, if time and circumstances permit, a warning shot will be discharged.
 - A. In any life-threatening situation where the inmate does possess a deadly weapon or serious physical injury and/or death is imminent, the policy will be to "shoot to stop" by shooting at a vital portion of the body, such as the torso.
 - B. Every effort should be made to direct the round into the aggressor and not the victim.
 - C. If doubt exists in the officer's mind as to whether he should discharge the firearm under the circumstances that have been outlined above, the officer should conclude that he SHOULD NOT discharge the firearm.

405.07 DEADLY FORCE

1. Mini 14 .223 caliber rifle loaded with 55 grain soft point rounds. May only be used by trained and qualified Authorized Personnel.
2. .40 caliber Glock semi-automatic hand gun loaded with hollow point 165 to 180 grain round – approved through FBI protocols/specifications. May only be used by trained and qualified Authorized Personnel.
3. Specialized weapons may be authorized for emergency situations with approval from the Director/designee. May only be used by trained and qualified Authorized Personnel. Refer to Administrative Regulation (AR) 412 Armory Weapons and Control, for descriptions of authorized weapons, munitions and less lethal equipment.

405.08 ESCAPE FROM SECURED PERIMETER

1. If possible, prior to using firearms, attempts should be made to apprehend or physically restrain an escapee or an attempted escapee.
2. If an officer observes an inmate located within the "No Man's Land," an immediate alarm will be sounded to initiate a response then the following command in a loud and firm voice, will be given, "Stop or I will shoot." If the inmate fails to stop and no other means of stopping the inmate is available, then the officer may fire a warning shot as outlined in this procedure.
3. If the inmate continues toward the inner perimeter fence, after verbal warnings and a warning shot has been discharged, additional warning shots may be discharged near the escaping inmate in an effort to gain compliance. The officer must exercise care to prevent a possible ricochet of the warning shots. (Wardens will designate in operations procedures where warning shots will be discharged.)
4. Once an inmate has begun going over, under, or through the inner perimeter fence, (that is, feet have left the ground or crawling under or through), the following will be done:
 - A. The officer, after firing a warning shot, will "shoot to stop."
 - B. The officer will choose which firearm to use based on distance and conditions surrounding the incident. The perimeter towers have both 12 gauge shotguns with .00 buckshot and .223 Mini-14 rifles designed for greater distance and accuracy.
 - Effective ranges:
 - .223 caliber round - up to 1000 yards
 - 00 buckshot - up to 150 yards

5. Should the situation arise in which the inmate attempting to escape is not noticed until after clearing the inner perimeter fence, the officer will fire one (1) warning shot if, in their opinion, there is still sufficient time to be able to "shoot to stop" before the inmate could clear the outer perimeter fence. If there is not enough time for a warning shot after the inmate has cleared the inner fence, then shots may be discharged directly at the escaping inmates to shoot to stop.

405.09 USE OF FORCE IN THE COMMUNITY

1. There are numerous situations that call for Department personnel to provide escort and security functions in the community. Inmates may be transported to outside medical facilities, between institutions/facilities, into courtrooms for judicial proceedings or to a variety of other locations. Use of Force in the community calls for exercising extreme caution and for making careful judgments. The level of force utilized in any particular situation MUST be based largely on, the threat, physical surroundings and the proximity of civilians.
2. The physical surroundings and proximity to civilians MUST be considered when an inmate is escaping during transport in an outside setting and if deadly force is necessary to prevent the inmate from escaping. If, in the best judgment of the transporting officer(s), it is deemed necessary to fire shots at the inmate escaping into the community, all shots will be directed at the inmates' torso with the intent to completely stop the escape.
3. Officers are required to cooperate with local law enforcement officials in any unusual or emergency situation involving inmates under the custody of the Department of Corrections.

405.10 MEDICAL CARE AFTER USE OF FORCE

- A. Medical care which includes medical treatment and examinations will be conducted by institutional medical staff when a Use of Force incident has occurred. When order has been restored, the inmate(s) who has been subjected to any Use of Force will be examined by medical staff and provided medical care proportionate to the individual's injuries sustained. This examination will be documented utilizing the Unusual Occurrence Report form DOC 2514. All refusals of medical treatment will be documented and included in the Use of Force incident files utilizing the Refusal of Medical Treatment form DOC 2523.
- B. Any staff member involved in the Use of Force sustaining injuries will be examined by NDOC medical staff and will provide emergency medical care proportionate to the individual's injuries prior to transport to an appropriate healthcare facility. This examination will be documented utilizing the Unusual Occurrence Report form DOC 2514.

405.11 REPORTING OF USE OF FORCE

In all cases the reporting of Uses of Force MUST be accomplished as soon as practical after the incident and before leaving the institution or going off duty. Any Use of Force will be reported to the shift supervisors who will ensure, once order has been restored and the involved inmate(s) are placed in secure housing, that written reports from all staff involved are completed. This includes custody officers, institutional staff, medical staff, volunteers or any persons that witnessed the Use of Force.

1. These reports will be entered into the Nevada Offender Tracking Information System (NOTIS) for review by the appropriate supervisors.
 - A. All relevant and supporting documentation and information associated with the Use of Force will be contained within the NOTIS Incident Report (IR).
 - B. All relevant incident questions, inmate involvement questions, and staff involvement questions will be completed within NOTIS.
2. Verbal notification of the Use of Force will be made via the chain of command to the Warden. The Warden will notify the Deputy Director of Operations.
3. An email will be generated by the shift supervisor, notifying institutional/facility administration, the Deputy Director of Operations, and the Inspector General of the IR number and Use of Force for instances that involved, (the below referenced list includes but is not limited to the following uses of force that must be reported):
 - A. Discharge of a firearm for any reason other than training;
 - B. Any Use of Force that results in an injury to staff or an inmate;
 - C. Any Use of Force that results in an allegation or grievance claiming an injury;
 - D. Any complaint, grievance or indication of an unnecessary or excessive Use of Force; or
 - E. Planned Use of Force that results in any of the above.

405.12 USE OF FORCE INCIDENT REVIEWS

1. Any Use of Force suspected to be excessive or unnecessary will be immediately referred to and assigned to the Inspector General for investigation. In these circumstances the Use of Force Incident Review will not be completed.
2. Any use of less lethal force will result in a Use of Force Review panel convening within ten (10) days from the Use of Force. To ensure a fair and impartial review, the

review panel will be comprised of staff not directly involved in the incident to ensure a fair and impartial review.

3. At a minimum the review panel will consist of:
 - A. An Associate Warden from the institution involved.
 - B. An institutional Command Staff at the level of authority of a Correctional Lieutenant or above, from the institution involved.
4. The review panel will review all information, reports, all video footage, and any other pertinent information or document that is or will become available.
5. The review panel will review the actions of all staff members and inmate(s) involved in the Use of Force incident, including those actions leading up to the Use of Force, taking into account any NOTIS incident reports surrounding the time frame of the Use of Force, especially involving the staff member that used the force and the inmate that had the force used upon their person.
6. The review panel will conduct in person, recorded interviews of all staff and inmate(s) involved in the Use of Force. Should the panel, as part of the review, desire to question/interview an employee involved in the use of force, the panel will conduct all interviews in accordance with department disciplinary procedures, as well as relevant provisions of NRS chapter 284 and 289. The panel does not have the authority to recommend discipline.
7. The review panel will evaluate the Use of Force incident and prepare a written report on its evaluation and determination to the Warden, the Deputy Director of Operations and Inspector General within ten (10) days from commencement of the Use of Force review, to include:
 - A. Was the Use of Force justified;
 - B. Was the Use of Force within policy, procedures and training of the Department;
 - C. Could the Use of Force have been prevented;
 - D. Could this type of Use of Force be prevented in the future;
 - E. Any referral for investigation for possible disciplinary action for staff member(s) involved in the Use of Force.
 - F. Any recommended corrective action for staff member(s) involved in the use of force.
 - G. Any recommendation for any staff member that acted with distinction in the Use of Force; and

- H. Any recommended changes or enhancements to policy, procedure, or training related to this Use of Force.

405.13 SERIOUS USE OF FORCE INCIDENT REVIEWS

1. Any Use of Force suspected to be excessive or unnecessary will be immediately referred to and assigned to the Inspector General for investigation. In these circumstances the Use of Force Incident Review will not be completed.
2. Any use of deadly force or less lethal force causing serious physical injury will result in convening a Serious Incident Review Panel within fifteen (15) days from the Use of Force. The review panel will be comprised of staff not directly involved in the incident to ensure a fair and impartial review.
3. At a minimum the review panel will consist of:
 - A. A Warden and/or an Associate Warden from an institution where the Use of Force did not occur;
 - B. An Investigator or Supervisory Investigator from the Inspector General's Office;
 - C. An institutional Command Staff at a level of authority of a Correctional Lieutenant or above, from an institution where the Use of Force did not occur.
4. The review panel will review all information, reports, all video footage, and any other pertinent information or document that is or will become available.
5. The review panel will review the actions of all staff members and inmate(s) involved in the Use of Force incident, to include those actions leading up to the use of force. The panel will also take into account any NOTIS incident reports surrounding the time frame of the Use of Force, especially involving the staff member that used the force and the inmate that had the force used upon their person.
6. The review panel will conduct in person, recorded interviews of all staff and inmate(s) involved in the Use of Force. When the panel, questions/interviews a staff member involved in the Use of Force the panel will conduct all interviews in accordance with department disciplinary procedures, as well as relevant provisions of NRS chapter 284 and 289. The panel does not have the authority to recommend discipline.
 - A. The written notice will provide the names of the assigned staff members to the review panel;
 - B. The written notice will identify the NOTIS Incident Number for the Use of Force incident;

- C. The written notice will identify the date, time and location of the interview;
 - D. The review panel will ask questions and gather information related to the specific Use of Force, the inmate(s) involvement and any historical information related to the interaction between the involved staff member and the involved inmate(s);
 - E. The written notice will provide the Notice of Confidentiality applied to the Use of Force Review.
7. The review panel will evaluate the Use of Force incident and prepare a written report on its evaluation and determination to the Director and the Deputy Director of Operations within thirty (30) days from commencement of the Use of Force review, to include:
- A. Was the Use of Force justified;
 - B. Was the Use of Force within policy, procedures and training of the Department;
 - C. Could the Use of Force have been prevented;
 - D. Could this type of Use of Force be prevented in the future;
 - E. Any referral for investigation for possible disciplinary action for staff member(s) involved in the Use of Force.
 - F. Any referral for investigation for possible corrective action for staff member(s) involved in the Use of Force.
 - G. Any recommendation for any staff member that acted with distinction in the Use of Force; and
 - H. Any recommended changes or enhancements to policy, procedure, or training related to this Use of Force.
8. Any recommended corrective action being applied to a staff member will be reported to the appointing authority via a memorandum that outlines the reason for the corrective action. A corrective action is not deemed a discipline.
9. Any findings that recommend disciplinary action be taken against a staff member will be referred to the Inspector General and Director for their review and appropriate response; response may include, but not be limited to official assignment for Administrative Investigation.
10. Any findings that recommend a change or enhancement to a policy, procedure, or training will be sent to the Director and Deputy Director of Operations.

11. Any findings that identifies that a staff member acted with distinction in the Use of Force will be sent to the Director and Deputy Director of Operations.
12. The review panel report and its contents are confidential and not subject to dissemination except by order of the Director, Inspector General, or lawful court order.
13. The Inspector General's Office will track all Use of Force reviews to insure timely completeness. The Inspector General's Office will prepare and submit to the Director's executive team, an annual report that details the number of Uses of Force that were reviewed and the total of the outcomes for each of the categories reviewed

405.14 OFFICER INVOLVED SHOOTING INVESTIGATIONS

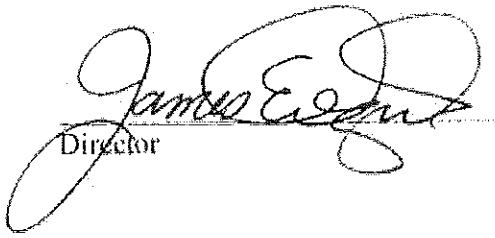
1. All uses of force that involve the discharge of a firearm, excluding blank rounds, will result in an Officer Involved Shooting (OIS) investigation being done by an investigator(s) of the Inspector General's Office (IG) unless;
 - A. A death occurs as the result of the discharged round, at which time an outside law enforcement investigating body will be called in for response and investigation;
 - B. Director or Inspector General determines that the matter is or may be a conflict of interest to the Department.
2. The processes, procedures and format used in conjunction with an OIS investigation and the subsequent report are contained within the confidential I.G. manual.
3. All OIS investigations are confidential and not subject to dissemination without the authorization of the Director, Inspector General, and Board of Prison Commissioner's or in conjunction with lawfully issued court order.
4. The OIS report will be e-mailed to the Director, Deputy Director of Operations and the Inspector General/designee. Once approved, this report will be made available to the Use of Force Review Panels.

APPLICABILITY

1. An Operational Procedure is required within thirty (30) days of this regulation's effective date.
2. This AR requires an audit.

REFERENCES

ACA Standards: 4-4206, 4-4204, 4-4203, 4-4202, 4-4201, and 4-4191.


Director

9/13/16
Date

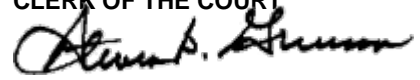


EXHIBIT 6

EXHIBIT 6

1 **BEFORE THE NEVADA STATE PERSONNEL COMMISSION**
2 **MARK GENTILE, HEARING OFFICER**

3
4 JOSE MIGUEL NAVARRETE,

Case No.: 1713379-MG

5 Petitioner/Employee,

6 v.

7 DEPARTMENT OF CORRECTIONS,

8 Respondent/Employer
9 _____/

10 **SUPPLEMENTAL BRIEF REGARDING CHANGE OF LAW**

11 Petitioner/Employee Jose Navarrete, by and through the undersigned attorney Daniel Marks,
12 Esq., and Nicole M. Young, Esq., of the Law Office of Daniel Marks, hereby submits the following
13 supplement:

14 On May 2, 2019, the Nevada Supreme Court issued a published decision in *NDOC v. Ludwick*,
15 135 Nev. Adv. Op. 12, attached hereto as Exhibit 1. In that decision, the Court held that AR 339 is
16 "**invalid**" because the State Personnel Commission [hereinafter "Commission"] never approved that
17 regulation, so it has "**no legal effect** for purposes of employee discipline." (*See* Exhibit 1, at p. 7
18 (emphasis added).) Further, at the hearing that took place in this case, "NDOC provided no evidence
19 showing that the Commission approved AR 339." (*See* Exhibit 1, at p. 8.)

20 Based on the invalidity of AR 339, this Hearing Officer may NOT rely on AR 339 "for any
21 purpose related to the disciplinary charges in this case." (*See* Exhibit 1, at p. 9.) This Hearing Officer
22 may consider "the valid NAC provisions listed in [the] specificity of charges without any reliance on
23 AR 339." *Id.* This includes the "Class of Offense Guidelines" listed under AR 339.07 and the

24 ////

25 ////

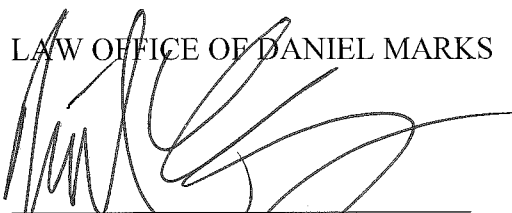
1 ////

2 "Prohibitions and Penalties" listed under AR 339.06, specifically the "Chart of Corrective/Disciplinary
3 Sanctions" mandating termination for class 4 and 5 offenses. Reliance on AR 339 now constitutes "*a*
4 *clear error of law warranting remand.*" *Id.* (emphasis added).

5 Because AR 339 has been deemed invalid by the Nevada Supreme Court, this Hearing Officer
6 may only rely on the NAC provisions listed in the specificity of charges and the standard set forth
7 under *O'Keefe v. Department of Motor Vehicles*, 134 Nev. Ad. Op. 92, 431 P.3d 350 (2018), to
8 determine whether Officer Navarrete committed the charged violation and whether
9 termination/discipline was warranted without regard for AR 339.

10 DATED this 2 day of May, 2019.

11 LAW OFFICE OF DANIEL MARKS

12 

13 DANIEL MARKS, ESQ.
14 Nevada State Bar No. 002003
15 NICOLE M. YOUNG, ESQ.
16 Nevada State Bar No. 12659
17 610 South Ninth Street
18 Las Vegas, Nevada 89101
19 *Attorney for Petitioner/Employee*
20
21
22
23
24
25

1
2
3 **CERTIFICATE OF SERVICE**

4 I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS and on the
5 2 day of May, 2019, I did serve the above and foregoing **SUPPLEMENTAL BRIEF**
6 **REGARDING CHANGE OF LAW** by way of email and did depositing a true and correct copy with
7 first class postage fully prepaid thereon with the United States Post Office at Las Vegas, Nevada to the
8 following addresses:

9 Michelle Di Silvestro Alanis
10 Deputy Attorney General
11 Office of the Attorney General
12 Personnel, Business & State Services
13 555 E. Washington Ave., Ste. 3900
14 Las Vegas, Nevada 89101
15 Email: MAlanis@ag.nv.gov
16 *Attorney for Petitioner*

Zoe McGough
Appeals Office
2200 S Rancho Dr #220
Las Vegas, NV 89102
Email: zmcgough@admin.nv.gov

17 
18 _____
19 An employee of the
20 LAW OFFICE OF DANIEL MARKS
21
22
23
24
25

EXHIBIT 1

135 Nev., Advance Opinion 12
IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
DEPARTMENT OF CORRECTIONS,
Appellant,
vs.
BRIAN LUDWICK, AN INDIVIDUAL,
Respondent.

No. 73277

FILED

MAY 02 2019

ERIN BROWN
CLERK OF SUPREME COURT
BY: *[Signature]*
THIS DEPARTMENT

Appeal from a district court order denying a petition for judicial review in an employment matter. Eighth Judicial District Court, Clark County; Nancy L. Alf, Judge.

Reversed and remanded.

Aaron D. Ford, Attorney General, and Michelle Di Silvestro Alanis, Deputy Attorney General, Carson City,
for Appellant.

Law Office of Daniel Marks and Daniel Marks and Adam Levine, Las Vegas,
for Respondent.

BEFORE HARDESTY, STIGLICH and SILVER, JJ.

OPINION

By the Court, SILVER, J.:

After appellant Nevada Department of Corrections (NDOC) terminated respondent Brian Ludwick's employment for a first-time offense, Ludwick was reinstated by a hearing officer on administrative appeal. At issue is whether the hearing officer erred in finding that NDOC's

decision to terminate was improper. We hold that the hearing officer erred by relying, even if only in part, on a regulation that the State Personnel Commission (Commission) had not approved as statutorily required. The hearing officer also did not properly consider, as addressed in our recent opinion *O'Keefe v. State, Department of Motor Vehicles*, 134 Nev., Adv. Op. 92, 431 P.3d 350 (2018),¹ whether Ludwick's actions constituted violations of the valid regulations NDOC charged him with violating and, if so, whether those violations warranted termination as a first-time disciplinary measure. Accordingly, we reverse the district court's denial of NDOC's petition for judicial review and remand for proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

Ludwick worked for NDOC as a correctional officer. During his employment, he qualified for leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 (2012), due to hypertension. In the more than two years Ludwick worked for NDOC, he had no disciplinary history.

On the day of the incident for which Ludwick was terminated, Ludwick was assigned to Unit 1 at the correctional facility. Unit 1 houses inmates returning from solitary confinement and tends to have more violent incidents than any other unit. The mandated minimum staffing for Unit 1 at the time was two officers, but three officers were assigned to Unit 1 on that day. During his shift, Ludwick attempted to contact his supervisor to inform him that he was not feeling well, but could not get ahold of him. Ludwick then left Unit 1, without prior permission, to speak to his

¹We recognize that the parties, the hearing officer, and the district court did not have the benefit of the *O'Keefe* opinion when addressing these issues.

supervisor in person. Although the parties dispute the specifics of the conversation that ensued, Ludwick ultimately left work on FMLA leave. The supervisor subsequently generated a report stating that Ludwick neglected his duty and abandoned his post without authorization when he left Unit 1.

After an internal investigation into the supervisor's report, NDOC charged Ludwick with violating NAC 284.650(1) (activity incompatible with employee's conditions of employment), NAC 284.650(3) (violating or endangering the security of the institution), NAC 284.650(7) (inexcusable neglect of duty), and NDOC's Administrative Regulation (AR) 339.05.15 (neglect of duty—leaving an assigned post while on duty without authorization of a supervisor). NDOC initially recommended a five-day suspension but ultimately decided to terminate Ludwick for consistency purposes, as other employees who had violated AR 339 were terminated.

Ludwick administratively challenged NDOC's decision and, following a hearing, the hearing officer overturned the termination. The hearing officer agreed with NDOC that "Ludwick engaged in inexcusable neglect by leaving his post without the prior permission of a supervisor." The hearing officer found that termination of employment, however, was too harsh a penalty, as Ludwick had no prior discipline and no incidents arose in Unit 1 after Ludwick left. The hearing officer also disagreed with NDOC's argument that Ludwick's leaving Unit 1 without prior approval constituted a serious security risk, as the minimum staffing requirements for the unit were still met and no one was assigned to replace Ludwick in Unit 1 after he left for the day. Finding that "some discipline" was still required because Ludwick "in fact violate[d] a very important safety and security policy by leaving his post without prior authorization from a

supervisor,” the hearing officer ordered that Ludwick be suspended for not more than 30 days. The district court denied NDOC’s subsequent petition for judicial review and this appeal followed.

DISCUSSION

“When reviewing a district court’s denial of a petition for judicial review of an agency decision, this court engages in the same analysis as the district court.” *Taylor v. State, Dep’t of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013) (quoting *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 349, 240 P.3d 2, 4 (2010)). Thus, pursuant to Nevada’s Administrative Procedure Act (NAPA), we review the hearing officer’s decision to determine whether it is clearly erroneous, arbitrary or capricious, or affected by an error of law. NRS 233B.135(3). In doing so, we review questions of law de novo but “defer[] to [a hearing officer’s] interpretation of its governing statutes or regulations if the interpretation is within the language of the statute.” *Taylor*, 129 Nev. at 930, 314 P.3d at 951 (quoting *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008)).

The hearing officer’s review of NDOC’s decision to terminate

Initially, the parties present arguments regarding the deference the hearing officer owed to NDOC’s decisions. We recently addressed that issue in *O’Keefe v. State, Department of Motor Vehicles*, 134 Nev., Adv. Op. 92, 431 P.3d 350 (2018), and concluded that the hearing officer conducts a de novo review of “whether the employee *in fact* committed the charged violation.” *Id.* at 355. And, when reviewing an agency’s decision that termination will serve the good of the public service, the hearing officer is to employ a deferential standard. *See id.* at 355-56 (overruling *Dredge v. State, Department of Prisons*, 105 Nev. 39, 769 P.2d 56 (1989), *State, Department of Prisons v. Jackson*, 111 Nev. 770, 895 P.2d

1296 (1995), and their progeny to the extent they “suggest that the hearing officer decides de novo whether the employee’s termination serves the good of the public service” (internal quotation marks omitted)). *O’Keefe* did not directly address, however, whether the hearing officer owes deference to an employer’s decision that a violation is so serious that it warrants termination for a first-time offense when the agency does not have a published regulation to that effect in place. *See id.* at 356 (providing that when a published regulation prescribes termination for a first-time offense, “then that violation is necessarily ‘serious’ as a matter of law”).

Examining *O’Keefe*’s reasoning for its limited overruling of *Dredge* and *Jackson* demonstrates that, even when there is no published regulation in place, the hearing officer should give deference to an employer’s decision that a violation is so serious it warrants termination for a first-time offense. *O’Keefe* explained that while those previous cases emphasized the need for deference to the employer when security concerns were implicated, the cases “did not create a broad rule that deference is generally not owed unless there are security concerns.” *Id.* *O’Keefe* then recognized that a hearing officer generally owes deference “as to whether the agency’s termination decision was reasonable and with just cause.” *Id.* (citing NRS 284.390(1), (7)). Because the determination of whether a violation is so serious that it warrants termination for a first-time offense is part of the hearing officer’s consideration of whether the agency’s decision to terminate was reasonable and with just cause, *O’Keefe* mandates that the hearing officer defer to the employer’s decision. *See id.*

The hearing officer erred by relying on an invalid regulation in reviewing the termination decision

A hearing officer's review of an agency's decision to terminate an employee as a first-time disciplinary measure requires a three-step process. *Id.* at 356 (citing NRS 284.390(1)). "First, the hearing officer reviews de novo whether the employee in fact committed the alleged violation." *Id.* (citing NAC 284.798). The hearing officer next "determines whether that violation is a 'serious violation[] of law or regulations' such that the 'severe measure[]' of termination is available as a first-time disciplinary action." *Id.* (alterations in original) (quoting 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.* (quoting NRS 284.383(1) and citing NAC 284.646(1)). A violation is also "serious" as a matter of law if the agency has a policy that prescribes termination as an appropriate level of discipline for a first-time offense. *See id.*; *see also* NAC 284.646(1)(a). Where no such regulation or policy is in place, the hearing officer applies a deferential standard of review to an agency's determination that "[t]he seriousness of the offense or condition warrants such dismissal." NAC 284.646(1)(b); *see O'Keefe*, 134 Nev., Adv. Op. 92, 431 P.3d at 356. "Third and last, the hearing officer applies a deferential standard of review to the agency's determination that termination will serve 'the good of the public service.'" *O'Keefe*, 134 Nev., Adv. Op. 92, 431 P.3d at 356 (quoting NRS 284.385(1)(a)).

All of the violations listed in Ludwick's specificity of charges were based on the fact that he left Unit 1 without prior permission from his supervisor. Ludwick does not dispute that he left the unit without permission except to argue that he had implied permission to leave under

the FMLA. We disagree, as 29 C.F.R. § 825.303(c) (2018) provides that “[w]hen the need for leave is not foreseeable, an employee must comply with the employer’s usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances,” and Ludwick did not demonstrate any unusual circumstances in this case. The question then becomes whether Ludwick leaving the unit without prior permission constitutes a violation of the NAC provisions and AR 339 as listed in the specificity of charges.

Addressing AR 339.05.15² first, the hearing officer determined that this regulation had to be approved by the Commission to be of any disciplinary effect. On appeal, NDOC asserts that the plain language in another statute, NRS 209.111, allows the Board of State Prison Commissioners (Board) to adopt administrative regulations regarding the labor of employees without the approval of the Commission and that AR 339 is therefore valid because it was approved by the Board.³ We agree with Ludwick and the hearing officer, however, that the fact that the Commission never approved AR 339 makes it invalid and of no legal effect for purposes of employee discipline.

²The parties agree that the relevant version of AR 339.05.15 provided that a corrections officer leaving an assigned post without permission constituted inexcusable neglect of duty.

³NDOC also contends that it is exempted from the NAPA’s statutes regarding the adoption of regulations. While the NAPA exempts NDOC from certain of its procedures, see NRS 233B.039(1)(b), NDOC is not exempt from the procedures regarding the adoption of regulations governing state personnel. See NRS 284.013 (exempting only certain state entities from NRS Chapter 284).

NRS 284.383(1) provides that the Commission must adopt, by regulation, "a system for administering disciplinary measures against a state employee." That system is set forth in NAC 284.638-.6563. The Commission also adopted NAC 284.742(1), which directs agencies to identify prohibited activities and possible violations and penalties and explain the discipline process for classified employees. Under that regulation, the agencies' policy must receive approval from the Commission:

Each appointing authority shall determine, *subject to the approval of the Commission*, those specific activities which, for employees under its jurisdiction, are prohibited as inconsistent, incompatible or in conflict with their duties as employees. The appointing authority shall identify those activities in the policy established by the appointing authority pursuant to NRS 284.383.

(Emphasis added.) *See also* NRS 284.383(3) ("An appointing authority shall provide each permanent classified employee of the appointing authority with a copy of a policy *approved by the Commission* that explains prohibited acts, possible violations and penalties and a fair and equitable process for taking disciplinary action against such an employee." (emphasis added)). The foregoing law clearly demonstrates that the Commission's approval was required for any administrative regulation regarding an employee's discipline to have any force and effect.

We agree with the hearing officer that NDOC provided no evidence showing that the Commission approved AR 339. NDOC's argument that NRS 209.111 allows the Board to bypass the Commission's approval fails. Although that statute states that the Board "has full control of all . . . labor" of the NDOC, it is referring to inmate labor, rather than the governance of NDOC employees. *See State v. Hobart*, 13 Nev. 419, 420 (1878) (addressing the precursor to NRS 209.111, which specifically

referred to "prison labor"); *Hearing on S.B. 116 Before the Sen. Finance Comm.*, 59th Leg. (Nev., Feb. 28, 1977) (statement of Charles L. Wolff, Warden, Nevada State Prison) (explaining that the bill was intended to provide more effective educational and vocational training to inmates "so they are prepared to be placed effectively back into the community and earn a livelihood" without any mention of employee discipline). And, because the regulation was never approved by the Commission, the hearing officer correctly determined that it was invalid and could not form a basis for terminating Ludwick.

Despite the hearing officer's correct determination that AR 339 was invalid, the officer still relied on the regulation in order to understand "the expectations and duties as it relates to correctional officers being at their assigned post" and to determine whether Ludwick's actions constituted an inexcusable neglect of duty under NAC 284.650(7) and justified termination for the first offense. This is a clear error of law warranting remand—because the regulation is invalid, the hearing officer should not have relied on it for any purpose related to the disciplinary charges in this case. *See* NRS 233B.135(3)(d). On remand, the hearing officer must address whether Ludwick's actions of leaving his post without prior permission constitutes violations of the *valid* NAC provisions listed in his specificity of charges without any reliance on AR 339. And, if the hearing officer finds that Ludwick violated the relevant NAC provisions, the officer must then apply the remaining two steps outlined in *O'Keefe* to determine whether those violations warranted terminating Ludwick as a first-time disciplinary action. *See* 134 Nev., Adv. Op. 92, 431 P.3d at 356.

CONCLUSION

Because the hearing officer committed legal error in relying on an invalid regulation to set aside Ludwick's termination, we reverse the district court's denial of NDOC's petition for judicial review. We therefore remand this matter to the district court so that it may grant NDOC's petition and remand the case to the hearing officer for further proceedings consistent with this opinion.

Silver, J.
Silver

We concur:

Hardesty, J.
Hardesty

Stiglich, J.
Stiglich

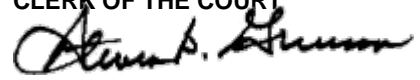


EXHIBIT 7

EXHIBIT 7

1 **BEFORE THE NEVADA STATE PERSONNEL COMMISSION**
2 **HEARING OFFICER**

3 JOSE NAVARRETE,)

4 Petitioner-Employee,)

5 vs.)

6)

7 NEVADA DEPARTMENT OF)

8 CORRECTIONS,)

9 Respondent-Employer.)

Appeal No.: 1713379-MG

**NEVADA DEPARTMENT OF
CORRECTIONS' RESPONSE TO
EMPLOYEE'S SUPPLEMENTAL BRIEF
REGARDING CHANGE OF LAW**

10 Respondent-Employer, Nevada Department of Corrections (NDOC), by and through its counsel,
11 Aaron D. Ford, Attorney General for the State of Nevada, and Michelle Di Silvestro Alanis, Deputy
12 Attorney General, hereby submits its Response to Petitioner-Employee, Jose Navarrete's Supplemental
13 Brief Regarding Change of Law.

14 The Nevada Supreme Court issued its Opinion in *NDOC v. Ludwick*, holding that NDOC
15 Administrative Regulation (AR) 339 is "invalid and of no legal effect for purposes of employee
16 discipline" because AR 339 has not been approved by the Personnel Commission. *NDOC v. Ludwick*,
17 135 Nev. Adv. Op. 12, ___ P.3d ___ (May 2, 2019). *Ludwick* does not change anything of substance in
18 this case. *Ludwick* does not change the documents, video, and audio admitted into evidence nor the
19 testimony heard over the course of two days. *Ludwick* did not invalidate the other ARs that govern the
20 policies and procedures for NDOC staff, including AR 405. *Ludwick* did not invalidate the Operational
21 Procedure (OP) or Post Order governing the policies and procedures at Southern Desert Correction Center
22 or the evidence that NDOC determined Navarrete's misconduct as serious offenses. More importantly,
23 *Ludwick* does not change the rights guaranteed under the Eighth Amendment. *Ludwick* only changes that
24 the hearing officer cannot rely on AR 339 for the purposes of employee discipline due to a procedural
25 hurdle.

26 In fact, *Ludwick* held that the hearing officer must address whether the employee's actions
27 constitutes violations of NAC 284.650 as listed in the specificity of charges. *Ludwick* at 9. If the hearing
28 officer finds that the employee violated the relevant NAC provisions, the hearing officer **must** then apply

1 the remaining two steps outlined in *O'Keefe* to determine whether those violations warranted termination
2 as a first-time disciplinary action. *Ludwick* at 9 (emphasis added).

3 Step two of *O'Keefe* requires a hearing officer to next “determine[] whether that violation is a
4 serious violation[] of law or regulations’ such that the ‘severe measure[]’ of termination is available as a
5 first-time disciplinary action.” *O'Keefe v. State, Department of Motor Vehicles*, 134 Nev. ___, Adv. Op.
6 92, 431 P.3d 350, 356 (2018).

7 If the agency’s published regulations prescribe termination as an
8 appropriate level of discipline for a first-time offense, then that violation is
9 necessarily serious as a matter of law. **A violation is also serious as a**
10 **matter of law if the agency has a policy that prescribes termination as**
11 **an appropriate level of discipline for a first-time offense. Where no such**
12 **regulation or policy is in place, the hearing officer applies a deferential**
13 **standard of review to an agency’s determination that the seriousness of**
14 **the offense or condition warrants such dismissal.** Third and last, the
15 hearing officer applies a deferential standard of review to the agency’s
16 determination that termination will serve the good of the public service.

17 *Ludwick* at 6 (internal citations and quotations omitted and emphasis added).

18 “[E]ven when there is no published regulation in place, the hearing officer should give deference
19 to an employer’s decision that a violation is so serious it warrants termination for a first-time offense.”
20 *Ludwick* at 5.

21 Here, NDOC charged Navarrete with the following NAC 284.650 violations:

22 NAC 284.650(1) Activity which is incompatible with an employee’s
23 conditions of employment established by law or which violates a provision
24 of NAC 284.653 or 284.738 to 284.771, inclusive.

25 NAC 284.650(10) Dishonesty.

26 NAC 284.650(21) Any act of violence which arises out of or in the course
27 of the performance of the employee’s duties, including without limitation,
28 stalking, conduct that is threatening or intimidating, assault, or battery.

29 This hearing officer must determine if Navarrete allowed an authorized or improper use of force
30 to occur and completed a report that included false and/or misleading statements or omissions. Pursuant
31 to *O'Keefe* and *Ludwick*, the hearing officer must first determine if Navarrete’s conduct was a violation
32 of NAC 284.650(1), (10) and/or (21) under step one of *O'Keefe*. If the hearing officer finds a violation
33 under NAC 284.650, then under step two the hearing officer applies a deferential standard of review to
34 NDOC’s determination that the seriousness of the offenses warrant dismissal. As noted above, while the

1 hearing officer cannot rely on AR 339 as a valid regulation to determine whether the violation was
2 serious, the hearing officer can rely on NDOC policies such as AR 405, OP 405 and 407, and the
3 Post Order for Search and Escort. Additionally, the hearing officer applies a deferential standard of review
4 to NDOC's determination that the offenses were serious. AR 339 has been invalidated for the purposes
5 of basing discipline on those violations due to a procedural hurdle; however, it is still persuasive evidence
6 that NDOC finds such violations to be serious enough to warrant termination. Lastly, under step three,
7 the hearing officer applies a deferential standard of review to NDOC's determination that the termination
8 will serve the good of the public service.

9 Based on the foregoing and the evidence presented at the hearing in this matter, Navarrete clearly
10 violated NAC 284.650 (1), (10) and (21) and this hearing officer must give deference to NDOC's
11 determination that the violations were serious and the termination served the good of the public service.

12 DATED this 3rd day of May, 2019.

13 AARON D. FORD
14 ATTORNEY GENERAL

15 By: /s/ Michelle Di Silvestro Alanis
16 Michelle Di Silvestro Alanis (Bar No. 10024)
17 Deputy Attorney General
18 Attorneys for Respondent-Employer
19 Nevada Department of Corrections
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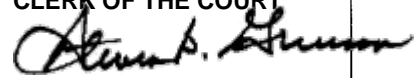
1 **CERTIFICATE OF SERVICE**

2 Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on May 3, 2019, service
3 of **NEVADA DEPARTMENT OF CORRECTIONS' RESPONSE TO EMPLOYEE'S**
4 **SUPPLEMENTAL BRIEF REGARDING CHANGE OF LAW** was made this date by depositing a
5 true copy of the same for mailing, first class mail, at Reno, Nevada, or via e-mail, addressed as follows:

6 Mark Gentile (Email and mail)
7 Appeals Officer
8 Department of Administration
9 2200 S. Rancho Dr., Ste. 200
Las Vegas, NV 89101
zmcgough@admin.nv.gov

10 Daniel Marks (Email and mail)
11 Law Offices of Daniel Marks
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13 Las Vegas, NV 89101
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15 An employee of the Office of Attorney General
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LAW OFFICE OF DANIEL MARKS
DANIEL MARKS, ESQ.
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Attorney for Respondent Jose Navarrete

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel, DEPARTMENT
OF PUBIC SAFETY,

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

Petitioner,

v.

Date of Hearing: 08/13/19
Time of Hearing: 9:00 a.m.

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

Respondents.

**RESPONDENT JOSE NAVARRETE'S OPPOSITION TO
PETITIONER'S MOTION TO STAY AND PETITIONER'S COUNTER-MOTION
FOR IMMEDIATE REINSTATEMENT AND PAYMENT OF ALL BACK PAY AND FULL
BENEFITS**

COMES NOW Respondent Jose Navarrete by and through undersigned counsel Daniel Marks,
Esq. of the Law Office of Daniel Marks and hereby files his Opposition to Petitioner's Motion to Stay
and Petitioner's Counter-Motion for Immediate Reinstatement and Payment of All Back Pay and Full
Benefits.

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1 The grounds for Respondent Jose Navarrete's Opposition are set forth in the following
2 Memorandum of Points and Authorities.

3 DATED this 9 day of July, 2019.

4 LAW OFFICE OF DANIEL MARKS

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7 DANIEL MARKS, ESQ.

8 Nevada State Bar No. 002003

9 610 South Ninth Street

10 Las Vegas, Nevada 89101

11 *Attorneys for Respondent Jose Navarrete*

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. INTRODUCTION**

14 Jose Navarrete was a nine (9) year veteran of NDOC without any disciplinary action and had
15 been employee of the month before this incident. He was terminated without cause and prosecuted by
16 the State of Nevada. In December 2018, a jury in Clark County found him not guilty of using excessive
17 force and oppression under color of law. In April 2019, State Hearing Officer Gentile found against the
18 State on the charge of using or permitting the use of excessive force and filing a false report. Based on
19 the decision of the Hearing Officer on the facts, the State could not prove by a mere preponderance of
20 the evidence either charge. Hearing Officer Gentile ordered reinstatement and back pay to Jose
21 Navarrete.

22 Although the State has now lost both cases under two (2) different legal standards, they filed a
23 petition for judicial review and this stay. Based on the arguments set forth below, the stay should be
24 denied. Mr. Navarrete will be arguing at a later date the petition for judicial review should be denied.

1 **II. LEGAL STANDARD FOR JUDICIAL REVIEW AND THE GRANTING OF A STAY**
2 **PENDING JUDICIAL REVIEW**

3 **A. Standard For Judicial Review**

4 The provisions of NRS 233B. 135(3) state:

5 The court shall not substitute its judgment for that of the agency as to the weight of
6 evidence on a question of fact. The Court may remand or affirm the final decision or set
it aside in whole or in part if substantial rights of the petitioner have been prejudiced
because the final decision of the agency is:

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

13 The grounds to reverse a Hearing Officer under the facts of this case are limited pursuant to the
14 plain meaning of the statute. Whereas here, there is “substantial evidence” in the record, the findings of
15 facts of the Hearing Officer are not merely entitled to “deference,” they are conclusive. *State*
16 *Employment Security Dept. v. Nacheff*, 104 Nev. 347, 575 P.2d 787 (1988). While the Courts are free
17 to decide purely legal issues without deference to the determination of the administrative agency,
18 where the agency’s conclusions of the law are so connected to the facts of the case they are likewise
entitled to deference and may not be disturbed if supported by substantial evidence, *Jones v. Rosner*,
102 Nev. 215, 719 P.2d 805 (1986).

19 In reviewing the decision of an administrative agency, this Court may not substitute its own
20 judgment for that of a Hearing Officer with regard to the weight of the evidence or the credibility of
21 witnesses, *Gilman v. Nevada State Board of Veterinary Medical Examiners*, 120 Nev. 263 (2004),
22 *Knapp v. State Department of Prisons*, 111 Nev. 420, 892 P.2d 575 (1995). This Court may not disturb
23 the Hearing Officer’s decision unless the Court finds that the decision was “arbitrary and capricious.”
24 To be “arbitrary and capricious,” the decision of the administrative agency must be in “disregard of the

1 facts and circumstances involved”. *Meadow v. The Civil Service Board of LVMPD*, 105 Nev. 624, 781
2 P.2d 772 (1989).

3 **B. Standard for A Stay Of An Administrative Agency Decision**

4 Stays pending judicial reviews of the decisions of an administrative agency are governed by
5 NRS 223B. 140 which states:

- 6 1. A petitioner who applies for a stay of the final decision in a contested case shall
7 file and serve a written motion for the stay on the agency and all parties of record to the
8 proceeding *at the time of filing the petition for judicial review*,
- 9 2. In determining whether to grant a stay, the court shall consider the same factors
10 as are considered for a preliminary injunction under Rule 65 of the Nevada Rules of
11 Civil Procedure.
- 12 3. In making a ruling, the court shall:
 - 13 (a) Give deference to the trier of fact; and
 - 14 (b) Consider the risk to the public, if any, of staying the administrative decision.

15 The petitioner must provide security before the court may issue a stay.

16 (emphasis added).

17 As set forth by subsection (2) of the statute, DPS must meet the high burden of proving the
18 same factors governing preliminary injunctions. This requires DPS to establish (1) that the nonmoving
19 party ‘s conduct, if allowed to continue, will cause irreparable harm for which compensatory relief is
20 inadequate and (2) that the moving party has a reasonable likelihood of success on the merits. *Boulder
21 Oaks Cmty. Ass’n v. B & J Andrews*, 125 Nev. 397, 403, 215, P.3d 27, 31 (2009). Likewise, the court
22 must consider “the potential hardships to the relative parties”. *University and Community College
23 System of Nevada v. Nevadans for Sound Government*, 120 Nev. 712, 100 P.3d 179 (2004).

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1 **III. PETITIONER’S MOTION FOR STAY MUST BE DENIED AS UNTIMELY**

2 While set forth below, NDOC is not entitled to a stay on the merits, the Motion for Stay must
3 be denied on the grounds that it is untimely. NRS 233B.140 states:

- 4 1. A petitioner who applies for a stay of the final decision in a contested case shall file
5 and serve a written motion for the stay on the agency and all parties of record to the
proceeding **at the time of filing the petition for judicial review.**

6 (Emphasis added). DPS did not file its Motion “at the time of filing the petition for judicial review” as
7 mandated by the plain language of the statute. NDOC’s Petition for Judicial Review was filed June 28,
8 2019. NDOC did not file its Motion for Stay until July 1, 2019.

9 The Nevada Supreme Court has held that the procedural requirements of the provisions seeking
10 judicial review must be strictly complied with. *Washoe County v. Otto*, 128 Nev. Adv. Op. 40, 282
11 P.3d 719 (2012). The Court must “construe statutes to give meaning to all of their parts and language,
12 and this court will read each sentence, phrase, and word to render it meaningful within the context of
13 the purpose of the legislation” and “no part of a statute should be rendered meaningless.” *Harris*
14 *Associates v. Clark County School District*, 119 Nev. 638, 642, 81 P.3d 532, 535 (2003). If NDOC
15 wished to seek a stay of the Hearing Officer’s Decision pending judicial review, it was statutorily
16 obligated to file the Motion for Stay “at the time of filing the petition for judicial review.” NDOC is
17 not permitted to render that statutory language meaningless or irrelevant by filing after the
18 jurisdictional deadline for filing a petition for judicial review. Because the filing was untimely it must
19 be denied on procedural grounds.

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1 **IV. PETITIONER'S MOTION MUST BE DENIED ON THE MERITS**

2 **A. NDOC Cannot Demonstrate Irreparable Harm.**

3 This Court should not even address the issue of reasonable likelihood of success on the merits
4 because NDOC cannot establish irreparable harm. Generally, harm will only be deemed "irreparable"
5 if "it cannot adequately be remedied by compensatory damages." *Hamm v. Arrowcreek Homeowners'*
6 *Ass'n*, 124 Nev. 290, 183 P.3d 895 (2008).

7 NDOC'S Motion for Stay sites to *Raniser v. State Industrial Insurance System*, 104 Nev. 742,
8 766 P.2d 274 (1988) to claim that it will not be able to recoup any back pay which is paid to Navarrete.
9 However, a review of *Ransier* does not support NDOC'S position. Rather, in *Raniser* the Supreme
10 Court based its decision upon a statutory scheme which is "uniquely legislative in nature." 104 Nev.
11 At 746. It is because of this uniquely legislative structure the court reached its conclusion that the
12 common-law remedies would not be applicable.

13 In the absence of such a unique legislative scheme, the Nevada Supreme Court has held that
14 employees should immediately receive the benefits of the decisions of administrative agencies, and if
15 the administrative agency subsequently prevails on appeal it may "seek reimbursement of benefits it
16 paid." *Falline v. GNLV Corp.*, 107 Nev. 1004, 823 P.2d 888 (1991). In *Bergerson v. Salem-Keizer*
17 *School Dist.*, 185 Or. App. 649, 60 P.3d 1126 (2003) the Oregon Court of Appeals specifically rejected
18 the argument that concerns over the ability to recoup the back pay justified staying an order of
19 reinstatement with back pay for a terminated public employee. See also *Board of Trustees of Jackson*
20 *Public School Dist. v. Knox*, 638 So.2d 1278 (Miss 1994). In *Department of Transport v. Keeley*, 2018
21 WL 4352855 (Del. September 11, 2018), the Delaware Supreme Court found no irreparable harm in
22 requiring back pay pending judicial review noting that the possibility that the employee might impose
23 the return of back pay should the Department prevail was "mere speculation."
24

1 Navarrete expressly acknowledges the obligation to return any back pay received by him if
2 NDOC ultimately prevails. If, in the unlikely event NDOC prevails in connection with its Petition for
3 Judicial Review, NDOC may seek reimbursement of back pay from Navarrete. If Navarrete does not
4 repay the money, NDOC may obtain a money judgment under a common law theory of unjust
5 enrichment.

6 The ability to obtain a money judgment is sufficient in and of itself to defeat the claim of
7 irreparable harm. Federal courts examining this issue in connection with F.R.C.P. 65 have likewise
8 held that even the inability to pay a monetary judgment is not sufficient to constitute irreparable harm.
9 *Dannebrog Rederi AS v. M/Y True Dream*, 146 F.Supp.2d 1307 (S.D.Fla.1987). See also *Oxford*
10 *International Bank and Trust, Ltd. V. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 374 So.2d 54, 56
11 (Fla.Dist.Ct.App.1979).

12 **B. Petitioner Is Unlikely to Prevail On The Merits.**

13 Petitioner is unlikely to prevail on the merits because the Hearing Officer held a two (2) day
14 evidentiary hearing and ruled against the State on the merits. The Hearing Officer utilized the *O'Keefe*,
15 in which the State had to prove just cause to terminate on the merits. This is not a case of relative
16 discipline; this is a case where Mr. Navarrete prevailed on the merits. He did not use or permit
17 excessive force. He did not file a false report.

18 Since the determination was straight forward, there is no way the State can prevail unless this
19 Court substitutes its own judgment for that of the Hearing Officer. This is something the statutes and
20 case law says you can't do. For those reasons, this Court should deny the stay and order reinstatement
21 with back pay with benefits.

22 ////

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24 ////

1 **C. The State Fails to Recognize The Hearing Officer Ruled In Navarrete's Favor on**
2 **The Merits.**

3 The leading case in this area of law is *O'Keefe v. Department of Motor Vehicles*, 135 Nev. Ad.
4 Op. 92, 431 P.3d 350 (2018). The *O'Keefe* case expressed the standard of review as follows:

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

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

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

17 In the instant case, The Hearing Officer only had to apply the first step because Navarrete
18 denied he committed the alleged violation. The Hearing Officer agreed that Navarrete did not commit
19 the charged offense by a preponderance of the evidence. (See Gentile decision page 6). Additionally,
20 The Hearing Officer utilized the standard of preponderance of the evidence set forth in *Nassiri and*
21 *Johnson v. Chiropractic Physicians' Board of Nevada*, 130 Nev. Ad. Op. 7 (2014). In *Nassiri*, the
22 Supreme Court held that the standard of proof is the degree or level of proof demanded to prove a
23 specific allegation and that preponderance of the evidence is the standard of proof for an agency to take
24 disciplinary action against an employee. (See Gentile decision page 6).

 The preponderance of the evidence standard is described as "more probable than not." The
21 *Nassiri and O'Keefe* cases read in connection with the decision on the merits in the instant case means
22 the Hearing Officer found NDOC could not prove Navarrete willfully employed or permitted the use
23 of unauthorized or excessive force. (See Gentile decision page 6). Additionally, NDOC could not
24 prove by a preponderance of the evidence that Navarrete knowingly and intentionally submitted a

1 report with false or misleading information. Therefore the Hearing Officer's conclusion is more likely.

2
3 **D. The Ludwick Case Is Not Relevant To This Case.**

4 *Ludwick* involved the issue of the appropriate discipline of an employee who engaged in
5 "inexcusable negligent" by leaving his post without the prior permission of a supervisor. The Hearing
6 Officer found termination was a too harsh remedy. The Supreme Court held that when deciding
7 whether a violation is so serious that it warrants termination for a first time offense, the Hearing
8 Officer should deferr to the employer's decision. That part of the *Ludwick* case is not applicable
9 because in *Navarrete* the NDOC failed to prove there was a violation.

10 The second part of *Ludwick* is whether the Hearing Officer should have made his disciplinary
11 decision based on the valid NAC provisions rather than AR 339 in imposing discipline. (See *Ludwick*
12 decision page 9). Thereafter, if a violation occurred, the Hearing Officer must apply steps 2 and 3 of
13 *O'Keefe*.

14 *Ludwick* does not apply to *Navarrete* because the parties agreed this was a Part I *O'Keefe* case.
15 The NDOC could not prove a violation occurred. The Hearing Officer never dealt with Steps 2 and 3
16 of *O'Keefe* since they were not relevant to the analysis. The Hearing Officer did not base his decision
17 in *Navarrete* on AR 339. Since the Hearing Officer found no violation by a preponderance of the
18 evidence on the merits, *Ludwick* does not apply. Even if the Hearing Officer had ruled on AR 339,
19 *Ludwick* would support the *Navarrete* decision. The Hearing Officer applying *Ludwick* could not
20 approve a termination based on a rule not properly approved by the State Personnel Commissioner.

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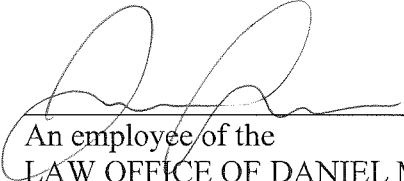
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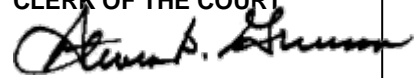
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1 **CERTIFICATE OF SERVICE BY ELECTRONIC MEANS**

2 I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 9
3 day of July, 2019, pursuant to NRCP 5(b) and Administrative Order 14-2, I electronically transmitted a
4 true and correct copy of the above and foregoing **RESPONDENT JOSE NAVARRETE'S**
5 **OPPOSITION TO PETITIONER'S MOTION TO STAY AND PETITIONER'S COUNTER-**
6 **MOTION FOR IMMEDIATE REINSTATEMENT AND PAYMENT OF ALL BACK PAY**
7 **AND FULL BENEFITS** by way of Notice of Electronic Filing provided by the court mandated E-file
8 & Serve system, to the e-mail address on file for:

9 Michelle Di Silvestro Alanis, Esq.
10 Deputy Attorney General
11 NEVADA ATTORNEY GENERAL
 Attorney for Petitioner
 e-mail: malanis@ag.nv.gov

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13 
14 An employee of the
15 LAW OFFICE OF DANIEL MARKS
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ex rel. DEPARTMENT OF CORRECTIONS

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel. its
DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

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

Respondents.

CASE NO: A-19-797661-J

DEPT NO: XVI

PETITIONER'S REPLY TO RESPONDENT,
JOSE NAVARRETE'S OPPOSITION TO
PETITION'S MOTION FOR STAY AND
OPPOSITION TO RESPONDENT'S
COUNTER-MOTION FOR IMMEDIATE
REINSTATEMENT AND PAYMENT OF
ALL BACK PAY AND FULL BENEFITS

Petitioner, STATE OF NEVADA ex rel. DEPARTMENT OF CORRECTIONS (NDOC), by and through counsel, AARON D. FORD, Attorney General for the State of Nevada, and MICHELLE DI SILVESTRO ALANIS, Supervising Senior Deputy Attorney General, hereby submits its REPLY in support of NDOC's Motion for Stay and OPPOSITION to Respondent's Countermotion for Immediate Reinstatement and Payment of All Back Pay and Full Benefits.

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1 This Reply and Opposition are made and based on upon the following memorandum of points
2 and authorities, the pleadings and papers on file herein, and oral argument to be presented by counsel
3 at any hearing in this matter.

4 DATED this 16th day of July, 2019.

5 AARON D. FORD
6 Attorney General

7 By: /s/ Michelle Di Silvestro Alanis
8 MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)
9 Deputy Attorney General

10 *Attorneys for Petitioner STATE OF NEVADA*
11 *ex rel. its DEPARTMENT OF CORRECTIONS*

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. LEGAL ARGUMENT**

14 **A. NDOC's Motion for Stay is timely**

15 NDOC submitted its Petition for Judicial Review (PJR) on Friday, June 28, 2019 for filing with
16 the Court through the electronic filing system. That same day at 3:36 p.m., the PJR was filed and the
17 case was assigned a case number and a department. NDOC submitted its Motion for Stay on July 1,
18 2019, for filing with the Court. The notification that the Motion had been successfully filed was sent the
19 same day at approximately 5:40 p.m.

20 Employee argues that NDOC's motion for stay is untimely because NDOC did not file its
21 Motion "at the time of filing the petition for judicial review" as set forth in NRS 233B.140. Employee
22 relies on *Washoe County v. Otto*, 128 Nev. 424, 432, 282 P.3d 719, 725 (2012) for the position that the
23 procedural requirements of NRS 233B.140 must be strictly complied with. Employee's argument is
24 without merit and his reliance on Washoe County is misplaced.

25 First, it is NDOC's position that the Motion for Stay was filed at the time of the filing of the
26 PJR. As stated above, the PJR was filed on Friday, June 28, 2019 and the Motion followed on Monday,
27 July 1, 2019. The plain language of the statute does not state that the Motion must be filed on "the same
28 day," by the "deadline for filing a petition for judicial review" or "the time frame imposed by NRS

1 233B.130(2)(d)". Instead, it states "at the time of filing." NRS 233B.140 was added in 1967 and last
2 amended in 1989. This statute certainly did not take into consideration the new electronic filing system,
3 which sometimes does not immediately accept submitted filings.

4 Furthermore, the deadline to file a PJR in this case was July 1, 2019.¹ NDOC filed its Motion
5 for Stay within the deadline for filing a PJR. Since the plain language of the statute simply states at the
6 time of filing, its NDOC's position that filing its Motion the next business day after filing the PJR and
7 within the deadline to file a PJR is at the time of filing and reasonable.

8 Second, Employee's reliance on *Washoe County v. Otto* is misplaced. In *Otto*, the Supreme
9 Court held "to invoke a district court's jurisdiction to consider a petition for judicial review, the
10 petitioner must strictly comply with the APA's procedural requirements. **Those jurisdictional**
11 **procedural requirements are found in NRS 233B.130(2).**" *Washoe County v. Otto*, 128 Nev. 424,
12 432, 282 P.3d 719, 725 (2012). The Supreme Court **did not hold** that the jurisdictional requirements
13 were found in NRS 233B.140 which is the statute at issue here. Moreover, the *Otto* Court examined
14 whether all of the parties were named in the petition for judicial review pursuant to NRS 233B.130 not
15 whether a motion for stay was timely filed under NRS 233B.140. Further, to the extent that *Otto* is
16 relevant, it is merely to reinforce that the Petition for Judicial Review must be timely filed to invoke
17 this court's jurisdiction. Here, there is no allegation that the PJR was untimely and thus this court has
18 jurisdiction to hear any motion filed in this case. This includes a motion for stay as NRS 233B.140 does
19 not impose a jurisdictional time constraint on the filing of a motion for stay. The Nevada Supreme
20 Court has recognized that a motion to stay is fundamentally different than a PJR and cannot be appealed
21 so it is unclear why Employee believe a PJR's jurisdictional requirement would be imposed on a
22 motion for stay. *See S. Nevada Health Dist. v. Local Gov't Employee-Mgmt. Relations Bd* No. 76625,
23 2018 WL 6609648, at 1 (Nev. Dec. 12, 2018) (unpublished) citing *Brunzell Constr. Co. v. Harrah's*
24 *Club*, 81 Nev. 414, 404 P.2d 902 (1965).

25 Third, since NRS 233B.140 is not jurisdictional, it would be within the **discretion** of the district
26 court judge to determine whether NDOC has complied with NRS 233B.140. Again as stated above,
27 NDOC filed its Motion the next business day after filing its petition for judicial review and within the
28

¹ The Hearing Officer entered its final order on May 30, 2019. NRS 233B.130(2)(d) states that PJRs must be filed within 30 days after service of the final decision. Here, the 30-day deadline was July 1, 2019.

1 July 1, 2019 deadline to file a PJR. Certainly, filing a motion for stay the day after initiating an appeal
2 and within the deadline for filing an appeal, is not only “at the time of filing” a PJR but also reasonable.

3 Fourth, not only is it within the discretion of the District Court Judge but there is no prejudice to
4 the Employee that the Motion was filed on July 1st. The Employee was already made aware that NDOC
5 disagreed with the hearing officer’s ruling when the undersigned and Employee’s counsel spoke
6 following the hearing officer’s decision. Additionally, the Employee then received the Petition for
7 Judicial Review on July 1st through the Court’s electronic service, by mail and by email. Employee is
8 not prejudiced by the Motion being filed on July 1st. Thus, this Court must reject Employee’s
9 arguments that the Motion is untimely.

10 **B. NDOC would suffer irreparable harm if its Motion for Stay is not granted**

11 **1. Back pay**

12 In his Opposition, Employee argues that *Ransier v. State Industrial Insurance System*, 104 Nev.
13 742, 766 P.2d 274 (1988) does not support NDOC’s position that it will not be able to recoup the back
14 pay award. Yet, the Nevada Supreme Court has recently cited to this same case in *State of Nevada,*
15 *Office of the Military v. William Simpson*, No. 72618, (unpublished), noting as follows:

16
17 NRS 284.390(7) provides that a hearing officer must award an employee
18 full pay for the period of dismissal if the hearing officer concludes that the
19 employee was improperly dismissed. However, **because the Legislature**
20 **has not explicitly stated that an employer can recoup unwarranted**
21 **back pay, we conclude that [the Office of the Military] is not entitled**
22 **to recoup back pay even if this court concludes that Simpson’s**
23 **dismissal was proper.** *See Ransier v. State Indus. Ins. Sys.* 104 Nev. 742,
746-47, 766 P.2d 274, 276-77 (1988) (providing that an employer could
not recoup funds paid to an employee, which were later found to be
unwarranted on appeal because there is no statutory authority within the
workers’ compensation act that authorizes such action).

24 *State of Nevada Office of the Military v. Simpson*, No. 72618, footnote 2 (Dec. 2018) (unpublished)
25 (emphasis added) attached hereto as Exhibit 1.

26 Furthermore, the Nevada Supreme Court has recently denied an employee’s motion for stay of
27 the district court’s order, which granted a petition for judicial review. *See Vrantavez Garcia v. State of*
28 *Nevada Department of Corrections*, No. 76585, Order Denying Motion filed on November 30, 2018,

1 attached hereto as Exhibit 2. The Supreme Court denied employee's motion for stay because the harm
2 to the employee was compensable with monetary remedies and was outweighed by the possible
3 irreparable harm to the employer from having to expend unallocated funds to continue the employee's
4 employment pending resolution of the appeal. *Id.*

5 Moreover, Employee cites to irrelevant case law from other jurisdictions. Here, there is relevant
6 case law on point so there is no need to turn to Oregon, Mississippi, Delaware or Florida. Clearly, the
7 Nevada Supreme Court has taken the position that the State of Nevada would be irreparably harmed by
8 having to pay back pay to an employee pending appeal.

9 Thus, Employee's argument that *Rainser* is not applicable and that NDOC can seek a common
10 law remedy against the employee is incorrect. Based on the foregoing, NDOC cannot seek a civil
11 money judgment against Employee.

12 Employee, however, will not suffer the same harm if the Motion for Stay is granted. If the issues
13 on appeal are found in the Employee's favor, there will be no dispute that he would receive any monies
14 due to him in back pay. Simply stated, Employee can be made whole – unlike NDOC. Therefore, there
15 is no indication that Employee will suffer any irreparable harm or serious injury. Accordingly, the
16 probability of irreparable harm clearly weighs in NDOC's favor, and for granting the stay.

17 Employee also cites to NRS 286.435, yet again fails to note that there is no statutory authority
18 for NDOC to recoup the money paid. Under NRS 286.435(1)(a), Employee would have to pay back to
19 Public Employers Retirement System (PERS) any contributions that were refunded to the member.
20 Additionally, Employee would also have to pay back all employee contributions, which would have
21 been made on the back pay awarded to the member and interest on any amount due. NRS 286.435(1)(c)
22 and (d). Also, it is unknown how much Employee would owe and whether he would receive any funds
23 after making all payments necessary to PERS. While NDOC would have to deduct the money owed to
24 PERS from Employee's back pay award pursuant to NRS 286.435(2) this does not mean that NDOC
25 would not suffer irreparable harm. As noted in *Simpson* and *Rainser*, the Legislature has not explicitly
26 stated that an employer can recoup unwarranted back pay. It does not matter that NDOC would possibly
27 have to recoup money from PERS. If anything, it simply makes it more complicated and in NDOC's
28 favor.

1 **2. Reinstatement**

2 NDOC terminated Employee because he engaged in serious acts of misconduct, including but
3 not limited to, allowing the use of excessive force and making false and misleading statements. NDOC
4 does not believe Employee to be fit to work as a correctional officer for the State of Nevada.
5 Furthermore, should there be another incident where use of force is at issue, it could create liability for
6 NDOC for retaining Employee.

7 **C. NDOC has shown a likelihood of success on the merits.**

8 **1. Ludwick is Relevant and the Hearing Officer's reliance on AR 339 was Clear Error**
9 **of Law.**

10 In *NDOC v. Ludwick*, the Nevada Supreme Court held NDOC Administrative Regulation (AR)
11 339 is "invalid and of no legal effect for purposes of employee discipline" because AR 339 has not
12 been approved by the Personnel Commission. *NDOC v. Ludwick*, 135 Nev. Adv. Op. 12, ___ P.3d ___
13 (May 2, 2019). The Supreme Court also found that it was "a clear error of law warranting remand" for a
14 hearing officer to rely on AR 339 "for any purpose." *Ludwick* at 9.

15 In his Opposition, Employee asserts that Ludwick is irrelevant (1) on the facts of the case and
16 (2) because this decision was determined under step one of the *O'Keefe* case. Neither argument is
17 correct.

18 First, the type of discipline or misconduct in the underlying case is irrelevant as to whether
19 *Ludwick* applies. The only thing this Court would look to is whether the hearing officer relied on AR
20 339. Here, NDOC charged Employee with the following violations under AR 339:

21 AR 339.07.9 FALSE OR MISLEADING STATEMENTS

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

28 AR 339.07.17 UNAUTHORIZED USE OF FORCE

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

1 The Hearing Officer then found as follows:

2 A. NDOC has not met its burden of proving, by a preponderance of
3 the evidence, that Mr. Navarrete **willfully employed or permitted the use
of unauthorized force.**

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

6 Exhibit 1 to Motion for Stay (emphasis added).

7 The hearing officer clearly cited to the exact language of the AR and made findings of whether
8 the Employee violated AR 339. The Decision makes no reference to whether the Employee violated the
9 relevant portions of the NAC as required under *Ludwick*.

10 Second, whether the decision was determined under step one of *O'Keefe* has no bearing on
11 whether *Ludwick* applies. Again, as stated above, the hearing officer relied on AR 339 in making its
12 findings. Pursuant to *Ludwick*, this was a clear error of law warranting remand. Therefore, *Ludwick*
13 applies to this case and based on *Ludwick* alone, NDOC will likely prevail on the merits of the case.
14 Thus, the Motion for Stay should be granted.

15 **2. The Hearing Officer failed to consider whether employee violated NAC 284.650**
16 **which was a violation of statute and clear error.**

17 *Ludwick* further held that the hearing officer must address whether the employee's actions
18 constitutes violations of NAC 284.650 as listed in the specificity of charges. *Ludwick* at 9. The hearing
19 officer did not address whether Employee's actions violated NAC 284.650. The hearing officer's failure
20 to consider these NAC 284.650 violations was not harmless error, since substantial evidence confirmed
21 that Employee violated NAC 284.650(1) by permitting the use of unnecessary, unauthorized or
22 excessive force against an inmate in direct violation of AR 405, SDCC OP 405 and SDCC OP 407,
23 while substantial evidence also confirmed that Employee violated NAC 284.650(21) by permitting an
24 act of violence, including intimidation, assault or batter, to occur in the performance of his duties.
25 Furthermore, the substantial evidence confirmed that Employee was dishonest when he submitted a
26 report containing false and/or misleading statements as well as omissions. As such, the hearing officer
27 committed clear legal error by disregarding his statutory obligations and by failing to rule on all the
28 charges at issue, especially since these charges under NAC 284.650 were supported by substantial

1 evidence in the record.

2 Employee did not oppose this argument. Thus, this Court should find that NDOC likely would
3 prevail on the merits since the hearing officer failed to consider the NAC 284.650 violations.

4 **3. Preponderance of the Evidence is the wrong standard.**

5 The hearing officer made findings based on the preponderance of the evidence, however neither
6 *O'Keefe* nor NAC 284.798 provide that the hearing officer should use a preponderance of the evidence
7 standard. Instead, *O'Keefe* supports that the hearing officer applies a substantial evidence standard
8 when determining if a violation occurred. *See id.* at *9 (explaining the reasonableness standard is the
9 substantial evidence standard of review); *id.* at *10 (noting a discharge for just cause is one that is
10 supported by substantial evidence); *id.* at *13 (noting that substantial evidence supported the appointing
11 authority's decision).

12 "A discharge for '*just*' or 'good' cause is one which is not for any arbitrary, capricious, or
13 illegal reason and which is one based on facts (1) *supported by substantial evidence*, and (2) reasonably
14 believed by the employer to be true." *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 1078, 901 P.2d
15 693, 701 (1995)(emphasis added).

16 As set forth in the Motion, there was substantial evidence through documents, testimony and
17 video that Employee violated NAC 284.650 by violating AR 405 and OP 405 and 407, allowing the use
18 of unnecessary and unauthorized force and submitting an incident report that was dishonest as it
19 contained false statements as well as omissions.

20 **4. The Hearing Officer's decision was arbitrary and capricious**

21 To be arbitrary and capricious the decision of the administrative agency must be in disregard of
22 the facts and circumstances involved. *See Meadow v. The Civil Serv. Bd. of LVMPD*, 105 Nev. 624,
23 627, 781 P.2d 772, 774 (1989).

24 Here, there was substantial evidence that Employee violated AR 405 when he allowed his
25 subordinate to keep an inmate on the wall with his hands raised for over ten minutes for no reason.
26 Employee as a senior correctional officer was obligated to deescalate the situation and prevent the use
27 of unauthorized force particularly when he observed his partner get increasingly agitated and
28 unnecessarily keep the inmate on the wall. The video evidence was clear. The report written by the

Employee did not accurately report the events and falsified that the inmate came off the wall while the other officer was attempting to restrain him. Yet, the video clearly shows the officer was in no way attempting to restrain the inmate and instead approached the inmate and placed him in a chokehold. The report also had glaring omissions of the facts leading to the use of force which is also classified as dishonesty. Furthermore, the testimony from the multitude of witnesses supported that NDOC had substantial evidence in making their disciplinary decision and terminating Employee. Despite the substantial evidence in the record, the hearing officer made a decision after “much soul searching” rather than based on the substantial evidence in the record. The hearing officer’s determination that Employee did not permit unauthorized force and that Employee was not dishonest when he wrote his incident report is contrary to the reliable, probative and substantial evidence in the while 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. NDOC will likely prevail on the merits. Thus, the Motion for Stay should be granted.

II. OPPOSITION TO COUNTERMOTION

Employee’s countermotion is without merit and must be denied. NDOC is asking this Court to stay the hearing officer’s order so that Employee will not be reinstated pending appeal. Should NDOC’s motion be denied, NDOC will be forced to return Employee to NDOC. There is no need for a countermotion for immediate reinstatement. The underlying motion addresses this very issue.

Furthermore, Employee’s position that NDOC is not willing to include all pay and benefits is equally without merit. NRS 284.390(7) states, “if the hearing officer determines that the dismissal, demotion, or suspension was without just cause as provided in NRS 284.385, the action must be set aside and the employee must be reinstated, with full pay for the period of dismissal, demotion or suspension.”

Here, the parties entered a stipulation staying the administrative hearing pending Employee’s criminal case and also limiting the award of back pay. *See* Stipulation and Order attached hereto as Exhibit 3. Employee agreed that should his discipline be overturned and he be reinstated, he knowingly and willingly waived his right to back pay from the period of January 26, 2018 until the time an appeal hearing is conducted. Exhibit 3. Employee also waived the ability to make any arguments contrary to this

1 stipulation. Exhibit 3. Thus, Employee will only receive back pay from the time of his dismissal, April 21,
2 2017 to the time the appeal was originally set for hearing, January 25, 2018 and from the time the hearing
3 commenced, April 2, 2019, to the time he is reinstated (unless NDOC prevails on its Motion for Stay and
4 PJR). Pursuant to the parties' agreement, Employee will not receive back pay from January 26, 2018 to
5 April 2, 2019. Therefore, Employee cannot now ask this court for full pay and benefits when he knowingly
6 and willing stipulated to limit such pay and benefits for the benefit of continuing his administrative case
7 until his criminal case concluded. Should NDOC have to reinstate Employee he will receive back pay and
8 benefits pursuant to the parties stipulation, which includes payments to PERS, health insurance,
9 unemployment, etc (fringe benefits).

10 Lastly, Employee assertions in its countermotion are based on prospective amounts the parties
11 discussed in confidential settlement discussions. Since NDOC has not reinstated Employee yet and has
12 instead filed a Motion for Stay, Employee cannot make arguments about benefits and tax rates that have
13 not taken place. Employee only had the benefit of prospective amounts, which again were the subject of
14 settlement discussions and inappropriate and inadmissible in this hearing. Thus, Employee's
15 countermotion must be denied.

16 **III. CONCLUSION**

17 Based on the foregoing, NDOC has met the criteria for a stay of the enforcement of the hearing
18 officer's May 30, 2019, final order reinstating Employee with full pay for the period of dismissal.
19 NDOC requests that this Court grant the stay so that the Hearing Officer's Decision be stayed until this
20 Court makes a final decision on DPS's Petition for Judicial Review.

21 DATED this 16th day of July, 2019.

22 AARON D. FORD
23 Attorney General

24 By: /s/ Michelle Di Silvestro Alanis
25 MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)
26 Deputy Attorney General

27 *Attorneys for Petitioner STATE OF NEVADA*
28 *ex rel. its DEPARTMENT OF CORRECTIONS*

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that
3 on July 16, 2019, I electronically filed the foregoing **PETITIONER'S REPLY TO RESPONDENT,**
4 **JOSE NAVARRETE'S OPPOSITION TO PETITION'S MOTION FOR STAY AND**
5 **OPPOSITION TO RESPONDENT'S COUNTER-MOTION FOR IMMEDIATE**
6 **REINSTATEMENT AND PAYMENT OF ALL BACK PAY AND FULL BENEFITS** via this
7 Court's electronic filing system. Parties that are registered with this Court's electronic filing system
8 will be served electronically. For those parties not registered, service was made by depositing a copy
9 for mailing in the United States Mail, first-class postage prepaid at Las Vegas, Nevada to the
10 following:

11
12 Mark Gentile
13 Hearing Officer
14 Department of Administration
15 2200 S. Rancho Dr., Ste. 210
16 Las Vegas, NV 89102

(Via U.S. mail and E-mail: zmcgough@admin.nv.gov)

17 Dan Marks, Esq.
18 Law Offices of Daniel Marks
19 610 S. 9th St.
20 Las Vegas, NV 89101

(Via U.S. Mail and email to: office@danielmark.net,
gguo@danielmarks.net)

21 /s/ Anela Kaheaku
22 An employee of the Office of Attorney General
23
24
25
26

27 5917
28

EXHIBIT 1

EXHIBIT 1

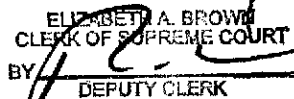
IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA OFFICE OF THE
MILITARY,
Appellant,
vs.
WILLIAM SIMPSON,
Respondent.

No. 72618

FILED

DEC 11 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal from a district court order denying a petition for judicial review in an employment matter. First Judicial District Court, Carson City; James Todd Russell, Judge.

In June 2006, appellant State of Nevada, Office of the Military (OOM) hired respondent William Simpson as a military security officer. Simpson's work evaluations always met or exceeded performance standards, and he was never subject to discipline for violating any of OOM's rules or regulations.

In July 2014, a military officer filed a complaint with OOM alleging a hostile work environment caused by sexual harassment. In particular, the complainant stated that other military officers were making sexual comments and innuendos while at work. In response, Provost Marshal Kolvet, a senior military police officer, issued a letter of instruction stating that all sexual comments or innuendos in the workplace were unacceptable and any occurrences of such behavior would be subject to administrative action. All of the military officers, including Simpson, signed a form indicating that they received and understood the letter of

instruction. The complainant reported that Kolvet's letter had resolved his issues and that his colleagues were no longer making sexual comments at work.

In March 2015, Simpson was promoted to a supervisory position as chief of security. In June 2015, Simpson issued a letter to subordinate military officers stating that "[t]he State of Nevada has a 'zero tolerance' policy for sexual harassment, inappropriate comments, behavior to include racial remarks, religious persecution, sexual comments regarding same sex, sexual interaction or any other offensive conduct, behavior or material displayed on computers or personal devices." During this approximate time, a different military officer filed a complaint alleging that supervisors were punishing him for minor logbook infractions while failing to investigate serious allegations of sexual harassment. The complaint prompted the Nevada Department of Administration, Division of Human Resource Management (DHRM) to conduct a sexual harassment investigation. The complaint also prompted a federal investigation into the allegation that employees were using federally owned computers to download and view pornographic material.

The DHRM investigation revealed that OOM had a longstanding history of condoning sexual harassment. The investigation also elicited statements from subordinate employees indicating that Simpson engaged in sexual harassment for the past ten years. As a result of the investigation's findings, the DHRM recommended that all military officers complete sexual harassment training.

The federal investigation revealed that four employees possessed pornographic material on their federally owned computers. Consequently, OOM terminated military officer Robert Pool, after it found

out that he used his federally owned computer to view hundreds of pornographic images while at work.¹ Pool challenged his termination by alleging that his supervisor, Simpson, sent him an image of a nude male's genitalia from his personal cell phone back in March 2015. Pool provided OOM with a copy of the text message containing the image, and thus, an investigation into Pool's allegation was initiated.

Initially, OOM did not believe that it could discipline Simpson because he sent the image from his personal cell phone. However, the investigation revealed that Simpson sent the image while he was at work, and after consulting with the district attorney, OOM learned that pursuant to NAC 284.646(2)(a), an employee can be immediately dismissed for intentionally viewing or distributing pornographic material on the work premises. OOM believed Simpson's conduct violated NAC 284.646(2)(a) and OOM's Prohibitions and Penalties (3)(B)(2) "Misconduct of a supervisor because of prejudice, anger or other unjustifiable reason."

Simpson initially denied sending the image to Pool after being confronted by Kolvet, but subsequently admitted that he sent the image to Pool in a joking nature. A pre-disciplinary hearing was held for Simpson. The pre-disciplinary hearing officer concluded that the language in NAC 284.646 and OOM's Prohibitions and Penalties gave OOM discretion to determine the appropriate level of discipline, and termination was justifiable based on Simpson's actions and supervisory role. OOM's Administrator decided to terminate Simpson, effective March 2016,

¹Concerning the other three military officers, one officer was already no longer employed with OOM, one officer resigned after receiving the notice of investigation, and one officer was found that the images on his computer did not constitute pornographic material.

reasoning that Simpson was in a supervisory position and OOM had a zero tolerance policy for sexual harassment.

Simpson requested a hearing to challenge OOM's decision to terminate his employment. Following the hearing, the hearing officer overturned Simpson's termination. The hearing officer described his duty "to insure that the Employer did not act arbitrarily or capriciously, thus abusing its discretion." In addition, the hearing officer stated that it is his duty "to determine whether the action of the employer in disciplining the employee was based on evidence that would show that the good of the public service would be served by such discipline." Lastly, the hearing officer cited *Knapp v. State Department of Prisons*, 111 Nev. 420, 892 P.2d 575 (1995), to assert the proposition that he is "to make an independent determination as to whether there is sufficient evidence showing that the discipline would serve the good of the public service."

The hearing officer found that "[t]he reliable, substantial and probative evidence establishes that on March 5, 2015 [Simpson] sent a text message from his private cell phone of a picture depicting a nude human male with the male's genitals in full view to a subordinate male employee while on the work premises." The hearing officer further found that Simpson's act violated NAC 284.646(2)(a) and OOM's Prohibitions and Penalties (3)(B)(2).

Despite finding that Simpson committed a terminable offense, the hearing officer concluded that written reprimand would be more appropriate. The hearing officer found that the image did not become an issue until nine months after it was sent. Further, the hearing officer found that termination in this case was inconsistent with progressive discipline pursuant to NRS 284.383. In particular, the hearing officer stated that

Simpson "has had an otherwise unblemished seventeen (17) year career in law enforcement beginning with his employment with the Washoe Tribe Police Department in 1999." Thus, the hearing officer concluded that termination was unreasonable and did not serve the good of the public service. The hearing officer reinstated Simpson to his position with back pay.

OOM petitioned the district court for judicial review. The district court denied the petition, concluding that the hearing officer did not have to give deference to OOM's disciplinary decision, and the hearing officer's decision overturning Simpson's termination was proper. This appeal followed.

This appeal is moot

Simpson argues that the instant appeal is moot because his employment position was subsequently eliminated. OOM disagrees by arguing that Simpson received back pay and retains reemployment rights, and that should this court reverse the hearing officer's decision, OOM could start the process of recovering the back pay and Simpson would not have a right of reemployment to a state job.² Thus, OOM argues that an actual or live controversy continues to exist between the parties in this case.

²NRS 284.390(7) provides that a hearing officer must award an employee full pay for the period of dismissal if the hearing officer concludes that the employee was improperly dismissed. However, because the Legislature has not explicitly stated that an employer can recoup unwarranted back pay, we conclude that OOM is not entitled to recoup back pay even if this court concludes that Simpson's dismissal was proper. See *Ransier v. State Indus. Ins. Sys.*, 104 Nev. 742, 746-47, 766 P.2d 274, 276-77 (1988) (providing that an employer could not recoup funds paid to an employee, which were later found to be unwarranted on appeal because there is no statutory authority within the workers' compensation act that authorizes such action).

This court generally will not decide moot cases. *Cashman Equip. Co. v. W. Edna Assocs., Ltd.*, 132 Nev., Adv. Op. 69, 380 P.3d 844, 853 (2016). “A case is moot if it seeks to determine an abstract question which does not rest upon existing facts or rights.” *Id.* (internal quotation marks omitted). Here, this appeal was rendered moot when Simpson became ineligible for reemployment because a year had passed since his lay off date. See NAC 284.630(1) (an employee that was laid off will “be placed on the statewide reemployment list”); NAC 284.630(7) (“Each person on the list retains reemployment eligibility for 1 year after the layoff date.”). Because Simpson was laid off on March 12, 2017, his reemployment rights expired on March 12, 2018.

However, “[e]ven when an appeal is moot, . . . we may consider it if it involves a matter of widespread importance that is capable of repetition, yet evading review.” *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). Because a laid-off employee’s reemployment rights last for the duration of one year, it is possible, as in this case, that the case will never make it through the judicial review process for full resolution of the underlying issue. Moreover, determining which standard of review a hearing officer should apply when reviewing an employer’s termination decision of a state classified employee involves an issue of widespread importance. Accordingly, we hold that the exception to the mootness doctrine applies.

Standard of review

“When a decision of an administrative body is challenged, the function of this court is identical to that of the district court. It is to review the evidence presented to the administrative body and ascertain whether that body acted arbitrarily or capriciously, thus abusing its discretion.”

Gandy v. State, Div. of Investigation & Narcotics, 96 Nev. 281, 282, 607 P.2d 581, 582 (1980). Pursuant to the arbitrary and capricious standard, this court will defer to the hearing officer's "conclusions of law [that] are closely related to [the hearing officer]'s view of the facts," but we will decide "pure legal questions" de novo. *Knapp v. State, Dep't of Prisons*, 111 Nev. 420, 423, 892 P.2d 575, 577 (1995).

The hearing officer abused his discretion in overturning Simpson's termination

OOM argues that the hearing officer exceeded his statutory authority in overturning Simpson's termination. OOM also contends that the hearing officer's decision was based on extraneous facts and disregarded substantial evidence, and thus, was arbitrary and an abuse of discretion. We agree.

This court recently addressed the appropriate standard of review a hearing officer applies when reviewing an employer's termination of an employee. See *O'Keefe v. State, Dep't of Motor Vehicles*, 134 Nev., Adv. Op. 92, ___ P.3d ___, ___ (2018). We determined that "when a classified employee requests a hearing to challenge an agency's decision to terminate [him or her] as a first-time disciplinary measure, the hearing officer 'determines the reasonable' of the agency's decision by conducting a three-step review process." *Id.* (citing NRS 284.390(1)). Accordingly, the hearing officer should engage in the following analysis:

First, the hearing officer reviews de novo whether the employee in fact committed the alleged violation. See NAC 284.798. Second, the hearing officer determines whether that violation is a "serious violation of law and regulations" such that the "severe measure" of termination is appropriate as a first-time disciplinary action. NRS 284.383(1); NAC 284.646(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. NRS 284.383(1). Third and last, the hearing officer applies a deferential standard of review to the agency's determination that termination will serve "the good of the public service." NRS 284.385(1)(a). The inquiry is not what the hearing officer believes to be the good of the public service, but rather whether it was reasonable for the agency to "consider that the good of the public service would be served" by termination. *Id.*

Id.

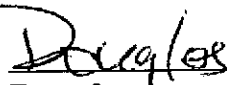
Here, the hearing officer correctly applied de novo review to find that Simpson violated NAC 284.646(2)(a) and OOM's Prohibitions and Penalties (3)(B)(2). Although OOM's Prohibitions and Penalties (3)(B)(2) is not categorized as a first-time terminable offense, the hearing officer abused his discretion when it found that Simpson's violations did not warrant termination because NAC 284.646(2)(a) provides that "[a]n appointing authority may dismiss an employee for . . . [i]ntentionally viewing or distributing pornographic material at the premises of the workplace" Thus, as a matter of law, Simpson's conduct was "serious." *O'Keefe*, 134 Nev., Adv. Op. 92, ___ P.3d at ___.

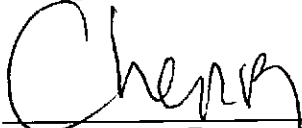
The hearing officer also abused his discretion when he applied de novo review to overrule OOM's determination that termination served the "good of the public service." NRS 284.385(1)(a). The hearing officer disregarded substantial evidence and instead erroneously focused on the delay between Simpson's violation and OOM's investigation, and the fact the Simpson was a long-term state employee with no record of previous violations. However, the delay was reasonable because OOM did not learn about the transmission of the image until nine or ten months after it was

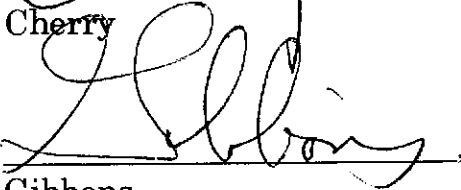
sent. Moreover, this court has stated, "[t]ermination of [a long-term state employee with no record of previous violations] may still be appropriate if the employee commits an offense that is punishable by termination for a first-time violation." *O'Keefe*, 134 Nev., Adv. Op. 92, ___ P.3d at ___. Therefore, neither of the facts the hearing officer relied on provided sufficient bases for determining that Simpson's termination was unreasonable. Rather, the substantial evidence showed that OOM believed that termination was necessary because it did not want to set a precedent in its work place that continued to condone sexual behavior. As an employer, OOM is in a better position than the hearing officer to determine what is best for the public service.

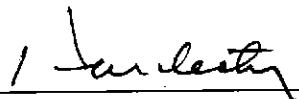
Accordingly, we

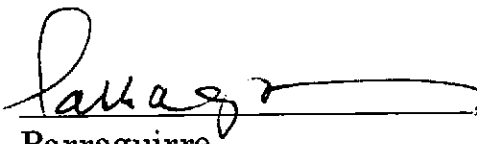
ORDER the judgment of the district court REVERSED, with direction to remand this matter to the hearing officer for proceedings consistent with this order.



_____, C.J.
Douglas


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Stiglich

cc: Hon. James Todd Russell, District Judge
Debbie Leonard, Settlement Judge
Attorney General/Carson City
Attorney General/Reno
Attorney General/Las Vegas
Dyer, Lawrence, Penrose, Flaherty, Donaldson & Prunty
Carson City Clerk

PICKERING, J., concurring:

The new test announced in *O'Keefe v. State, Department of Motor Vehicles*, 134 Nev., Adv. Op. 92, ___ P.3d ___, ___ (2018), supports my colleagues' decision to reverse Simpson's reinstatement and back-pay award. Once the hearing officer confirmed that Simpson violated NAC 284.646(2)(a), which authorizes an agency to bypass progressive discipline and terminate an employee for a first offense, *O'Keefe's* dicta, if not its holding, required him to defer to the agency's judgment that Simpson's termination would serve the good of the public service. *Id.* I write separately to emphasize that this case illustrates how *O'Keefe*, for which remittitur has not yet issued, improvidently reduces the hearing officer's independent role in ensuring fair and impartial discipline of a state employee to that of a functionary.

The Office of the Military terminated Simpson for sending a picture of a naked man through text message to his subordinate and long-time friend, Robert Pool. The text read "Sup playa," followed by an image of a naked man sitting down, followed by the message "Suuuuuuup." Pool was apparently not offended by the picture, and the incident went unnoticed for nine months until Pool, facing termination for viewing hundreds of pornographic images on his work computer, showed Simpson's text to investigators. Simpson admitted to sending the text from his personal cellphone to Pool's personal cellphone. Pool received the text while off-duty, but Simpson sent the message while sitting in his car in the OOM's parking lot during a work break. Simpson had no other disciplinary record in his ten years at the OOM.

The hearing officer reinstated Simpson's employment, determining that the offense warranted progressive discipline, not termination. In my judgment, the hearing officer properly exercised his role by providing a "new and impartial view of the evidence" and did not need to defer to the OOM's decision to dismiss Simpson. See *Knapp v. State, Dep't of Prisons*, 111 Nev. 420, 424, 892 P.2d 575, 577-78 (1995) (quoting *Dredge v. State, Dep't of Prisons*, 105 Nev. 39, 48, 769 P.2d 56, 62 (1989) (Springer, J., dissenting)); *State, Dep't of Prisons v. Jackson*, 111 Nev. 770, 773, 895 P.2d 1296, 1298 (1995) (recognizing that deference to an agency's termination decision would "undermine the job security of otherwise permanent employees, who deserve to have a fair and independent evaluation of the agency head's termination decision"). Unlike *O'Keefe*, where the employee committed a prohibited act for which DMV policy mandated termination—and other employees had been terminated for the same offense—the OOM's internal policies permitted but did not mandate termination for what Simpson did. 134 Nev., Adv. Op. 92, ___ P.3d at ___. See NAC 284.646(a) ("An appointing authority *may* immediately dismiss an employee for . . . [i]ntentionally viewing or distributing pornographic material at the premises of the workplace") (emphasis added). In the hearing officer's view, it was an afterthought, apparently to justify Pool's dismissal for more egregious violations on his work computer, to consider Simpson's text message from his personal cellphone to Pool's, who was off duty, as a terminable offense under NAC 284.646(2)(a).

Knapp, *Dredge*, and *Jackson* afforded the hearing officer the latitude to determine that, even though Simpson technically violated NAC 284.646(2)(a), the offense did not warrant termination. While we as a reviewing court might have decided the matter differently, the hearing

officer listened to the witnesses, reviewed the evidence, and decided progressive discipline short of termination was warranted. The hearing officer had authority to make this determination which, under *Knapp*, *Dredge*, and *Jackson*, we should review deferentially and uphold. The effect of the rule in *O'Keefe*, however, is that the hearing officer must treat Simpson's violation of NAC 284.646(2)(a) the same as Pool's violation of NAC 284.646(2)(a), because the OOM considered it for the good of the public service to terminate both employees. See *O'Keefe*, 134 Nev., Adv. Op. 92, ___ P.3d at ___ (allowing the hearing officer to review de novo whether the employee committed the violation, but requiring the hearing officer to defer to the agency's determination that dismissal for that violation will serve the good of the public service). But in the hearing officer's view, possessing hundreds of pornographic images on a work computer (Pool) is not the same as a 10-year employee with no prior discipline sending a picture of a naked man to an off-duty coworker and long-time friend in jest, from a personal cell phone to a personal cell phone, and while on a break from work (Simpson). *O'Keefe* does not properly account for these differences and the reality that the level of discipline corresponding to a violation of policy, regulation, or law often presents a mixed question of law and fact for which the hearing officer should be given the flexibility to ensure that a state employer's disciplinary actions are consistent and proportionate to the facts of each case.

This court should hesitate to reverse a hearing officer when he or she provides the independent, fair, and impartial review of a state employer's disciplinary actions for which our statutes provide. See *Knapp*, 111 Nev. at 423-24, 892 P.2d at 577-78; *Jackson*, 111 Nev. at 773, 895 P.2d at 1298; NRS 233B.135(3). While *O'Keefe* supports reversal, assuming the

remittitur in that case issues without withdrawal or amendment of the opinion, I reiterate my concern that *O'Keefe* represents an unsound departure from our statutes and case precedent.

Pickering, J.
Pickering

EXHIBIT 2

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

VRANTEVAZ GARCIA, AN
INDIVIDUAL,

Appellant,

vs.

THE STATE OF NEVADA
DEPARTMENT OF CORRECTIONS,
Respondent.

No. 76585

FILED

NOV 30 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING MOTION

This is an appeal from an order granting a petition for judicial review. Appellant seeks a stay of the district court's order so that she may continue to work until the final resolution of this appeal. Respondent opposes the motion.¹

Having considered the parties' arguments and the factors under NRAP 8(c), we conclude that a stay is not warranted. Although we do not lightly consider the loss of employment, the harm to appellant is compensable with monetary remedies and is outweighed by the possible irreparable harm to respondent from having to expend unallocated funds to

¹Cause appearing, we grant respondent's motion for leave to file a response in excess of the 10-page limit. NRAP 27(d)(2). The clerk shall file the opposition received via e-flex on November 5, 2018.

continue appellant's employment pending the resolution of this appeal. See NRAP 8(c)(2), (3).

It is so ORDERED.

Cherry, J.
Cherry

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

cc: Dyer Lawrence, LLP
Attorney General/Carson City
Attorney General/Las Vegas

EXHIBIT 3

EXHIBIT 3

1 **BEFORE THE NEVADA STATE PERSONNEL COMMISSION**
2 **MARK GENTILE, HEARING OFFICER**

3 JOSE MIGUEL NAVARRETE,

Case No.: 1713379-MG

4 Petitioner/Employee,

5 v.

6 DEPARTMENT OF CORRECTIONS,

7 Respondent/Employer
8 _____/

9 **STIPULATION TO STAY THE ABOVE ENTITLED MATTER PENDING THE**
10 **RESOLUTION OF A CRIMINAL MATTER AGAINST PETITIONER**

11 COMES NOW Petitioner Jose Navarette, by and through his counsel Daniel Marks, Esq., and
12 Nicole M. Young, Esq., of the Law Office of Daniel Marks, and Respondent Department of
13 Corrections, by and through its counsel Michelle Di Silvestro Alanis, Esq., of the Nevada Attorney
14 General's Office, submit as follows:

15 WHEREAS, Petitioner Jose Navarrete is currently the subject of a criminal matter in Las Vegas
16 Justice Court, Case No. 17F20960B, relating to the allegations at issue in the above-captioned matter
17 and does not wish to waive his 5th Amendment right against self-incrimination.

18 IT IS STIPULATED AND AGREED that the hearing presently scheduled for January 25,
19 2018, be continued and stayed until the resolution of the criminal matter.

20 IT IS FURTHER STIPULATED AND AGREED that Petitioner's counsel shall immediately
21 advise the Hearing Officer once the criminal matter has been resolved.

22 IT IS FURTHER STIPULATED AND AGREED that should Petitioner's discipline be
23 overturned and employment reinstated, Petitioner's back pay will be limited from April 21, 2017, the
24 effective date of his dismissal, to January 25, 2018, the original scheduled date of Petitioner's appeal
25 hearing. Any award of back pay would be subject to any offsets in accordance with State law.

1 IT IS FURTHER STIPULATED AND AGREED that should Petitioner, Jose Navarrete, be
2 reinstated, he knowingly and willing waives his right to back pay for the period from January 26, 2018,
3 until such time as an appeal hearing is conducted. The parties agree that the Hearing Officer's decision
4 will be binding on the parties pursuant to NRS 284.390(7).

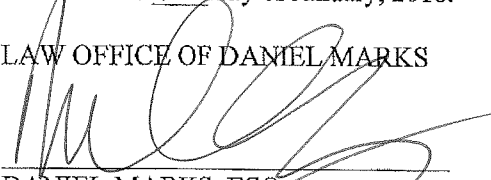
5 IT IS FURTHER STIPULATED AND AGREED that Petitioner waives his right to make any
6 arguments contrary to this stipulation regarding his back pay in any subsequent pleading, motion or
7 appeal brought as a result of this matter.

8 DATED this 10 day of January, 2018.

DATED this 9th day of January, 2018.

9 LAW OFFICE OF DANIEL MARKS

NEVADA ATTORNEY GENERAL'S OFFICE

10
11 
DANIEL MARKS, ESQ.

Nevada State Bar No. 002003


12 NICOLE M. YOUNG, ESQ.

Nevada State Bar No. 012659

13 610 S. Ninth Street

Las Vegas, Nevada 89101

14 *Attorneys for Petitioner/Employer*

15
16
17
18
19
20
21
22
23
24
25

MICHELLE DI SILVESTRO ALANIS, ESQ.

Deputy Attorney General

Nevada State Bar No. 10024

555 E. Washington Avenue, Suite 3900

Las Vegas, Nevada 89101

Attorney for Respondent/Employer

1 BEFORE THE NEVADA STATE PERSONNEL COMMISSION

2 HEARING OFFICER

FILED

JAN 29 2018

3 JOSE MIGUEL NAVARRETE

4 Petitioner-Employee

5 vs.

6 DEPARTMENT OF CORRECTIONS

7 Respondent-Employer.

HEARINGS DIVISION

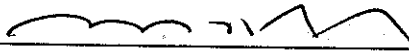
Appeal No: 1713379-MG

8
9 ORDER FOR STAY

10 This matter was set for a hearing to begin on January 25, 2018. Pursuant to the
11 Stipulation of the parties and good cause appearing;

12 **IT IS HEREBY ORDERED** that Appeal No. 1713379-MG be stayed pending the
13 resolution of a criminal matter against the Petitioner.

14 **IT IS SO ORDERED** this 24 day of January, 2018.

15
16
17 
18 MARK GENTILE, ESQ.
19 HEARING OFFICER
20
21
22
23
24
25
26
27
28

1 **CERTIFICATE OF SERVICE**

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

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

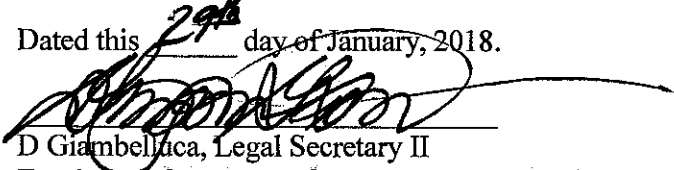
8 DANIEL MARKS
9 610 S NINTH ST
10 LAS VEGAS NV 89101

11 DEPARTMENT OF CORRECTIONS
12 JAMES DZURENDA, DIRECTOR
13 3955 WEST RUSSELL ROAD
14 LAS VEGAS NV 89118

15 DAVID WRIGHT, HUMAN RESOURCES MANAGER II
16 NEVADA DEPARTMENT OF CORRECTIONS
17 5500 SNYDER AV, BLDG 17
18 CARSON CITY NV 89702

19 MICHELLE D. ALANIS, DEPUTY ATTORNEY GENERAL
20 BUREAU OF LITIGATION - PERSONNEL DIVISION
21 555 E WASHINGTON AV #3900
22 LAS VEGAS NV 89101

23 Dated this 29th day of January, 2018.

24 
25 D Giambelluca, Legal Secretary II
26 Employee of the State of Nevada
27
28

A-19-797661-J

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Judicial Review/Appeal

COURT MINUTES

August 29, 2019

A-19-797661-J Nevada Dept of Corrections, Petitioner(s)
vs.
Jose Navarette, Respondent(s)

August 29, 2019 1:05 PM Minute Order re: Petitioner's Motion for Stay

HEARD BY: Williams, Timothy C. **COURTROOM:** Chambers

COURT CLERK: Christopher Darling

JOURNAL ENTRIES

- After review and consideration of the arguments of counsel and the moving papers on file herein, the Court determined as follows:

The Court in the instant action is called upon to determine whether strict or substantial compliance is required when filing the application for stay under NRS 233B.140 because the State of Nevada ex rel. Nevada Department of Corrections (NDOC), failed to file its application for stay at the time of filing its petition for judicial review. NRS 233B.140 provides in pertinent part, A petitioner who applies for a stay of the final decision in a contested case shall file and serve a written motion for stay in the agency and all parties of record at the time of filing the petition for judicial review. The record reveals that NDOC filed its Petition for Judicial Review on June 28, 2019. However, NDOC did not file the motion for stay until July 1, 2019, on the last day NDOC was allowed to file its Petition for Judicial Review.

In determining whether strict or substantial compliance is required under a statute, as it relates to mandated court filings and timing, Nevada law focuses on the nature of the statutory requirements and whether it is a time and manner statute or a form and content statute. In Leven v. Frey, the Supreme Court noted:

Our interpretation of the statute's timing requirements and our conclusion that those requirements must be complied with strictly is consistent with the general tenet that time and manner requirements are strictly construed, whereas substantial compliance may be sufficient for form and content requirements. Leven v. Frey, 123 Nev. 399, 408.

This Court determines that NRS 233B.140 is a time and manner statute that mandates strict

PRINT DATE: 08/29/2019

Page 1 of 2

Minutes Date: August 29, 2019

construction. Thus, in order for this Court to consider the application for stay, it must be filed at the time of the filing of the Petition for Judicial Review. Since the motion for stay was filed not at the time of, but after the time of filing the Petition for Judicial Review, the Court has no choice but to follow the statutory mandate under a time and manner statute and must deny the application for stay as untimely. Additionally, the Court sees no need to address the other issues raised in opposition to the application for stay. Consequently, NDOC s Motion for Stay shall be DENIED.

Counsel for Respondent shall prepare a detailed Order, Findings of Facts, and Conclusions of Law, based not only on the foregoing Minute Order, but also on the record on file herein. This is to be submitted to adverse counsel for review and approval and/or submission of a competing Order or objections, prior to submitting to the Court for review and signature.

CLERK'S NOTE: This Minute Order has been electronically served to the parties through Odyssey eFile.



LAW OFFICE OF DANIEL MARKS
DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
office@danielmarks.net
610 South Ninth Street
Las Vegas, Nevada 89101
(702) 386-0536: FAX (702) 386-6812
Attorney for Respondent Jose Navarrete

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel, DEPARTMENT
OF CORRECTIONS,

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

Petitioner,

v.

Date of Hearing: August 20, 2019
Time of Hearing: 9:00 a.m.

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

Respondents.

ORDER FROM AUGUST 20, 2019 HEARING

This matter having come on for hearing on the 20th day of August, 2019, on Petitioner's Motion for Stay and Respondents opposition thereto and Counter-Motion for Immediate Reinstatement and Payment of All Back Pay and Full Benefits; Petitioner State of Nevada appearing by and through its counsel, Michelle Di Silvestro Alanis, of the Attorney General's Office; and Respondent Jose Navarrete appearing in person, and by and through his counsel Daniel Marks, Esq., and Nicole M. Young, Esq., of the Law Office of Daniel Marks; the Court having reviewed the papers and pleadings on file, having heard the arguments of counsel, and good cause appearing:

1 THE COURT HEREBY FINDS that NRS 233B.140 provides in pertinent part, "A petitioner
2 who applies for a stay of the final decision in a contested case shall file and serve a written motion for
3 stay on the agency and all parties of record to the proceeding at the time of filing the petition for
4 judicial review."

5 THE COURT FURTHER FINDS that the record reveals that Petitioner filed its Petition for
6 Judicial Review on June 28, 2019. However, Petitioner did not file the motion for stay until July 1,
7 2019, on the last day Nevada Department of Corrections was allowed to file a Petition for Judicial
8 Review.

9 THE COURT FURTHER FINDS that pursuant to *Leven v. Frey*, a statute's time and manner
10 requirements must be strictly construed as compared to form and content requirements, which only
11 require substantial compliance. 123 Nev. 399, 408 (2007). This Court determines that NRS 233B.140
12 is a time and manner statute that mandates strict construction.

13 ////

14 ////

15 ////

16 ////

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22 ////

23 ////

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1 IT IS HEREBY ORDERED ADJUDGED AND DECREED that in order for this Court to
2 consider the application for stay, it must be filed at the time of the filing of the Petition for Judicial
3 Review. Since the motion for stay was filed not at the time of, but after the time of filing the Petition
4 for Judicial Review, the Court has no choice but to follow the statutory mandate under a time and
5 manner statute and must deny the application for stay as untimely. Additionally, the Court sees no need
6 to address the other issues raised in opposition to the application for stay. Consequently, Nevada
7 Department of Correction's Motion for Stay shall be DENIED.

8 DATED this 7th day of ~~September~~ October, 2019.

9
10 
DISTRICT COURT JUDGE CS

11 Respectfully submitted:

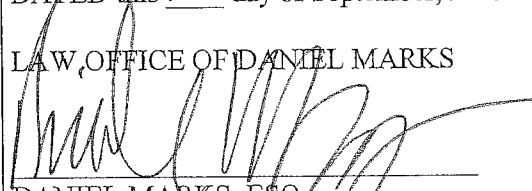
Approved as to form and content:

12 DATED this 30 day of September, 2019.

13 DATED this 20th day of September, 2019.

14 LAW OFFICE OF DANIEL MARKS

NEVADA ATTORNEY GENERAL'S OFFICE

15 
DANIEL MARKS, ESQ.

16 
MICHELLE DI SILVESTRO ALANIS, ESQ.

17 Nevada State Bar No. 002003

Deputy Attorney General

18 NICOLE M. YOUNG, ESQ.

Nevada State Bar No. 10024

19 Nevada State Bar No. 012659

555 E. Washington Avenue, Suite 3900

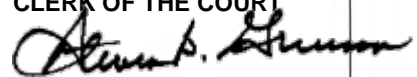
20 610 S. Ninth Street

Las Vegas, Nevada 89101

21 Las Vegas, Nevada 89101

Attorney for Petitioner/Employer rma

22 Attorneys for Respondent/Employer



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

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel, DEPARTMENT
OF PUBIC SAFETY,

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

Petitioner,

v.

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

HEARING REQUESTED

Respondents.

MOTION FOR ADJUDICATION OF ATTORNEY'S LIEN

COMES NOW Petitioner Jose Navarrete by and through undersigned counsel and moves this
Court to adjudicate an attorney's lien. Pursuant to NRS 18.015 the Court shall, after five (5) days'
notice to all entered parties, adjudicate the rights of the attorney, client or other parties.

///

///

1 This Motion is made and based upon all the pleadings and papers on file herein, the attached
2 Points and Authorities and or argument presented at any hearing on this matter.

3 DATED this 24 day of September, 2019.

4 LAW OFFICE OF DANIEL MARKS

5
6 DANIEL MARKS, ESQ.

Nevada State Bar No. 002003

7 office@danielmarks.net

8 NICOLE M. YOUNG, ESQ.

Nevada State Bar No. 012659

9 nyoung@danielmarks.net

610 South Ninth Street

10 Las Vegas, Nevada 89101

(702) 386-0536: FAX (702) 386-6812

11 *Attorneys for Respondent Jose Navarrete*

12
13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 On August 29, 2019 the Court issued its Minute Order denying the Petitioner's Motion to Stay.
15 As a result of that Minute Order, Petitioner Navarrete is entitled to receive reinstatement and his full
16 back pay and benefits.

17 Based upon prior cases, Navarrete will be receiving a letter from NV PERS stating that he has
18 to repay PERS the contribution withdrawn, with interest, calculated through the date of his actual
19 return to work date.

20 NRS 286.435(2) Repayment upon retroactive reinstatement.

21 2. The employer shall deduct from any back pay awarded or granted to the member
22 all money due pursuant to subsection 1 and forward this amount to the System. If the
23 amount of back pay awarded or granted to the member is not sufficient to pay all of the
money due pursuant to subsection 1, the member shall pay any balance due to the
System under a reasonable plan for payment established by the System.

24 ///

1 Under the statute, NDOC will be required to reimburse PERS from Navarrete's back pay award.
2 However, this right to reimbursement is subordinate to the entitlement of the Law Office of Daniel
3 Marks to be compensated from the proceeds of the back pay award.

4 The issue of the priority of payments from a back pay award has been adjudicated by the
5 Eighth Judicial District Court on three (3) separate occasions with two (2) different decisions on the
6 priority between federal withholding and attorney's lien. However, all three (3) decisions placed the
7 priority of the payment of an attorney's lien ahead of repayment to PERS. See *Blake v State of Nevada*
8 *Department of Corrections*, Eighth Judicial District Court Case No. A-13-675446-J (Exhibit "1") and
9 *Malcic v. State of Nevada Department of Corrections*, Eighth Judicial District Court Case No. A-15-
10 717787-J (Exhibit "2") and *State of Nevada Department of Corrections v. Brian Ludwick*, Eighth
11 Judicial District Court Case No. A-16-741032-J (Exhibit "3"). Issue preclusion will prevent NDOC
12 from re-litigating the fact that the Law Office of Daniel Marks's attorney's lien pursuant to NRS
13 18.015 takes priority over PERS right of reimbursement under NRS 286.435(2).

14 On September 18, 2019 a Notice of Attorney Lien in the amount of Thirty Three and One Third
15 Percent (33 1/3%) of Navarrete's gross back pay and benefits, including but not limited to PERS
16 contributions was mailed via Certified Return Receipt Requested to the Attorney General's Office and
17 Mr. Navarrete who received it on September 19, 2019 (See Exhibit "4").

18 NRS 18.015 **Lien for attorney's fees: Amount; perfection; enforcement** states:

19 1. An attorney at law shall have a lien:

20 (a) Upon any claim, demand or cause of action, including any claim for
21 unliquidated damages, which has been placed in the attorney's hands by a client
for suit or collection, or upon which a suit or other action has been instituted.

22 (b) In any civil action, upon any file or other property properly left in the
23 possession of the attorney by a client.

24 ///

1 2. A lien pursuant to subsection 1 is for the amount of any fee which has been
2 agreed upon by the attorney and client. In the absence of an agreement, the lien is for a
reasonable fee for the services which the attorney has rendered for the client.

3 3. An attorney perfects a lien described in subsection 1 by serving notice in
4 writing, in person or by certified mail, return receipt requested, upon his or her client
and, if applicable, upon the party against whom the client has a cause of action,
5 claiming the lien and stating the amount of the lien.

6 4. A lien pursuant to:

7 (a) Paragraph (a) of subsection 1 attaches to any verdict, judgment or decree
entered and to any money or property which is recovered on account of the suit
8 or other action; and

9 (b) Paragraph (b) of subsection 1 attaches to any file or other property
properly left in the possession of the attorney by his or her client, including,
10 without limitation, copies of the attorney's file if the original documents
received from the client have been returned to the client, and authorizes the
11 attorney to retain any such file or property until such time as an adjudication is
made pursuant to subsection 6, from the time of service of the notices required
12 by this section.

13 5. A lien pursuant to paragraph (b) of subsection 1 must not be construed as
inconsistent with the attorney's professional responsibilities to the client.

14 6. On motion filed by an attorney having a lien under this section, the attorney's
15 client or any party who has been served with notice of the lien, the court shall, after 5
days' notice to all interested parties, adjudicate the rights of the attorney, client or other
16 parties and enforce the lien.

17 7. Collection of attorney's fees by a lien under this section may be utilized with,
after or independently of any other method of collection.

18 Pursuant to subsection 6, the undersigned counsel is filing this motion to adjudicate the rights of the
19 parties under this lien.

20 Therefore undersigned counsel's Motion to Adjudicate the Attorney's Lien in this matter
21 should be GRANTED and the Petitioner Department of Corrections should be ordered to satisfy the
22 attorney's lien filed on September 18, 2019 in the amount of Thirty Three and One Third Percent (33

23 ///

24 ///

1 1/3%) of Navarrete's gross back pay and benefits, including, but not limited to PERS contributions,
2 prior to any repayment to PERS or other withholding.

3 DATED this 24 day of September, 2019.

4 LAW OFFICE OF DANIEL MARKS

5
6 
7 DANIEL MARKS, ESQ.
8 Nevada State Bar No. 002003
9 office@danielmarks.net
10 NICOLE M. YOUNG, ESQ.
11 Nevada State Bar No. 012659
12 nyoung@danielmarks.net
13 610 South Ninth Street
14 Las Vegas, Nevada 89101
15 *Attorneys for Petitioner*
16
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18
19
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1 CERTIFICATE OF SERVICE

2 I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 24th
3 day of September, 2019, pursuant to NRCP 5(b) and Administrative Order 14-2, I electronically
4 transmitted a true and correct copy of the above and foregoing MOTION TO ADJUDICATE
5 ATTORNEYS LIEN by way of Notice of Electronic Filing provided by the court mandated E-file &
6 Serve system, to the e-mail address on file for:

7 Jose Navarrete
8 5917 Pearlie May Ct.
9 North Las Vegas, Nevada 89081
Email: Josem.navarrete57@gmail.com
Respondent

10 And

11 AARON D. FORD
12 Attorney General
MICHELLE DI SILVESTRO ALANIS
13 Deputy Attorney General
State of Nevada
Email: malanis@ag.nv.gov
14 AKaheaku@ag.nv.gov
15 *Attorneys for Petitioner*

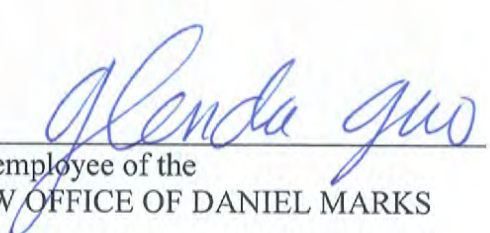
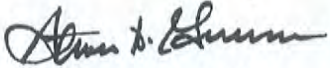
16
17 
18 An employee of the
19 LAW OFFICE OF DANIEL MARKS
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EXHIBIT “1”

EXHIBIT “1”

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CLERK OF THE COURT

1 ORDR
2 LAW OFFICE OF DANIEL MARKS
3 DANIEL MARKS, ESQ.
4 Nevada State Bar No. 002003
5 ADAM LEVINE, ESQ.
6 Nevada State Bar No. 004673
7 530 South Las Vegas Blvd., Suite 300
8 Las Vegas, Nevada 89101
9 (702) 386-0536: FAX (702) 386-6812
10 Attorneys for Petitioner-Employee

6
7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 DERLAND BLAKE

Case No.: A-13-675446-J
Dept. No.: XVI

10 Petitioner-Employee,

11 v.

12 STATE OF NEVADA DEPARTMENT
13 OF CORRECTIONS, and DEPARTMENT
14 OF ADMINISTRATION DIVISION OF
15 HUMANRESOURCES MANAGEMENT,

Date: 07/23/13
Time: 9:00am

16 Respondents- Employer
17 _____ /

18 **ORDER REGARDING MOTION FOR ADJUDICATION OF ATTORNEY'S LIEN**

19 Respondents Motion for Adjudication of Attorney's Lien having come before this Court for
20 hearing on July 23, 2013 at 9:00 AM, and Petitioner being represented by Adam Levine, Esq. of the
21 Law Office of Daniel Marks, and Respondent Department of Corrections being represented by Chief
22 Deputy Attorney General Linda C. Anderson, and the court having reviewed, and having heard the
23 arguments of counsel;

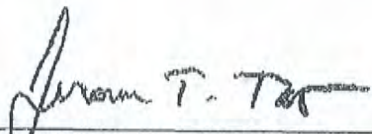

24 IT IS HEREBY ORDERED ADJUDGED AND DECREED that the Respondent Nevada
25 Department of Corrections shall pay to the Law Office of Daniel Marks for Petitioners back pay award

1 forty-five percent (45%) of the gross amount the back pay plus costs in the amount of four hundred
2 twenty-eight dollars and seventy-five cents (\$428.75).

3 IT IS FURTHER ORDERED ADJUDGED AND DECREED that after payment to the Law
4 Office of Daniel Marks any withholdings required by Federal law will be deducted.

5 IT IS FURTHER ORDERED ADJUDGED AND DECREED that after payment to the Law
6 Office of Daniel Marks and any withholdings required by Federal law, the remaining balance if any
7 shall be paid to Nevada PERS pursuant to NRS 286.4375.

8 DATED this 7th day of July, 2013

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10 
DISTRICT COURT JUDGE JEROME T. TAO
11  TIMOTHY C. WILLIAMS

11 Respectfully Submitted by:

12 LAW OFFICE OF DANIEL MARKS

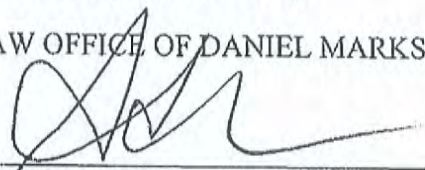
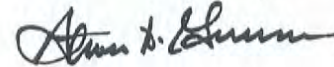
13 
14 DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
15 ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
16 530 S. Las Vegas Blvd., Ste. 300
Las Vegas, Nevada 89101
17 Attorney for Petitioner
Derland Blake
18

EXHIBIT “2”

EXHIBIT “2”

1 ORDD
LAW OFFICE OF DANIEL MARKS
2 DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
3 ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
4 610 South Ninth Street
Las Vegas, Nevada 89101
5 (702) 386-0536: FAX (702) 386-6812
Attorneys for Respondent Vanja Malcic



CLERK OF THE COURT

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9
10 STATE OF NEVADA ex rel, its
DEPARTMENT OF CORRECTIONS

Case No.: A-15-717787-J
Dept. No.: XXIX

11 Petitioner,

12 v.

13 VANJA MALCIC, an individual; THE
14 STATE OF NEVADA ex rel; ITS
DEPARTMENT OF ADMINISTRATION
15 PERSONNEL COMMISSION, HEARING
OFFICER,

16 Respondents.
17 _____/

18 **ORDER DENYING STAY AND ORDER ADJUDICATING ATTORNEY'S LIEN**

19 This matter having come on for hearing on the 6th day June, 2016 on Petitioner's Motion to
20 Stay Pending Appeal to the Nevada Supreme Court; and on Respondent's Motion for Adjudication of
21 Attorney's Lien; with Petitioner being represented by Jennifer K. Hostetler, Esq., Chief Deputy
22 Attorney General of the Office of the Attorney General and Respondent Vanja Malcic appearing
23 through Adam Levine, Esq. of the Law Office Of Daniel Marks; the Court having reviewed the
24 pleadings and having heard argument of counsel;

State of Nevada, ex rel its Dept. of Corrections v. Vanja Malcic
Case No. A-15-717787-J
Dept. XXIX

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Petitioner's Motion to Stay Pending Appeal to the Nevada Supreme Court is DENIED. The Court recognizes that there is conflicting dicta in case law addressing industrial insurance benefits with regard to whether or not the State may recoup amounts paid if it ultimately succeeds on appeal. However, the Court is of the opinion that there are mechanisms which will allow the State to recoup the back pay award should it ultimately succeed on appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion to Adjudicate Attorney's Lien is GRANTED IN PART and DENIED IN PART. The State of Nevada Department of Corrections shall withhold from Malcic's back pay award the sum of seven thousand and three dollars and fifty cents (\$7,003.50) and pay that amount directly to the Law Office of Daniel Marks.

However, the court disagrees that issue preclusion prohibits this Court from relitigating the issue of priority of payment for liens arising under NRS 18.015 from *Derland Blake v. Nevada Department of Corrections*, District Court Case No. A-13-675446. This Court finds that the priority of

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State of Nevada, ex rel its Dept. of Corrections v. Vanja Malcic
Case No. A-15-717787-J
Dept. XXIX

Payment or deductions should be (1) withholdings mandated by federal law; (2) payment pursuant to the attorney's fees lien under NRS 18.015; (3) the amounts required to be deducted or withheld by State statute for State entities such as PERS or DETR; and finally (4) any voluntary withholdings authorized by Vanja Malcic.

DATED this 10th day of June, 2016.


DISTRICT COURT JUDGE

Respectfully submitted by:

LAW OFFICE OF DANIEL MARKS


DANIEL MARKS, ESQ.

Nevada State Bar No. 002003

ADAM LEVINE, ESQ.

Nevada State Bar No. 004673

610 South Ninth Street

Las Vegas, Nevada 89101

Attorneys for Respondent Vanja Malcic

Approved As To Form And Content:

OFFICE OF THE ATTORNEY GENERAL


ADAM PAUL LAXALT,
Attorney General

JENNIFER K. HOSTETLER, ESQ.

Nevada State Bar No. 003900

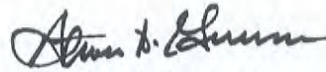
555 E. Washington Avenue, Suite 3900

Las Vegas, Nevada 89101

Attorneys for Petitioner

EXHIBIT “3”

EXHIBIT “3”



CLERK OF THE COURT

1 ORDR
2 LAW OFFICE OF DANIEL MARKS
3 DANIEL MARKS, ESQ.
4 Nevada State Bar No. 002003
5 ADAM LEVINE, ESQ.
6 Nevada State Bar No. 004673
7 610 South Ninth Street
8 Las Vegas, Nevada 89101
9 (702) 386-0536; FAX (702) 386-6812
10 *Attorneys for Respondent Brian Ludwick*

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

10 STATE OF NEVADA ex rel, ITS
11 DEPARTMENT OF CORRECTIONS

Case No.: A-16-741032-J
Dept. No.: XXVII

12 Petitioner,

13 v.

14 BRIAN LUDWICK, an individual; THE
15 STATE OF NEVADA ex rel; ITS
16 DEPARTMENT OF ADMINISTRATION
17 PERSONNEL COMMISSION, HEARING
18 OFFICER,

19 Respondents.

18 ORDER ADJUDICATING ATTORNEY'S LIEN

19 This matter having come on for hearing on the 13th day October, 2016 at 9:30 a.m. on
20 Respondent's Motion for Adjudication of Attorney's Lien; with Petitioner being represented by,
21 Michelle Di Silvestro Alanis, Deputy Attorney General of the Office of the Attorney General and
22 Respondent Brian Ludwick appearing through Adam Levine, Esq. of the Law Office Of Daniel Marks;
23 the Court having reviewed the pleadings and having heard argument of counsel;

24 ///

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion to Adjudicate Attorney's Lien is GRANTED. The State of Nevada Department of Corrections shall withhold from Ludwick's back pay award the sum of Eight Thousand Four Hundred Seventy Dollars and Thirty Cents (\$8,470.30) and pay that amount directly to the Law Office of Daniel Marks.

The Court finds that an analysis under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969) is unnecessary as this matter does not involve a fee award by the court, but rather an agreed-upon contractual amount between the attorney and client. However, based upon information provided in the Reply Brief, if the court were to conduct a *Brunzell* analysis the court would find the sum of \$8,470.30 reasonable based upon factors set forth in that case.

The Court further finds that the priority of payment or deductions from the back pay award shall be as follows: (1) withholdings mandated by federal law; (2) payment of the \$8,470.30 to

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State of Nevada, ex rel its Dept. of Corrections v. Ludwick
Case No. A-16-741032-J
Dept. XXVII

the Law Office of Daniel Marks pursuant to the attorney's fees lien under NRS 18.015; (3) the amounts required to be deducted or withheld by State statute for State entities such as PERS's; and finally (4) any voluntary withholdings authorized by Brian Ludwick.

DATED this 25 day of October, 2016.

Nathan L. Allen
DISTRICT COURT JUDGE

Respectfully submitted by:

LAW OFFICE OF DANIEL MARKS





OFFICE OF THE ATTORNEY GENERAL

[Signature]
DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
610 South Ninth Street
Las Vegas, Nevada 89101
Attorneys for Respondent Brian Ludwick

[Signature]
ADAM PAUL LAXALT, Attorney General
MICHELLE DI SILVESTRO ALANIS, ESQ.
Deputy Attorney General
Nevada State Bar No. 010024
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
Attorneys for Petitioner

EXHIBIT “4”

EXHIBIT “4”

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<p>■ Complete items 1, 2, and 3.</p> <p>■ Print your name and address on the reverse so that we can return the card to you.</p> <p>■ Attach this card to the back of the mailpiece, or on the front if space permits.</p>		<p>A. Signature </p> <p>B. Received by (Printed Name) </p> <p>C. Date of Delivery </p>	
<p>1. Article Addressed to:</p> <p>Michelle Di Silvestro Alanis Supervising Sr. Deputy Attorney General Office of the Attorney General Personnel, Business & State Services 555 E. Washington Ave., Ste. 3900 Las Vegas, Nevada 89101</p> <p>9590 9402 2411 6249 1689 87</p>		<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>	
<p>2. Article Number (Transfer from service label)</p> <p>7019 1120 0000 6889 0022</p>		<p>3. Service Type </p> <p><input type="checkbox"/> Adult Signature</p> <p><input type="checkbox"/> Adult Signature Restricted Delivery</p> <p><input checked="" type="checkbox"/> Certified Mail®</p> <p><input type="checkbox"/> Certified Mail Restricted Delivery</p> <p><input type="checkbox"/> Collect on Delivery</p> <p><input type="checkbox"/> Collect on Delivery Restricted Delivery</p> <p><input type="checkbox"/> Insured Mail</p> <p><input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)</p> <p><input type="checkbox"/> Priority Mail Express®</p> <p><input type="checkbox"/> Registered Mail™</p> <p><input type="checkbox"/> Registered Mail Restricted Delivery</p> <p><input checked="" type="checkbox"/> Return Receipt for Merchandise</p> <p><input type="checkbox"/> Signature Confirmation™</p> <p><input type="checkbox"/> Signature Confirmation Restricted Delivery</p>	
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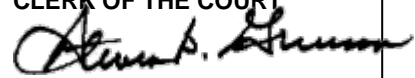
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United States Postal Service	<p>First-Class Mail</p> <p>Postage & Fees Paid</p> <p>USPS</p> <p>Permit No. G-10</p>
<p>* Sender, Please print your name, address, and ZIP+4® in this box*</p> <p>DANIEL MARKS Attorneys at Law 610 South Ninth Street Las Vegas, Nevada 89101</p>	

Navarrete adv NDOC A-19-797661-1

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<p>■ Complete items 1, 2, and 3.</p> <p>■ Print your name and address on the reverse so that we can return the card to you.</p> <p>■ Attach this card to the back of the mailpiece, or on the front if space permits.</p> <p>1. Article Addressed to:</p> <p>Jose Navarrete 5917 Pearlle May Court North Las Vegas, Nevada 89081</p>	<p>A. Signature </p> <p><input type="checkbox"/> Agent <input checked="" type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) Jose Navarrete C. Date of Delivery 9/1/99</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>
 9590 9402 2411 6249 1689 94	<p>3. Service Type</p> <p><input type="checkbox"/> Adult Signature <input type="checkbox"/> Adult Signature Restricted Delivery <input checked="" type="checkbox"/> Certified Mail® <input type="checkbox"/> Certified Mail Restricted Delivery <input type="checkbox"/> Collect on Delivery <input type="checkbox"/> Collect on Delivery Restricted Delivery <input type="checkbox"/> Insured Mail <input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)</p> <p><input type="checkbox"/> Priority Mail Express® <input type="checkbox"/> Registered Mail™ <input type="checkbox"/> Registered Mail Restricted Delivery <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Signature Confirmation™ <input type="checkbox"/> Signature Confirmation Restricted Delivery</p>
<p>2. Article Number (Transfer from service label)</p> <p>7019 1120 0000 6889 0039</p>	
PS Form 3811, July 2015 PSN 7530-02-000-9053	Domestic Return Receipt

<p>USPS TRACKING #</p>  9590 9402 2411 6249 1689 94		<p>First-Class Mail Postage & Fees Paid USPS Permit No. G-10</p>
<p>United States Postal Service</p>	<p>• Sender: Please print your name, address, and ZIP+4® in this box*</p> <p>DANIEL MARKS Attorneys at Law 610 South Ninth Street Las Vegas, Nevada 89101</p>	

Navarrete adv NDOC - A-19-797661-J



AARON D. FORD
Attorney General
MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)
Supervising Senior Deputy Attorney General
State of Nevada
555 E. Washington Ave., Ste. 3900
Las Vegas NV 89101-1068
Tel: (702) 486-3268
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malanis@ag.nv.gov
Attorneys for Petitioner STATE OF NEVADA
ex rel. DEPARTMENT OF CORRECTIONS

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel. its
DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

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

Respondents.

CASE NO: A-19-797661-J

DEPT NO: XVI

PETITIONER'S OPPOSITION TO MOTION
FOR ADJUDICATION OF ATTORNEY'S
LIEN

Hearing Date: November 5, 2019
Hearing Time: 9:00 a.m.

Petitioner, STATE OF NEVADA ex rel. DEPARTMENT OF CORRECTIONS (NDOC), by
and through counsel, AARON D. FORD, Attorney General for the State of Nevada, and MICHELLE
DI SILVESTRO ALANIS, Supervising Senior Deputy Attorney General, hereby submits its
Opposition to Motion for Adjudication of Attorney's Lien.

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1 This Opposition is made and based on the following memorandum of points and authorities,
2 the pleadings and papers on file herein, and oral argument to be presented by counsel at any hearing in
3 this matter.

4 DATED this 27th day of September 2019.

5 AARON D. FORD
6 Attorney General

7 By: /s/ Michelle Di Silvestro Alanis
8 MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)
9 Supervising Senior Deputy Attorney General

10 *Attorneys for Petitioner STATE OF NEVADA*
11 *ex rel. its DEPARTMENT OF CORRECTIONS*

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. INTRODUCTION AND PROCEDURAL HISTORY**

14 This case stems from the appeal of Respondent, Senior Correctional Officer Jose Navarrete's
15 (Employee) dismissal from his employment with NDOC.

16 NDOC dismissed employee from State service effective April 21, 2017, for various acts of
17 misconduct. ROA 840-923. On May 8, 2017, Employee appealed his dismissal to the Department of
18 Administration Personnel Commission pursuant to NRS 284.390. ROA 1147-1149. A hearing was held
19 on April 2, 2019 and April 16, 2019 before Hearing Officer Mark Gentile. ROA 611-612, 1082-1084.
20 On May 30, 2019, the hearing officer entered his Findings of Fact, Conclusions of Law Decision and
21 Order (Decision) which reversed Employee's dismissal and restored him to his prior position as a senior
22 correctional officer with back pay and benefits in accordance with the prior stipulation of the parties.
23 ROA 583-592.

24 The stipulation entered into by the parties agreed to stay the administrative appeal pending the
25 conclusion of Employee's criminal trial and stipulated as follows on the issue of back pay:

26
27 [S]hould Petitioner's discipline be overturned and employment reinstated,
28 Petitioner's back pay will be limited from April 21, 2017, the effective
date of his dismissal, to January 25, 2018, the original scheduled date of
Petitioner's appeal hearing. Any award of back pay would be subject to
any offsets in accordance with State law.

1 [S]hould Petitioner, Jose Navarrete, be reinstated he knowingly and
2 willingly waives his right to back pay for the period from January 26,
3 2018, until such time as an appeal hearing is conducted.

4 *See* ROA 1115-1116, Stipulation attached hereto as Exhibit “1.”

5 NDOC filed a Petition for Judicial Review pursuant to NRS 284.390(9) and NRS 233B.010 et.
6 seq. NDOC also filed a Motion for Stay of the Hearing Officer’s Decision. On August 29, 2019, the
7 Court issued its minutes denying the Motion for Stay. Thus, on September 23, 2019, NDOC reinstated
8 Employee as a senior correctional officer.

9 On September 18, 2019, Respondent’s counsel, Daniel Marks, Esq. filed a Notice of Attorney’s
10 Lien with Court. On September 19, 2019, the undersigned counsel received the Notice of Attorney’s Lien.
11 On September 24, 2019, the day after Employee was reinstated as a senior correctional officer,
12 Respondent’s counsel filed a Motion for Adjudication of Attorney’s Lien, seeking an order that his lien for
13 attorney’s fees take priority in the payment of any back pay and benefits to Employee. Specifically,
14 Respondent’s counsel’s lien seeks fees of “Thirty Three and One Third Percent (33 1/3%) of Navarrete’s
15 gross back pay and benefits, including but not limited to PERS contributions.” Motion at 3. Thus,
16 Respondent’s Counsel is requesting his lien be paid from the gross back pay award prior to any Federal
17 income tax, Medicare, or Nevada PERS deductions.

18 **II. LEGAL ARGUMENT**

19 **A. The Motion for Adjudication of attorney’s lien must be denied because this Court does** 20 **not have jurisdiction.**

21 Under the Nevada Administrative Procedure Act (APA), this Court does not have subject matter
22 jurisdiction to adjudicate whether the lien arising under NRS 18.015 has priority over federal taxes and
23 statutory withholdings required under NRS 286.435(2). In fact, when an aggrieved party seeks judicial
24 review of the final decision of the hearing officer, as NDOC has in this case, the district court’s statutory
25 jurisdiction is limited to review of that final agency decision. *See* NRS 233B.130(1), *see* NRS 233B.135,
26 and NRS 284.390(9). Nowhere in the APA does it grant upon the district court a limitless jurisdiction to
27 resolve any and all legal issues presented by the parties. As the Nevada Supreme Court noted in *Otto*, “only
28 those decisions falling within the APA’s terms and challenged according to the APA’s procedures invoke

1 the district court's jurisdiction." *Washoe Cty. v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 725 (2012).
2 Accordingly, since the issue of adjudicating a lien and lien priority is not a decision falling within the APA
3 and since Respondent's counsel is not challenging an agency decision in accordance with the APA, this
4 Court's lacks authority under NRS 233B.130 *et seq.* to consider the Respondent's Motion, which is outside
5 this Court's limited appellate jurisdiction.¹ At least one district court has ruled that the district court does
6 not have jurisdiction to adjudicate an attorney's lien. *See* Exhibit 2 attached hereto, Order denying Motion
7 for Adjudication of Attorney's Lien in *State of Nevada, Dep't. of Corrections v. Morris Guice*, First
8 Judicial District Court Case No. 18 OC 000101 1B. As this Court lacks subject matter jurisdiction on this
9 issue, Petitioner would request that the Motion for Adjudication of Attorney Lien be denied.

10 **B. Statutory obligations to PERS are not a lien, so an attorney lien cannot take priority over**
11 **PERS contributions.**

12 An agency's statutory obligation under NRS 286.435 is not a lien; therefore, the entire notion
13 that an attorney's lien would take priority over a statutory obligation is misplaced. As quoted in
14 Employee's Motion, NRS 286.435(2) dictates that "[t]he employer **shall** deduct from any back pay
15 awarded . . . all money due pursuant to subsection 1 and forward this amount to the System. If the
16 amount of back pay awarded or granted to the member is not sufficient to pay all of the money due
17 pursuant to subsection 1, the member shall pay any balance due to the System under a reasonable plan
18 for payment established by the System." (Emphasis added). Not only is this statute *mandatory* by use of
19 the word "shall," but this statute clearly makes no exceptions for liens or debts of any kind. Nor does
20 NRS 286.435(2) suggest that money to be deducted is subordinate to an employee's other debt
21 obligations. Accordingly, NRS 286.435(2) is not a lien that can be adjudicated and prioritized, it is a
22 statutory obligation with no exceptions and which must be followed regardless of any liens created by
23 private contract, such as Respondent counsel's attorney lien. Employee's Motion cites no rules, statutes,
24

25 ¹ NRS 18.015 may not even apply to administrative proceedings, such as an appeal pursuant to NRS
26 284.390 or a petition for judicial review brought by an aggrieved party pursuant to NRS 233B.130. *See* NRS
27 18.015(1)(a) and (b). Further, an administrative hearing officer only has the ability to set aside the discipline and
28 order the employee be reinstated with full pay for the period of dismissal. *See* NRS 284.390(7). In fact, there are no
provisions for attorney's fees anywhere within NRS Chapter 284 or NAC Chapter 284. *See* generally, NRS Chapter
284 and NAC Chapter 284. *State, Dept. of Human Resources, Welfare Div. v. Fowler*, 109 Nev. 782, 858 P.2d 375
(1993).

1 or binding case precedent to the contrary.²

2 **C. Respondent's Counsel did not perfect his lien and failed to address the findings this**
3 **Court is required to make before an adjudication of Attorney's Lien**

4 Before adjudicating an attorneys' lien, "the court must make certain findings and conclusions
5 before distribution,' including whether (1) NRS 18.015 is available to the attorney, (2) there is some
6 judgment or settlement, (3) the lien is enforceable, (4) the lien was *properly perfected* under NRS
7 18.015(2), (5) the lien is subject to any offsets, and (6) extraordinary circumstances affect the amount of
8 the lien." *McDonald Carano Wilson v. Bourassa Law Grp.*, 131 Nev. 904, 908, 362 P.3d 89, 91 (Nev.
9 2015) (citing *Michel v. Eighth Judicial Dist. Court*, 117 Nev. 145, 151–52, 17 P.3d 1003, 1007–08
10 (2001)) (emphasis added). "Further, the court must determine the actual amount of the lien pursuant to
11 the retainer agreement or, if there is no agreement, set a reasonable fee." *Id.* "Finally, the district court
12 must ensure that the attorney's fee agreement is not unreasonable." *Id.* (citing *Marquis & Aurbach v.*
13 *Eighth Judicial Dist. Court*, 122 Nev. 1147, 1160–61, 146 P.3d 1130, 1138–39 (2006); *Brunzell v.*
14 *Golden Gate Nat'l Bank*, 85 Nev. 345, 349–50, 455 P.2d 31, 33–34 (1969); RPC 1.5).

15 As discussed at length above, this Court does not have jurisdiction to adjudicate the attorney's lien.
16 However, if this Court determines it has jurisdiction, Respondent's Counsel has not perfected his lien and
17 has failed to provide sufficient information to adjudicate the lien.

18 **1. Whether NRS 18.015 is available to the attorney**

19 As discussed in Section II, A, footnote 1 *supra*, it is arguable whether NRS 18.015 is available in
20 this type of administrative proceeding. With that being said, based on the representations of Respondent's
21

22 ² The Motion cites to three Eighth Judicial District Court orders, wherein it was determined that
23 attorney's fees would be deducted second (after Federal withholdings) from an award of back pay. *See* Motion,
24 Exhibit Nos.: 1, 2, and 3. However, other district court orders are not binding authority and have zero
25 precedential value with respect to the present matter. Furthermore, not one of these orders provides any legal
26 analysis to support that court's decision on lien priority. *Id.* Moreover, Although Respondent's counsel contends
27 that issue preclusion applies with respect to the attorneys' lien, the findings the Court is required to make in this
28 case in terms of whether a lien is available, properly perfected and prior, and whether the fees requested are
reasonable cannot be substituted nor are they identical to the issues in the Derland Blake, Vanja Malcic, or Brian
Ludwick matter. Indeed, the Nevada Supreme Court has determined that "[t]he availability of issue preclusion is
a mixed question of law and fact, in which legal issues predominate and, once it is determined to be available, the
actual decision to apply it is left to the discretion of the tribunal in which it is invoked." *Redrock Valley Ranch,*
LLC v. Washoe Cty., 127 Nev. 451, 460, 254 P.3d 641, 647 (2011) (internal citation and quotations omitted).
Accordingly, the NDOC requests that the Court exercise its discretion in declining to apply issue preclusion and
rule upon the important legal issues in this case.

1 counsel there appears to be a retainer agreement with an agreed upon fee amount of, “Thirty Three and
2 One Third Percent (33 1/3%) of Navarrete’s gross back pay and benefits, including but not limited to PERS
3 contributions.” However, Respondent’s counsel has not attached a copy of the retainer agreement showing
4 the agreed upon fee for this Court to even begin its analysis and make the appropriate findings. Without the
5 retainer agreement, this Motion must be denied because the Court cannot determine if NRS 18.015 is
6 available to the attorney.

7 **2. Whether there is a judgment or settlement**

8 NRS 18.015 (1)(a) states that “[a]n attorney at law shall have a lien: (a) Upon any claim,
9 demand or cause of action, including any claim for unliquidated damages, which has been placed in the
10 attorney's hands by a client for suit or collection, or upon which a suit or other action has been
11 instituted.”

12 NRS 18.015(4)(a) states in pertinent part that “a lien pursuant to paragraph (a) of subsection 1
13 attached to any *verdict, judgment, or decree* entered and to any money or property which is recovered
14 on account of the suit or other action from the time of service of the notices required by this section.”
15 (emphasis added).

16 Respondent’s counsel was retained to represent Employee in a hearing pursuant to NRS 284.390(1)
17 to determine the reasonableness of his dismissal from NDOC. Pursuant to NRS 284.390(7), “[i]f the
18 hearing officer determines that the dismissal, demotion or suspension was without just cause as
19 provided in NRS 284.385, the action must be set aside and the employee must be reinstated, with full
20 pay for the period of dismissal, demotion or suspension.” The hearing officer issued his Decision on
21 May 30, 2019 wherein he reversed Employee’s dismissal and restored him to his prior position with
22 back pay and benefits in accordance with the parties’ stipulation. ROA 583-592. The Decision was not a
23 verdict as this is an administrative hearing not a civil or criminal matter. It is debatable whether the
24 hearing officer’s Decision is considered a decree or judgment. To the extent, the Decision would be
25 considered a decree or judgment, it was entered on May 30, 2019.

26 **3. Whether the lien is enforceable**

27 Because an attorney's charging lien is a creature of statute, the attorney must meet all of the
28 statutory requirements before the lien can be enforced. *Golightly & Vannah, PLLC v. TJ Allen, LLC*,

1 132 Nev. 416, 373 P.3d 103 (2016). An attorney lien is only enforceable when it is attached and
2 perfected pursuant to statute. *Id.* As argued below, the lien is not enforceable.

3 **4. The Attorney Lien was not timely perfected**

4 The statutory requirements for perfecting a charging lien *must* be met for a court to adjudicate
5 and enforce a charging lien. *Leventhal v. Black & LoBello*, 129 Nev. 472, 305 P.3d 907 (2013)
6 (emphasis added).

7 NRS 18.015(3) provides that “[a]n attorney perfects a lien ... by serving notice in writing, in
8 person or by certified mail, return receipt requested, upon his or her client and, if applicable, upon the
9 party against whom the client has a cause of action, claiming the lien and stating the *amount* of the
10 lien.” NRS 18.015 (emphasis added); *See also Michel*, 117 Nev. at 152, 17 P.3d at 1008.

11 NRS 18.015(4)(a) states in pertinent part that “a lien pursuant to paragraph (a) of subsection 1
12 attached to any verdict, judgment, or decree entered and to any money or property which is recovered
13 on account of the suit or other action *from the time of service of the notices required by this section.*”
14 (Emphasis added).

15 Here, counsel filed a Notice of Attorney Lien on September 18, 2019. Counsel served by
16 certified mail a copy of the Attorney lien to Navarrete, which he received on September 19, 2019.
17 Motion, Exhibit 4. Additionally, the undersigned received the lien via certified mail on September 19,
18 2019. However, the notices of the lien were served on September 19, 2019, one hundred and eleven
19 days (over three months) after the hearing officer’s final Decision in this case which was entered on
20 May 30, 2019. Thus, counsel did not attempt to perfect his lien until after the “judgment” or “decree”
21 was entered. Where an attorney does not attempt to perfect his lien until after a judgment or settlement
22 then the lien cannot attach to the back pay. *See Leventhal v. Black & LoBello*, 129 Nev. 472, 305 P.3d
23 907; *see also Golightly and Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. 416, 373 P.3d 103 (2016). Thus,
24 the lien was not properly or timely perfected.

25 Furthermore, pursuant to NRS 18.015(3) the amount of the lien must be stated. While NDOC
26 acknowledges that the Supreme Court has held that a lien does not need to state an exact dollar amount
27 (*See Golightly*, 132 Nev. at 420, 373 at 106), here, the amount of lien is a percentage of Employee’s
28 *gross* income instead of his *net* income.

1 The Nevada Supreme Court held, “a perfected attorney's lien attaches to the net judgment that
2 the client receives after all setoffs arising from that action have been paid. Once a net judgment is
3 determined, then the attorney's lien is superior to any later lien asserted against that judgment. *John W.*
4 *Muije, Ltd. v. A N. Las Vegas Cab Co.*, 106 Nev. 664, 667, 799 P.2d 559, 561 (1990) citing *United*
5 *States Fidelity & Guarantee v. Levy*, 77 F.2d 972 (5th Cir.1935) (attorney's lien is superior to offset
6 from a claim arising out of a different matter from which the judgment arose); *Cetenko v. United*
7 *California Bank*, 30 Cal.3d 528, 179 Cal.Rptr. 902, 638 P.2d 1299 (1982) (attorney's lien is superior to
8 that of another creditor who obtained a lien on the same judgment); *Haupt v. Charlie's Kosher*
9 *Market*, 17 Cal.2d 843, 112 P.2d 627 (1941) (attorney's lien is superior to that of third-party judgment
10 creditor). Should this Court determine the lien was perfected, the attorney’s lien cannot be deducted
11 from gross income and would have to be paid following federal taxes and statutory deductions for
12 PERS, which would represent the net income.

13 **5. The lien is subject to offsets**

14 Respondent obtained employment following his dismissal from NDOC. Thus, not only is
15 Employee’s gross income subject to federal tax and state statutory deductions but his back pay award
16 will be offset by the income he earned during the relevant periods of his dismissal. *See Schall v. State*
17 *ex rel. Dept. of Human Resources*, 94 Nev. 660, 587 P.2d 1311 (1978) (State employee who had been
18 improperly dismissed was entitled to be reinstated with all accrued back pay and rights, less the amount
19 he earned in gainful employment since dismissal).

20 Additionally, as noted above the parties entered into a stipulation that limited the award of back
21 pay and benefits due to Respondent’s request to continue the hearing pending resolution of his criminal
22 case. Thus, there will be no back pay for the period of time from January 25, 2018 to April 2, 2019.
23 Therefore, should this Court determine that it has jurisdiction and the lien is perfected, it must be paid
24 after all federal taxes, state deductions, limited stipulated time frame, and offsets for other income.

25 **6. Whether the lien is subject to extraordinary circumstances**

26 NDOC is not aware of any extraordinary circumstances other those already discussed herein.

27 ///

28 ///

1 **7. The Court must determine the actual amount of the lien pursuant to the retainer**
2 **agreement or a reasonable fee**

3 The Court must determine the actual amount of the lien pursuant to the retainer agreement; yet,
4 in his Motion, Respondent's counsel did not attach the retainer agreement for this Court to determine
5 that amount. Counsel is seeking thirty three and one third percent (33 1/3%) of gross back pay and
6 benefits, including but not limited to PERS contributions. Therefore, counsel is seeking an amount of
7 money from Employee's back pay prior to any federal income taxes being withheld. The fees requested
8 are not from a net amount to the Employee and come from an amount which would not ultimately end
9 up in the Employee's pocket.

10 When determining whether the amount of attorney's fees requested is reasonable, the Court
11 **must** address what are commonly known as the *Brunzell* factors, which were first articulated by the
12 Nevada Supreme Court in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969),
13 and have been adopted by the Court in cases ever since. *See Shuette v. Beazer Homes Holdings Corp.*,
14 121 Nev. 837, 864-65, 124 P.3d 530, 549 (2005) ("We emphasize that, whichever method is chosen as
15 a starting point, however, the court must continue its analysis by considering the requested amount in
16 light of the factors enumerated by this court in *Brunzell v. Golden Gate National Bank*. . .").

17 These factors are:

- 18 (1) Qualities of the advocate, his ability, training, education, experience, professional
19 standing and skill.
- 20 (2) The character of the work to be done, its difficulty, intricacy, importance, the
21 time and skill required, the responsibility imposed and the prominence and
22 character of the parties when they affect the importance of the litigation.
- 23 (3) The work actually performed by the lawyer, the skill, time and attention given to
24 the work.
- 25 (4) The result, whether the attorney was successful, what benefits were derived.

26 *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 350, 455 P.2d 31, 33 (1969). The *Brunzell* Court also
27 noted that each of these factors should be considered and that no one element should predominate or be
28 given undue weight. *Id.* at 350, 455 P.2d at 34. In addition to the four *Brunzell* factors discussed

1 above, Nevada courts analyzing the reasonableness of an attorney's fee also look to additional factors
2 identified in Nevada Rule of Professional Conduct 1.5. *Harvey v. United Pac. Ins. Co.*, 109 Nev. 621,
3 624, 856 P.2d 240, 241 (1993).

4 Rule 1.5 identifies eight factors, some of these factors, though, are duplicative of the four
5 *Brunzell* factors discussed above, and for that reason will not be discussed again.³ The additional
6 factors not expressly included in the *Brunzell* analysis are (1) the likelihood, if apparent to the client,
7 that the acceptance of the particular employment will preclude other employment by the lawyer; (2) the
8 time limitations imposed by the client or the circumstances; (3) the fee customarily charged in the
9 locality for similar legal services; (4) whether the fee is fixed or contingent; and (5) the nature and
10 length of the professional relationship with the client. *Johnson v. Incline Vill. Gen. Improvement Dist.*,
11 5 F. Supp. 2d 1113, 1116 (D. Nev. 1998).

12 Respondent's counsel has not provided any analysis of the *Brunzell* factors or a copy of his fee
13 agreement with Employee. As a result, the Court cannot properly determine the amount of the
14 attorney's fees or consider the *Brunzell* factors and determine the reasonableness of the fees requested.

15 **D. Should The Court Adjudicate The Attorney's Lien, Federal And State Law Requires**
16 **Various Amounts To Be Deducted From An Employee's Back Pay**

17 As set forth above, this Court does not have jurisdiction to adjudicate the lien. Should the court
18 determine it has jurisdiction counsel has not shown that he has perfected his lien and whether his fees are
19 reasonable to allow this Court to adjudicate the lien he claims. However, should this Court find that
20 adjudication is appropriate, the priority of the attorney's lien must be determined as Respondent's counsel
21 seeks a lien on Employee's award of gross back pay and requests that the lien take priority over any
22 deductions that may be required under Federal and State law.

23 First, Federal law mandates that employers withhold Federal employment taxes on employee
24 wages. See 26 U.S.C. § 3402 (explaining that "[e]very employer making payment of wages *shall* deduct
25 and withhold upon such wages a tax determined in accordance with tables or computational procedures
26 prescribed by the Secretary"); 26 U.S.C. § 3102(a) ("The [FICA] tax imposed by section 3101 *shall* be

27
28 ³ For example, the time and labor required, the novelty and difficulty of the question presented and the
skill required to perform the services properly, factors that are encompassed by *Brunzell* factors 1, 2 and 3; the
experience, reputation and ability of the lawyers performing the services is encompassed by *Brunzell* factors 1
and 3; the skill, time, and attention actually given to the work is encompassed by *Brunzell* factor 3.

1 collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and
2 when paid.”); 26 C.F.R. § 31.3402(k)-1(c)(1) (explaining the priority of tax collection in general)
3 (emphasis added). Therefore, Federal law requires the NDOC to deduct Federal taxes from any gross
4 back wages issued to employees. *See Payne v. Dixie Elec. Co.*, 174 Ga. App. 610, 610, 330 S.E.2d 749,
5 750 (1985) (“It is well settled, of course, that an employer is not only authorized but required to
6 withhold federal income taxes from his employees' pay.”) The failure to make such deductions may
7 subject the NDOC to liability. *See* 26 U.S.C. §§ 3403 and 7202.

8 Respondent’s counsel has not cited to any case law suggesting that the NDOC’s obligation
9 under Federal law is subordinated to Nevada’s attorney’s lien statute under the Supremacy Clause. *See*
10 *Rust v. Johnson*, 597 F.2d 174, 179 (9th Cir. 1979) (“State legislation must yield under the supremacy
11 clause of the Constitution to the interests of the federal government when the legislation as applied
12 interferes with the federal purpose or operates to impede or condition the implementation of federal
13 policies and programs.”). *Cf. Pac. Pools Const. Co. v. McClain's Concrete, Inc.*, 101 Nev. 557, 561,
14 706 P.2d 849, 852 (1985) (“[I]f an employer’s funds are insufficient to pay its employees’ net wages
15 and to pay proper withholding taxes, the employer must prefer the United States over its workers and
16 reduce the amount of wages paid by an amount sufficient to leave funds for payment of the withholding
17 taxes.”) (*citing Sorenson v. United States*, 521 F.2d 325 (9th Cir.1975)); *Knight v. United States*, 982
18 F.2d 1573, 1577 (Fed. Cir. 1993) (recognizing the U.S. government’s argument that “the state
19 [attorney’s] lien law, if applied, would impermissibly regulate the operations of the federal government
20 and compel the disbursement of federal funds for purposes not authorized by federal law” has merit).

21 Second, various State statutes require a State employer to make deductions from back pay prior to
22 disbursing funds. For example, with respect to unemployment benefits, State statute provides that the
23 amount the employee received in unemployment compensation must be deducted from any back pay
24 awarded. *See* NRS 612.371(1) (“Before an employer pays [an] employee [awarded back pay], the
25 employer **shall** ascertain the amount of the benefits received by the person during the period for which
26 back pay was awarded and shall withhold that amount from the payment of back pay. The employer
27 shall deliver the amount withheld to the Division.”)(emphasis added). With respect to the Public
28 Employment Retirement System (PERS) contributions, State statute provides that such amounts must be

1 deducted from any back pay awarded. *See* NRS 286.435(2) (“The employer ***shall*** deduct from any back
2 pay awarded or granted to the member all money due pursuant to subsection 1 [i.e. employee
3 contributions which were refunded to the employee, all contributions the employee would have made
4 on the back pay, etc.] and forward this amount to the System.”)(emphasis added).

5 Accordingly, the NDOC is required to make the above deductions by operation of Federal law
6 and if applicable, State law. While State law addresses the priority of medical liens and certain setoffs
7 with respect to an attorney lien, the Nevada Supreme Court has not yet had an opportunity to address an
8 attorney lien under NRS 18.015 with respect to the payment of back wages or otherwise specify
9 whether the employer is required to satisfy an opposing party’s attorney lien prior to making wage
10 deductions required under Federal and State law. *See Michel*, 117 Nev. at 150, 17 P.3d at 1006
11 (explaining that an attorney’s lien is superior in priority to medical liens); *John W. Muije, Ltd. v. A N.*
12 *Las Vegas Cab Co.*, 106 Nev. 664, 667, 799 P.2d 559, 561 (1990) (finding that a setoff under NRS
13 17.115 is superior to an attorney’s lien). However, as noted above, the Nevada Supreme Court has
14 addressed a ***perfected*** attorney’s lien attaches to the **net judgment** that the client receives after all setoffs
15 arising from that action have been paid. *Muije*, 106 Nev. at 667, 799 P.2d at 561. Once a net judgment
16 is determined, then the **attorney’s lien is superior to any later lien** asserted against that judgment. *Id.*
17 Since Federal and State statutory deductions come from the gross income then the attorney’s lien could
18 only come from the net income the employee received.

19 **E. PERS should weigh in on the priority of an attorney’s lien over its withholdings**

20 This Court cannot fairly and adequately adjudicate whether liens arising under NRS 18.015
21 have priority over statutory withholdings required under NRS 286.435(2), because Nevada PERS (i.e.
22 the recipient of withheld funds under NRS 286.435(2)) has not been served with the Motion and
23 provided an opportunity to respond. PERS should have the opportunity to respond in how and whether
24 agencies comply with NRS 286.435(2), and whether the withholdings required under that statute are
25 subordinate to a lien for attorney’s fees. Therefore, it would be entirely improper for this Court to
26 adjudicate this legal issue without PERS having notice of Respondent’s Motion and an opportunity to
27 respond.

28 ///

1 **III. CONCLUSION**

2 Based upon the foregoing, the NDOC requests that the Motion for Adjudication be denied because
3 this Court does not have jurisdiction. In the alternative, NDOC would request that the Motion be denied
4 because the lien has not been properly perfected. Should this Court determine the attorney lien can be
5 adjudicated, NDOC would request this Court order that the lien be paid after all federal and state
6 deductions have been made.

7 DATED this 27th day of September 2019.

8 AARON D. FORD
9 Attorney General

10 By: /s/ Michelle Di Silvestro Alanis
11 MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)
Supervising Senior Deputy Attorney General

12 *Attorneys for Petitioner STATE OF NEVADA*
13 *ex rel. its DEPARTMENT OF CORRECTIONS*
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1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that
3 on September 27, 2019 I electronically filed the foregoing **PETITIONER'S OPPOSITION TO**
4 **MOTION FOR ADJUDICATION OF ATTORNEY'S LIEN** via this Court's electronic filing
5 system. Parties that are registered with this Court's electronic filing system will be served
6 electronically. For those parties not registered, service was made by depositing a copy for mailing in
7 the United States Mail, first-class postage prepaid at Las Vegas, Nevada to the following:

8
9 Mark Gentile
10 Hearing Officer
11 Department of Administration
12 2200 S. Rancho Dr., Ste. 210
13 Las Vegas, NV 89102

(Via U.S. mail and E-mail: zmcgough@admin.nv.gov)

14 Dan Marks, Esq.
15 Law Offices of Daniel Marks
16 610 S. 9th St.
17 Las Vegas, NV 89101

(Via U.S. Mail and email to: office@danielmark.net,
gguo@danielmarks.net)

18 /s/ Anela Kaheaku
19 An employee of the Office of Attorney General
20
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EXHIBIT 1

EXHIBIT 1

1 **BEFORE THE NEVADA STATE PERSONNEL COMMISSION**
2 **MARK GENTILE, HEARING OFFICER**

3 JOSE MIGUEL NAVARRETE,

Case No.: 1713379-MG

4 Petitioner/Employee,

5 v.

6 DEPARTMENT OF CORRECTIONS,

7 Respondent/Employer
8 _____/

9 **STIPULATION TO STAY THE ABOVE ENTITLED MATTER PENDING THE**
10 **RESOLUTION OF A CRIMINAL MATTER AGAINST PETITIONER**

11 COMES NOW Petitioner Jose Navarette, by and through his counsel Daniel Marks, Esq., and
12 Nicole M. Young, Esq., of the Law Office of Daniel Marks, and Respondent Department of
13 Corrections, by and through its counsel Michelle Di Silvestro Alanis, Esq., of the Nevada Attorney
14 General's Office, submit as follows:

15 WHEREAS, Petitioner Jose Navarrete is currently the subject of a criminal matter in Las Vegas
16 Justice Court, Case No. 17F20960B, relating to the allegations at issue in the above-captioned matter
17 and does not wish to waive his 5th Amendment right against self-incrimination.

18 IT IS STIPULATED AND AGREED that the hearing presently scheduled for January 25,
19 2018, be continued and stayed until the resolution of the criminal matter.

20 IT IS FURTHER STIPULATED AND AGREED that Petitioner's counsel shall immediately
21 advise the Hearing Officer once the criminal matter has been resolved.

22 IT IS FURTHER STIPULATED AND AGREED that should Petitioner's discipline be
23 overturned and employment reinstated, Petitioner's back pay will be limited from April 21, 2017, the
24 effective date of his dismissal, to January 25, 2018, the original scheduled date of Petitioner's appeal
25 hearing. Any award of back pay would be subject to any offsets in accordance with State law.

1 IT IS FURTHER STIPULATED AND AGREED that should Petitioner, Jose Navarrete, be
2 reinstated, he knowingly and willing waives his right to back pay for the period from January 26, 2018,
3 until such time as an appeal hearing is conducted. The parties agree that the Hearing Officer's decision
4 will be binding on the parties pursuant to NRS 284.390(7).

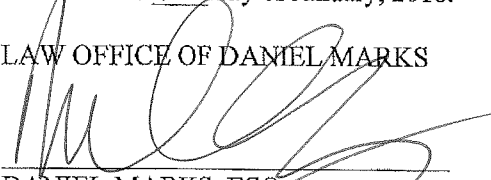
5 IT IS FURTHER STIPULATED AND AGREED that Petitioner waives his right to make any
6 arguments contrary to this stipulation regarding his back pay in any subsequent pleading, motion or
7 appeal brought as a result of this matter.

8 DATED this 10 day of January, 2018.

DATED this 9th day of January, 2018.

9 LAW OFFICE OF DANIEL MARKS

NEVADA ATTORNEY GENERAL'S OFFICE

10
11 
12 DANIEL MARKS, ESQ.
13 Nevada State Bar No. 002003
14 NICOLE M. YOUNG, ESQ.
Nevada State Bar No. 012659
610 S. Ninth Street
Las Vegas, Nevada 89101
Attorneys for Petitioner/Employee


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MICHELLE DI SILVESTRO ALANIS, ESQ.
Deputy Attorney General
Nevada State Bar No. 10024
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
Attorney for Respondent/Employer


EXHIBIT 2

EXHIBIT 2

REC'D & FILED

2019 JAN 25 PM 2:03

AUBREY ROWLAND
CLERK

BY  CLERK

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

STATE OF NEVADA, *ex rel.* its
DEPARTMENT OF CORRECTIONS

Petitioner,

vs.

MORRIS GUICE, an individual; STATE OF
NEVADA *ex rel.* its DEPARTMENT OF
ADMINISTRATION, PERSONNEL
COMMISSION, DIVISION OF HEARINGS
AND APPEALS; and ROBERT ZENTZ,
Hearing Officer,

Respondents.

Case No. 18 OC 000101 1B

Dept. No. II

**ORDER DENYING RESPONDENT'S
MOTION FOR ADJUDICATION OF
ATTORNEY'S LIEN**

This matter comes before the Court pursuant to the December 11, 2018, Motion for Adjudication of Attorney's Lien. This Court, having reviewed the record and considered the parties' respective pleadings, and good cause appearing, hereby decides as follows:

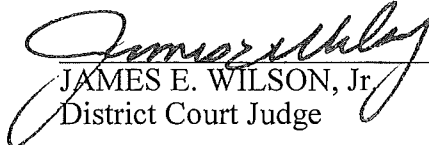
Under the Administrative Procedure Act (APA), this Court has no subject matter jurisdiction to adjudicate the legal issue of whether a lien arising under NRS 18.015 has priority over statutory withholdings required under NRS 286.435(2). When an aggrieved party seeks judicial review of a "final decision in a contested case," such as NDOC sought in the matter at bar, then the district court's statutory jurisdiction is limited to review of that final agency decision. *See* NRS 233B.130(1); *see also* NRS 233B.135. Nowhere does the APA bestow upon district courts jurisdiction to resolve any and all legal questions presented by the parties. Instead, as the Nevada Supreme Court noted in *Otto*, "only those decisions falling within the APA's terms and challenged according to the APA's procedures invoke the district court's jurisdiction." *Washoe Cty. v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 725

1 (2012). Since the issue of lien priority is not a decision falling within the APA's terms and since
2 counsel for Guice is not challenging a final agency decision in accordance with the APA's procedural
3 rules, this Court lacks authority under NRS 233B.130 *et seq.* to consider the Respondent's Motion
4 within the case at bar.

5 Moreover, NRS 286.435 is not a lien. NRS 286.435(2) dictates that "[t]he employer **shall**
6 deduct from any back pay awarded . . . all money due pursuant to subsection 1 and forward this amount
7 to the System. If the amount of back pay awarded or granted to the member is not sufficient to pay all
8 of the money due pursuant to subsection 1, the member shall pay any balance due to the System under
9 a reasonable plan for payment established by the System." (Emphasis added). Not only is this statute
10 mandatory by use of the word "shall," but this statute clearly makes no exceptions for liens or debts of
11 any kind. Nor does NRS 286.435(2) suggest that money to be deducted is subordinate to an employee's
12 private debt obligations. Accordingly, NRS 286.435(2) is a statutory mandate with no exceptions and
13 which must be followed regardless of any liens created by private contract.

14 Based on the foregoing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the
15 Motion for Adjudication of Attorney's Lien is hereby DENIED.

16 DATED January 25, 2019.

17 
18 JAMES E. WILSON, Jr.
19 District Court Judge
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Office of the Attorney General
Reno, Nevada

JAN 28 2019

Bureau of Litigation
Personnel Division

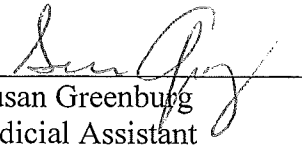
CERTIFICATE OF SERVICE

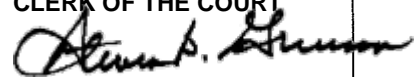
I certify that I am an employee of the First Judicial District Court of Nevada; that on January 25, 2019, I served a copy of this document by placing a true copy in an envelope addressed to

Kevin A. Pick, Esq.
5420 Kietzke Lane, Suite 202
Reno, NV 89511

Adam Levine, Esq.
610 South Ninth Street
Las Vegas, NV

the envelope sealed and then deposited in the Court's central mailing basket in the Court Clerk's Office for delivery to the United State Post Office at 1111 South Roop Street, Carson City, Nevada for mailing.


Susan Greenburg
Judicial Assistant



LAW OFFICE OF DANIEL MARKS
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Las Vegas, Nevada 89101
(702) 386-0536; FAX (702) 386-6812
Attorneys for Respondent Jose Navarrete

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel, DEPARTMENT
OF PUBIC SAFETY,

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

Petitioner,

Date of Hearing: 10/10/19
Time of Hearing: 9:00 a.m.

v.

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

Respondents.

RESPONDENT'S REPLY TO POINTS AND AUTHORITIES

COMES NOW Respondent, Jose Navarrete, by and through undersigned counsel Daniel Marks,
Esq. of the Law Office of Daniel Marks and hereby files his Reply to Points and Authorities.

////

////

////

1 The grounds for Respondent Jose Navarrete's Reply are set in the following Memorandum of
2 Points and Authorities.

3 DATED this 8 day of October, 2019.

4 LAW OFFICE OF DANIEL MARKS

5 

6 DANIEL MARKS, ESQ.

7 Nevada State Bar No. 002003

8 NICOLE M. YOUNG, ESQ.

9 Nevada State Bar No. 12659

610 South Ninth Street

Las Vegas, Nevada 89101

Attorneys for Respondent Jose Navarrete

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. THERE IS ENOUGH CASH TO PAY THE ATTORNEY FEES**

12 According to the State, from April 21, 2017 through January 25, 2018 the gross back pay was
13 \$45,605.12, deductions for tax are \$13,864.50 and net pay is \$31,740.62. The fringe benefits are
14 \$12,182.10. For April 2, 2019 through September 22, 2019, the gross pay was \$30,579.84, deductions
15 are \$12,420.38, and net pay is \$18,159.46. The fringe total is \$9,039.40. Therefore, there is enough
16 cash to pay all taxes, fringe benefits, and PERS, and enough cash for the attorney fees of \$32,468.79.
17 There is no reason for the State to oppose the Motion to Perfect the Lien, based on their own
18 calculations.

19 ////

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1 The case cited by the State says the lien pursuant to NRS 18.015(3) does not have to be stated as
2 a exact amount, (*See Golightly* 132 Nev. at 420) page 7 of the State's Opposition. The State is opposing
3 this Motion to perfect the lien mainly for the sole of opposing the Motion. There is enough cash to pay
4 taxes, PERS, and the perfected attorney fee lien amount. Therefore, this Court should perfect the lien
5 and order the attorney fees to be paid.

6 **II. AN ATTORNEY'S LIEN IS SUPERIOR TO A LIEN OF A GENERAL CREDITOR**

7 It is not disputed that Navarrete must repay NVPERS any amounts necessary to satisfy
8 employee contributions which were refunded following Navarrete's termination. *See* NRS 286.537.
9 However, the statute does not give NVPERS a lien on the property; it merely makes NVPERS a
10 creditor.

11 Even if NRS 286.537 created a statutory lien, or even if NVPERS obtained a judgment against
12 Navarrete, such claims would be subordinate to an attorney's lien under NRS 18.015. The law is very
13 clear that an attorney's lien under NRS 18.015 is a super priority lien.

14 In *Muiji v. A North Las Vegas Co., Inc.*, 106 Nev. 664, 799 P.2d 599 (1990) the Nevada
15 Supreme Court stated:

16 [A] perfected attorney's lien attaches to the net judgment that a client received after all
17 setoffs arising from that action have been paid. Once a net judgment is determined, then the
18 attorney's lien is superior to any later lien asserted against that judgment. *See United States*
19 *Fidelity & Guarantee v. Levy*, 77 F.2d 972 (5th Cir. 1935) (attorney's lien is superior to offset
20 from a claim arising out of a different matter from which the judgment arouse); *Cetenko v.*
United California Bank, 30 Cal. 4th 528, 179 Cal. Rptr. 902, 638 P/2d 1299 (1982) (attorney's
lien is superior to that of another creditor who obtained a lien on the same judgment); *Haupt v.*
Charlie's Kosher Market, 17 Cal. 2d 843, 112 P.2d 627 (1941) (attorney's lien is superior to
that of a 3rd-party judgment creditor).

21 106 Nev. at 667, 799 P.2d at 56.

22 In *Michael v. Eighth Judicial District Court*, 117 Nev. 145, 17 P.3d 1003 (2001) the Supreme
23 Court reiterated the priority of attorneys liens holding that such liens take priority even over statutory
24

1 hospital liens. In explaining the rationale for giving attorney's lien's priority the Supreme Court quoted
2 from *Cetenko v. United California Bank*, supra:

3 [P]ersons with meritorious claims might well be deprived of legal representation because of
4 Their inability to pay legal fees or to assure such fees will be paid out of the sum recovered
5 In the latest lawsuit. Such a result would be detrimental not only to prospective litigants, but
6 Their creditors as well.

117 Nev. at 149-150, 17 P.3d at 1006.

6 But for the word performed by Navarrete's counsel, there would be no recovery of back pay for
7 Jose Navarrete and DPS would be unjustly enriched in the amount of approximately \$100,000.00
8 Likewise, there would be no recovery of any amount by NVPERS. Accordingly, undersigned counsel is
9 entitled to be paid pursuant to the lien. Any remaining amounts after *appropriate* withholdings may be
10 paid to NVPERS pursuant to NRS 286.537.

11 **III. EVEN IN THE ABSENSE OF A LIEN UNDER NRS 18.015 NVPERS WOULD STILL**
12 **BE RESPONSIBLE FOR COUNSEL'S FEES PURSUANT TO THE COMMON FUND**
13 **DOCTRINE**

14 Counsel for Jose Navarrete does not actually need a lien under NRS 18.015 in order to recover
15 attorney's fees. The claims of NVPERS cannot defeat undersigned counsel's right to payment pursuant
16 to the "common fund doctrine."

17 In *State of Nevada Department of Human Resources v. Elcano*, 106 Nev. 449, 794 P.2d 725
18 (1990) an employee contracted polio from exposure to raw sewage on the job and was rendered a
19 ventilator-dependent quadriplegic. The employee applied for permanent total disability workers
20 compensation benefits with the State Industrial Insurance System (SIIS). However, SIIS denied his
21 claim. The employee was forced to retain counsel and a result of counsel's actions a Hearing Officer of
22 the Department of Administration reversed the denial. SIIS and the employer filed an appeal. During
23 the pendency of the appeal SIIS own expert concluded the employee had contracted polio on the job.

1 SIIS subsequently set aside \$ 8 million for the employee's lifetime medical expenses. 106 Nev. at 450-
2 451, 794 P.2d at 726.

3 SIIS was legally obligated to reimburse the employee's medical providers including the State of
4 Nevada Department of Human Resources which it paid out considerable Medicaid money through its
5 Welfare Division. The attorneys for the employee initiated suit against the State of Nevada Department
6 of Human Resources, Welfare Division to compel the State to pay their attorneys' fees. The District
7 Court determined that the State of Nevada must pay its fair share of attorney's fees incurred to obtain
8 the recovery from SIIS. The Nevada Supreme Court affirmed under the "common fund doctrine"
9 holding:

10 If the efforts of a litigant or his attorney create a common fund benefiting third persons, the
11 doctrine requires these passive beneficiaries to pay their fair share of litigation expenses by
12 allowing the litigant or attorney to recover reasonable attorneys' fees from the common fund.
13 *Boeing v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980). Here, but
14 for respondent's labor, the common fund would not have been created in the Welfare Division
15 would not receive any money from SIIS. In addition, upholding the award would further the
16 policies behind the common fund doctrine by being fair to respondents, requiring the Welfare
17 Division to help pay for the expenses incurred in recovering its own money, in encouraging
18 attorneys to undertake and diligently pursue cases such as this with the assurance of prompt
19 and direct compensation. [Citations omitted]. Therefore, it is only right that the Welfare
20 Division, as passive beneficiaries of respondents' efforts, pay attorneys' fees to respondents.

21 106 Nev. at 452, 794 P.2d at 726-727.

22 In this case, the efforts of Navarrete's attorney created a common fund which benefited a third
23 party – NVPERS. The same policies which required the State of Nevada Department of Human
24 Resources, Welfare Division to pay the attorneys' fees associated with its recovery from the
employees' SIIS fund would likewise require NVPERS as a passive beneficiary to pay the attorneys'
fees associated with its recovery of refunded employee contributions from the back pay fund.

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1 **IV. CONCLUSION**

2 This issue has come before both this Court previously and another department and those Court's
3 have adjudicated the liens. (See attached). Therefore, it is respectfully requested that the Attorney's lien
4 of \$32,468.79 be perfected and NDOC be ordered to pay counsel directly.

5 DATED this 5 day of October, 2019.

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