

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-19-79766-9
(Eighth Judicial District Court,
Nevada)

Electronically Filed
May 11, 2021 12:32 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

JOINT APPENDIX VOL. VI OF VII

Aaron D. Ford
Nevada Attorney General
Michelle Di Silvestro Alanis
Bar No. 10024
Supv. Sr. Deputy Attorney General
Office of the Attorney General
555 E. Washington Ave. #3900
Las Vegas, NV 89101
Phone: 702-486-3268
Fax: 702-486-3773
malanis@ag.nv.gov
Attorneys for Appellant

Dan Marks, Esq.
Bar No. 002003
Law Office of Daniel Marks
610 S. 9th Street
Las Vegas, NV 89144
Phone: 702-386-0536
office@danielmarks.net
Attorney for the Respondent

INDEX

<u>Volume</u>		<u>Page(s)</u>
I	Acceptance of Service, filed 8/9/2019	0017
VI	Affidavit of Supplemental Transmittal, filed 11/20/2019	1430
VI	Affidavit of Transmittal, filed 8/14/2019	1423
VI	Answering Brief, filed 2/26/2020	1465 - 1487
VII	Case appeal statement, filed 11/12/2020	1535 - 1538
I	Certificate of Service, filed 7/2/2019	0018 - 0019
I	Certificate of Supplemental Transmittal, filed 11/20/2019	
	1428 - 1429
IV	Certificate of Transmittal, filed 8/14/2019	1421 - 1422
VII	Findings of Fact, Conclusions of Law and Order, filed 10/12/2020	
	1513 – 1517
VII	Letter to District Court Judge Timothy C. Williams from Department of Administration Hearings Division regarding submittal of files under seal, dated 8/15/19	1588 - 1589
I	Minutes from Motion to Stay, dated 8/29/2019	0199 – 0200
VII	Minute Order on PJR, dated 8/6/2020	1511 -1512
I	Motion for Adjudication of Attorney’s Lien, filed 9/24/2019	

	0204 - 0223
I	Motion for Stay with Exhibits, filed 7/1/2019	0020 – 0153
VII	Notice of Appeal, filed 11/12/2020	1525 - 1534
VII	Notice of Entry of FFCL and Order, filed 10/13/2020	1518 - 1524
I	Notice of Intent to Participate, filed 7/1/2019	0015 - 0016
VI	Opening Brief, filed 11/27/2019	1431 – 1464
I	Opposition to Motion for Adjudication of Attorney’s Lien, filed 9/27/2019	0224 – 0244
I	Opposition to Motion for Stay and Countermotion, filed 7/9/2019
	0154 - 0164
II	Order on Motion for Attorney’s Lien, filed 1/24/2020.....	0263 – 0265
I	Order on Motion for stay, filed 10/9/2019	0201 - 0203
I	Petition for Judicial Review, filed 8/28/2019	0001 - 0014
VI	Reply Brief, filed 5/15/2020	1488 - 1510
I, II	Reply to Opposition to Motion for Adjudication of Lien, filed 10/8/2019.....	0245 - 0258
I	Reply to Opposition to Motion for Stay and Opposition to Countermotion, filed 7/16/2019	0165 - 0198
VII	Reporters Transcript of 6-9-20 hearing, filed 4/9/2021	1539 - 1587
II	Supplemental Points and Authorities, filed 10/14/2019	0259 - 0262

VI Supplemental Transmittal of Record, filed 11/20/2019.....1424 - 1427

II, III, IV

V, VI Transmittal of Record, filed 8/14/2019.....266 - 1420

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:

Daniel Marks, Esq.
Law Office of Daniel Marks
610 South Ninth Street
Las Vegas, Nevada 89101
Office@danielmarks.net

/s/ Anela Kaheaku
Anela Kaheaku, an employee of
the Office of the Attorney General

Remarks by Senator Close.
Motion carried.

GENERAL FILE AND THIRD READING

Senate Bill No. 109.

Bill read third time.

Roll call on Senate Bill No. 109:

YEAS—20.

NAYS—None.

Senate Bill No. 109 having received a constitutional majority, Mr. President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 116.

Bill read third time.

Remarks by Senators Wilson, Close, Echols, Gibson and Dodge.

Roll call on Senate Bill No. 116:

YEAS—20.

NAYS—None.

Senate Bill No. 116 having received a constitutional majority, Mr. President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 144.

Bill read third time.

Roll call on Senate Bill No. 144:

YEAS—20.

NAYS—None.

Senate Bill No. 144 having received a constitutional majority, Mr. President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 335.

Bill read third time.

Remarks by Senators Neal and Close.

Roll call on Senate Bill No. 335:

YEAS—18.

NAYS—Faiss, Neal—2.

Senate Bill No. 335 having received a constitutional majority, Mr. President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senator Gibson moved that the Senate recess subject to the call of the Chair.

Motion carried.

Senate in recess at 12:02 p.m.

SENATE IN SESSION

At 12:12 p.m.

President Rose presiding.

Quorum present.

ASSEMBLY
GOVERNMENT AFFAIRS
April 11, 1977
8:00am

MEMBERS PRESENT: Chairman Murphy
Mr. May
Mr. Craddock
Mr. Jeffrey
Mr. Mann
Mr. Robinson
Mrs. Westall (later)
Mr. Jacobsen

MEMBERS EXCUSED: Mr. Moody

GUESTS PRESENT: See attached list

ASSEMBLY BILL 154

The subcommittee of Mr. Jacobsen, Mr. May and Mr. Moody recommended the following amendments. Retain section 6, add to section 2 sub. 7 "in unoccupied areas", add to section 8, line 18 "with special session of the legislature".

Assemblyman May commented that after reading the bill through it was not as severe as it was without the amendments.

Assemblyman Mann commented that the bill still scared him because it gives absolute dictatorial powers to the Governor.

Assemblyman Robinson commented that section 3 does not prohibit citizens from taking civil actions for redress.

ASSEMBLY BILL 614 and 615

Assemblyman May told the committee that both bills would interlock with a consolidation bill.

Mr. George Ogilvie, County Administrator, reminded the committee that the bills only affected counties over the population of 200,000. It deals with a massive annexation and problems such as disruption of and distribution of revenue, reduction of county employees. The bills are mutually exclusive and the committee couldn't pass both of them. His personal choice is A.B. 615. He suggested the following amendments to A.B. 615: line 6 p.1 NRS 268.582 and on page 3 line 24 insert whenever, also make the bills effective upon passage and approval.

SENATE BILL 116

Charles L. Wolff, Jr., Warden of the Prison, told the committee that this bill brings prior legislation together to form a Department of Prisons.

ASSEMBLY
GOVERNMENT AFFAIRS
April 11, 1977
Page Two

Mr. Pat Mullin, Attorney General's office, told the committee that there is no fiscal impact in the bill that the Senate had amended the fiscal impact parts out of the bill. The bill makes basic terminology changes, such as changing the "Warden" to a "Director". It also makes some minor accounting procedure changes.

Assemblyman Mann commented that he had some problems with the bill and that the language needed tightening up.

Mrs. Westall arrived at this point.

Chairman Murphy appointed Mr. Mann as a subcommittee of one to confer with the chairman of the Judiciary committee to see if he would like it referred to his committee as they had dealt with the prison system many times this session.

SENATE BILL 360

There was no testimony on the bill. The committee discussed its merits among themselves.

COMMITTEE ACTION

SENATE BILL 360 - Mr. Craddock moved to DO PASS, seconded by Mr. Jacobsen, passed unanimously. Mr. Moody was not present for the vote.

ASSEMBLY BILL 443- Mr. Robinson moved to AMEND AND DO PASS, seconded by Mr. Jacobsen, motion passed. Mrs. Westall abstained and Mr. Moody was not present.

SENATE BILL 116- Mr. Mann, after conferring with Mr. Barengo, chairman of the Judiciary committee, moved to refer the bill to the Judiciary committee, seconded by Mr. May, motion passed.

There being no further business, the committee was adjourned at 9:40.

Respectfully submitted,



Kim Morgan, Committee Secretary

MINUTES

ASSEMBLY JUDICIARY COMMITTEE
April 20, 1977

Members Present: Chairman Barengo
Assemblyman Hayes
Assemblyman Banner
Assemblyman Coulter
Assemblyman Polish
Assemblyman Price
Assemblyman Sena
Assemblyman Ross
Assemblyman Wagner

The meeting was called to order at 7:20 a.m. by Chairman Barengo. All witnesses wishing to testify were sworn in as they testified.

AB 491: Mr. Bud Hicks, stated that this provides for a mini-declaratory relief act which commences on page 3, line 29. He said that it differs from the existing law by broadening the relief to other people than are now covered to include persons found suitable, holding companies, intermediary companies, publicly traded companies, and registered corporations to seek this kind of relief. He stated that the portion of the bill which covers the staying of writs by the district court is already current law and also the portions on extraordinary relief is already law, too. He stated that this simply puts this existing case law into specific statute form and is a result of the Rosenthal case which pointed out this loophole in the statutes. He stated that they felt that the current declaratory relief statute is outmoded and outdated and should be changed in this manner.

The next point Mr. Hicks addressed was that of the use of board investigative reports in the decision making process at the commission level. He stated that they would not object to a qualifying statement which would state "unless used as evidence" may be confidential and subject to privilege. He stated that anything currently used as evidence for the commission is made known to the applicant, etc., and they would not object to that or some similar qualifying language. He noted that what they were primarily concerned about was that those reports which were in the board's files should not be made public if not directly related to the decision making of the commission.

Chairman Barengo and Mrs. Wagner stated that they felt there should be some other way to handle this and that it was too broad. Mr. Hicks stated that if this section would hold up passage of the entire bill that he would suggest that that section be eliminated from this bill and be redrafted for a later time. He did state that the bill itself was very important from legislative intent stand and he felt it was necessary because of some of the other sections of the bill.

Mrs. Wagner asked Mr. Hicks if he felt he would rather have no law

explanation she stated that currently this is used in lieu of taking the concern who is violating the fair trade practices to civil court and is confidential to both parties concerned. This would make the confidentiality of the document discretionary. She stated that their office felt that some of these orders should be made public and that, in fact, the federal authorities make their concent orders public currently.

In answer to a question from Chairman Barengo, Miss Katt stated that if the assurance is violated, the DA's office or director of consumer affairs can proceed and make the assurance public and then there is a possible fine of \$10,000.

Miss. Katt stated that NRS 598.580 is the section which provides for the ten day notice to the person who is violation the fair trade practices and this is the section they wish to have deleted. She stated that this ten day notice provision prevents them from being as effective as they might be because once these people are served, they pick up their assets and leave town. She pointed out that when deceptive advertising is involved they are not limited by this ten day notice provision and changing this as proposed would make those two procedures consistent.

In answer to a question from Mr. Ross, Miss Katt stated that having the discretionary power to make the assurnaces public would help them in negotiating with the people who were doing things which were not in the best interest of the public. She also said that if they had the power to make this public and the concern knew that they could that might prevent a major law suit because of subsequent violation of the assurance.

Miss Katt stated that they are also having some problem with the extreme confidentiality of the assurances and stated that they cannot disburse this information even to law enforcement agencies currently. She stated that this is a problem inasmuch as sometimes different divisions are working on cases which involve some of the same people in different areas and this makes it hard to cross reference and perhaps match up some of these violators.

In answer to a question from Chairman Barengo, Miss Katt stated that many of these people just move from place to place and continue defrauding people by their bad practices.

Mr. Carl Lovell, City Attorney, Las Vegas, was next to testify on this bill. Mr. Lovell stated that he felt that the city attorneys should be added to the bill on page 2, lines 23 and 41 and on page 3, line 2, because as the bill is written they would not be included and he felt they should be. He stated he felt this addition would help the consumers affairs agencies throughout the state by broadeneing the base.

SB 116: Warden Charles Wolfe, Nevada State Prisons, addressed this bill and stated that it essentially sets up a sound organizational structure for the supervision and administration of the growing penal system in Nevada. He stated that this bill would provide the

general structure and policy for that organization and define the terminology involved within the system. He also pointed out that there was no fiscal impact on this bill as it was removed by the Senate Finance committee.

Deputy Attorney General, Patrick Mullen was next to testify on this bill. He stated that in the last committee hearing on this bill, Assemblyman Mann had stated that he had some questions as to Page 7, section 43 and the term "visits". Mr. Mann had asked if this would include conjugal visits. Mr. Mullen stated that it was the feeling of the attorney generals office that the definition of visits was already codified and did not include conjugal visits and he felt the intent of the bill was clear because of the fate of the bill dealing with conjugal visitation which had been killed earlier this session.

He stated that the second question brought out was regarding section 41 on page 7 which is the pre-release section. He stated that that section was the same as existing law on the subject, namely NRS 209.441. Chairman Barengo asked Mr. Mullen if he could supply to the committee a letter setting out these points and Mr. Mullen stated that it would be supplied promptly. The letter is attached and marked Exhibit C.

He also said that the other sections which were questioned were sections 44 and 45 on page seven and he stated that those sections provide for the same thing as existing law does.

AJR 57: Assemblyman Jim Kosinski, introducer of the bill, handed out to the committee a paper prepared in relation to this bill and it is attached and marked Exhibit D. He stated that the compilation in the exhibit contained the constitutional provisions of the various other states relating to the right of privacy. He pointed out that he felt the language in the Montana statute on page 3 was more clear and direct. He stated that the reason for inclusion of the last sentence in the proposed AJR was to prevent our constitution from being used to strike down an ethics law, perhaps, at a later date. He stated that he felt the language might be a little strong but that it did set out legislative intent.

Mrs. Wagner pointed out that she did support the concept, however, she felt that it might cause some problems with some other existing statutes because of the scope of it.

Chairman Barengo stated that he felt that the language on lines 9 through 11 should be deleted. A brief discussion followed and Mr. Kosinski stated that he felt that that would be acceptable and he would suggest that they use the Montana language in the exhibit and make it a new section 19.

SB 379: Mr. Norm Robison, Dep. Atty. General for the Highway Department, and Norm Herring, Research Assistant, were first to speak on this bill. Mr. Robison stated that the bill is an attempt to iron out the differences between the comparative negligence statute and the joint feisor act which were passed into law at the same time.



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
CAPITOL COMPLEX
SUPREME COURT BUILDING
CARSON CITY 89710

ROBERT LIST
ATTORNEY GENERAL

April 20, 1977

The Honorable Robert R. Barengo
Chairman, Assembly Judiciary Committee
Legislative Building
Carson City, Nevada 89710

RE: S.B. 116, SUBSTANTIVE CHANGES FROM NRS CHAPTER 209

Dear Mr. Barengo:

On April 20, 1977, S.B. 116 was presented to your committee. At that time, you requested a visual list of major changes proposed by S.B. 116 which are not included in NRS Chapter 209.

It should be first noted that this Bill mainly proposes to establish a Department of Prisons to modernize our current prison system. The Prison Board will remain in tact; however, the Warden will be designated "Director" and each separate institute of the Nevada State Prisons will be headed by a "Superintendent." S.B. 116 interposes the above designations as applicable throughout the Nevada Revised Statutes.

Briefly, the major changes of S.B. 116 are the following:

1. Updating all accounting and business practices at the Nevada State Prisons to comply with State Purchasing requirements and recommendations from a recent Legislative Audit.

2. Eliminating the requirement upon the Warden to compile a monthly list of necessities for the Nevada State Prisons to the Prison Board.

3. Eliminating the requirement upon the Warden to compile a quarterly report to the Prison Board regarding all manufactured articles by inmates at the Nevada State

The Honorable Robert R. Barengo
April 20, 1977
Page 2

Prisons. (This data in 2 and 3 is available upon request from the Prison Board, but would be too expensive and time consuming to comply with the current NRS mandates. In practice, these reports have not been solicited by the Prison Board.)

4. Sections 36 and 37 of S.B. 116 make it mandatory upon the Director to perform the duties provided therein. Chapter 209 states these duties to be discretionary with the Warden.

5. NRS 209.300-209.330 regarding imprisonment of female prisoners outside the state is deleted by S.B. 116. This was done because this section is superfluous in view of the Intrastate Compact Act and our Women's Prison in Carson City.

6. Chapter 209.340-209.480 regards employment of prisoners at the Nevada State Prisons. The change proposed by S.B. 116 is to prevent a "forced labor concept" as provided in Chapter 209 to optional employment for inmates giving good time credits and other monetary rewards. This change was necessitous to comply with U. S. Supreme Court requirements against involuntary servitude and is also, in the opinion of the Warden, the more realistic approach.

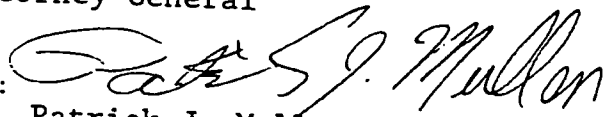
7. Chapter 209.483-209.497 is deleted by S.B. 116 to be included in Chapter 216 of NRS. This was done to place the work release program under the appropriate NRS chapter from which it is administered.

It is here noteworthy to state again that there is no fiscal impact by S.B. 116.

The legislative history of this Bill during this session has been the following: the Senate Governmental Functions Committee, the Senate Finance Committee, the Senate Judiciary Committee, and the Assembly Governmental Affairs Committee. It is my understanding that this Bill has received a "do pass" by all committees with minor changes.

Sincerely,

ROBERT LIST
Attorney General

By: 
Patrick J. Mullen
Deputy Attorney General
Criminal Division

PJM:np

MINUTES

ASSEMBLY JUDICIARY COMMITTEE
April 29, 1977

Members Present: Chairman Barengo
Assemblyman Hayes
Assemblyman Coulter
Assemblyman Banner
Assemblyman Polish
Assemblyman Price
Assemblyman Ross
Assemblyman Sena
Assemblyman Wagner

The meeting was called to order at 8:10 a.m. by Chairman Barengo. The witnesses wishing to testify were sworn in as they testified.

SB 412: Assistant District Attorney of Clark County, Tom Beatty, was first to address this bill stating that he felt that whether or not section 17, subsection 3, should be include in the bill was a matter of legislative policy, but he pointed out that there are many in public prosecution who feel that a prohibition against homosexual conduct is necessary because they feel to raise the prohibition would raise the inference that that type of behavior was condoned.

He stated that there were still points which they felt should be looked into in regard to the bill and they are: 1. The bill would reduce penalties in some areas which cover assault on a child by an adult, 2. Virginia has passed laws upholding its sodomy statutes as being constitutional, and the Supreme Court ruled that a state may prohibit this action among adults, 3. The Senate side had basically left the infamous crimes section the same as previous law.

In answer to a question from Mr. Coulter, Mr. Beatty stated that there have been no cases tried recently in Clark County on this basis.

In answer to a question from Mrs. Wagner, Mr. Beatty stated that whether or not section 17, subsection 3, was discriminatory toward homosexuals, was, again, a policy decision for the legislature. Mrs. Wagner again asked him to express his own personal opinion, inasmuch as he was instrumental in adding the amendment and he declined to express his opinion.

Mrs. Wagner stated that she had didcussed this subject with members of the Washoe Sheriff's Department and they had stated that they do not enforce these types of laws in general. Mr. Beatty stated that they are hard to prosecute because of the proof factor. He also pointed out in response to a question from Mr. Coulter that if you did not outlaw that type of behavior then it was supposed that that behavior was proper conduct. And, he stated, for that reason, many prosecutors believe it should be retained. He also said he did not feel they would object to a gross misdemeanor, depending on the gravity of the act.

They stated that this bill is aimed at the panderer or "pimp" who physically abuses the prostitutes in order to keep them in the business of prostitution. Bart Jacka stated that it is difficult to prove, as the law stands now, that a prostitute is kept in the profession against her will because the pimp can state that she was working in prostitution before he was associated with her.

Mr. Price asked if this could have been taken care of in AB 451, and Mr. Hicks stated that he did not believe so because that bill only dealt with the language of the law, and did not lend itself to specific infractions, as such.

Mr. Hicks stated that the District Attorneys Association is in support of the bill.

Mr. Sena asked Mr. Hicks or Mr. Jacka to comment on page 2, line 9 regarding aiding or assisting. Mr. Hicks said that this was pointed at the problem of transporting the prostitutes due to the fact the pimp usually hires someone else to do the driving from place to place and therefore cannot be convicted of taking part in the supplying of the prostitutes. Mr. Jacka stated that that, indeed, was the problem for the lack of convictions in Clark County.

In answer to a question from Mr. Price, Mr. Jacka stated that he felt the present laws were strict enough except for the fact that they were having difficulty getting convictions because of some of the weaknesses and he felt this would help to eliminate that problem for them and get more convictions.

COMMITTEE ACTION:

SB 514: Mr. Ross stated that he felt the language in section five should be restored to its original structure. Mr. Ross moved for a Do Pass as Amended. Mr. Coulter seconded the motion and it carried.

SB 510: Mr. Ross stated that this bill should be amended to make it consistent with AB 451 when it is passed by the Assembly. Mr. Ross moved for a Do Pass as Amended. Mr. Sena seconded the motion and it carried.

SB 116: Mr. Polish moved for a Do Pass. Mrs. Wagner seconded the motion and it carried.

SB 431: Chairman Barengo stated that the amendment to this bill on line 28 of page two, to include "engineered and engineering" would be discussed and worked out with Russ McDonald. Mr. Polish moved for a Do Pass as Amended. Mr. Sena seconded the motion and it carried.

SB 74: Mr. Ross moved for a Do Pass. Mrs. Hayes seconded the motion and it carried.

1180

FIFTY-NINTH SESSION

1047

The following amendment was proposed by Assemblyman Barengo:
Amendment No. 1213A.

Amend the bill as a whole by deleting section 2.

Amend sec. 3, page 2, line 11, by deleting "Sec. 3." and inserting "Sec. 2."

Amend sec. 4, page 2, by deleting line 24 and inserting:

"Sec. 3. 1. NRS 663.015 is hereby repealed.

2. NRS 673.350 is hereby repealed.

Sec. 4. Subsection 2 of section 3 of this act shall become effective at 12:01 a.m. on July 1, 1977."

Assemblyman Barengo moved the adoption of the amendment.

Remarks by Assemblyman Barengo.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

Senate Bill No. 116.

Bill read second time.

The following amendment was proposed by Assemblyman Barengo:
Amendment No. 1214A.

Amend sec. 89, page 25, lines 13 and 14, by deleting "either by himself," and inserting "personally or by".

Amend sec. 89, page 25, by deleting lines 17 and 18 and inserting:
"For that purpose the board of county commissioners or metropolitan police commission shall pay all necessary costs, charges and".

Amend sec. 89, page 25, by deleting line 22 and inserting:

"3. The provisions of subsection 2 apply in".

Assemblyman Barengo moved the adoption of the amendment.

Remarks by Assemblyman Barengo.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

Senate Bill No. 187.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary:

Amendment No. 1216A.

Amend sec. 4, page 2, line 17, by deleting "creditor" and inserting "debtor".

Amend sec. 4, page 2, by deleting lines 19 through 24 and inserting:

"2. The interest earned on the security shall be distributed to the judgment creditor as the interest accrues."

Amend sec. 5, page 2, line 41, by deleting "The total amount of".

Amend sec. 5, page 2, by deleting lines 42 and 43.

Assemblyman Barengo moved the adoption of the amendment.

Remarks by Assemblyman Barengo.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

Senate Bill No. 429.

Bill read second time and ordered to third reading.

Assembly Bill No. 750.

Bill read second time, ordered engrossed and to third reading.

(REPRINTED WITH ADOPTED AMENDMENTS)

THIRD REPRINT

S. B. 116

SENATE BILL NO. 116—COMMITTEE ON EDUCATION,
HEALTH AND WELFARE AND STATE INSTITUTIONS

JANUARY 21, 1977

Referred to Committee on Education, Health and Welfare
and State Institutions

SUMMARY—Establishes the department of prisons. (BDR 16-198)

FISCAL NOTE: Local Government Impact: No.
State or Industrial Insurance Impact: Yes.

EXPLANATION—Matter in *italics* is new; matter in brackets [] is material to be omitted.

AN ACT relating to the punishment of crime; establishing the department of prisons; providing for its organization, administration, powers, duties and functions; providing for the transportation, transfer, custody, care, education and employment of offenders; providing for credits on the term of imprisonment; providing for the release of offenders; providing penalties; and providing other matters properly relating thereto.

*The People of the State of Nevada, represented in Senate and Assembly,
do enact as follows:*

1 SECTION 1. Chapter 209 of NRS is hereby amended by adding
2 thereto the provisions set forth as sections 2 to 51.5, inclusive, of this act.

3 SEC. 2. *As used in this chapter, unless the context otherwise requires,*
4 *the terms defined in sections 3 to 10, inclusive, of this act have the mean-*
5 *ings ascribed to them in those sections.*

6 SEC. 3. "Board" means the board of state prison commissioners as
7 defined by section 21 of article 5 of the Nevada constitution.

8 SEC. 4. "Classification" means the process of individual case evalua-
9 tion to determine the custody and program needs of the individual
10 offender.

11 SEC. 5. "Custody" means the level of security restrictions imposed
12 on an offender by a classification committee.

13 SEC. 6. "Department" means the department of prisons.

14 SEC. 7. "Director" means the director of the department of prisons.

15 SEC. 8. "Institution" means a prison, community correctional center,
16 or other facility operated by the department for the custody, care and
17 training of offenders.

18 SEC. 9. "Offender" means any person convicted of a crime under
19 the laws of this state and sentenced to imprisonment in the state prison.

Remarks by Assemblyman Barengo.

Roll call on Senate Bill No. 74:

YEAS—39.

NAYS—None.

Absent—Brookman.

Senate Bill No. 74 having received a constitutional majority, Mr. Speaker pro Tempore declared it passed, as amended.

Bill ordered transmitted to the Senate.

Senate Bill No. 116.

Bill read third time.

Roll call on Senate Bill No. 116:

YEAS—37.

NAYS—Rhoads, Weise—2.

Absent—Brookman.

Senate Bill No. 116 having received a constitutional majority, Mr. Speaker pro Tempore declared it passed, as amended.

Bill ordered transmitted to the Senate.

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Mello moved that Assembly Bill No. 646 be placed on the General File.

Remarks by Assemblyman Mello.

Motion carried.

Assemblyman Mello moved that Assembly Bill No. 723 be placed on the Second Reading File.

Remarks by Assemblyman Mello.

Motion carried.

Assemblyman Demers moved that Assembly Bills Nos. 597, 716, Senate Bills Nos. 173, 376 and 424 be placed on the Second Reading File.

Motion carried.

Assemblyman Robinson moved that Assembly Bill No. 593 be placed on the General File.

Remarks by Assemblyman Robinson.

Motion carried.

Mr. Speaker pro Tempore announced that if there were no objections, the Assembly would recess subject to the call of the Chair.

Assembly in recess at 12:30 p.m.

ASSEMBLY IN SESSION

At 12:31 p.m.

Mr. Speaker presiding.

Quorum present.

SECOND READING AND AMENDMENT

Assembly Bill No. 723.

Bill read second time.

The following amendment was proposed by the Committee on Ways and Means:

SENATE JUDICIARY COMMITTEE

MINUTES OF MEETING

MAY 3, 1977

The meeting was called to order at 8:00 a.m. Senator Close was in the Chair.

PRESENT: Senator Close
Senator Bryan
Senator Dodge
Senator Foote
Senator Sheerin
Senator Gojack
Senator Ashworth

ABSENT:

AB 459 Provides definition of firearm, prohibits possession of certain firearms and removal of identification marks on firearms.

Bart Jacka, Assistant Sheriff, Las Vegas Metropolitan Police Department informed the Committee that this was legislation requested by his department. It is very close to the federal gun law which restricts the possession of sawed-off shotguns and rifles to those individuals who have registered with the Alcohol and Tobacco Tax unit of the U. S. Department of the Treasury. This bill will also make it unlawful for anyone to alter, change, remove or obliterate a serial number from a firearm.

Mr. Jacka stated that the purpose of the bill was to enable prosecution under a state law rather than having to go to the U. S. Attorney General; he didn't seem to have the time to prosecute these cases as his priorities are set in different areas. In response to a concern expressed by the Committee, Mr. Jacka assured them that this did not go beyond federal law.

Ed Dannon, Bill Drafter, defined for the Committee the meaning of caliber and informed them that this bill would not cover the BB gun.

Senator Gojack moved a do pass.
Seconded by Senator Dodge.
Motion carried. The vote was as follows:

VOTING AYE:	Senator Close	VOTING NAY:	Senator Ashworth
	Senator Bryan		
	Senator Dodge		
	Senator Foote	ABSENT FROM	
	Senator Gojack	THE VOTE:	Senator Sheerin

Minutes of Meeting
May 3, 1977
Page Eight

SB 74 Amend provisions for disposition of funds in joint tenancy accounts.

The Committee concurred in the Assembly amendment.

SB 413 Makes substantial changes in procedure for disciplining physicians.

The Committee concurred in the Assembly amendment.

SB 116 Establishes the Department of Prisons.


The Committee concurred in the Assembly amendment.

SB 187 Provides for periodic payment of certain damages recovered in malpractice claims against health care providers.

The Committee did not concur in the Assembly amendments.

There being no further business, the meeting was adjourned.

Respectfully submitted,


Cheri Kinsley, Secretary

APPROVED:

SENATOR MELVIN D. CLOSE, JR., CHAIRMAN

of NRS 612.121, does not qualify for coverage [under NRS 612.121] because it does not meet the requirements of subparagraph (2) of paragraph (b) of subsection 1 of [such] that section; [such organization shall cease to be an employer subject to this chapter.]

(c) Any agricultural employer, as defined in NRS 612.055, does not qualify for coverage because it does not meet the requirements of that section; or

(d) Any domestic employer, as defined in NRS 612.055, does not qualify for coverage because it does not meet the requirements of those sections.

2. For the purposes of this section, the two or more employing units mentioned in subsection 2 or 3 of NRS 612.055 shall be treated as a single employing unit.

SEC. 23. NRS 612.580 is hereby amended to read as follows:

612.580 The executive director may terminate the approval of the election [of any such employer] of coverage made by any employing unit pursuant to NRS 612.565 and 612.570 at any time upon 30 days' written notice. [Political subdivisions that have elected coverage for employees of hospitals and institutions of higher education may not have such election terminated by the executive director. Any such political subdivision may terminate coverage in the manner provided in subsection 3 of NRS 612.575.]

SEC. 24. NRS 612.116 and 612.575 are hereby repealed.

SEC. 25. The legislature declares that it is enacting those provisions of this act which extend coverage under chapter 612 of NRS to employees of this state and its political subdivisions only because such extension is required by Public Law 94-566 to prevent the loss by private employers in this state of their credit against the federal unemployment tax, and not voluntarily. If it is finally decided by an appropriate court that Congress lacks the power to compel the states to provide compensation for their employees and those of their political subdivisions, the attorney general shall so advise the legislative counsel, and the legislative counsel shall prepare and submit to the next session of the legislature at which it may be considered, appropriate legislation to repeal the provisions mentioned in this section.

SEC. 26. This act shall become effective on January 1, 1978.

Senate Bill No. 116—Committee on Education, Health and Welfare
and State Institutions

CHAPTER 430

AN ACT relating to the punishment of crime; establishing the department of prisons; providing for its organization, administration, powers, duties and functions; providing for the transportation, transfer, custody, care, education and employment of offenders; providing for credits on the term of imprisonment; providing for the release of offenders; providing penalties; and providing other matters properly relating thereto.

(Approved May 8, 1977)

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter 209 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 51.5, inclusive, of this act.

SEC. 2. *As used in this chapter, unless the context otherwise requires, the terms defined in sections 3 to 10, inclusive, of this act have the meanings ascribed to them in those sections.*

SEC. 3. "Board" means the board of state prison commissioners as defined by section 21 of article 5 of the Nevada constitution.

SEC. 4. "Classification" means the process of individual case evaluation to determine the custody and program needs of the individual offender.

SEC. 5. "Custody" means the level of security restrictions imposed on an offender by a classification committee.

SEC. 6. "Department" means the department of prisons.

SEC. 7. "Director" means the director of the department of prisons.

SEC. 8. "Institution" means a prison, community correctional center, or other facility operated by the department for the custody, care and training of offenders.

SEC. 9. "Offender" means any person convicted of a crime under the laws of this state and sentenced to imprisonment in the state prison.

SEC. 10. "Superintendent" means the administrative officer in charge of an institution.

SEC. 11. 1. The department of prisons is hereby created.

2. The head of the department is the board of state prison commissioners.

3. The governor is the president of the board. The secretary of state is the secretary of the board.

4. Any two members of the board constitute a quorum for the transaction of business.

5. The secretary shall keep full and correct records of all the transactions and proceedings of the board.

SEC. 12. The board has full control of all grounds, buildings, labor, and property of the department, and shall:

1. Purchase, or cause to be purchased, all commissary supplies, materials and tools necessary for any lawful purpose carried on at any institution of the department.

2. Sell all manufactured articles and collect the money for their sale.

3. Contract with tax-supported, nonprofit government agencies for any labor of offenders and collect money therefor. All state agencies shall

cooperate with the department in carrying out the provisions of this subsection to the extent consistent with their other lawful duties.

4. Regulate the number of officers and employees of the department.
5. Prescribe regulations for carrying on the business of the board and the department.

SEC. 13. 1. The chief administrative and fiscal officer of the department is the director.

2. The director:

- (a) Shall be appointed by the governor.
- (b) Is responsible to the board.
- (c) Shall be selected with special reference to his training, experience and aptitude in the field of corrections.
- (d) Is entitled to receive an annual salary in an amount fixed by law.
- (e) Shall not engage in any other gainful employment or occupation.

SEC. 14. The director shall:

1. Administer the department under the direction of the board.
2. Supervise the administration of all institutions of the department.
3. Receive, retain and release in accordance with law offenders sentenced to imprisonment in the state prison.
4. Be responsible for the supervision, custody, treatment, care, security and discipline of all offenders under his jurisdiction.
5. Establish regulations with the approval of the board and enforce all laws governing the administration of the department and the custody, care and training of offenders.
6. Take proper measures to protect the health and safety of the staff and inmates of the institutions of the department.
7. Cause to be placed from time to time in conspicuous places about each institution copies of laws and regulations relating to visits and correspondence between offenders and others.
8. Provide for the holding of religious services in the institutions and make available to the inmates copies of appropriate religious materials.

SEC. 15. The director may, with the approval of the board, enter into agreements with other governmental agencies and with private organizations to carry out the purposes of this chapter.

SEC. 16. 1. The director shall appoint, with the approval of the board, a deputy director, who shall be in the unclassified service of the state and is entitled to receive an annual salary in an amount fixed by law.

2. During any absence of the director, the deputy director is acting director of the department without increase in salary.

3. The deputy director shall carry out such administrative duties as may be assigned to him by the director and shall not engage in any other gainful employment or occupation.

SEC. 17. 1. The director shall appoint a superintendent for each institution of the department.

2. Each superintendent shall be in the classified service of the state except for purposes of retention and is entitled to receive an annual salary in an amount fixed by law.

3. Each superintendent is responsible to the director for the administration of his institution, including the execution of all policies and the enforcement of all regulations of the department pertaining to the custody, care and training of offenders under his jurisdiction.

SEC. 18. 1. The director, deputy director, and the superintendent, deputy superintendent, correctional officers and other employees of an institution so designated by the director have the powers and privileges of peace officers when performing duties prescribed by the director.

2. For the purposes of subsection 1, the duties which may be prescribed by the director include, but are not limited to, pursuit and return of escaped offenders, transportation and escort of offenders and the general exercise of control over offenders within or outside the confines of the institution.

SEC. 19. 1. If the director finds that it is necessary or desirable that any officer or employee reside at an institution, perquisites granted to the officer or employee or charges for services rendered to him shall be at the discretion of the board.

2. The director shall notify the legislature at each regular session of the existing charges and perquisites.

SEC. 20. 1. The prison residence fund is hereby created as a special revenue fund.

2. The prison residence fund consists of all receipts of rents charged for occupancy of prison residences.

3. Subject to the approval of the board, the director may expend the money in the prison residence fund for the purchase of materials and equipment, but not for furniture or furnishings, to improve existing prison residences and for the construction of new residences by prison labor.

SEC. 21. 1. The prison revolving account in the sum of \$1,500 is hereby created, and may be used for the payment of small prison bills and bills requiring immediate payment, and for no other purposes.

2. The director may deposit the prison revolving account in one or more banks of reputable standing.

3. Payments made from the prison revolving account shall be promptly reimbursed from appropriated money of the department on claims as other claims against the state are paid.

SEC. 22. 1. The prison warehouse fund is hereby created as an intragovernmental service fund. The director shall administer the fund.

2. Purchases for the use of the department shall be made from the fund, and as each item purchased is distributed to an institution of the department, its cost shall be charged to the budget of that institution and credited to the fund.

3. Claims against the fund, approved by the director, shall be paid as other claims against the state are paid.

SEC. 23. 1. The prisoners' store fund is hereby created as a trust fund. All money received for the benefit of offenders through contributions, percentages from sales of goods manufactured by the offenders, and from other sources not otherwise required to be deposited in another fund, shall be deposited in the prisoners' store fund.

2. The director shall:

- (a) Deposit the prisoners' store fund in one or more banks of reputable standing;
- (b) Keep, or cause to be kept, a full and accurate account of the fund; and

(c) Submit reports to the board relative to money in the fund as may be required from time to time.

3. Money in the prisoners' store fund shall be expended for the welfare and benefit of all offenders.

SEC. 24. 1. Any money received from the operation of any honor camp established under this chapter or from the assignment of any honor camp crew, to the extent that such money is not used for salaries, overhead or operating expenses of any such camp or crew, shall be placed in the division of forestry account.

2. The state forester forewarden, as executive head of the division of forestry of the state department of conservation and natural resources, may:

(a) Expend the moneys received pursuant to subsection 1 for:

(1) The renovation, repair or improvement of buildings and other facilities for any honor camp.

(2) The acquisition of special clothing, tools and equipment and payment of expenses directly related to work projects performed by honor camp crews such as, but not limited to, the costs of utilities and operation of equipment.

(b) Direct all activities in connection with any such renovation, repair or improvement of buildings and other facilities for any honor camp or any honor camp work project.

SEC. 25. The director may accept money and valuables belonging to offenders for safekeeping pending their releases, and shall deposit such money in the prisoners' personal property fund, which is a trust fund. He shall keep, or cause to be kept, a full and accurate account of such money and valuables; and shall submit reports to the board relating to such money and valuables as may be required from time to time.

SEC. 26. All books and papers kept by or under the direction of the secretary of the board or the director shall:

1. At all times, on all legal days, be open to the inspection of the members of the board, all other state officers, members of the legislature, and the sheriffs of the several counties of this state.

2. At the expiration of their term of office, be delivered to their successors.

SEC. 27. 1. Upon notification by the county clerk of any county in this state that a person is being held under sentence of imprisonment in the state prison, the director shall immediately provide for the transportation of the offender from the place of confinement to an appropriate institution.

2. The expense of such transportation is a charge against the department and shall be paid upon approval by the board as other claims against the state are paid.

3. The reasonable expenses of maintaining every person sentenced to imprisonment in the state prison, after 5 days' notice to the director, is a charge against the department.

4. The officer in charge of transporting an offender is entitled to receive the transportation and subsistence allowance authorized by law for state employees.

5. In all cases where an appeal is sustained by the supreme court, further transportation of the offender is at the expense of the county in which

the offender was convicted and at the same rate as provided in subsection 4.

SEC. 28. The officer in charge shall transport at the same time all persons awaiting transportation, and the board shall not allow any extra expense incurred by the making of unnecessary trips in transporting separately persons who might be transferred at the same time.

SEC. 29. An officer of the department may transport an offender temporarily to or through any state which adjoins the State of Nevada if:

1. The offender will perform general labor in connection with forestry projects and will be directly returned to the State of Nevada after completion of the general labor; or

2. Some part of Nevada is threatened by fire or other natural disaster and the threat emanates from an adjoining state.

SEC. 30. 1. The director may transfer an offender:

(a) From one institution to another within the department; or

(b) To other governmental agencies.

in accordance with classification evaluations and the requirements of treatment, training, security and custody of the offender.

2. The prison sentence of an offender continues uninterrupted while he is at the facility to which he has been transferred.

SEC. 31. The department may, with the consent of the superintendent of the Nevada youth training center or the superintendent of the Nevada girls training center, transfer to the Nevada youth training center or the Nevada girls training center any minor persons who are inmates of an institution of the department.

SEC. 32. At the request of a county sheriff or the chief of police of a city, the director may authorize the transfer of a person detained in a local facility to an institution of the department for safekeeping. The director shall determine the cost of the custody and care of that person which shall be borne by the local government affected.

SEC. 33. The director may arrange for the transfer of an offender to other appropriate governmental agencies for psychiatric observation, evaluation or stabilization pursuant to an agreement with the agency for such transfers. When the head of the facility to which the offender has been transferred determines that the offender has recovered from the condition which caused the transfer, the director shall provide for his return to the department.

SEC. 34. An offender may be taken outside an institution, under appropriate precautions to prevent his escape, when necessary for medical evaluation or treatment, as determined by the director.

SEC. 35. The director shall assign every person who is sentenced to imprisonment in the state prison to an appropriate institution of the department. The assignment shall be based on an evaluation of the offender's records, particular needs and custody requirements.

SEC. 36. The director shall:

1. Establish a system of classification and evaluation to insure the individualized custody, care and training of offenders under the department's jurisdiction.

2. Keep, or cause to be kept, records of all offenders whereon shall be recorded:

(a) The name, age, date of birth, race, sex, height, weight, complexion, color of eyes and hair, peculiarities of build or features.

(b) Place of birth (state, county or city, or country, province or city).

(c) Occupation, and whether the offender can read and write.

(d) Date of sentence, name of the judge passing sentence, county from which sentenced, the crime charged, date of incarceration, term of imprisonment, expiration date of minimum and maximum terms of imprisonment.

(e) Such other desirable or pertinent information as may be necessary.

3. Maintain a comprehensive record of the behavior of each offender reflecting his accomplishments and progress as well as charges of infractions of regulations, punishments imposed and medical services rendered.

SEC. 37. The director shall:

1. Adopt with the approval of the board such regulations as are necessary to:

(a) Maintain proper custody of an offender in accordance with his current classification.

(b) Prevent escapes and maintain good order and discipline.

2. Establish procedures by regulation for disposing of cases involving violations of law in institutions of the department.

3. Establish sanctions appropriate to the type and severity of such violations.

SEC. 38. Corporal punishment and inhumane treatment of offenders are prohibited.

SEC. 39. 1. Each offender in an institution of the department shall be provided a healthful diet and appropriate, sanitary housing.

2. The director with the approval of the board shall establish standards for personal hygiene of offenders and for the medical and dental services of each institution.

SEC. 40. The director shall:

1. Establish programs to provide medical, psychological, psychiatric and other appropriate forms of counseling to offenders under the jurisdiction of the department, in accordance with classification requirements.

2. Establish educational and vocational programs and training directed toward the eventual release of the offender to the community as a productive, law-abiding citizen.

SEC. 41. The director may, with the approval of the board, establish facilities which enable offenders to live in a community while obtaining regular employment, enrolling in academic courses, participating in vocational training programs, utilizing community resources in meeting their personal and family needs, and participating in whatever other approved programs may exist within the community.

SEC. 42. The director shall provide a facility for the detention and treatment of such persons committed to the custody of the administrator of the mental hygiene and mental retardation division of the department of human resources under NRS 178.425 as the administrator may deem proper to place in such facility if other secure facilities are not available to the mental hygiene and mental retardation division for this purpose.

SEC. 43. Superintendents may authorize visits and correspondence

between offenders and appropriate friends, relatives, and others under regulations adopted by the director and approved by the board.

SEC. 44. 1. Every offender who was sentenced to an institution of the department on or before June 30, 1969, who has no serious infraction of the regulations of the institution, or laws of the state, recorded against him, and who performs in a faithful, orderly and peaceable manner the duties assigned to him, shall be allowed for his term a deduction of 2 months in each of the first 2 years, 4 months in each of the next 2 years, and 5 months in each of the remaining years of the term, and pro rata for any part of a year where the sentence is for more or less than a year.

2. The mode of reckoning credits shall be as shown in the following table:

SCHEDULE OF CREDITS

Number of years of sentence.	Good time granted.	Total good time made.	Time to be served if full time is made.
1st year.....	2 months	2 months	10 months
2nd year.....	2 months	4 months	1 year, 8 months
3rd year.....	4 months	8 months	2 years, 4 months
4th year.....	4 months	1 year	3 years
5th year.....	5 months	1 year, 5 months	3 years, 7 months
6th year.....	5 months	1 year, 10 months	4 years, 2 months
7th year.....	5 months	2 years, 3 months	4 years, 9 months
8th year.....	5 months	2 years, 8 months	5 years, 4 months
9th year.....	5 months	3 years, 1 month	5 years, 11 months
10th year.....	5 months	3 years, 6 months	6 years, 6 months

and so on through as many years as may be the term of the sentence.

3. In addition to the credits for good behavior provided for in subsection 1, the board may adopt regulations allowing credits for offenders whose diligence in labor or study merits such credits and for offenders who donate their blood for charitable purposes.

4. Each offender is entitled to the deductions allowed by this section unless the board finds that for misconduct or other cause reported by the director he should not receive them.

SEC. 45. 1. Every offender who is sentenced to an institution of the department after June 30, 1969, who has no serious infraction of the regulations of the institution, or laws of the state, recorded against him, and who performs in a faithful, orderly and peaceable manner the duties assigned to him, shall be allowed for the period he is actually incarcerated under sentence a deduction of 2 months for each of the first 2 years, 4 months for each of the next 2 years, and 5 months for each of the remaining years of the term, and pro rata for any part of a year where the actual term served is for more or less than a year. Credit shall be recorded on a monthly basis as earned for actual time served.

2. The mode of reckoning credits shall be as shown in the following table:

SCHEDULE OF CREDITS

Number of years served.	Good time granted.	Total good time made.
1 year.....	2 months	2 months
2 years.....	2 months	4 months
3 years.....	4 months	8 months
4 years.....	4 months	1 year
5 years.....	5 months	1 year, 5 months
6 years.....	5 months	1 year, 10 months
7 years.....	5 months	2 years, 3 months
8 years.....	5 months	2 years, 8 months
9 years.....	5 months	3 years, 1 month
10 years.....	5 months	3 years, 6 months

and so on through as many years as may be the term of the sentence. The "total good time made" shall be deducted from the maximum term imposed by the sentence and shall apply to parole eligibility as provided by law.

3. In addition to the credits for good behavior provided for in subsection 1, the board may adopt regulations allowing credits for offenders whose diligence in labor or study merits such credits and for offenders who donate their blood for charitable purposes.

4. Each offender is entitled to the deductions allowed by this section if he has satisfied the conditions of subsection 1 as determined by the director.

SEC. 46. 1. If any offender:

(a) Commits any assault upon his keeper or any foreman, officer, offender or other person, or otherwise endangers life;

(b) Is guilty of any flagrant disregard of the regulations of the department; or

(c) Commits any misdemeanor, gross misdemeanor or felony,

he forfeits all deductions of time earned by him before the commission of such offense, or forfeits such part of such deductions as to the state board of parole commissioners may seem just.

2. If any offender commits a serious violation of any of the regulations of the department, he may forfeit all or part of such deductions, in the discretion of the state board of parole commissioners.

3. A forfeiture shall be made only by the state board of parole commissioners after proof of the offense and notice to the offender. The decision of the state board of parole commissioners regarding a forfeiture is final.

4. The state board of parole commissioners may restore credits forfeited for such reasons as to it may seem proper.

SEC. 47. 1. The director shall make available appropriate employment opportunities and work experience for inmates based on the results of a classification evaluation. To the greatest extent possible, equipment, management practices and general procedures should approximate the normal conditions of employment in the community.

2. The department, through the director and with the approval of the board, may make contractual arrangements for the use of an offender's labor by other units of government or for purposes of training in actual

employment when evidence is available that such employment will contribute to the process of preparing the offender for lawful and productive community living.

3. Offenders may be compensated at rates fixed by the director and approved by the board for work performed.

4. The department may grant the prisoner the privilege of leaving the institution during necessary and reasonable hours for the purposes set forth in subsections 1 and 2.

5. The director shall establish administrative and fiscal procedures to permit the use of approved regional or community institutions for the placement of offenders approved for the purposes set forth in subsections 1 and 2.

SEC. 48. The director, with the approval of the board, may allow offenders to participate in certain educational, civic and charitable programs in and deemed beneficial to the community in accordance with classification standards and appropriate security measures.

SEC. 49. Any offender participating in work or educational release programs or in any other classification assignment under the provisions of this chapter, other than parole:

1. Continues to be in the legal custody of the director during the offender's absence from an institution.

2. Is considered within the confines of the institution for these purposes, and is subject to all provisions of law pertaining to his confinement, regardless of the location of his assignment.

SEC. 50. 1. The director may grant temporary furloughs consistent with classification evaluations and requirements:

(a) To permit offenders to:

(1) Be interviewed by prospective employers;

(2) Respond to family emergencies; or

(3) Participate in other approved activities.

(b) For such other purposes as may be deemed appropriate by the director with the approval of the board.

2. Furloughs:

(a) Are limited to the confines of the state.

(b) Shall not be granted to offenders:

(1) Sentenced to life imprisonment without the possibility of parole.

(2) Imprisoned for violations of chapter 201 of NRS who have not been certified by the designated board as eligible for parole.

3. The director shall notify appropriate law enforcement authorities in the affected county or city to anticipate the arrival of the offender within their jurisdiction and inform them of the date and time of the offender's arrival, the reason the furlough was granted, the time when the furlough expires and any other pertinent information which the director deems appropriate.

4. The director with the approval of the board shall adopt regulations for administering the provisions of this section and governing the conduct of offenders granted a furlough.

SEC. 51. When an offender is released from an institution by expiration of his term of sentence, by pardon or by parole, the director:

1. May furnish him with a sum of money not to exceed \$50, the amount to be based upon the offender's economic need as determined by

the director, which shall be paid out of the appropriate account within the state general fund for the use of the department as any other claim against the state is paid.

2. Shall give him notice of the provisions of NRS 202.360, forbidding ex-felons to possess or have custody of concealable weapons and the provisions of NRS 207.080 to 207.150, inclusive, relating to the registration and fingerprinting of convicted persons.

3. Shall require him to sign an acknowledgment of the notice required in subsection 2.

SEC. 51.5. 1. Any unauthorized absence from the place of assignment by an offender who is on temporary furlough, participating in a work or educational release program or otherwise in a classification assignment under the provisions of this chapter, constitutes an escape from prison, and the offender shall be punished as provided in NRS 212.090.

2. This section does not apply to offenders released on parole.

SEC. 52. Chapter 213 of NRS is hereby amended by adding thereto the provisions set forth as sections 53 to 60, inclusive, of this act.

SEC. 53. 1. The state board of parole commissioners, through the chief parole and probation officer, shall establish and administer a work release program under which a person sentenced to a term of imprisonment in a penal or correctional institution may be granted the privilege of leaving secure custody during necessary and reasonable hours to:

(a) Work in this state at gainful private employment that has been approved by the state board of parole commissioners for such purpose.

(b) Obtain in this state additional education, including but not limited to vocational, technical and general education.

2. The work release program may also include, under rules developed by the chief parole and probation officer and approved by the state board of parole commissioners, temporary leave for the purpose of seeking employment in this state.

3. The state board of parole commissioners is responsible for the quartering and supervision of prisoners enrolled in the work release program.

SEC. 54. 1. The director of the department of prisons shall, by appropriate means of classification and selection, determine which of the offenders, during the last 6 months' confinement, are suitable for the work release program, excluding those sentenced to life imprisonment who are not eligible for parole and those imprisoned for violations of chapter 201 of NRS who have not been certified by the designated board as eligible for parole.

2. The director shall then submit to the state board of parole commissioners the names of those offenders he determines to be eligible for the work release program, and the board shall select from those names the offenders it considers to be suitable for the program.

3. Before work release privileges are granted to any offender so selected, the sentencing court shall be notified of the intent to take such action. If the court does not object within 10 judicial days of the notice, the state board of parole commissioners may proceed to enroll the offender in the work release program.

4. In enrolling an offender in the work release program, the state board of parole commissioners shall delegate full authority to the chief

parole and probation officer to take all necessary action to enforce rules relating to the general procedures and objectives of the program.

SEC. 55. 1. The chief parole and probation officer shall administer the work release program. In addition to the other duties assigned by the state board of parole commissioners, the chief parole and probation officer shall:

(a) Locate employment for qualified applicants;

(b) Effect placement of offenders under the work release program; and

(c) Generally promote public understanding and acceptance of the work release program.

2. All state agencies shall cooperate with the state board of parole commissioners in carrying out this section to such extent as is consistent with their other lawful duties.

3. Subject to the approval of the state board of parole commissioners, the chief parole and probation officer shall adopt rules for administering the work release program.

SEC. 56. 1. The salaries or wages of an offender employed pursuant to the work release program shall be disbursed in the following order:

(a) To pay the cost of quartering, feeding and clothing the offender.

(b) To allow the offender necessary travel expense to and from work and his other incidental expenses.

(c) To support the offender's dependents.

(d) To pay, either in full or ratably, the offenders' obligations which have been acknowledged by him in writing or which have been reduced to judgment.

2. Any balance of an offender's wages remaining after all disbursements have been made pursuant to subsection 1 shall be paid to the offender upon his release from custody.

SEC. 57. 1. The state board of parole commissioners through the chief parole and probation officer may contract with the governing bodies of political subdivisions in this state for quartering in suitable local facilities of offenders enrolled in work release programs. Each such facility must satisfy standards established by the state board of parole commissioners to assure secure custody of offenders quartered therein.

2. The state board of parole commissioners may not enroll any offender in the work release program unless it has been determined that suitable facilities for quartering the offender are available in the locality where the offender has employment or the offer of employment.

SEC. 58. 1. An offender enrolled in the work release program is not an agent, employee or servant of the department of prisons or the state board of parole commissioners of this state:

(a) While working in employment under the program or seeking such employment; or

(b) While going to such employment from the place where he is quartered or while returning therefrom.

2. An offender enrolled in the work release program is considered to be an offender in an institution of the department of prisons.

SEC. 59. 1. The chief parole and probation officer may immediately terminate any offender's enrollment in the work release program and transfer him to an institution of the department of prisons if, in his judgment, the best interests of the state or the offender require such action.

2. If an offender enrolled in the work release program is absent without a reason acceptable to the state board of parole commissioners from his place of employment or his designated quarters, such absence:

- (a) Immediately terminates his enrollment in the work release program.
- (b) Constitutes an escape from prison, and such offender shall be punished as provided in NRS 212.090.

Sec. 60. 1. There is hereby created in the state treasury the prisoner's work release revolving loan fund in the sum of \$2,500.

2. The fund shall be used to make loans to offenders to pay their expenses for food, quarters and clothing while participating in the work release program and provision shall be made for repayment.

3. To the extent that the total cash balance of the fund exceeds \$2,500 at the end of each fiscal year the excess cash shall revert to the state general fund.

(There is no section 61.)

Sec. 62. NRS 6.020 is hereby amended to read as follows:

6.020 1. Upon satisfactory proof, made by affidavit or otherwise, the following-named persons, and no other, shall be exempt from service as grand or trial jurors:

- (a) Any federal or state officer.
- (b) Any judge, justice of the peace or attorney at law.
- (c) Any county clerk, recorder, assessor, sheriff, deputy sheriff, constable, deputy constable or police officer.
- (d) Any physician, dentist, graduate nurse or registered pharmacist.
- (e) Any locomotive engineer, locomotive fireman, conductor, brakeman, switchman or engine foreman.
- (f) Any mail carrier engaged in the actual carrying of the United States mail on a star route in a rural area.
- (g) Any teacher, principal or superintendent actually engaged in teaching or in the supervision of teaching in the public schools of this state, and any member of the faculty of the University of Nevada System, shall be exempt from jury duty during the session of the public schools or university of this state in which he is employed. Nothing in this paragraph shall excuse or be construed to excuse any teacher, principal, superintendent or university faculty member from jury duty during school vacation, except when he is taking training in his professional work or in finishing his school reports and other matters incident thereto within 1 month of the day of the closing of the school in which he is employed, or in preparation for the opening of school during the 2 weeks immediately preceding the opening of school.
- (h) Members and officers of paid and volunteer fire departments and members of exempt firemen's associations, societies or organizations, as follows:

- (1) One-half of all members of each regularly enrolled fire department in this state as specified by such department. This exemption shall not apply to any fire department having 50 or more regular paid personnel.
- (2) Any member of a volunteer fire department, association, society or organization in this state.

This exemption shall not apply to more than 50 members as designated by such department, association, society or organization.

- (1) Any officer or correctional officer employed by the Nevada state prison, department of prisons.
- (2) Any member or employee of the legislature or the legislative council bureau while the legislature is in session.

2. All persons of the age of 65 years or over are exempt from serving as grand or trial jurors. Whenever it shall appear to the satisfaction of the court, by affidavit or otherwise, that a juror is over the age of 65 years, the court shall order the juror excused from all service as a grand or trial juror, if the juror so desires.

Sec. 63. NRS 11.400 is hereby amended to read as follows:

11.400 1. Except as provided in subsection 2, an action for injury or death against a health care provider as defined in subsection 5 shall not be commenced more than 4 years after the date of injury or 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first, for:

- (a) Injury to or wrongful death of a person, based upon such health care provider's alleged professional negligence; [or]
- (b) Injury to or wrongful death of a person for rendering professional services without consent; or
- (c) Injury to or wrongful death of a person for error or omission in such health care provider's practice.

2. This time limitation is tolled for any period during which such health care provider has concealed any act, error or omission upon which such action is based and which is known or through the use of reasonable diligence should have been known to such health care provider.

3. For purposes of this section, the warden of the Nevada state prison, director of the department of prisons and the administrator of the mental hygiene and mental retardation division of the department of human resources shall be deemed the guardian of every person subject to their respective control who is under a legal disability and are responsible for exercising reasonable judgment in determining whether to initiate any cause of action arising under this section which any such legally disabled person may have against any health care provider under subsection 1. If the warden, director or administrator fails to take action on behalf of such legally disabled person within the prescribed period of limitation, the legally disabled person shall not be permitted to bring an action based on the same injury against any health care provider under subsection 1 upon the removal of his legal disability.

4. For purposes of this section, the parent, guardian or legal custodian of any minor child is responsible for exercising reasonable judgment in determining whether to initiate any cause of action which such minor child may have against any health care provider under subsection 1. If the parent, guardian or custodian fails to take any action on behalf of such child within the prescribed period of limitations, such child shall not be permitted to bring an action based on the same alleged injury against any health care provider under subsection 1 upon the removal of his disability, except that in the case of brain damage or birth defect the period of limitation is extended until the child attains 10 years of age.

5. For purposes of this section, the warden of the Nevada state prison, director of the department of prisons and the administrator of the mental hygiene and mental retardation division of the department of human resources shall be deemed the guardian of every person subject to their respective control who is under a legal disability and are responsible for exercising reasonable judgment in determining whether to initiate any cause of action arising under this section which any such legally disabled person may have against any health care provider under subsection 1. If the warden, director or administrator fails to take action on behalf of such legally disabled person within the prescribed period of limitation, the legally disabled person shall not be permitted to bring an action based on the same injury against any health care provider under subsection 1 upon the removal of his legal disability.

6. For purposes of this section, the parent, guardian or legal custodian of any minor child is responsible for exercising reasonable judgment in determining whether to initiate any cause of action which such minor child may have against any health care provider under subsection 1. If the parent, guardian or custodian fails to take any action on behalf of such child within the prescribed period of limitations, such child shall not be permitted to bring an action based on the same alleged injury against any health care provider under subsection 1 upon the removal of his disability, except that in the case of brain damage or birth defect the period of limitation is extended until the child attains 10 years of age.

5. As used in this section, "health care provider" means a physician or surgeon, dentist, registered nurse, dispensing optician, optometrist, registered physical therapist, podiatrist, licensed psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, veterinarian or a licensed hospital as the employer of any such person.

SEC. 64. NRS 169.125 is hereby amended to read as follows:

169.125 "Peace officer" includes:

1. The bailiff of the supreme court and bailiffs of the district courts, justices' courts and municipal courts;
2. Sheriffs of counties and of metropolitan police departments and their deputies;
3. Constables;
4. Personnel of the Nevada highway patrol when exercising the police powers specified in NRS 481.150 and 481.180;
5. The inspector or field agents of the motor carrier division of the department of motor vehicles when exercising the police powers specified in NRS 481.049;
6. Members of and all inspectors employed by the public service commission of Nevada when exercising those enforcement powers conferred by chapters 704 to 706, inclusive, of NRS;
7. Marshals and policemen of cities and towns;
8. Parole and probation officers;
9. Special investigators employed by the office of any district attorney or the attorney general;
10. Arson investigators for fire departments specially designated by the appointing authority;
11. Members of the University of Nevada System police department;
12. The state fire marshal and his deputies;
13. The brand inspectors of the state department of agriculture when exercising the enforcement powers conferred in chapter 565 of NRS;
14. Arson investigators for the state forester firewarden specially designated by the appointing authority;
15. The deputy [warden,] director, superintendents, correctional officers and other employees of the [Nevada state prison] department of prisons when carrying out any duties prescribed by the [warden of the Nevada state prison,] director of the department of prisons;
16. Nevada state park system employees designated by the administrator of the Nevada state park system in the state department of conservation and natural resources when exercising police powers specified in NRS 407.065;
17. Security officers employed by the board of trustees of any school district;
18. The executive, supervisory and investigative personnel of the Nevada gaming commission and the state gaming control board when exercising the enforcement powers specified in NRS 463.140;
19. The director, division chiefs, investigators, agents and other sworn personnel of the department of law enforcement assistance;
20. Field dealer inspectors of the vehicle compliance and enforcement section of the registration division of the department of motor vehicles when exercising the police powers specified in NRS 481.048;
21. Vehicle emission control officers of the vehicle emission control

section of the registration division of the department of motor vehicles when exercising the police powers specified in NRS 481.0481;

22. The personnel of the Nevada department of fish and game when exercising those enforcement powers conferred by Title 45 and chapter 488 of NRS; and

23. Security officers of the legislature of the State of Nevada when protecting the persons and property of the members of the legislature, staff of the legislature and personnel of the legislative counsel bureau.

SEC. 65. NRS 176.045 is hereby amended to read as follows:

176.045 1. Whenever a person convicted of a public offense in this state is under sentence of imprisonment pronounced by another jurisdiction, federal or state, whether or not the prior sentence is for the same offense, the court in imposing any sentence for the offense committed in this state may, in its discretion, provide that such sentence shall run either concurrently or consecutively with the prior sentence.

2. If the court provides that the sentence shall run concurrently, and the defendant is released by the other jurisdiction prior to the expiration of the sentence imposed in this state, the defendant shall be returned to the State of Nevada to serve out the balance of such sentence, unless the defendant is eligible for parole under the provisions of chapter 213 of NRS, and the board of parole commissioners directs that he [shall] be released on parole as provided in that chapter.

3. If the court makes an order pursuant to this section, the clerk of the court shall provide the [warden of the Nevada state prison] director of the department of prisons with a certified copy of judgment and notification of the place of out-of-state confinement.

4. If the court makes no order pursuant to this section, the sentence imposed in this state shall not begin until the expiration of all prior sentences imposed by other jurisdictions.

SEC. 66. NRS 176.107 is hereby amended to read as follows:

176.107 Whenever a sentence of imprisonment in the [Nevada] state prison is imposed, immediately after the rendition of judgment, the district attorney who prosecuted the cause shall transmit to the [warden of the Nevada state prison] director of the department of prisons a written statement of facts surrounding the commission of the offense, upon forms furnished by the [warden,] director.

SEC. 67. NRS 176.335 is hereby amended to read as follows:

176.335 1. If the judgment is for imprisonment in the state prison, the sheriff of the county must, on receipt of the triplicate certified copies thereof, immediately notify the [warden of the state prison,] director of the department of prisons and the [warden of the state prison] director shall, without delay, send some authorized person to the county where the prisoner is held for commitment to receive the prisoner.

2. When such authorized person presents to the sheriff holding the prisoner his order for the delivery of the prisoner, the sheriff shall deliver to such authorized person two of the certified copies of the judgment, and take from such person a receipt for the prisoner, and the sheriff shall make return upon his certified copy of such judgment, showing his proceedings thereunder, and both such copy with the return affixed thereto and the receipt from the authorized person shall be filed with the county clerk.

3. The term of imprisonment designated in the judgment shall begin on the date of sentence of the prisoner by the court.

4. Upon the expiration of the term of imprisonment of the prisoner, or the termination thereof for any legal reason, the [warden] director of the department of prisons shall return one of his certified copies of the judgment to the county clerk of the county from whence it was issued, with a brief report of his proceedings thereunder endorsed thereon, and the endorsed copy shall be filed with the county clerk. The return shall show the cause of the termination of such imprisonment, whether by death, legal discharge or otherwise.

SEC. 68. NRS 176.345 is hereby amended to read as follows:

176.345 1. When a judgment of death has been pronounced, a certified copy of the entry thereof in the minutes of the court shall be forthwith executed and attested in triplicate by the clerk under the seal of the court. There shall be attached to the triplicate copies a warrant signed by the judge, attested by the clerk, under the seal of the court, which shall recite the fact of the conviction and judgment, and appoint a week within which the judgment is to be executed, which must not be less than 60 days nor more than 90 days from the time of judgment, and must direct the sheriff to deliver the prisoner to such authorized person as the [warden of the state prison shall designate] director of the department of prisons designates to receive the prisoner, for execution, such prison to be designated in the warrant.

2. The original of the triplicate copies of the judgment and warrant shall be filed in the office of the county clerk, and two of the triplicate copies shall be immediately delivered by the clerk to the sheriff of the county; one of the triplicate copies to be delivered by the sheriff, with the prisoner, to such authorized person as the [warden of the state prison shall designate] director of the department of prisons designates, which shall be the warrant and authority of the [warden of the state prison] director for the imprisonment and execution of the prisoner, as therein provided and commanded, and the [warden] director shall return his certified copy of the judgment to the county clerk of the county whence it was issued; and the other triplicate copy of such judgment and warrant to be the warrant and authority of the sheriff to deliver the prisoner to such authorized person so designated by the [warden of the state prison] director, the last-mentioned copy to be returned to the county clerk by the sheriff with his proceedings endorsed thereon.

SEC. 69. NRS 176.355 is hereby amended to read as follows:

176.355 1. The judgment of death shall be inflicted by the administration of lethal gas.

2. The execution shall take place within the limits of the state prison, wherein a suitable and efficient enclosure and proper means for the administration of such gas for that purpose shall be provided by the board of prison commissioners.

3. The [warden of the state prison] director of the department of prisons must be present, and must invite a competent physician, and not less than six reputable citizens over the age of 21 years, to be present at the execution; but no other persons shall be present at the execution.

SEC. 70. NRS 176.365 is hereby amended to read as follows:

176.365 After the execution, the [warden] director of the department of prisons must make a return upon the death warrant to the court by which the judgment was rendered, showing the time, place, mode and manner in which it was executed.

SEC. 71. NRS 176.425 is hereby amended to read as follows:

176.425 1. If, after judgment of death, there is a good reason to believe that the defendant has become insane, the [warden of the state prison] director of the department of prisons to whom the convicted person has been delivered for execution may by a petition in writing, verified by a physician, petition a district judge of the district court of the county in which the state prison is situated, alleging the present insanity of such person, whereupon such judge shall:

(a) Fix a day for a hearing to determine whether the convicted person is insane;

(b) Appoint two physicians, at least one of whom shall be a psychiatrist, to examine the convicted person; and

(c) Give immediate notice of the hearing to the attorney general and to the district attorney of the county in which the conviction was had.

2. If [such judge shall determine] the judge determines that the hearing on and the determination of the sanity of the convicted person cannot be had before the date of the execution of such person, [such] the judge may stay the execution of the judgment of death pending the determination of the sanity of [such] the convicted person.

SEC. 72. NRS 176.435 is hereby amended to read as follows:

176.435 1. On the day fixed, the [warden of the state prison] director of the department of prisons shall bring the convicted person before the court, and the attorney general or his deputy shall attend the hearing. The district attorney of the county in which the conviction was had, and an attorney for the convicted person, may attend the hearing.

2. The court shall receive the report of the examining physicians and may require the production of other evidence. The attorney general or his deputy, the district attorney, and the attorney for the convicted person or such person if he is without counsel may introduce evidence and cross-examine any witness, including the examining physicians.

3. The court shall then make and enter its finding of sanity or insanity.

SEC. 73. NRS 176.445 is hereby amended to read as follows:

176.445 If it is found by the court that the convicted person is sane, the [warden] director of the department of prisons must execute the judgment of death; but if [such] the judgment has been stayed, as provided in NRS 176.425, the judge shall cause a certified copy of his order staying the execution of the judgment, together with a certified copy of his finding that the convicted person is sane, to be immediately forwarded by the clerk of the court to the clerk of the district court of the county in which the conviction was had, who shall give notice thereof to the district attorney of such county. [whereupon proceedings shall] Proceedings shall then be instituted in the last-mentioned district court for the issuance of a new warrant of execution of the judgment of death in the manner provided in NRS 176.495.

SEC. 74. NRS 176.455 is hereby amended to read as follows:

176.455 1. If it is found by the court that the convicted person is insane, the judge shall make and enter an order staying the execution of the judgment of death until the convicted person [shall have become] *becomes* sane, and shall therein [direct the warden of the state prison] *order the director of the department of prisons* to confine such person in a safe place of confinement until his reason is restored.

2. The clerk of the court shall serve or cause to be served three certified copies of the order, one on the [warden.] *director*, one on the governor, for the use of the state board of pardons commissioners, and one on the clerk of the district court of the county in which the conviction was had.

3. If the convicted person [shall thereafter become] *thereafter becomes* sane, notice of [such] *this* fact shall be given by the [warden] *director* to a judge of the court staying the execution of the judgment, and [such] *the* judge, upon being satisfied that such person is then sane, shall enter an order vacating the order staying the execution of the judgment.

4. The clerk of the court shall immediately serve or cause to be served three certified copies of such vacating order as follows: One on the [warden.] *director*, one on the governor, for the use of the state board of pardons commissioners, and one on the clerk of the district court of the county in which the conviction was had, who shall give notice thereof to the district attorney of such county, whereupon proceedings shall be instituted in the last-mentioned district court for the issuance of a new warrant of execution of the judgment of death in the manner provided in NRS 176.495.

Sec. 75. NRS 176.465 is hereby amended to read as follows:

176.465 1. If there is good reason to believe that a female against whom a judgment of death has been rendered is pregnant, the [warden of the state prison] *director of the department of prisons* to whom she has been delivered for execution shall petition a judge of the district court of the county in which the state prison is situated, in writing, alleging such pregnancy, whereupon such judge shall summon a jury of three physicians to inquire into the alleged pregnancy and fix a day for the hearing thereon, and give immediate notice thereof to the attorney general and to the district attorney of the county in which the conviction was had.

2. The provisions of NRS 176.425 and 176.435 [shall] apply to the proceedings upon the inquisition, [save and] except that three physicians shall be summoned. They shall certify in writing to the court their findings as to pregnancy.

Sec. 76. NRS 176.475 is hereby amended to read as follows:

176.475 1. If it is found by the court that the female is not pregnant, the [warden] *director of the department of prisons* must execute the judgment of death; but if a stay of execution has been granted pursuant to NRS 176.425 the procedure provided in NRS 176.445 [shall then be] *is* applicable.

2. If the female is found to be pregnant, the judge shall enter an order staying the execution of the judgment of death, and shall therein [direct the warden of the state prison] *order the director* to confine such female in a safe place of confinement commensurate with her condition until further order of the court.

3. [Thereafter and when] *When* such female [shall be] *is* no longer pregnant, notice of [such] *this* fact shall be given by the [warden] *director* to a judge of the court staying the execution of the judgment. Thereupon the judge, upon being satisfied that the pregnancy no longer exists, shall enter an order vacating the order staying the execution of the judgment and shall direct the clerk of such court to serve or cause to be served three certified copies of such order, one on the [warden.] *director*, one on the governor, for the use of the state board of pardons commissioners, and one on the clerk of the district court of the county in which the conviction was had, who shall give notice thereof to the district attorney of such county, whereupon proceedings shall be instituted in the last-mentioned district court for the issuance of a new warrant of execution of the judgment in the manner provided in NRS 176.495.

Sec. 77. NRS 176.495 is hereby amended to read as follows:

176.495 1. If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction was had must, upon the application of the attorney general or the district attorney of the county in which the conviction was had, cause another warrant to be drawn, signed by the judge and attested by the clerk under the seal of the court, and delivered to the [warden of the state prison.] *director of the department of prisons*.

2. The warrant must state the conviction and judgment and appoint a day on which the judgment is to be executed, which must be not less than 15 days nor more than 30 days after the date of the warrant.

3. Where sentence was imposed by a district court composed of three judges, the district judge before whom the confession or plea was made, or his successor in office, shall set the date of execution and sign the warrant.

Sec. 78. NRS 176.505 is hereby amended to read as follows:

176.505 When a remittitur showing the affirmation of a judgment of death has been filed with the clerk of the court from which the appeal therefrom has been taken, the court in which the conviction was had must inquire into the facts, and, if no legal reasons exist against the execution of the judgment, must make and enter an order that the [warden of the state prison] *director of the department of prisons* shall execute the judgment at a specified time; but the presence of the defendant in the court at the time the order of execution is made and entered, or the warrant is issued, as in this section provided, [shall not be] *is not* required.

Sec. 79. NRS 178.524 is hereby amended to read as follows:

178.524 If the defendant surrenders himself to, is apprehended by or is in the custody of a peace officer in the State of Nevada or the [warden of the Nevada state prison] *director of the department of prisons* other than the officer to whose custody he was committed at the time of giving bail, the bail may make application to the court for the discharge of his bail bond, and shall then give to the court an amount in cash or a surety bond sufficient in amount to guarantee reimbursement of any costs that may be expended in returning the defendant to the officer to whose custody the defendant was committed at the time of giving bail.

Sec. 80. NRS 178.630 is hereby amended to read as follows:

178.630 The [warden of the Nevada state prison] *director of the department of prisons* shall comply with the provisions of Articles III and

IV of The Agreement on Detainers whenever he has in his custody a prisoner who has detainers lodged against him from other jurisdictions which are parties to such agreement.

SEC. 81. NRS 179.223 is hereby amended to read as follows:

179.223 1. When the return to this state of a person charged with crime in this state is required, the district attorney shall present to the governor his written application for a requisition for the return of the person charged in which application shall be stated:

- (a) The name of the person so charged;
- (b) The crime charged against him;
- (c) The approximate time, place and circumstances of its commission;
- (d) The state in which he is believed to be, including the location of the accused therein at the time the application is made; and
- (e) A certification that, in the opinion of the district attorney, the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.

2. When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the district attorney of the county in which the offense was committed, the state board of parole commissioners, or the [warden of the institution] *director of the department of prisons* or the sheriff of the county from which escape was made shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated:

- (a) The name of the person;
- (b) The crime of which he was convicted;
- (c) The circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole; and
- (d) The state in which he is believed to be, including the location of the person therein at the time application is made.

3. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The district attorney, state board of parole commissioners, [warden] *director of the department of prisons* or sheriff may also attach such further affidavits and other documents in duplicate as he deems proper to be submitted with such application. One copy of the application, with the action of the governor indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information and affidavits, or of the judgment of conviction or of the sentence shall be filed in the office of the secretary of state of the State of Nevada to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition.

SEC. 82. NRS 200.030 is hereby amended to read as follows:

200.030 1. Capital murder is murder which is perpetrated by:

- (a) Killing a peace officer or fireman;
- (1) While such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity; and

- (2) With knowledge that the victim is or was a peace officer or fireman.

For purposes of this paragraph "peace officer" means sheriffs of counties and their deputies, marshals and policemen of cities and towns, the chief and agents of the investigation and narcotics division of the department of law enforcement assistance, personnel of the Nevada highway patrol when exercising the police powers specified in NRS 481.150 and 481.180, and the [warden, deputy warden] *director, deputy director, superintendent, correctional officers and other employees of the [Nevada state prison] department of prisons* when carrying out any duties prescribed by the [warden of the Nevada state prison] *director of the department*.

- (b) A person who is under sentence of life imprisonment without possibility of parole.

- (c) Executing a contract to kill. For purposes of this paragraph "contract to kill" means an agreement, with or without consideration, whereby one or more of the parties to the agreement commits murder. All parties to a contract to kill are guilty as principals.

- (d) Use or detonation of a bomb or explosive device.

- (e) Killing more than one person willfully, deliberately and with premeditation as the result of a single plan, scheme or design.

2. Murder of the first degree is murder which is:

- (a) Perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing.

- (b) Committed in the perpetration or attempted perpetration of rape, kidnaping, arson, robbery, burglary or sexual molestation of a child under the age of 14 years; or

- (c) Committed to avoid or prevent the lawful arrest of any person by a peace officer or to effect the escape of any person from legal custody.

As used in this subsection, sexual molestation is any willful and lewd or lascivious act, other than acts constituting the crime of rape, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of the perpetrator or of the child.

3. Murder of the second degree is all other kinds of murder.

4. The jury before whom any person indicted for murder is tried shall, if they find such person guilty thereof, designate by their verdict whether such person is guilty of capital murder or murder of the first or second degree.

5. Every person convicted of capital murder shall be punished by death.
6. Every person convicted of murder of the first degree shall be punished by imprisonment in the state prison for life with or without possibility of parole. If the penalty is fixed at life imprisonment with possibility of parole, eligibility for parole begins when a minimum of 10 years has been served.

7. Every person convicted of murder of the second degree shall be punished by imprisonment in the state prison for life or for a definite term of not less than 5 years. Under either sentence, eligibility for parole begins when a minimum of 5 years has been served.

SEC. 83. NRS 200.375 is hereby amended to read as follows:

200.375 No person convicted of forcible rape may, if the victim was a child under the age of 14 years, be paroled unless a board consisting of the administrator of the mental hygiene and mental retardation division of the department of human resources or his designee, the [warden of the Nevada state prison] director of the department of prisons and a physician authorized to practice medicine in Nevada who is also a qualified psychiatrist certifies that such person was under observation while confined in [the Nevada state prison] an institution of the department of prisons and is not a menace to the health, safety or morals of others.

Sec. 84. NRS 201.190 is hereby amended to read as follows:

201.190 1. Except as provided in subsection 2, every person of full age who commits the infamous crime against nature shall be punished:

(a) Where physical force or the immediate threat of such force is used by the defendant to compel another person to participate in such offense, or where such offense is committed upon the person of one who is under the age of 18 years, by imprisonment in the state prison for life with possibility of parole, eligibility for which begins, unless further restricted by subsection 3, when a minimum of 5 years has been served.

(b) Otherwise, by imprisonment in the state prison for not less than 1 year nor more than 6 years.

2. No person who is compelled by another, through physical force or the immediate threat of such force, to participate in the infamous crime against nature is thereby guilty of any public offense.

3. No person convicted of violating the provisions of subsection 1 of this section may, if the victim was a child under the age of 14 years, be:

(a) Paroled unless a board consisting of the administrator of the mental hygiene and mental retardation division of the department of human resources or his designee, the [warden of the Nevada state prison] director of the department of prisons and a physician authorized to practice medicine in Nevada who is also a qualified psychiatrist certifies that such person was under observation while confined in [the state prison] an institution of the department of prisons and is not a menace to the health, safety or morals of others.

(b) Released on probation unless a psychiatrist licensed to practice medicine in the State of Nevada certifies that such person is not a menace to the health, safety and morals of others.

Sec. 85. NRS 201.210 is hereby amended to read as follows:

201.210 1. Every person who commits any act of open or gross lewdness is guilty:

(a) For the first offense, of a gross misdemeanor.

(b) For any subsequent offense, of a felony, and upon conviction shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years.

2. No person convicted of violating the provisions of subsection 1 of this section may be:

(a) Paroled unless a board consisting of the administrator of the mental hygiene and mental retardation division of the department of human resources or his designee, the [warden of the Nevada state prison] director of the department of prisons and a physician authorized to practice medicine in Nevada who is also a qualified psychiatrist certifies that such

person was under observation while confined in [the state prison] an institution of the department of prisons and is not a menace to the health, safety or morals of others.

(b) Released on probation unless a psychiatrist licensed to practice medicine in the State of Nevada certifies that such person is not a menace to the health, safety or morals of others.

Sec. 86. NRS 201.220 is hereby amended to read as follows:

201.220 1. Every person who makes any open and indecent or obscene exposure of his person, or of the person of another, is guilty:

(a) For the first offense, of a gross misdemeanor.

(b) For any subsequent offense, of a felony, and upon conviction shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years.

2. No person convicted of violating any of the provisions of subsection 1 of this section may be:

(a) Paroled unless a board consisting of the administrator of the mental hygiene and mental retardation division of the department of human resources or his designee, the [warden of the Nevada state prison] director of the department of prisons and a physician authorized to practice medicine in Nevada who is also a qualified psychiatrist certifies that such person was under observation while confined in [the state prison] an institution of the department of prisons and is not a menace to the health, safety or morals of others.

(b) Released on probation unless a psychiatrist licensed to practice medicine in the State of Nevada certifies that such person is not a menace to the health, safety or morals of others.

Sec. 87. NRS 201.230 is hereby amended to read as follows:

201.230 1. Any person who [shall] willfully and lewdly [commit] commits any lewd or lascivious act, other than acts constituting the crime of rape and the infamous crime against nature, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be punished by imprisonment in the state prison for not less than 1 year nor more than 10 years.

2. No person convicted of violating any of the provisions of subsection 1 of this section may be:

(a) Paroled unless a board consisting of the administrator of the mental hygiene and mental retardation division of the department of human resources or his designee, the [warden of the Nevada state prison] director of the department of prisons and a physician authorized to practice medicine in Nevada who is also a qualified psychiatrist certifies that such person was under observation while confined in [the state prison] an institution of the department of prisons and is not a menace to the health, safety or morals of others.

(b) Released on probation unless a psychiatrist licensed to practice medicine in the State of Nevada certifies that such person is not a menace to the health, safety or morals of others.

Sac. 88. NRS 202.380 is hereby amended to read as follows:

202.380 1. Every person, firm or corporation who within the State of Nevada knowingly sells or offers for sale, possesses or transports any

form of shell, cartridge or bomb containing or capable of emitting tear gas, or any weapon designed for the use of such shell, cartridge or bomb, except as permitted under the provisions of NRS 202.370 to 202.440, inclusive, is guilty of a gross misdemeanor.

2. Nothing in NRS 202.370 to 202.440, inclusive, shall prohibit police departments or regular salaried peace officers thereof, sheriffs and their regular salaried deputies, [wardens and guards of the Nevada state prison,] the director, deputy director and superintendents of, and guards employed by, the department of prisons, personnel of the Nevada highway patrol or the military or naval forces of the state or of the United States from purchasing, possessing or transporting such shells, cartridges, bombs or weapons for official use in the discharge of their duties.

SEC. 89. NRS 211.040 is hereby amended to read as follows:

211.040 1. Payment of expenses and the method of transporting a prisoner from a county jail to [the state prison] an institution of the department of prisons shall be as provided in chapter 209 of NRS. When a prisoner is transferred from the county jail to [the state prison,] such an institution, the sheriff shall provide the [warden of the state prison] director of the department of prisons with a written report pertaining to medical, psychiatric, behavioral or criminal aspects of the prisoner's history. This report may be based upon observations of the prisoner while confined in the county jail and shall note in particular any medication or medical treatment administered in the jail, including type, dosage and frequency of administration.

2. Except as provided in subsection 1, the sheriff, personally or by his deputy, or by one or more of his jailers, shall transfer all prisoners within his county to whatever place of imprisonment the sentence of the court may require, at as early a date after the sentence as practicable. For that purpose the board of county commissioners or metropolitan police commission shall pay all necessary costs, charges and expenses of the prisoner or prisoners, and of the officer or officers having charge thereof, to which shall be added mileage for each officer, at the rate of 20 cents per mile, one way only.

3. The provisions of subsection 2 apply in cases where prisoners are taken from county jails to be tried at any courts in other counties.

SEC. 90. NRS 212.030 is hereby amended to read as follows:

212.030 When any prisoner or prisoners escape from [the state prison,] it shall be lawful for the warden of the state prison to [an institution of the department of prisons, the director of the department may issue a warrant for the recapture of the escaped prisoner or prisoners, which warrant [shall have force and effect] is effective in any county in this state, and may command the sheriff of any county in this state, or any constable thereof, or any police officer of any city in this state, to arrest the prisoner or prisoners, and make return to the [warden,] director, with the prisoner or prisoners who may be arrested under the warrant.

SEC. 91. NRS 212.040 is hereby amended to read as follows:

212.040 If an escape is not the result of carelessness, incompetency, or other official delinquency of the [warden,] director or other officers of the [state prison, any and] department of prisons, all expenses of

enforcing the provisions of NRS 212.030, or [in any wise] appertaining to the recapture and return of escaped convicts [to the state prison, shall be] are a charge against the state, and shall be paid out of the reserve for statutory contingency fund upon approval by the state board of examiners.

SEC. 92. NRS 212.150 is hereby amended to read as follows:

212.150 1. [No] A person shall not visit, or in any manner communicate with, any prisoner convicted of or charged with any felony, imprisoned in the county jail, other than the officer having such prisoner in charge, his attorney, or the district attorney, [except such] unless the person has a written permission so to do, signed by the district attorney, or has the consent of the director of the department of prisons or the constable [,] or sheriff [or warden] having such prisoner in charge.

2. Any person violating, aiding in, conniving at, or participating in the violation of this section is guilty of a gross misdemeanor.

SEC. 93. NRS 212.160 is hereby amended to read as follows:

212.160 1. Any person, not authorized by law, who knowingly [shall furnish, or attempt] furnishes, or attempts to furnish, or [aid or assist] aids or assists in furnishing or attempting to furnish to any prisoner confined in [the state prison, state prison farm, conservation honor camp,] an institution of the department of prisons, or any other place where prisoners are authorized to be or are assigned by the [warden,] director of the department, any deadly weapon, explosives, any controlled substance as defined in chapter 453 of NRS, or intoxicating liquor, shall be punished:

(a) Where a deadly weapon, controlled substance or explosive is involved, by imprisonment in the state prison for not less than 1 year nor more than 6 years.

(b) Where an intoxicant is involved, for a gross misdemeanor.

2. Knowingly leaving or causing to be left any such article where it may be obtained by any such prisoner [shall be held to be,] constitutes, within the meaning of this section, the furnishing such article to such prisoner.

SEC. 94. NRS 213.020 is hereby amended to read as follows:

213.020 1. Any person intending to apply to have a fine or forfeiture remitted, or a punishment commuted, or a pardon granted, or someone in his behalf, shall make out quadruplicate copies of notices in writing of such application, specifying therein:

(a) The court in which the judgment was rendered.

(b) The amount of the fine or forfeiture, or kind or character of punishment.

(c) The name of the person in whose favor the application is to be made.

(d) The particular grounds upon which the application will be based.

(e) The time when it will be presented.

2. One of the copies shall be served upon the district attorney and one upon the district judge of the county wherein the conviction was had. The triplicate copy shall be served upon the [warden of the Nevada state prison] director of the department of prisons and the original copy shall be filed with the clerk of the board. In cases of fines and forfeitures

a similar notice shall also be served on the chairman of the board of county commissioners of the county wherein the conviction was had.

3. The notice shall be served, as herein provided, at least 30 days prior to the presentation of the application, unless a member of the board, for good cause, prescribes a shorter time.

Sec. 95. NRS 213.100 is hereby amended to read as follows:

213.100 Whenever clemency [shall have been] is granted by the board, there shall be served upon the [warden of the state prison,] *director of the department of prisons* or other officer having the person in custody, an order to discharge him therefrom upon a day to be named in the order, upon the conditions, limitations or restrictions named therein.

Sec. 96. NRS 228.150 is hereby amended to read as follows:

228.150 1. When requested, the attorney general shall give his opinion, in writing, upon any question of law, to the governor, the secretary of state, the state controller, the state treasurer, [the trustees, commissioners, or warden of the state prison, the state hospital, or the officers of any state institution,] *the director of the department of prisons*, to the head of any state department, agency, board or commission, to any district attorney and to any city attorney of any incorporated city within the State of Nevada, upon any question of law relating to their respective offices, departments, agencies, boards or commissions.

2. Nothing contained in subsection 1 [shall be construed to require] *requires* the attorney general to give his written opinion to any city attorney concerning questions relating to the interpretation or construction of city ordinances.

3. The attorney general shall receive no fee for the performance of any duty required of him by law.

Sec. 97. NRS 281.210 is hereby amended to read as follows:

281.210 1. Except as provided in this section, it is unlawful for any individual acting as a school trustee, state, township, municipal or county official, or as an employing authority of the University of Nevada, any school district or of the state, any town, city or county, or for any state or local board, agency or commission, elected or appointed, to employ in any capacity on behalf of the State of Nevada, or any county, township, municipality or school district thereof, or the University of Nevada, any relative of such individual or of any member of such board, agency or commission, within the third degree of consanguinity or affinity.

2. This section [shall not be construed to] *does not* apply:

(a) To school districts, when the teacher or other school employee so related is not related to more than one of the trustees or person who is an employing authority by consanguinity or affinity and shall receive a unanimous vote of all members of the board of trustees and approval by the state department of education.

(b) To school districts, when the teacher or other school employee so related has been employed by an abolished school district or educational district, which constitutes a part of the employing county school district, and the county school district for 4 years or more prior to April 1, 1957.

(c) To the wife of the [warden of the Nevada state prison.] *superintendent of an institution of the department of prisons.*

(d) To the wife of the superintendent of the Nevada girls training center.

(e) To relatives of blind officers and employees of the bureau of services to the blind of the rehabilitation division of the department of human resources when such relatives are employed as automobile drivers for such officers and employees.

3. Nothing in this section: [shall:

(a) Prevent:] (a) *Prevents* any officer in this state, employed under a flat salary, from employing any suitable person to assist in any such employment, when the payment for any such service shall be met out of the personal funds of such officer.

(b) [Be deemed to disqualify] *Disqualifies* any widow with a dependent or dependents as an employee of any officer or board in this state, or any of its counties, townships, municipalities or school districts.

4. [No] 4 person employed contrary to the provisions of this section shall *not* be compensated for such employment.

5. Any person violating any provisions of this section is guilty of a gross misdemeanor.

Sec. 98. NRS 412.278 is hereby amended to read as follows:

412.278 1. No provost marshal, commander of a guard, master at arms, [warden,] keeper or officer of a city or county jail or any other jail, penitentiary or prison designated under NRS 412.276 may refuse to receive or keep any prisoner committed to his charge, when the committing person furnishes a statement, signed by him, of the offense charged against the prisoner.

2. Every commander of a guard, master at arms, [warden,] keeper or officer of a city or county jail or of any other jail, penitentiary or prison designated under NRS 412.276 to whose charge a prisoner is committed shall, within 24 hours after that commitment or as soon as he is relieved from guard, report to the commanding officer of the prisoner the name of the prisoner, the offense charged against him, and the name of the person who ordered or authorized the commitment.

Sec. 99. NRS 433A.450 is hereby amended to read as follows:

433A.450 [Whenever a person, while undergoing imprisonment in the Nevada state prison, becomes mentally ill as determined by two mental health professionals, at least one of them being a psychiatrist, the warden shall apply to the administrator for detention and mental health treatment at an appropriate division facility as determined by the administrator. If adequate security and treatment services are not available in division facilities as determined by the administrator, the administrator shall make available consultation and other appropriate services within the resources available to the division as he deems necessary to the warden in order that the person is provided treatment at the Nevada state prison. It shall be the warden's decision whether to accept such services.] *When a psychiatrist and one other mental health professional determines that an offender confined in an institution of the department of prisons is mentally ill, the director of the department of prisons shall apply to the administrator for the offender's detention and treatment at a division facility selected by the administrator. If the administrator determines that adequate security or treatment is not available in a*

division facility, the administrator shall provide, within the resources available to the division and as he deems necessary, consultation and other appropriate services for the offender at the place where he is confined. It is the director's decision whether to accept such services.

SEC. 100. 1. NRS 209.010 to 209.070, inclusive, 209.090, 209.110, 209.120, 209.133 to 209.140, inclusive, 209.196, 209.200, 209.220, 209.240 to 209.380, inclusive, and 209.400 to 209.480, inclusive, are hereby repealed.

2. NRS 209.115, 209.130, 209.190 to 209.195, inclusive, 209.197, 209.230, 209.390 and 209.500 are hereby repealed.

3. Sections 10 to 19, inclusive, and section 22 of chapter 47, Statutes of Nevada 1977 (being Senate Bill No. 114 of the 59th session of the legislature) are hereby repealed.

SEC. 101. The legislative counsel shall, in preparing the supplement to Nevada Revised Statutes with respect to any section which is not amended by this act or which is further amended or added by another act, substitute an appropriate reference to the director of the department of prisons where reference is made to the former warden of the Nevada state prison.

SEC. 102. The inventory of the state prison warehouse on July 1, 1977, constitutes the opening balance of the prison warehouse fund.

SEC. 103. Subsections 2 and 3 of section 100 of this act shall become effective at 12:01 a.m. on July 1, 1977.

Assembly Bill No. 181—Committee on Labor and Management

CHAPTER 431

AN ACT relating to unemployment compensation; requiring a waiting period before an unemployed person is entitled to receive benefits; and providing other matters properly relating thereto.

(Approved May 8, 1977)

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 612.380 is hereby amended to read as follows:
612.380 [An individual shall be disqualified for benefits for the week in which he has filed a claim for benefits, if he has left his most recent work, or the work immediately preceding his most recent work, if he has not earned at least five times his weekly benefit amount following the work immediately preceding his most recent work, voluntarily without good cause, if so found by the executive director, and for not more than 15 consecutive weeks thereafter, occurring within the current benefit year, or within the current and following benefit year, as determined by the executive director according to the circumstances in each case. The total benefit amount, during his current benefit year, shall be reduced by an

amount equal to the number of weeks for which he is disqualified multiplied by his weekly benefit amount, provided no benefit amount shall be reduced by more than one-half the amount to which such individual is otherwise entitled.] *A person is ineligible for benefits for the week in which he has voluntarily left his last or next to last employment without good cause, if so found by the executive director, and until he earns remuneration in covered employment equal to or exceeding his weekly benefit amount in each of 10 weeks.*

Assembly Bill No. 334—Assemblyman Gomes

CHAPTER 432

AN ACT making an appropriation to the bureau of alcohol and drug abuse in the rehabilitation division of the department of human resources for allocation to certain local alcohol and drug abuse treatment programs; and providing other matters properly relating thereto.

(Approved May 8, 1977)

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. 1. There is hereby appropriated from the state general fund to the bureau of alcohol and drug abuse in the rehabilitation division of the department of human resources the sum of \$150,000 for each of the fiscal years beginning July 1, 1977, and July 1, 1978, to be allocated by the bureau to local alcohol and drug abuse treatment programs pursuant to subsection 2.

2. Any money allocated by the bureau shall not be expended unless an equal amount is provided from another source, and shall be used to provide for:

- (a) Detoxification programs;
- (b) Outpatient programs;
- (c) Residential programs; and
- (d) Education and prevention programs.

3. The bureau shall adopt regulations and establish procedures to carry out the purposes of this act and shall report the results of the program to the 60th session of the Nevada legislature.

EXHIBIT H

EXHIBIT H

Respondent's EXHIBIT # H

NDOC Temporary Administrative Regulations Summaries

(All regulations to be reviewed at least once every three years)

August 30, 2017

AR 114 Board of Prison Commissioners Meeting	Made Temporary Date: 6/15/17	Previous AR Date: 8/13/10
Summary of changes: Open meeting law requirements addressed. Mandatory regulation review. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 123 Divisional Reporting	Made Temporary Date: 6/16/17	Previous AR Date: 5/20/10
Summary of changes: Language update to include legislative mandatory reporting. Mandatory regulation review. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 153 Critical Incident Review	Made Temporary Date: 6/01/17	Previous AR Date: 12/17/13
Summary of changes: Mandatory regulation review. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 300 Recruitment and Hiring	Made Temporary Date: 7/20/17	Previous AR Date: 9/16/14
Summary of changes: Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 302 Meet and Confer	Made Temporary Date: 6/16/17	Previous AR Date: 8/13/10
Summary of changes: Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 305 Sexual Harrassment Prevention	Made Temporary Date: 6/15/17	Previous AR Date: 8/13/10
Summary of changes: Mandatory regulation review. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance, processes and investigations. Brought AR in compliance with federal and state regulations and the Governor's Policy Against Sexual Harassment.		
AR 306 Employee Grievance Procedure	Made Temporary Date: 7/20/17	Previous AR Date: 9/16/14
Summary of changes: Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for processes.		
AR 317 Employee Awards and Commendations	Made Temporary Date: 7/5/17	Previous AR Date: 3/19/13
Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for processes.		

NDOC 0282

01015

JA 1284

AR 319 Workplace Safety	Made Temporary Date: 07/05/17	Previous AR Date: 9/16/14
Summary of changes: Ensured updates reflected current federal and state OSHA requirements. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 321 Workplace Violence	Made Temporary Date: 07/05/17	Previous AR Date: 6/17/12
Summary of changes: Significant changes to bring regulation into compliance with federal and state regulations and best practices for a safe work environment and to prevent workplace violence. Language updated to include stalking and the act of extortion. Mandated reporting of specific incidents. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 330 Employee Resignation and Reinstatement/Rehire	Made Temporary Date: 7/20/17	Previous AR Date: 3/19/13
Summary of changes: Mandatory regulator update. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 339 Employee Code of Ethics and Conduct	Made Temporary Date: 7/1/17; 7/20/17	Previous AR Date: 1/14/16
Summary of changes: Updates to reflect changes in recent legislative actions for employee investigations, including defining the difference between an investigation, inquiry or fact-finding. Provided clarification on process measures and timelines to resolve investigatory procedures and actions. Modified prohibitions and penalties to provide greater flexibility for supervisor consideration of disciplinary actions. The regulations requires an internal administrative investigatory guide that will remain confidential within the Inspector General's Office. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 349 Employee/Applicant Alcohol and Drug Testing	Made Temporary Date: 7/20/17	Previous AR Date: 9/16/14
Summary of changes: Provided a review of the policy to reflect peace officer safety provisions that marijuana, whether or not by medical card, creates an impairment and impacts actions while serving in a public safety position. Included in the policy is procedures for random drug testing for drivers. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 350 Grooming and Dress Standards	Made Temporary Date: 7/20/17	Previous AR Date: 12/17/13
Summary of changes: Mandatory regulation review with changes to allow for more flexibility and non-gender specific grooming and dress standards. Worked to ensure flexibility for summer dress standards to allow the wearing of hats which will protect the back of the neck, as well as the face, when on the facility yards as well as polo shirts (at appropriate post assignments). Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 352 Staff Identification Cards	Made Temporary Date: 7/20/17	Previous AR Date: 6/17/12
Summary of changes: Mandatory regulation review. Formalized the process for employee		

NDOC 0283

01016

JA 1285

identification. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 357 Summons and Complaint Service of Process	Made Temporary Date: 7/20/17	Previous AR Date: 6/17/12
Summary of changes: Mandatory regulation review to update the current processes in line with the Attorney General's Office. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 364 Respiratory Protection Program	Made Temporary Date: 7/5/17	Previous AR Date: 10/15/13
Summary of changes: Updated the respiratory protection program with the OSHA guidelines in the CFR 29. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 430 Transportation of Inmates	Made Temporary Date: 07/20/17	Previous AR Date: 10/15/13
Summary of changes: Significant changes to the transportation of inmates to determine the authorized transportation; inspection of vehicles for contraband; the process for chase vehicles; pregnant inmates shall not be transported in waist and leg restraints; and restrict the armed officers from physically handling an inmate. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 431 Transportaton of Inmates to Court	Made Temporary Date: 7/20/17	Previous AR Date: 10/15/13
Summary of changes: Modified regulations to clarify practices and procedures for the transport of inmates to court to include criteria for separating security threat group members and transportation requirements for the safety of inmates and staff. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 494 Evaluation, Placement, and Treatment of Transgender and/or Intersex Inmates	Made Temporary Date: 7/20/17	Previous AR Date: New
Summary of changes: NDOC has worked with community partners from the LGBTQ community to implement a policy to ensure policies were enacted for evaluation, placement, and treatment of inmates who have undergone transgender treatment; are identified as transgender, intersex, or gender-variant, and to manage inmate safety and access to appropriate medical and mental helath care. AR 494 works in concert with NDOC's PREA Compliance Regulation.		
AR 545 Serious Illness/Escorted Leave	Made Temporary Date: 7/20/17	Previous AR Date: 6/17/12
Summary of changes: Mandatory regulation update to define immediate family; and in what situations and criteria that that escorted leave would and would not be permissible. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		

NDOC 0284

01017

JA 1286

AR 610 Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome AIDS	Made Temporary Date: 06/07/17	Previous AR Date: 10/12/16
Summary of changes: Incorporated last FY 17 legislative changes to statute to comply with federal regulations by updating information on when and who notification of confidential medical information is released. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 638 – Consent/Refusal of Treatment	Made Temporary Date: N/A	Previous AR Date: 6/17/12
Summary of changes: Mandatory regulation review to update the policy on consent and/or refusal of medical care. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 734 Inmate Disciplinary Detention	Made Temporary Date: N/A	Previous AR Date: 6/17/12
Summary of changes: Mandatory regulation review. Updates reflect compliance with other enacted regulations to ensure mental health professionals and correctional staff are ensuring that inmates are evaluated and treated appropriately prior to disciplinary action; to review and ensure the minimum level of sanctions are being applied to the appropriate level of offense; due-process is provided; and supervision and monitoring is being provided for those with the sanctions. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 740 Inmate Grievance Procedure	Made Temporary Date: N/A	Previous AR Date: 03/07/17
Summary of changes: After implementation of AR 740 in March and April 2017, NDOC staff identified necessary amendment to ensure a smooth flow of operations to ensure the intent of the policy is executed efficiently. Revisions reflect administrative flow modifications; administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		
AR 817 Community Re-Entry Program	Made Temporary Date: 7/10/17	Previous AR Date: 10/15/13
Summary of changes: Mandatory regulation review to clarify roles and responsibilities of program staff to ensure the effective delivery of re-entry programs that are evidence-based and consistent with the legislative direction as provided. Revisions included administrative language and technical amendments to clarify processes; updated applicable statutes and regulations; and ensured clear direction on responsibilities for compliance.		

Nevada Department of Corrections Glossary

A

Abandonment : The termination of review of any addressable grievance, at any level of the Inmate Grievance Procedure, resulting from the inmate's failure to file a timely, proper or procedurally sufficient grievance. (AR 740)

Accounting Inquiry Form: The accounting inquiry form, DOC-544, is the form used by an inmate to resolve fiscal issues regarding the inmate's account. (AR 201)

Administration of Medication: The direct, single dose application of a medication to the body of a patient whether by injection, ingestion, or any other means. (AR 635)

Administrative Regulations (AR): Nevada Department of Corrections administrative rules and administrative decisions derived by the authority from the state legislature. The Director is responsible to the Board of Prison Commissioners, which prescribes regulations for carrying on the business of the Board and Department. (NRS 209.111; 209.131)

Administrative Regulations Project Coordinator: Management Analyst IV (Policy Administrator) is responsible for managing and coordinating the development of the Administrative Regulations. (AR 100)

Admission/Intake: The process of receiving a newly committed inmate, parole violator or safekeeper into the custody of the Department. (AR 504)

Administrative Investigation: A formal investigative process regarding a complaint of employee misconduct. (AR 340)

Administrative Officer of the Day: A designated administrator, who will be notified by the institution/facility of any unusual incident during off-duty hours, weekends, and holidays, facilitates communication and advises the institution/facility on-duty supervisors. (AR 113, 420)

Administrative Segregation: A form of separation from the general population imposed by the classification committee, when the continued presence of the inmate in the general population or protective segregation would pose a serious threat to life, property, self, staff or other inmates, or to the security or orderly operation of the institution. (AR 507)

Adulterated Mail: Items of correspondence or publications that have an unknown substance on or in it. Adulteration includes, but is not limited to, lipstick, stickers, white out, perfumes and other unknown foreign substances. (AR750)

Adverse Action: Action taken to try and keep someone from opposing a discriminatory practice, or from participating in an employment discrimination proceeding. (AR 305)

BEFORE THE NEVADA STATE PERSONNEL COMMISSION
MARK GENTILE, HEARING OFFICER

JOSE MIGUEL NAVARRETE,

Case No.: 1713379-MG

Petitioner/Employee,

v.

DEPARTMENT OF CORRECTIONS,

Respondent/Employer

FILED

MAR 25 2019

APPEALS OFFICE

PREHEARING STATEMENT

Petitioner/Employee Jose Navarrete, by and through the undersigned attorney Daniel Marks, Esq., of the Law Office of Daniel Marks, hereby submits the following Pre-Hearing Statement.

I. BACKGROUND

Jose Navarrete was terminated for an incident at Southern Desert Correctional Center ("SDCC") involving another correction officer, Paul Valdez. At approximately 6:45 a.m., on October 9, 2016, a number of inmates were detained and stood up against the wall of the SDCC Culinary building. Over the course of several minutes, all of the inmates were released with the exception of inmate Rickie Norelus # 1104257. He was kept on the wall by Valdez due to noncompliance with Valdez's verbal commands.

While Officer Navarrete was leaning up against the wall, Valdez approached Norelus from behind with the apparent intent to place Norelus in handcuffs. At that point, it appeared to Navarrete that Norelus resisted this effort by pushing back. Valdez attempted to control Norelus by pushing his body closer up against the wall and reaching for Norelus' arm to bring it behind his back for cuffing. Immediately, and without advance warning to Navarrete, the two spun away from the wall onto the

DOCC012
-1-

01020
JA 1289

1 ground struggling. Pursuant to his training, Navarrete assisted Valdez to place Norelus in restraints and
2 thereafter reported the spontaneous use of force by Valdez.

3 Navarrete was shown the video shortly after the incident. While the video is of poor quality, it
4 reinforced Navarrete's impression that Officer Valdez was in fact attempting to restrain Norelus.
5 Navarrete later submitted a brief report in NOTIS regarding the incident. Navarrete wrote the
6 following brief report regarding the spontaneous use of force setting forth his impressions and
7 recollection:

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

16 This summary of the incident differed considerably from the report prepared by Officer Valdez.

17 On October 21, 2016, Navarrete was given official notice that he was under investigation for
18 the following allegations:

19 Departmental complaint alleges that on October 09, 2016 while on duty at SDCC Sr.
20 Correctional Officer Navarrete, José allowed a scenario where hands on use of force
21 was used and willfully and with intent, assisted in the excessive force upon an inmate.

22 Departmental complaint alleges that on October 09, 2016 while on duty at SDCC Sr.
23 Correctional Officer Navarrete, José wrote an official report relating to a use of force he
24 was involved in. The events of that use of force and Navarrete's subsequent report do
25 not share consistencies and rises to the level of fabrication in order to shield his true
actions.

On March 16, 2017 Navarrete was served with an NPD-41 Specificity of Charges recommending his
dismissal from State service.

The hearing on this matter was stayed because in addition to this internal investigation the
Office of Inspector General ("OIG") also conducted a criminal investigation. The OIG recommended
the Attorney General's office prosecute both Valdez and Navarrete for Oppression under Color of

Office, in violation of NRS 197.200, and False Report by Public Officer, in violation of NRS 197.130. The criminal case proceeded to trial and a jury acquitted both officers on all charges.

II. TIMELINESS

In 2011, Assembly Bill 179 was introduced by Assemblyman Elliot Anderson to amend NRS 284.387 to ensure fairness and due process in connection with internal investigations. Included within these amendments were strict time limits on internal investigations of employees. The purpose of the time limits on investigations was "to conclude a resolution of any investigation within 90 days" of the employee being given written notice of the investigation, but providing for extensions where necessary "with a complicated issue". The reason that such limits to discipline were enacted was "to ensure a shoe was not hanging over the head of our state employees indefinitely" because of the deleterious effects of prolonged investigations on the morale of the employee and their families. (Comments of Assemblyman Anderson and Kevin Ranft, AFSCME Local 4041 *Assembly Committee on Government Affairs* April 8, 2011). The time limits were further intended to ameliorate the financial effects of the State keeping employees on prolonged paid administrative leave. (*Senate Committee on Legislative Operations and Elections* May 10, 2011). These amendments were recognized as "a consensus between management and employees". (*Senate Committee on Legislative Operations and Elections* May 17, 2011).

The statute, NRS 284.387 states in pertinent part:

2. An internal administrative investigation that could lead to disciplinary action against an employee pursuant to NRS 284.385 and any determination made as a result of such an investigation must be completed and the employee notified of any disciplinary action within 90 days after the employee is provided notice of the allegations pursuant to paragraph (a) of subsection 1. If the appointing authority cannot complete the investigation and make a determination within 90 days after the employee is provided notice of the allegations pursuant to paragraph (a) of subsection 1, the appointing authority may request an extension of not more than 60 days from the Director upon showing good cause for the delay. No further extension may be granted unless approved by the Governor.

///

1 The statute is further accompanied by a regulation adopted by the Personnel Commission, NAC
2 284.6555, which states in pertinent part:

3 1. Pursuant to subsection 2 of NRS 284.387, if an appointing authority wishes to
4 request an initial extension of not more than 60 days from the Administrator to
5 complete an internal administrative investigation that could lead to disciplinary action
6 against an employee pursuant to NRS 284.385 and make a determination as a result of
7 the investigation, the appointing authority must:

8 (a) Submit the request to the Administrator on a form prescribed by the Division of
9 Human Resource Management on or before the 90th day after the employee was
10 provided notice of the allegations against the employee;

11 (b) Explain in the request why the appointing authority is unable to complete the
12 internal administrative investigation and make a determination within 90 days after the
13 employee was provided notice of the allegations; and

14 (c) Provide a copy of the request to the employee who is the subject of the internal
15 administrative investigation.

16 Navarrete was served with his notice of investigation on October 21, 2016. (Exhibit "1"). This
17 meant that he had to be served with an NPD-41 Specificity of Charges by no later than January 17,
18 2017.

19 On January 13, 2017, NDOC requested a 60 day extension from the Division of Human
20 Resource Management. The stated reason for the request was "The Specificity of Charges is currently
21 under review at the Attorney General's Office." (Exhibit "2"). The extension was granted on January
22 17, 2017, which was the last day to complete the investigation pursuant to NRS 284.387. (Exhibit "3").

23 Pursuant to the plain language of the statute, extensions may not be given based upon mere
24 request; rather such extensions are only granted "upon showing good cause for the delay." An
25 overextended caseload is not "good cause" for delay. Good cause must be "the result of the events
unforeseen and uncontrollable by both counsel and client". *Mississippi v. Turner*, 498 U.S. 1036, 111
S. Ct. 1032 (1991); *Mondiv, Div. of Lassonde Specialties, Inc. v. United States*, 219 F. Supp. 3rd 1364
(U.S. Court of Int. Trade 2017); *Pfeiffer v. Merit Sys. Prot. Bd.*, 230 F.3d 1375 (Fed. Cir. 1999).

1 There was no good cause for a delay requiring an extension, much less a showing of such by
2 NDOC when it made its request. Rather, the facts reveal that the OIG completed its investigation and
3 submitted the matter for adjudication to Warden Jo Gentry on December 9, 2016. Warden Gentry
4 sustained the charges on December 13, 2016. This is more than one month before the deadline.
5 (Exhibit "4").

6 As set forth above, the legislative history of NRS 284.387 makes clear that extensions are for
7 "complicated issues." There is nothing complicated about Navarrete's case. Navarrete was charged
8 with assisting "in the excessive force upon an inmate" and that his report was a "fabrication in order to
9 shield his true actions." (Exhibit "1"). According to NDOC, its disciplinary decisions are governed by
10 AR 339.

11 There was no reason why NDOC could not prepare an NPD-41 Specificity of Charges and have
12 such Specificity reviewed by the Attorney General's office in the one month between December 13,
13 2016 and January 17, 2017. The e-mails generated in connection with the requested extension do not
14 purport to claim "good cause for delay"; rather they demonstrate that NDOC was making multiple
15 requests in multiple cases. (Exhibit "5"). Because no showing of anything unforeseen or uncontrollable
16 was made on January 13, 2017, when the request was sought, the extension was unlawful and the
17 resulting discipline untimely.

18 In *Karen Haycox v. Department of Corrections*, Appeal No. 180-9372-RZ (November 29,
19 2018), the Hearing Officer held that the statutory language of NRS 284.387 and its counterpart
20 regulation at NAC 284.6555 "restrict the authority of the Administrator to grant a request for extension
21 only when an initial administrative investigation cannot be completed any determination made within
22 90 days and upon a showing of good cause for the request" and that the granting of additional time to
23 DPS in the absence of such a showing was "not authorized". (Exhibit "6").

24 Not only was the discipline untimely based upon the absence of any showing of good cause for
25 delay, NDOC further violated Navarrete's rights under NAC 284.6555 by not providing a copy of the

unlawful request for extension to Navarrete. Under NRS 289.080(8) Navarrete was entitled to the complete investigatory file. The file that was produced by NDOC is devoid of any documentation showing that NDOC provided a copy of the request for unlawful extension on or before that unlawful extension was granted.

III. JUST CAUSE UNDER THE *O'KEEFE* STANDARD

With the issuance of *O'Keefe v. Department of Motor Vehicles*, 134 Adv. Op. 92, 431 P.3d 350 (2018), the Supreme Court has now clarified how hearing officers are to review suspensions, demotions and dismissals from the classified service. No longer do hearing officers have to determine whether or not to defer to the appointing authority with regard to a determination as to whether a violation was committed. Under *O'Keefe*:

When a classified employee requests a hearing to challenge an agency's decision to terminate her as a first-time disciplinary measure, the hearing officer "determine [s] the reasonableness" of the agency's decision by conducting a three-step review process. NRS 284.390(1). 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 or regulations" such that the "severe measure[]" of termination is available as a first-time disciplinary action. 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. NRS 284.383(1); NAC 284.646(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 whether it was reasonable for the agency to "consider[] that the good of the public service w[ould] be served" by termination.

431 P.3d at 356. Only the third element – the agency's determination that termination will serve "the good of the public service" – is subject to deference to the appointing authority. However, the Supreme Court cautioned that such deference is not unlimited stating, "Although that inquiry affords deference to the agency's decision, it 'does not automatically mandate adherence to [the agency's] decision' as [d]eferential review is not no review, and deference need not be abject." *Id.*

Accordingly, in this particular case the hearing officer must determine *de novo* whether or not Navarrete utilized excessive force or knowingly made a false statement in his report. The State has the burden of proof on this issue.

Likewise, the hearing officer will determine *de novo* whether there was a serious violation of law or policy. This is because AR 339, upon which NDOC relies, has not been approved by the Personnel Commission. (Exhibit "6"). It was because the Personnel Commission had approved the Department of Motor Vehicles' Penalties and Prohibitions that the Supreme Court determined that the hearing officer abused her discretion in overturning the termination in *O'Keefe*. The Supreme Court noted that "*the DMV Prohibitions and Penalties were previously approved by the Personnel Commission*" and that the hearing officer second-guessing the DMV's assessment as to the seriousness of the violation of its own regulations had the result of "*defeating the purpose of requiring the Personnel Commission to approve agency's regulations in the first place.*" *O'Keefe*, at p. 8 and fn. 6 (emphasis added).

The procedure for having the Personnel Commission approve Penalties and Prohibitions is found at NAC 284.742, which states:

1. 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.

2. If an appointing authority revises the policy described in subsection 1, the appointing authority shall provide a copy of the revised policy to each employee.

3. An appointing authority shall include in the policy described in subsection 1 an explanation of the process of progressive discipline as administered by the appointing authority. The process must conform to the provisions of NRS 284.383 and NAC 284.638 to 284.6563, inclusive.

(Emphasis added). In order for Prohibitions and Penalties to designate a violation as "serious" as a matter of law, those Prohibitions and Penalties must be approved by the Personnel Commission as DMV's were in *O'Keefe*.

As practical matter, this case will be decided upon the first prong of *O'Keefe* – whether NDOC can prove excessive force by Navarrete. It will not be able to do so as the undisputed evidence is that the use of force was initiated by Valdez and that Navarrete did not lay hands on the inmate until after Valdez and the inmate were struggling on the ground. There will be no showing of excessive force by Navarrete.

Correctional officers are peace officers within the meaning of NRS Chapter 289. Under the minimum training standards enacted by the Nevada Commission on Peace Officer Standards and Training (“POST”) corrections officers received academy training in the use of force. *See* NAC 289.160(1)(e).

Under Nevada law, peace officers may use “reasonable force” to protect themselves and others. Under NDOC policy, “reasonable force” may be utilized to “subdue an attacker, overcome resistance, effect custody, or gain compliance with a lawful order”. NDOC’s definition of “Spontaneous Use of Force” includes: “Force used in an immediate situation or in response to a threat or emergency situation to dissuade or quell a course of action by an inmate”. The United States Supreme Court has recognized that in evaluating whether force is reasonable “corrections officials must make their decisions ‘in haste, under pressure, and frequently without the luxury of a second chance’.” *Hudson v. McMillian*, 503 U.S. 1, 6, 112 S. Ct. 995 (1992) (citing *Whitley v. Albers*, 475 U.S. 312, 320, 106 S.Ct. 1078, 1084 (1986)).

In *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865 (1989), the United States Supreme Court reiterated that use of force is to be evaluated under a standard of “objective reasonableness”. 490 U.S. at 391, 109 S. Ct. at 1869. The Supreme Court emphasized that the “reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 2020 vision of hindsight” and “not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers” is unreasonable. Rather:

1 The calculus of reasonableness must embody allowance for the fact that police officers
2 are often forced to make split-second judgments—in circumstances that are tense,
3 uncertain, and rapidly evolving—about the amount of force that is necessary in a
particular situation.

4 490 U.S. at 396-397, 109 S. Ct. at 1872. The evidence will demonstrate that NDOC's own
5 Administrative Regulation 405 "Use of Force" incorporates the "objective reasonableness" standard.

6 Likewise, the evidence will not show that Navarrete's report was knowingly false. Under
7 NDOC's AR 339 in order to violate 339.07.9 "False or Misleading Statements" the false or misleading
8 statement must be made "knowingly". See *Constantin Timis v. Nevada Department Corrections*,
9 Appeal 1902648-CMB (February 25, 2019).

10 The State's theory of the case in both its disciplinary and criminal case has been that both
11 Valdez and Navarrete lied in their reports to attempt to justify their use of excessive force. While this
12 may have been a viable theory for Valdez, it has never made any sense with regard to Navarrete
13 because Navarrete did not initiate the use of force and his only involvement was to assist Valdez only
14 after both Valdez and Norelus were struggling on the ground.

15 As set forth above, the versions of the incident as described in Valdez and Navarrete's reports
16 differ greatly. This hearing officer has already determined in appeal 1712965-MG that it was Valdez'
17 version which was false. Therefore, there is no just cause to terminate Navarrete.

18 **IV. WITNESSES**

- 19 1. Jose Navarrete, c/o Law Office of Daniel Marks, 610 S. Ninth Street, Las Vegas,
20 Nevada 89101;
- 21 2. Paul Lunkwitz, 7872 Tolberts Mill Drive, Las Vegas, Nevada 89131;
- 22 3. Mark Tansey, P.O. Box 530081, Henderson, Nevada 89053;

23 ///

24 ///

25 ///

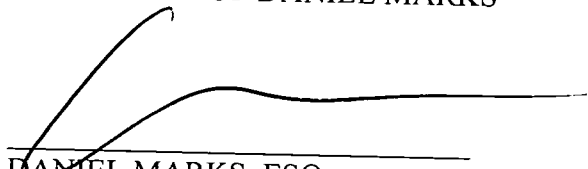
- 1 4. Brandon Marcano, 2108 Lady Lake Street, Las Vegas, Nevada 89128; and
2 5. Dean Willett, c/o Southern Desert Correctional Center, 20825 Cold Creek Road, Indian
3 Springs, Nevada 89018.

4 **V. EXHIBITS**

- 5 1. All videos produced in discovery;
6 2. All investigation materials;
7 3. All notices regarding investigation;

8 DATED this 25 day of March, 2019.

9 LAW OFFICE OF DANIEL MARKS

10 
11 _____
12 DANIEL MARKS, ESQ.
13 Nevada State Bar No. 002003
14 NICOLE M. YOUNG, ESQ.
15 Nevada State Bar No. 12659
16 610 South Ninth Street
17 Las Vegas, Nevada 89101
18 Attorney for Petitioner/Employee

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS and on the 25 day of March, 2019, I did serve the above and foregoing **PRE-HEARING STATEMENT** by way of email and did depositing a true and correct copy with first class postage fully prepaid thereon with the United States Post Office at Las Vegas, Nevada to the following addresses:

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

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

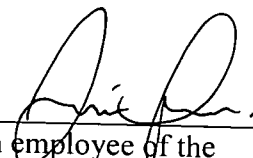

An employee of the
LAW OFFICE OF DANIEL MARKS

EXHIBIT 1

STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
NOTICE OF INTERROGATION/INTERVIEW
ADMINISTRATIVE INVESTIGATION
Peace Officer
IA-2016-145

TO: Navarrete, Jose Senior Correctional Officer, SDCC
FROM: Rod Moore, Supervisory Criminal Investigator, Office of the Inspector General
DATE: October 21, 2016

This is to advise you that you are the subject of an internal administrative investigation that could result in punitive action being taken against you. While investigators gather the facts concerning the allegations against you, be assured that every reasonable effort will be made to conduct the investigation in a neutral, fair, impartial, and timely manner. Your full cooperation is required. In accordance with NAC 284.650(23), failure to participate in an administrative investigation authorized by the Department is cause for disciplinary action. This investigation is based upon one or more allegations of improper conduct or activity that has been received by this office. Your statements during this interview may also be used as a witness statement in another case. Nothing in this process shall abridge any rights guaranteed by the Constitution of the United States or any other applicable law or regulation.

Pursuant to State law, (NRS 289.060) you have the right to have two representatives of your choosing present during any phase of an interrogation or hearing relating to the investigation including without limitation, a lawyer, a representative of a labor union or another peace officer when you are questioned regarding this/these allegations. You have up to 48 hours to obtain a lawyer or other authorized representative, if you so choose. However, the representative must not be a person connected to or named as a subject or witness to the investigation. It is your responsibility to arrange for the presence of a representative. Representatives who are also Department employees must not be on-duty during the time they are representing you. (AR 342.01)

It is alleged that you engaged in **UNAUTHORIZED USE OF FORCE and FALSE AND MISLEADING STATEMENTS**

Departmental complaint alleges that on October 09, 2016 while on duty at SDCC Sr. Correctional Officer Navarrete, Jose allowed a scenario where hands on use of force was used and willfully and with intent, assisted in the excessive force upon an inmate.

Departmental complaint alleges that on October 09, 2016 while on duty at SDCC Sr. Correctional Officer Navarrete, Jose wrote an official report relating to a use of force he was involved in. The events of that use of force and Navarrete's subsequent report do not share consistencies and rises to the level of fabrication in order to shield his true actions.

This matter has been assigned for investigation to **ROD MOORE** who is in charge of the investigation. You are directed to make yourself available for interview on **THURSDAY, OCTOBER 27, 2016 at 11:00 am.** The interview will be conducted by **ROD MOORE.** The interview will be held at **3955 W. RUSSELL ROAD, LAS VEGAS, NEVADA, AT THE CGTH BUILDING.** You are expected to provide candid and truthful information during the interview. Providing false or misleading statements to the interviewer is a separate violation that could result in additional disciplinary action, including termination.

This is an official investigation being conducted by the Department of Corrections. All matters are strictly confidential. In order to protect your confidentiality, the rights of other employees and involved persons, and the integrity of the investigation, you are hereby directed not to participate in the dissemination/discussion of any information based on this investigative process. In addition, you will exclude yourself from any form of communication with others regarding this investigation. Information shared with your representative is excluded from this directive. Any violation of this confidentiality directive or attempts to influence any witness or victim is a separate violation that could result in additional disciplinary action, including termination.

() I waive my right to have an attorney/representative present.

 X I wish to have IB1 represent me during this interview. **NDOC 0029**

01032
JA 1301

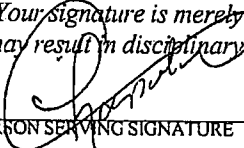
STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
NOTICE OF INTERROGATION/INTERVIEW
ADMINISTRATIVE INVESTIGATION
Peace Officer
IA-2016-145

Any information that a representative obtains from the peace officer who is the subject of the investigation is confidential and must not be disclosed, except under the prescribed mandated circumstances outlined in NRS 289.080.

IMPORTANT: *Your signature is not an admission of guilt. Your signature is merely an acknowledgement of receipt of this notice. Your refusal to sign this notice when ordered to do so may result in disciplinary action against you.*


EMPLOYEE SIGNATURE

10.21.14
DATE


PERSON SERVING SIGNATURE

10/21/14
DATE

EXHIBIT 2

AGENCY REQUEST TO EXTEND INTERNAL ADMINISTRATIVE INVESTIGATION

An investigation pursuant to NRS 284.385 must be investigated and the employee notified of the determination within 90 days after the employee is provided notice of the allegations on the *Notice of Employee Rights During an Internal Investigation* (NPD-32) form. This form must be used to request such an extension of not more than 60 days from the Administrator.

Subject of Internal Administrative Investigation

Employee Name:	Jose Navarrete
Employee Title:	Senior Correctional Officer
Employee ID:	041181

Extension Request Information

Date employee served Notice of Employee Rights During an Internal Investigation (NPD-32):	10/21/2016
Extension date requested (Please note a request for an extension must be submitted prior to exhaustion of the initial 90-day period):	01/13/2017

Please describe the cause for delay in notifying the employee of determination:
The Specificity of Charges is currently under review at the Attorney General's office.

Appointing Authority or Designee Information

Agency or Department:	Nevada Department of Corrections
Name:	Sharlet Gabriel
Title:	Division Administrator Human Resources
Phone Number:	702-486-9944
Email:	sgabriel@doc.nv.gov

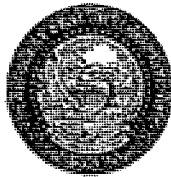
Please email request to:

Peter Long, Administrator
Division of Human Resource Management
c/o Carrie Lee
carrie.lee@admin.nv.gov
Phone (775) 684-0131

cc: Employee or Employee Representative

EXHIBIT 3

Brian Sandoval
Governor



Patrick Cates
Director

Peter Long
Administrator

STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION
Division of Human Resource Management

209 E. Musser Street, Suite 101 | Carson City, NV 89701
Phone: (775) 684-0150 | <http://hr.nv.gov>

DEC 29 2017

MEMORANDUM

January 17, 2017

TO: James Dzurenda, Director
Department of Corrections

FROM: Peter Long, Administrator *Peter Long*
Division of Human Resource Management

RE: 60-day Extension Request – Jose Navarrete

In response to your request for a 60-day extension in order to complete the administrative investigation for Jose Navarrete, Senior Correctional Officer, your request has been granted.

Please be advised pursuant to NRS 284.387(2) any further extension requests regarding Jose Navarrete, Senior Correctional Officer can only be granted by the Governor's Office.

PL:cl

NDOC 0001

01037
JA 1306

EXHIBIT 4

STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
OFFICE OF THE INSPECTOR GENERAL

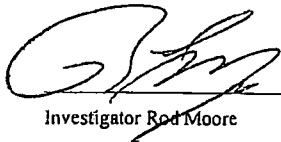
DATE: December 08, 2016
TO: Jo Gentry, Warden, Southern Desert Correctional Center
FROM: Rod Moore Supervisory Criminal Investigator, Office of the Inspector General
SUBJECT: REPORT OF PERSONNEL COMPLAINT INVESTIGATION
IA-2016-145

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

12/9/16
Date

Supervisor

Date

APPROVED

Pamela Del Portillo
Inspector General

INSPECTOR GENERAL
DOC

OFFICIAL USE ONLY

THIS DOCUMENT IS THE PROPERTY OF THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS. THE CONTENTS ARE CONSIDERED CONFIDENTIAL AND MAY NOT BE REPRODUCED OR DISSEMINATED WITHOUT THE EXPRESSED WRITTEN PERMISSION OF THE OFFICE OF THE INSPECTOR GENERAL.

NDOC 0041

01039
JA 1308

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



**State of Nevada
Department of Corrections**

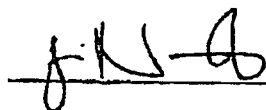
Brian Sandoval
Governor

James Dzurenda
Director

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.

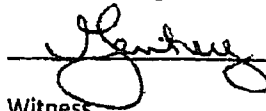
This recommendation is subject to final review and concurrence by the Department Human Resources' Office and/or Attorney General's Office.



Employee's Signature

12-13-16

Date



Witness

12-13-16

Date

NDOC 0089

01040

JA 1309

EXHIBIT 5

Teri Witherell - RE: HR Extensions

From: "Carrie L. Lee" <Carrie.Lee@admin.nv.gov>
To: "kgutierrez@doc.nv.gov" <kgutierrez@doc.nv.gov>
Date: 1/17/2017 8:44 AM
Subject: RE: HR Extensions
Cc: James Dzurenda <jedzurenda@doc.nv.gov>
Attachments: [REDACTED] HR-40 Navarrete 1.pdf; [REDACTED]

Navarrete.pdf [REDACTED]

Good morning,

Please see the attached approved extension requests for your reference.

Thank you,

Carrie Lee
Assistant to Administrator Peter Long
Division of Human Resource Management
(775) 684-0131 fax (775) 684-0122

From: Katie Gutierrez [kgutierrez@doc.nv.gov]
Sent: Friday, January 13, 2017 1:37 PM
To: Carrie L. Lee <Carrie.Lee@admin.nv.gov>; Gina E. Mick <gemick@admin.nv.gov>
Cc: John Borrowman <jborrowman@doc.nv.gov>; James Dzurenda <jedzurenda@doc.nv.gov>; Sharlet Gabriel <sgabriel@doc.nv.gov>; Teri Witherell <twitherell@doc.nv.gov>
Subject: HR Extensions

Hi Carrie,

May we have 60 day extensions on the following cases:

[REDACTED]

[REDACTED]

NDOC 0009

01042

JA 1311

60 Day Extension Needed

Navarrete, Jose (IA-2016-0145-04), Senior Correctional Officer, SDCC, Unauthorized Use of Force
Original Due Date: 01/19/2017

Please see requests attached. Thank you and have a wonderful weekend!

Katie Gutierrez

Admin Assistant III to:

Sharlet Gabriel, HR Administrator

3955 W. Russell Rd.

Las Vegas, NV 89118

Phone (702) 486-9914

Fax (702) 486-9974

This message, including any attachments, is the property of the Nevada Department of Corrections and is solely for the use of the individual or entity intended to receive it. It may contain confidential and proprietary information and any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient(s) or if you have received this message in error, please contact the sender by reply email and permanently delete it.

NDOC 0011

01043
JA 1312

EXHIBIT 6

1 **BEFORE THE NEVADA STATE PERSONNEL COMMISSION**

2 **HEARING OFFICER**

FILED

3 **NOV 29 2018**

4 **APPEALS OFFICE**

5 Karen J. Haycox,

6 Petitioner/Employee,

7 vs.

8 State of Nevada, Department of Public

9 Safety,

10 Respondent/Employer
11

) **Case No.: 1809372-RZ**

) **PETITION FOR RECONSIDERATION**

) **DECISION AND ORDER**

12
13 On November 21, 2018 the Employer submitted Petition for Reconsideration of
14 this Hearing Officer's Findings of Fact, Conclusions of Law and Decision and Order
15 issued November 8, 2018 in the above-entitled matter.

16
17 The Hearing Officer's Findings of Fact, Conclusions of Law, Decision and Order
18 were based solely on his evaluation of the admitted evidence, the testimony of the
19 witnesses during the hearing and the arguments of Counsel for the Parties.

20 The Employer argues that it was a clear error for the Hearing Officer to hold
21 that the internal administrative investigation was initiated on April 25, 2017 and
22 expired prior to the request for an extension of time to conclude the investigation.

23
24 The Employer also argues that it is clear error for the Hearing Officer to
25 conclude that the July 5, 2017 OPR Notice of Allegations for false and misleading
26 statements were new allegations, not noticed by DHRM, and consequently the
27 disciplinary action with the August 14, 2017 extension was timely.
28

NOV 30 2018

01045

JA 1314

1 **I. "INTERNAL ADMINISTRATIVE INVESTIGATION" AND "IMPARTIAL FACT**
2 **FINDING INVESTIGATION" ARE SYNONOMUS.**

3 There is no absurd result to conclude that "Impartial fact finding investigation"
4 found in NAC 284.655 and "Internal Administrative Investigation" in NRS 284.387 and
5 NAC 284.6555 have the same meaning and/or effect. The Employer focuses on the
6 word "internal" to argue that an impartial fact finding investigation" and "internal
7 administrative Investigation" are distinct. The Hearing Officer disagrees. The key in
8 the analysis is that due process requires an investigation be completed prior to
9 dismissing, suspending or demoting a permanent employee.
10

11 The NRS and NAC sections in question, as well as the legislative history
12 submitted by the parties makes it clear that the intention is to grant employees
13 consistent due process protections throughout the investigation. NAC 284.655
14 requires the Employer to conduct an impartial fact finding investigation "prior to
15 dismissing, suspending or demoting a permanent employee." (Emphasis added.)
16 NRS 284.387 does not explicitly require the Employer to conduct an "internal
17 administrative investigation" prior to dismissing, suspending, or demoting a permanent
18 employee. Accepting the Employer's view could result in employees being disciplined
19 without any investigation of the allegations. That is an absurd result which would deny
20 employees due process.
21
22
23

24 **II. INCORPORATION OF DHRM INVESTIGATION REPORT INTO OPR REPORT**

25 It appears the Employer is arguing that DHRM did not investigate the
26 allegations of making false and misleading statements and therefore those were new
27 allegations subject to a different timeline. That is incorrect based on the hearing
28

1 exhibits. The DHRM investigative report clearly shows that Investigator Gast
2 questioned the Employee regarding the scheduling of the FBI interviews, that he
3 contacted Mr. Fry and reported his findings to Julie Ornellas. The entire DHRM report,
4 with exhibits was included in the OPR investigation report. It is reasonable to
5 conclude then that Sergeant Madsen used that information in conducting his
6 investigation.
7

8 Consequently, for the purposes of NRS 284.387 and NAC 284.6555 the
9 timeline for this investigation began April 25, 2017, the day the Employee received
10 notice from DPS HR that she was being investigated for allegations of misconduct.
11 That notice does not indicate that the matter was being investigated by either DHRM
12 or DPS/OPR, but it was generated by DPS. Based on the fact the entire DHRM report
13 and exhibits were included in the OPR investigation report and every allegation, which
14 could amount to conduct creating a hostile work environment, was alleged to violate
15 DPS Policy and Regulations it is reasonable to conclude that DHRM contributed to the
16 OPR investigation.
17
18

19 **II. EXTENSION OF TIME TO CONCLUDE THE INVESTIGATION**

20 The Hearing Officer's decision that the Employer did not timely seek an
21 extension of time stands.
22

23 Even assuming, arguendo, the Employer's argument is correct and the timeline
24 for the investigation began July 10, 2017 the discipline is still invalid because on its
25 face the request for an extension of time fails under NRS 284.387 or NAC 284.6555.
26

27 ...

28 ...

1 On August 11, 2017 the Employer notified the Employee that the investigation
2 was complete and a determination made on the allegations.

3 The Employer requested an extension from the Administrator of DHRM for the
4 following reason:
5

6 The administrative investigation has now been completed and the
7 Department is currently reviewing the investigative findings to determine
8 the appropriate level of discipline.

9 NRS 284.387 states if "the appointing authority cannot complete the
10 investigation and make a determination within 90 days after the employee is provided
11 notice of the allegations. The appointing authority may request an extension of not
12 more than 60 days from the Director upon showing good cause for the delay."

13 NAC 284.6555 is more specific and requires the Appointing Authority to:
14

15 (b) Explain in the request why the appointing authority is unable to
16 complete the internal administrative investigation and make a
17 determination within 90 days after the employee was provided notice of
18 the allegations; and

19 The language of NRS 284.387 and NAC 284.6555 restrict the authority of
20 the Administrator to grant a request for extension only when an internal
21 administrative investigation cannot be completed and a determination made
22 within 90 days and upon a showing of good cause for the request. Granting
23 additional time simply to determine the appropriate level of discipline is not
24 authorized.

25 ...

26 ...

27 ...

28 -

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

The order that the disciplinary action be set aside and the Employee reinstated with full pay will not be disturbed.

Robert Zentz, Esq.
Hearing Officer

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

01050
JA 1319

EXHIBIT 7

STATE OF NEVADA PERSONELL COMMISION HEARING OFFICER

FILED

FEB 25 2019

APPEALS OFFICE

CONSTANTIN TIMIS,

Appeal No.: 1902648-CMB

Petitioner-Employee,

vs.

**FINDINGS OF FACT, CONCLUSIONS OF
LAW, DECISION AND ORDER**

NEVADA DEPARTMENT OF
CORRECTIONS,

RESPONDENT-EMPLOYER.

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

The above captioned matter came on for administrative hearing before the undersigned Hearing Officer on the 14th day of February, 2019. The Petitioner was present and represented by counsel, Adam Levine, Esq. of the Law Offices of Daniel Marks; and the State of Nevada, Department of Corrections ("NDOC") appeared by and through counsel, Katlyn Brady, Esq., Deputy Attorney General, State of Nevada. Petitioner initiated this administrative appeal of his dismissal from employment as a Correctional Officer ("CO") with NDOC, assigned to Casa Grande Transitional Housing Facility, by filing a timely appeal of his dismissal from State service on July 20, 2018 (Exhibit "A").

1 The following evidence was admitted and considered during the hearing:
2

- 3 • Respondent's Exhibits A-F, and J-L (Exhibits G, H and I were excluded).
4 • Petitioner's 1-14.
5

6 And Testimony, Under Oath, of:

- 7 ○ Constantin Timis, Petitioner
8 ○ Associate Warden, Gary Piccinini
9 ○ Warden, Jerry Powell
10 ○ CSN Professor, Rita Hayes
11 ○ Maya Timis
12 ○ Correctional Officer, Christopher James Perry, V
13 ○ Sr. Correctional Officer, Norma Leavitt
14

15 Having heard and considered the arguments of the parties and testimony of the witnesses
16 and having reviewed and considered the exhibits, pleadings and papers filed herein, the
17 undersigned Hearings Officer does hereby make the following Findings of Fact, Conclusions of
18 Law, Decision and Order.
19

20 **FINDINGS OF FACT**
21

22 Prior to his dismissal from service effective July 20, 2018, Mr. Timis had been employed
23 for approximately 4&1/2 years as a Correctional Officer ("CO") for the NDOC, the majority of
24 his time having been spent at the Casa Grande Traditional Housing Facility ("Casa Grande"). It
25 is undisputed that Mr. Timis had no prior discipline at the NDOC.
26

1 Mr. Timis was terminated for knowingly making false statements or omissions to his
2 supervisors. A summary of events and circumstances that culminated in the termination of Mr.
3 Timis are as follows:
4

5 Mr. Timis testified that prior to December of 2016, he had been granted a shift which
6 would allow him to work during the day and accommodate his joint custody schedule, allowing
7 him to spend time with his children, some of whom were experiencing behavioral issues. He had
8 obtained this particular scheduling by claiming hardship to his supervisors at the NDOC.
9
10

11 On January 25, 2017, Mr. Timis filed a formal grievance regarding a shift change that
12 occurred on December 27, 2016. In the formal grievance Mr. Timis referenced a previously filed
13 complaint for sexual harassment, and stated he believed his shift change was in retaliation for his
14 previous complaint for sexual harassment (Exhibit "1").
15

16 On November 30, 2017, Mr. Timis emailed Deputy Director David Tristan about a heated
17 interaction he had with Warden Neven, which Tristan had witnessed, over the ongoing shift
18 change accommodation dispute. A meeting was set up between Mr. Timis and Tristan for the
19 next day, on December 1, 2017 (Exhibit "4"). After that meeting, Director Tristan, committed,
20 in a written email, to a shift change for Mr. Timis, which would begin on December 18, 2017
21 (Exhibit "5").
22

23 According to testimony by the Petitioner's wife, Maya Timis, her mother had made
24 arrangements for the family to travel to the Bahamas for her 70th Birthday from March 25, 2018
25 to April 1, 2018. Mr. Timis testified he therefore requested vacation leave for that time period.
26

1 Associate Warden, Gary Piccinini testified that a meeting between he and Mr. Timis took
2 place on December 20, 2017. Mr. Timis testified that the meeting concerned both his continued
3 denial of a shift accommodation for hardship, and his denial of vacation leave requested for his
4 mother in law's birthday in the Bahamas, the latter which had been rejected by Piccinini. Timis
5 also testified that Director Tristan had approved his shift accommodation to begin on December
6 18, 2017, and that on December 20, 2017, two days had past, and the accommodation had not
7 been honored. Timis also testified that he informed Piccinini that his family had prepaid for
8 reservations or tickets in connection with a trip to the Bahamas. Mr. Piccinini admitted, under
9 oath, that Mr. Timis did not specifically reference "airplane" reservations or tickets during the
10 December 20, 2017 exchange. Mr. Timis testified that at a certain point during the December
11 20, 2017 meeting, Mr. Piccinini refused to allow Mr. Timis to speak further.

12
13
14 Thereafter, on December 20, 2017 at 2:28 p.m. Mr. Timis wrote an email to Mr.
15 Piccinini, Tristan, Gary Rosenfeld and James Dzurenda memorializing the December 20, 2017
16 meeting with Piccinini and reiterating his request for a shift change, as well as his leave request
17 for his family function which would take place from March 25, 2018 through April 1, 2018
18 (Exhibit "6"). This email attached the reservations/rental agreement made for a property rental
19 in the Bahamas during the dates for which Timis requested leave to go on the family vacation in
20 the Bahamas.

21
22
23 In response, on December 21, 2017 at 11:09 a.m., Piccinini wrote a return email
24 acknowledging receipt of the rental agreement, but stated it did not constitute a receipt for "plane
25 tickets". This December 21, 2017 return email also stated that Tristan had not approved his
26 leave, as such approval for vacation leave would have been documented (Exhibit "7").

1 On December 21, 2017 at 7:10 p.m. Tristan also wrote a response email stating he did not
2 approve vacation leave for any officer at any facility (Exhibit "8").

3
4 Thereafter, on December 21, 2017 at 10:47 p.m. Mr. Timis wrote a return email to
5 Tristan and Piccinini regarding annual leave and his requested shift accomodation. Therein he
6 stated he did not state Tristan had approved his vacation leave. Instead, he clarified he was
7 trying to tell Mr. Piccinini that his shift change had not taken place as Tristan had committed.
8 The email also states that Timis' direct manager, Rosenfeld, told him his "hands were tied" on
9 the issue of his shift change (Exhibit "9"). It is undisputed that Rosenfeld's supervisor is
10 Piccinini.
11

12 On January 3, 2018, Mr. Timis again emailed Piccinini, Tristan, Wickham, Dzurenda and
13 Wright (his chain of command) complaining he was being retaliated against in connection with
14 his request for hardship waiver for his shift change, and reporting that Piccinini falsely accused
15 him of claiming Tristan had approved his vacation leave (Exhibit "11"). In response, Piccinini
16 again requested copies of "plane tickets" in connection with his vacation leave request (Exhibit
17 "12"). Mr. Timis testified he had not purchased airplane tickets in connection with the
18 preplanned family vacation, was therefore denied vacation leave by Piccinini, and was therefore
19 prevented from attending his mother in law's 70th Birthday trip.
20

21 On February 20, 2018, Timis was served with a Notice of Interrogation/Interview
22 advising him he was the subject of internal investigation and alleging he engaged in false and
23 misleading statements on December 20, 2017 in both verbal and email correspondence that he
24 had pre-purchased "airline tickets" for his family function between March 25, 2018 and April 1,
25
26

1 2018, and that he falsely claimed Tristan approved his annual leave for vacation on those dates
2 (Exhibit "13").

3
4 The matter was assigned to Investigator Philip Gang who concluded that: "The
5 discussion regarding the issue of shift bid and alleged approval of annual leave by Deputy
6 Director Tristan appeared to be intertwined within several e-mails and additional conversations
7 that occurred on earlier dates prior to the 12/20/17 interaction between all parties involved
8 creating a possible miscommunication of what was represented by Officer Timis." (Exhibit
9 "14").
10

11 The sworn testimony of Mr. Timis, his wife, Maya Timis, Correctional Officer, Perry, Sr.
12 Correctional Officer, Norma Leavitt, and CSN Professor Rita Hayes, was that Mr. Timis is of
13 trustworthy character, and not known to make false statements; and that Mr. Timis did not speak
14 English as a first language, and is known to misunderstand or miscommunicate based upon his
15 language barriers.
16

17 CONCLUSIONS OF LAW

18 NRS and NAC 284 set forth the statutory framework governing the Nevada Personnel
19 System.

20 Pursuant to the authority granted under NRS 284.383, the Commission promulgated
21 regulations which set forth specific causes for disciplining State employees. Those regulations
22 have the full force and effect of law. *Turk v. Nevada State Prison*, 94 Nev. 101, 104 (1978).
23 NAC 284.646(1) sets forth the basis for which an appointing authority may dismiss an employee
24 and provides:
25
26

1
2 **NAC 284.646 Dismissals.**

- 3 1. An appointing authority may dismiss an employee of any cause set forth in NAC 284.650
4 if:
5 (a) The agency with which the employee is employed has adopted any rules or policies
6 which authorize the dismissal of an employee for such a cause; or
7 (b) The seriousness of the offense or condition warrants such dismissal.

8 Further, pursuant to the Nevada Supreme Court's ruling in *O'Keefe v. Dept of Motor*
9 *Vehicles*, 134 Nev.Adv.Op. 92 (December 6, 2018), the Court established a three part test
10 hearing officers should apply when evaluating a termination appeal as follows: 1) The hearing
11 officer to apply a substantial evidence standard when determining if a violation occurred; 2) The
12 hearing officer is to determine if the violation is serious enough to support termination as a first
13 time disciplinary action; and 3) The hearing officer is to apply a deferential standard to review
14 the agency's termination will serve the good of the public.

15 In the instant case, grounds for Mr. Timis' termination are found in NAC
16 284.650(1)&(17), and AR 339.07.9(A).

17 NAC 284.650 provides for appropriate disciplinary or corrective action may be taken in
18 the following instances:

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

22 NAC 284.650(17) Falsification of any record.
23
24
25
26

1
2 **AR 339.07.9 FALSE OR MISLEADING STATEMENTS**

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

10 **CLASS 5.**

11 The duty of the hearing officer at a hearing requested pursuant to NRS 284.390 is to
12 determine the reasonableness of the disciplinary action taken against the employee who has been
13 dismissed, demoted or suspended. See NRS 284.390(1). In reviewing the actions taken the
14 employer against the employee, the hearing officer is to make an independent determination as to
15 whether there is evidence showing the discipline would serve the good of the public service.
16 *Knapp v. State Dep't of Prisons*, 111 Nev. 420 (1995). In *Whalen v. Welliver*, 60 Nev. 154; 104
17 P.2d 188 (1940), the Nevada Supreme Court held that this requirement necessitates a showing of
18 just cause or "legal cause" for the discipline. The cause must be one touching the qualifications
19 of the officer or his performance of his duties, showing that he is not a fit or proper person to
20 hold the office. *Id.* At 158. An agency cannot act arbitrarily and capriciously when taking
21 disciplinary action. In other words, an agency cannot act in disregard of the facts and
22 circumstances involved. *Meadow v. Civil Service Ed. Of Las Vegas Metro. Police Dept.*, 105
23 Nev. 624, 627 (1989).
24
25
26

1 "[W]hile hearing officers may determine the reasonableness of disciplinary actions and
2 recommend appropriate levels of discipline, only appointing authorities have the power to
3 prescribe the actual discipline imposed on permanent classified state employees." *Taylor v.*
4 *Dept. of Health and Human Services*, 314 P.3d 951 (2013). The Employer has the burden of
5 presenting evidence and argument to prove the allegations presented in the specificity of charges
6 and whether there is "just cause" to discipline the employee. The findings of fact and decision of
7 the Hearing Officer must be based on a preponderance of the evidence NRS 233B.125.
8

9 DISCUSSION AND ANALYSIS

10
11 In order to determine whether there was just cause to terminate Mr. Timis, it must be first
12 determined whether there is substantial evidence to support a finding that Mr. Timis violated the
13 laws and regulations set forth in the Specificity of Charges.

14 **1. Did Mr. Timis "knowingly" make false or misleading statements or omissions to his** 15 **supervisors?**

16 Mr. Timis testified that prior to December of 2016, he had been granted a shift which
17 would allow him to work during the day and accommodate his joint custody schedule, allowing
18 him to spend time with his children, some of whom were experiencing behavioral issues. He had
19 obtained this particular scheduling by claiming hardship to his supervisors at the NDOC.
20

21 On January 25, 2017, Mr. Timis filed a formal grievance regarding a shift change that
22 occurred on December 27, 2016. In the formal grievance Mr. Timis referenced a previously filed
23 complaint for sexual harassment, and stated he believed his shift change was in retaliation for his
24 previous complaint for sexual harassment (Exhibit "1").
25
26

1 On November 30, 2017, Mr. Timis emailed Deputy Director David Tristan about a heated
2 interaction he had with Warden Neven, which Tristan had witnessed, over the ongoing shift
3 change accommodation dispute. A meeting was set up between Mr. Timis and Tristan for the
4 next day, on December 1, 2017 (Exhibit "4"). After that meeting, Director Tristan, committed,
5 in a written email, to a shift change for Mr. Timis, which would begin on December 18, 2017
6 (Exhibit "5").
7

8 According to testimony by the Petitioner's wife, Maya Timis, her mother had made
9 arrangements for the family to travel to the Bahamas for her 70th Birthday from March 25, 2018
10 to April 1, 2018. Mr. Timis testified he therefore requested vacation leave for that time period.
11

12 Associate Warden, Gary Piccinini testified that a meeting between he and Mr. Timis took
13 place on December 20, 2017. Mr. Timis testified that the meeting concerned both his continued
14 denial of a shift accommodation for hardship, and his denial of vacation leave requested for his
15 mother in law's birthday in the Bahamas, the latter which had been rejected by Piccinini. Timis
16 also testified that Director Tristan had approved his shift accommodation to begin on December
17 18, 2017, and that on December 20, 2017, two days had past, and the accommodation had not
18 been honored. Timis also testified that he informed Piccinini that his family had prepaid for
19 reservations or tickets in connection with a trip to the Bahamas. Mr. Piccinini admitted, under
20 oath, that Mr. Timis did not specifically reference "airplane" reservations or tickets during the
21 December 20, 2017 exchange. Mr. Timis testified that at a certain point during the December
22 20, 2017 meeting, Mr. Piccinini refused to allow Mr. Timis to speak further.
23

24 Thereafter, on December 20, 2017 at 2:28 p.m. Mr. Timis wrote an email to Mr.
25 Piccinini, Tristan, Gary Rosenfeld and James Dzurenda memorializing the December 20, 2017
26

10

meeting with Piccinini and reiterating his request for a shift change, as well as his leave request for his family function which would take place from March 25, 2018 through April 1, 2018 (Exhibit "6"). This email attached the reservations/rental agreement made for a property rental in the Bahamas during the dates for which Timis requested leave to go on the family vacation in the Bahamas.

In response, on December 21, 2017 at 11:09 a.m., Piccinini wrote a return email acknowledging receipt of the rental agreement, but stated it did not constitute a receipt for "plane tickets". This December 21, 2017 return email also stated that Tristan had not approved his leave, as such approval for vacation leave would have been documented (Exhibit "7").

On December 21, 2017 at 7:10 p.m. Tristan also wrote a response email stating he did not approve vacation leave for any officer at any facility (Exhibit "8").

Thereafter, on December 21, 2017 at 10:47 p.m. Mr. Timis wrote a return email to Tristan and Piccinini regarding annual leave and his requested shift accommodation. Therein he stated he did not state Tristan had approved his vacation leave. Instead, he clarified he was trying to tell Mr. Piccinini that his shift change had not taken place as Tristan had committed. The email also states that Timis' direct manager, Rosenfeld, told him his "hands were tied" on the issue of his shift change (Exhibit "9"). It is undisputed that Rosenfeld's supervisor is Piccinini.

On January 3, 2018, Mr. Timis again emailed Piccinini, Tristan, Wickham, Dzurenda and Wright (his chain of command) complaining he was being retaliated against in connection with his request for hardship waiver for his shift change, and reporting that Piccinini falsely accused him of claiming Tristan had approved his vacation leave (Exhibit "11"). In response, Piccinini

1 again requested copies of "plane tickets" in connection with his vacation leave request (Exhibit
2 "12"). Mr. Timis testified he had not purchased airplane tickets in connection with the
3 preplanned family vacation, was therefore denied vacation leave by Piccinini, and was therefore
4 prevented from attending his mother in law's 70th Birthday trip.
5

6 On February 20, 2018, Timis was served with a Notice of Interrogation/Interview
7 advising him he was the subject of internal investigation and alleging he engaged in false and
8 misleading statements on December 20, 2017 in both verbal and email correspondence that he
9 had pre-purchased "airline tickets" for his family function between March 25, 2018 and April 1,
10 2018, and that he falsely claimed Tristan approved his annual leave for vacation on those dates
11 (Exhibit "13").
12

13 The matter was assigned to Investigator Philip Gang who concluded that: "The
14 discussion regarding the issue of shift bid and alleged approval of annual leave by Deputy
15 Director Tristan appeared to be intertwined within several e-mails an additional conversations
16 that occurred on earlier dates prior to the 12/20/17 interaction between all parties involved
17 creating a possible miscommunication of what was represented by Officer Timis." (Exhibit
18 "14").
19

20 The sworn testimony of Mr. Timis, his wife, Maya Timis, Correctional Officer, Perry, Sr.
21 Correctional Officer, Norma Leavitt, and CSN Professor Rita Hayes, was that Mr. Timis is of
22 trustworthy character, and not known to make false statements; and that Mr. Timis did not speak
23 English as a first language, and is known to misunderstand or miscommunicate based upon his
24 language barriers.
25
26

1 Based upon the testimony of the witnesses regarding Timis' language barriers and
2 trustworthiness; the misunderstandings of Tristan and Piccinini regarding both Timis' vacation
3 leave request and shift change; and Piccinini's sworn testimony that Timis never stated he had
4 "airplane tickets", the substantial evidence supports a finding that Timis did not "knowingly"
5 make false or misleading statements or omissions.
6

7 **CONCLUSION**

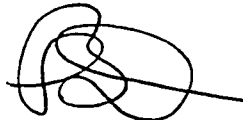
8 The reliable, substantial, and probative evidence shows that Mr. Timis' termination was
9 not supported by the substantial evidence, not for good cause, and not established to be for the
10 good of the public.
11

12 **ORDER**

13 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

14 That the decision to terminate Mr. Timis from his employment with the NDOC is hereby
15 **REVERSED.**
16

17 Dated this 15th of February, 2019.



18
19 CAROLYN BROUSSARD, ESQ.
Hearing Officer
20

21 **NOTICE:** Pursuant to NRS 233B.130, should any party desire to appeal this final
22 determination of the Appeals Officer a Petition for Judicial Review must be filed with the
23 District Court within 30 days after service by mail of this decision.
24
25
26

1
2 CERTIFICATE OF SERVICE

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

7 CONSTANTIN TIMIS
8 3910 W FISHER AV
9 LAS VEGAS NV 89031

10 ADAM LEVINE
11 LAW OFFICES OF DANIEL MARKS
12 610 S 9TH ST
13 LAS VEGAS NV 89101

14 DEPARTMENT OF CORRECTIONS
15 JAMES DZURENDA, DIRECTOR
16 3955 WEST RUSSELL ROAD
17 LAS VEGAS NV 89118

18 CHRISTINA LEATHERS, HUMAN RESOURCES MANAGER I
19 NEVADA DEPARTMENT OF CORRECTIONS
20 3955 W RUSSELL RD
21 LAS VEGAS NV 89118-2316

22 KATLYN BRADY, DEPUTY ATTORNEY GENERAL
23 OFFICE OF THE ATTORNEY GENERAL
24 555 E WASHINGTON AV #3900
25 LAS VEGAS NV 89101

26 Dated this 25th day of February, 2019.

27 *Zoe McGough*
28 Zoe McGough, Legal Secretary
Employee of the State of Nevada

BEFORE THE NEVADA STATE PERSONNEL COMMISSION
MARK GENTILE, HEARING OFFICER

JOSE MIGUEL NAVARRETE

Case No.: 1713379-MG

Petitioner/Employee,

v.

DEPARTMENT OF CORRECTIONS,

Respondent/Employer.

SUBPOENA FOR
ADMINISTRATIVE HEARING

Regular ☒ Duces Tecum ☐

THE STATE OF NEVADA SENDS GREETINGS TO:

PAUL LUNKWITZ
7872 Tolberts Mill Drive
Las Vegas, Nevada 89131

WE COMMAND YOU, that all and singular business and excuses being set aside, you appear and attend as a witness on behalf of, before the Nevada State Personnel Commission Hearing Officer, at **12:00 p.m. on April 2, 2019** until released, located at the Department of Administration, 2200 South Rancho Drive, Suite 220, Las Vegas, Nevada, 89102.

If you fail to attend, the Hearings Officer will take any and all appropriate action to enforce this Subpoena including, but not limited to, certifying this matter to the District Court for Contempt of Court.

Please contact attorney 24 hours prior to date and time specified above to confirm date and time of your required appearance.

STATE OF NEVADA
DEPARTMENT OF PERSONNEL

By: Mark J. Marks 3-20-19
Hearing Officer Date

Issued at the Request of:
LAW OFFICE OF DANIEL MARKS
DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
Attorney for Petitioner/Employee

00C013

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.

SUBPOENA FOR
ADMINISTRATIVE HEARING
Regular ☒ Duces Tecum ☐

8 **THE STATE OF NEVADA SENDS GREETINGS TO:**

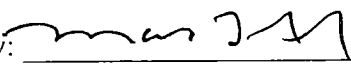
9 BRANDON MARCANO
10 2108 Lady Lake Street
Las Vegas, Nevada 89128

11 WE COMMAND YOU, that all and singular business and excuses being set aside, you appear
12 and attend as a witness on behalf of, before the Nevada State Personnel Commission Hearing Officer,
13 at **12:00 p.m. on April 2, 2019** until released, located at the Department of Administration, 2200 South
14 Rancho Drive, Suite 220, Las Vegas, Nevada, 89102.

15 If you fail to attend, the Hearings Officer will take any and all appropriate action to enforce this
16 Subpoena including, but not limited to, certifying this matter to the District Court for Contempt of
17 Court.

18 **Please contact attorney 24 hours prior to date and time specified above to confirm date and**
19 **time of your required appearance.**

20 STATE OF NEVADA
21 DEPARTMENT OF PERSONNEL

22 By:  3-20-19
Hearing Officer Date

22 Issued at the Request of:
23 LAW OFFICE OF DANIEL MARKS
DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
24 *Attorney for Petitioner/Employee*

DOC014
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.

SUBPOENA FOR
ADMINISTRATIVE HEARING

Regular ☒ Duces Tecum ☐

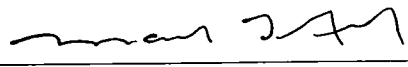
8 **THE STATE OF NEVADA SENDS GREETINGS TO:**

9 DEAN WILLET
10 c/o Southern Desert Correctional Center
11 20825 Cold Creek Road
Indian Springs, Nevada 89018

12 WE COMMAND YOU, that all and singular business and excuses being set aside, you appear
13 and attend as a witness on behalf of, before the Nevada State Personnel Commission Hearing Officer,
14 at **12:00 p.m. on April 2, 2019** until released, located at the Department of Administration, 2200 South
15 Rancho Drive, Suite 220, Las Vegas, Nevada, 89102.

16 If you fail to attend, the Hearings Officer will take any and all appropriate action to enforce this
17 Subpoena including, but not limited to, certifying this matter to the District Court for Contempt of
18 Court. **Please contact attorney 24 hours prior to date and time specified above to confirm date and**
19 **time of your required appearance.**

20 STATE OF NEVADA
21 DEPARTMENT OF PERSONNEL

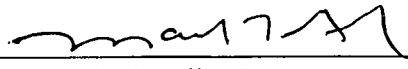
By:  3-20-19
Hearing Officer Date

22 Issued at the Request of:
23 LAW OFFICE OF DANIEL MARKS
24 DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
Attorney for Petitioner/Employee


00C016
1

1 IN WITNESS WHEREOF, I have hereunto set my hand on behalf of the State of Nevada
2 Department of Administration, this ~~20th~~ day of March, 2019.

3
4 DEPARTMENT OF ADMINISTRATION
5 PERSONNEL COMMISSION HEARING OFFICER

6 By 
7 Mark Gentile, Esq.

8 Issued at the request of:
9 AARON D. FORD, Attorney General

10 By 
11 Michelle Di Silvestro Alanis
12 Deputy Attorney General
13 555 E. Washington Ave., Ste. 3900
14 Las Vegas, NV 89101-1068
15 malanis@ag.nv.gov
16 Tel: (702) 486-3268
17 Fax: (702) 486-3773
18 Attorney for Respondent-Employer,
19 Nevada Department of Corrections
20
21
22
23
24
25
26
27
28

1 **BEFORE THE NEVADA STATE PERSONNEL COMMISSION**

2 **HEARING OFFICER**

3
4 JOSE MIGUEL NAVARRETE,)

5 Petitioner-Employee,)

6 vs.)

7 DEPARTMENT OF CORRECTIONS,)

8 Respondent-Employer.)

Appeal No.: 1713379-MG

9
10 **SUBPOENA**

11 **PURSUANT TO THE AUTHORITY OF NRS 284.391:**

12 **Jo Gentry**
13 

14 YOU ARE HERELY COMMANDED, that all and singular business and excuses being set aside,
15 you appear and attend as a witness and give testimony before the State of Nevada Department of
16 Administration Personnel Commission Hearing Officer, at 9:00 a.m. on April 2, 2019, until released,
17 located at the State of Nevada, Department of Administration, Appeals Office, 2200 South Rancho Drive,
Suite 220, Las Vegas, Nevada 89101.

18 YOU ARE FURTHER COMMANDED to bring with you at the time of your appearance the
19 books, documents, or tangible things set forth below that are in your possession, custody, or control. All
20 documents shall be produced as they are kept in the usual course of business or shall be organized and
labeled to correspond with the categories listed.

21 WITNESS FEES: Pursuant to NRS 284.392, all witnesses appearing pursuant to subpoena, other
22 than parties or officers or employees of the State of Nevada or any political subdivision thereof, are
entitled to receive fees and mileage in the same amounts and under the same circumstances as prescribed
23 by law for witnesses in civil action in the district courts.

24 FOR FAILURE TO ATTEND, you will, upon application by the Appeals Officer to the District
25 Court, be deemed GUILTY OF CONTEMPT OF COURT and shall forfeit to the party aggrieved the sum
of ONE HUNDRED DOLLARS (\$100.00) and all damages which the party may sustain by failure of the
26 witness to attend, which forfeiture and damages may be recovered in a civil action.

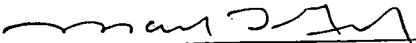
27 Please contact the attorney who requested the issuance of this Subpoena (see below) at least 24
28 hours prior to the date and time specified above to confirm the date and time of your required appearance.

DOCO18
-1-

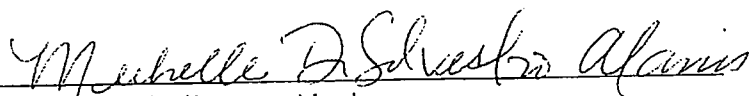
01072
JA 1341

1 IN WITNESS WHEREOF, I have hereunto set my hand on behalf of the State of Nevada
2 Department of Administration, this 20~~4~~ day of March, 2019.

3 DEPARTMENT OF ADMINISTRATION
4 PERSONNEL COMMISSION HEARING OFFICER

5 By 
6 Mark Gentile, Esq.

7
8 Issued at the request of:
9 AARON D. FORD, Attorney General

10 By 
11 Michelle Di Silvestro Alanis
12 Deputy Attorney General
13 555 E. Washington Ave., Ste. 3900
14 Las Vegas, NV 89101-1068
15 malanis@ag.nv.gov
16 Tel: (702) 486-3268
17 Fax: (702) 486-3773
18 Attorney for Respondent-Employer,
19 Nevada Department of Corrections
20
21
22
23
24
25
26
27
28

1 **BEFORE THE NEVADA STATE PERSONNEL COMMISSION**

2 **HEARING OFFICER**

3
4 JOSE MIGUEL NAVARRETE,)

5 Petitioner-Employee,)

6 vs.)

7 DEPARTMENT OF CORRECTIONS,)


8 Respondent-Employer.)

Appeal No.: 1713379-MG

SUBPOENA

9
10 **PURSUANT TO THE AUTHORITY OF NRS 284.391:**

11 **David Molnar**

12 
13
14 YOU ARE HERELY COMMANDED, that all and singular business and excuses being set aside,
15 you appear and attend as a witness and give testimony before the State of Nevada Department of
16 Administration Personnel Commission Hearing Officer, at **9:00 a.m. on April 2, 2019**, until released,
located at the State of Nevada, Department of Administration, Appeals Office, 2200 South Rancho Drive,
Suite 220, Las Vegas, Nevada 89101.

17 YOU ARE FURTHER COMMANDED to bring with you at the time of your appearance the
18 books, documents, or tangible things set forth below that are in your possession, custody, or control. All
19 documents shall be produced as they are kept in the usual course of business or shall be organized and
labeled to correspond with the categories listed.

20 WITNESS FEES: Pursuant to NRS 284.392, all witnesses appearing pursuant to subpoena, other
21 than parties or officers or employees of the State of Nevada or any political subdivision thereof, are
22 entitled to receive fees and mileage in the same amounts and under the same circumstances as prescribed
by law for witnesses in civil action in the district courts.

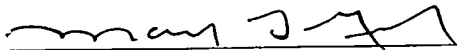
23 FOR FAILURE TO ATTEND, you will, upon application by the Appeals Officer to the District
24 Court, be deemed GUILTY OF CONTEMPT OF COURT and shall forfeit to the party aggrieved the sum
25 of ONE HUNDRED DOLLARS (\$100.00) and all damages which the party may sustain by failure of the
witness to attend, which forfeiture and damages may be recovered in a civil action.

26 Please contact the attorney who requested the issuance of this Subpoena (see below) at least 24
27 hours prior to the date and time specified above to confirm the date and time of your required appearance.
28

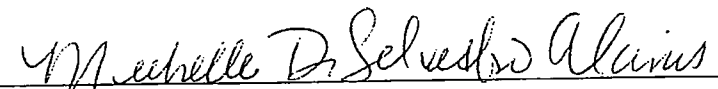
00C019

1 IN WITNESS WHEREOF, I have hereunto set my hand on behalf of the State of Nevada
2 Department of Administration, this 20th day of March, 2019.

3 DEPARTMENT OF ADMINISTRATION
4 PERSONNEL COMMISSION HEARING OFFICER

5 By 
6 Mark Gentile, Esq.

7
8 Issued at the request of:
9 AARON D. FORD, Attorney General

10 By 
11 Michelle Di Silvestro Alanis
12 Deputy Attorney General
13 555 E. Washington Ave., Ste. 3900
14 Las Vegas, NV 89101-1068
15 malanis@ag.nv.gov
16 Tel: (702) 486-3268
17 Fax: (702) 486-3773
18 Attorney for Respondent-Employer,
19 Nevada Department of Corrections
20
21
22
23
24
25
26
27
28

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

3
4 JOSE MIGUEL NAVARRETE,)

5 Petitioner-Employee,)

6 vs.)

7 DEPARTMENT OF CORRECTIONS,)

8 Respondent-Employer.)
9

Appeal No.: 1713379-MG

SUBPOENA

10 **PURSUANT TO THE AUTHORITY OF NRS 284.391:**

11 **Rod Moore**
12 **Office of the Inspector General**
13 **Nevada Department of Corrections**
14 **5500 Snyder Ave. Building 17**
15 **Carson City, Nevada 89702**

16 YOU ARE HEREY COMMANDED, that all and singular business and excuses being set aside,
17 you appear and attend as a witness and give testimony before the State of Nevada Department of
18 Administration Personnel Commission Hearing Officer, at **9:00 a.m. on April 2, 2019**, until released,
19 located at the State of Nevada, Department of Administration, Appeals Office, 2200 South Rancho Drive,
20 Suite 220, Las Vegas, Nevada 89101.

21 YOU ARE FURTHER COMMANDED to bring with you at the time of your appearance the
22 books, documents, or tangible things set forth below that are in your possession, custody, or control. All
23 documents shall be produced as they are kept in the usual course of business or shall be organized and
24 labeled to correspond with the categories listed.

25 WITNESS FEES: Pursuant to NRS 284.392, all witnesses appearing pursuant to subpoena, other
26 than parties or officers or employees of the State of Nevada or any political subdivision thereof, are
27 entitled to receive fees and mileage in the same amounts and under the same circumstances as prescribed
28 by law for witnesses in civil action in the district courts.

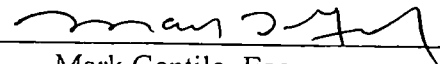
29 FOR FAILURE TO ATTEND, you will, upon application by the Appeals Officer to the District
30 Court, be deemed GUILTY OF CONTEMPT OF COURT and shall forfeit to the party aggrieved the sum
31 of ONE HUNDRED DOLLARS (\$100.00) and all damages which the party may sustain by failure of the
32 witness to attend, which forfeiture and damages may be recovered in a civil action.

33 Please contact the attorney who requested the issuance of this Subpoena (see below) at least 24
34 hours prior to the date and time specified above to confirm the date and time of your required appearance.


DOC020
- 1 -

1 IN WITNESS WHEREOF, I have hereunto set my hand on behalf of the State of Nevada
2 Department of Administration, this 20th day of March, 2019.

3 DEPARTMENT OF ADMINISTRATION
4 PERSONNEL COMMISSION HEARING OFFICER

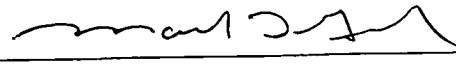
5 By 
6 Mark Gentile, Esq.

7
8 Issued at the request of:
9 AARON D. FORD, Attorney General

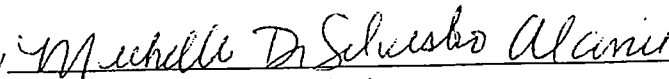
10 By 
11 Michelle Di Silvestro Alanis
12 Deputy Attorney General
13 555 E. Washington Ave., Ste. 3900
14 Las Vegas, NV 89101-1068
15 malanis@ag.nv.gov
16 Tel: (702) 486-3268
17 Fax: (702) 486-3773
18 Attorney for Respondent-Employer,
19 Nevada Department of Corrections
20
21
22
23
24
25
26
27
28

1 IN WITNESS WHEREOF, I have hereunto set my hand on behalf of the State of Nevada
2 Department of Administration, this 20th day of March, 2019.

3 DEPARTMENT OF ADMINISTRATION
4 PERSONNEL COMMISSION HEARING OFFICER

5
6 By 
Mark Gentile, Esq.

7
8 Issued at the request of:
9 AARON D. FORD, Attorney General

10 By 
11 Michelle Di Silvestro Alanis
12 Deputy Attorney General
13 555 E. Washington Ave., Ste. 3900
14 Las Vegas, NV 89101-1068
15 malanis@ag.nv.gov
16 Tel: (702) 486-3268
Fax: (702) 486-3773
Attorney for Respondent-Employer,
Nevada Department of Corrections

1 **BEFORE THE NEVADA STATE PERSONNEL COMMISSION**

2 **HEARING OFFICER**

3
4 JOSE MIGUEL NAVARRETE,)

5 Petitioner-Employee,)

6 vs.)

7 DEPARTMENT OF CORRECTIONS,)

8 Respondent-Employer.)

Appeal No.: 1713379-MG

SUBPOENA

9
10 **PURSUANT TO THE AUTHORITY OF NRS 284.391:**

11 **Officer David Wachter**
12 **Nevada Department of Corrections**
13 **3955 W. Russell Road**
Las Vegas, Nevada 89118

14 YOU ARE HEREY COMMANDED, that all and singular business and excuses being set aside,
15 you appear and attend as a witness and give testimony before the State of Nevada Department of
16 Administration Personnel Commission Hearing Officer, at **9:00 a.m. on April 2, 2019**, until released,
located at the State of Nevada, Department of Administration, Appeals Office, 2200 South Rancho Drive,
Suite 220, Las Vegas, Nevada 89101.

17
18 YOU ARE FURTHER COMMANDED to bring with you at the time of your appearance the
19 books, documents, or tangible things set forth below that are in your possession, custody, or control. All
documents shall be produced as they are kept in the usual course of business or shall be organized and
labeled to correspond with the categories listed.

20
21 WITNESS FEES: Pursuant to NRS 284.392, all witnesses appearing pursuant to subpoena, other
22 than parties or officers or employees of the State of Nevada or any political subdivision thereof, are
entitled to receive fees and mileage in the same amounts and under the same circumstances as prescribed
by law for witnesses in civil action in the district courts.

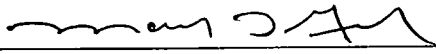
23
24 FOR FAILURE TO ATTEND, you will, upon application by the Appeals Officer to the District
Court, be deemed GUILTY OF CONTEMPT OF COURT and shall forfeit to the party aggrieved the sum
25 of ONE HUNDRED DOLLARS (\$100.00) and all damages which the party may sustain by failure of the
witness to attend, which forfeiture and damages may be recovered in a civil action.

26
27 Please contact the attorney who requested the issuance of this Subpoena (see below) at least 24
hours prior to the date and time specified above to confirm the date and time of your required appearance.


28
00C022

1 IN WITNESS WHEREOF, I have hereunto set my hand on behalf of the State of Nevada
2 Department of Administration, this 20~~th~~ day of March, 2019.

3 DEPARTMENT OF ADMINISTRATION
4 PERSONNEL COMMISSION HEARING OFFICER

5 By 
6 Mark Gentile, Esq.

7
8 Issued at the request of:
9 AARON D. FORD, Attorney General

10 By 
11 Michelle Di Silvestro Alanis
12 Deputy Attorney General
13 555 E. Washington Ave., Ste. 3900
14 Las Vegas, NV 89101-1068
15 malanis@ag.nv.gov
16 Tel: (702) 486-3268
17 Fax: (702) 486-3773
18 Attorney for Respondent-Employer,
19 Nevada Department of Corrections
20
21
22
23
24
25
26
27
28

BEFORE THE NEVADA STATE PERSONNEL COMMISSION

HEARING OFFICER

FILED

FEB - 7 2019

APPEALS OFFICE

JOSE MIGUEL NAVARRETE,

Petitioner-Employee,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent-Employer.

Appeal No: 1713379-MG

NOTICE OF HEARING

The hearing in the above entitled action is scheduled to begin on April 2, 2019, at 9:00 a.m. at the following location:

State of Nevada
Department of Administration
2200 South Rancho Drive, Suite 220
Las Vegas, Nevada 89102

On or before March 25, 2019, Pre-Hearing Statements must be served and filed setting forth the following matters in the following order:

- a) A statement of admitted or undisputed facts.
- b) A concise statement of the claimed facts supporting the party's claims or defenses.
- c) A statement of issues of law with supporting case and statutory authority (memorandum of authorities) and appropriate supporting legal argument.
- d) All Exhibits intended to be introduced with an explanation of each Exhibit's relevance to the party's case.
- e) The names and addresses of all witnesses.
- f) Any other appropriate comment, suggestion, or information for the assistance of the hearing officer in the hearing of the case.
- g) Certification by counsel that discovery has been completed, unless late discovery has been allowed by order of the hearing officer.

DOC023

01082

JA 1351

1 A hard copy of the Pre-Hearing Statement and any Exhibits must be filed with the State of
2 Nevada Department of Administration at 2200 South Rancho Drive, Suite 220, Las Vegas,
3 Nevada, 89102. Pre-Hearing Statements and Exhibits must be served upon the opposing party.
4 In addition, an electronic copy of Pre-Hearing Statements and Exhibits must be sent to the
5 Hearing Officer's designated assistant.

6 If either party needs the Hearing Officer to issue Subpoenas, the original Subpoenas
7 must be presented for issuance no later than March 19, 2019.

8 Motions must be filed no later than February 19, 2019.

9 If either party needs additional assistance of the Hearing Officer to resolve any
10 disputes regarding this matter, please contact the Hearing Officer to schedule a conference
11 call.

12 DATED this 7th day of February, 2019.

13
14
15 
16 MARK GENTILE, ESQ.
17 HEARINGS OFFICER
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

The undersigned, an employee of the State of Nevada, Department of Administration, Appeals Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing NOTICE OF HEARING was duly mailed, postage prepaid, **OR** transmitted via interoffice mail to the following:

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


DANIEL MARKS
LAW OFFICE OF DANIEL MARKS
610 S NINTH ST
LAS VEGAS NV 89101

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

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

MICHELLE D. ALANIS, DEPUTY ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
BUREAU OF LITIGATION - PERSONNEL DIVISION
555 E WASHINGTON AV #3900
LAS VEGAS NV 89101

Dated this 7th day of February, 2019.



Zoe McGough, Legal Secretary II
Employee of the State of Nevada

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

JAN 16 2019

APPEALS OFFICE

8
9 **ORDER REGARDING MOTION TO DISQUALIFY**

10 On December 28, 2018, Petitioner-Employee, Jose Miguel Navarette, filed the Motion to
11 Disqualify Hearing Officer Gentile from hearing this matter involving Jose Navarette.

12 The upcoming case involving Mr. Navarette involves an incident that occurred at the
13 Southern Nevada Correctional Center on October 9, 2018. The incident involved Correctional
14 Officer Paul Valdez and Correctional Officer Jose Navarette. I was previously assigned the hearing
15 involving the discharge of Correctional Officer Paul Valdez with respect to the incident that occurred
16 on October 9, 2018. There was, in fact, a video of the event which was part of the evidence
17 produced in that case and my memory was that for some period of time, Correctional Officer Jose
18 Navarette did appear in that video. I, frankly, do not recall the extent of time Mr. Navarette was
19 present in the video nor do I recall any of his specific actions. There were several correctional
20 officers that appeared at various points. My review and decision of the case involving Correctional
21 Officer Paul Valdez involved only the allegations against him and the conduct that was described
22 through the witnesses and depicted in the video of the incident. I did not consider the conduct of any
23 of the other individuals who may have tangentially been involved in this situation. At this point, I
24 do not know for certain what allegations have been asserted against Jose Miguel Navarette. I believe
25 he was terminated, but I do not know the basis of the termination or any of the particular facts
26 leading up to his termination.

27 At this point, I do not feel any bias for or against Petitioner-Employee Jose Navarette. I will
28 engage as a Hearing Officer in his case and listen to the evidence presented and make a proper
determination based upon his specific conduct and the evidence that is presented at a hearing in his

DOC024

01085

JA 1354

1 specific case. In reviewing the Motion to Disqualify, there was a specific citation to the case of
2 *FCHI, LLC v. Rodriguez*, 130 Nev. 425, 325 P.3d 183 (2014). I reviewed that case and really do
3 not understand why or how that situation, in any way, relates to my ability to serve as a Hearing
4 Officer in this particular case. In *FCHI*, District Court Judge Jessie Walsh presided in a bench trial
5 in which she awarded the plaintiff over \$6,000,000.00 in damages. On appeal, it was found that
6 Judge Walsh committed a number of evidentiary errors. The District Court Judge admitted and
7 considered inadmissible testimony by the plaintiff's treating physicians. She allowed these treating
8 physicians to testify as designated experts when, in fact, they were only designated as treating
9 physicians. Two other doctors for the plaintiff also testified, and were allowed to testify, in excess
10 of their roles as treating doctors. She also excluded the defendant's expert from testifying, in error,
11 where the Supreme Court concluded that the expert was qualified and had rendered proper and
12 appropriate opinions. The Supreme Court concluded that because the District Court Judge, in *FCHI*,
13 heard evidence that should have been excluded and formed an opinion of the ultimate merits, that
14 the case should be reassigned upon remand.

15 I do not quite understand why the *FCHI* case has anything to do with the issue of recusal in
16 the Navarette matter. While I did, at one point, review the video of the incident in determining the
17 hearing of Correction Officer Valdez, my focus in that hearing were the actions and conduct of Mr.
18 Valdez and whether or not the discipline imposed on him was appropriate, under the circumstances.
19 My review of the tape was not, in any way, done to critique the conduct of Jose Navarette and I did
20 not do so. I do not recall any testimony from officer Navarette at the prior hearing. I have never
21 formed and never expressed any opinion on the ultimate merits of the case involving Mr. Navarette.
22 I fail to comprehend how the *FCHI* case has any application to the determination in this particular
23 matter.

24 I have reviewed Nevada case law with respect to recusals and, particularly, the case of
25 *Millen v. Eighth Judicial District Court*, 122 Nev. 1245, 148 P.3d 694 (2006). The *Millen* case has
26 an in depth discussion and analysis of when a judge must recuse himself, which I am extending by
27 analogy to a hearing officer. The *Millen* court stated as follows:

28 NCJC Canon 3E(1) explains when a judge should not sit on a case and provides, in

1 pertinent part, as follows:

2 A judge shall disqualify himself or herself in a proceeding in which the
3 judge's impartiality might reasonably be questioned, including but not limited
4 to instances where:

- 5 (a) the judge has a personal bias or prejudice concerning a party
6 or a party's lawyer, or personal knowledge of disputed
7 evidentiary facts concerning the proceeding;
- 8 (b) the judge served as a lawyer in the matter in controversy, or
9 a lawyer with whom the judge previously practiced law
10 served during such association as a lawyer concerning the
11 matter, or the judge has been a material witness concerning it;
- 12 (c) the judge knows that he or she, individually or as a fiduciary,
13 or the judge's spouse, parent or child wherever residing, or
14 any other member of the judge's family residing in the judge's
15 household, has an economic interest in the subject matter in
16 controversy or in a party to the proceeding or has any other
17 more than de minimis interest that could be substantially
18 affected by the proceeding;
- 19 (d) the judge or judge's spouse, or a person within the third
20 degree of relationship to either of them, or the spouse of such
21 a person;
- 22 (I) is a party to the proceeding, or an officer, director or
23 trustee of a party;
- 24 (ii) is acting as a lawyer in the proceeding;
- 25 (iii) is known by the judge to have a more than de minimis
26 interest that could be substantially affected by the
27 proceeding.
- 28 (iv) is to the judge's knowledge likely to be a material
 witness in the proceeding.

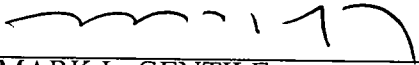
NCJC Canon 3E(1)(a) provides a subjective basis for disqualification in that only the
judge can determine whether he or she has a personal bias or prejudice toward
litigants or their counsel or possesses personal knowledge about the case.

I do not believe any of the criteria set forth in the *Millen* case applies to me in this case, or
justifies my disqualification. While I did see a video of the underlying event in a previous hearing,
I am anticipating that the exact same video is going to be used and produced to me in this matter to
be viewed in light of the conduct and participation of Mr. Navarette. I have learned, from the
pleadings, that there might be another video which depicts the incident from a different perspective
and I certainly welcome that and will consider that in conjunction with all the evidence presented

1 at the hearing in this case. I anticipate that this is going to be an entirely new hearing, involving a
2 new person, with new allegations, and entirely new evidence.

3 At this point, the request to disqualify myself from hearing this matter involving Jose
4 Navarette is DENIED.

5 DATED this 15 day of January, 2019.

6
7 
8 MARK L. GENTILE
9 Hearing Officer
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

The undersigned, an employee of the State of Nevada, Department of Administration, Appeals Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing **ORDER REGARDING MOTION TO DISQUALIFY** was duly mailed, postage prepaid, **OR** transmitted via interoffice mail to the following:

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

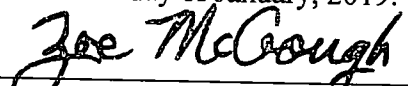
DANIEL MARKS
LAW OFFICE OF DANIEL MARKS
610 S NINTH ST
LAS VEGAS NV 89101

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

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

MICHELLE D. ALANIS, DEPUTY ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
BUREAU OF LITIGATION - PERSONNEL DIVISION
555 E WASHINGTON AV #3900
LAS VEGAS NV 89101

Dated this 16th day of January, 2019.



Zoe McCough, Legal Secretary
Employee of the State of Nevada

STATE OF NEW YORK
DEPARTMENT OF
CORRECTIONS
RECEIVED
JAN 16 1961
COMMUNICATIONS
DIVISION
No.: 1713379-MG
JAN 16 1961
DEPARTMENT OF

Respondent-Employer.

Appeal No.: 1713379-MG

Respondent-Employer, Department of Corrections (NDOC) by and through its counsel, Aaron D. Ford, Attorney General for the State of Nevada, and Michelle Di Silvestro Alanis, Deputy Attorney General, hereby files its Opposition to Petitioner's Motion to Disqualify Hearing Officer Gentile (Motion).

Petitioner-Employee, Jose M. Navarrete (Employee), requests that the hearing officer currently assigned to this appeal be disqualified. NDOC files this Opposition and would request that the Motion be denied because Employee has failed to show any basis for disqualification.

Employee was a senior correctional officer with NDOC assigned to Southern Desert Correctional Center (SDCC). Employee was terminated effective April 21, 2017 for the following violations:

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 employee's duties, including without limitation, stalking, conduct that is threatening or intimidating, assault, or battery.

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

00C025

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

The incident, which gave rise to employee's discipline, occurred on October 9, 2016, involving Employee, Correctional Officer Paul Valdez and inmate Rickie Norelus. Following a meal, Officer Valdez was randomly searching inmates leaving culinary. A video outside culinary recorded the incident and the recording demonstrates that six inmates were placed on the wall leaving culinary. Five inmates were searched and were released. Inmate Norelus was searched, no contraband appeared to have been found, yet, that inmate was required to stand facing the wall, with his arms above his head for over ten minutes. During that time, Officer Valdez is standing behind the inmate, talking to him, while Employee walks around and leans casually against the wall, even turning his back to the inmate. Valdez's body language becomes increasingly agitated and aggressive and eventually Valdez comes up behind the inmate, pushes up against him, then put his right arm around his neck and wrestles him to the ground. There was nothing to indicate that this spontaneous use of force was warranted or required.

Employee appealed his discipline on May 8, 2017.

On December 27, 2017, pursuant to Employee's request, the undersigned counsel provided Employee's investigatory file in this case. See Letter to Daniel Marks, Esq. from Michelle D. Alanis dated December 27th attached hereto as Exhibit "1."

A hearing was originally scheduled for January 25, 2018. However, prior to the hearing, Employee was charged criminally for the allegations at issue in this appeal and the parties agreed to stay the case pending the resolution of the criminal case.

Officer Valdez whose employment with NDOC was also terminated appealed his discipline and a hearing went forward on December 6, 2017. Hearing Officer Gentile also presided over Valdez's disciplinary appeal and issued a decision on January 8, 2018, affirming NDOC's decision to terminate Officer Valdez. See *Decision and Order* attached hereto as Exhibit "2."

On December 17, 2018, counsel for Employee advised the hearings division that the criminal matter was resolved and Employee wished to proceed with the administrative appeal. Following, this

1 email, Employee's counsel did not make any requests for discovery to the undersigned.

2 On December 28, 2018, Employee filed the instant Motion to Disqualify Hearing Officer Gentile.
3 In his Motion, Employee has cited to no cognizable case law to support his contention that Hearing
4 Officer Gentile must be disqualified or recused from this matter. Additionally, Employee has provided
5 no facts or evidence to support any bias by Hearing Officer Gentile. Instead, Employee makes numerous
6 baseless contentions about Mr. Valdez's case.

7 Employee seeks disqualification of Hearing Officer Gentile because he alleges that during
8 discovery in **the criminal matter**, Employee realized there was a video that was not previously disclosed
9 by the State. Employee alleges that the video is relevant to the termination case and attached an affidavit
10 of Employee's criminal counsel regarding his efforts to obtain the video during the discovery phase of
11 the criminal matter. The motion fails to identify the contents of the video and how they are relevant to
12 the case. More importantly, Employee fails to address why Hearing Officer Gentile if presented with this
13 "new" video could not act in an impartial and unbiased matter in Employee's case.

14 LAW AND ARGUMENT

15 The Hearing Officer Rules govern the assignment of Hearing Officers and method of selection
16 which allows **each** party to strike one hearing officer from a list of three qualified hearing officers. *See*
17 Hearing Officer Rules of Procedure 2.2 (emphasis added). There is no mechanism in the Hearing Officer
18 Rules to request disqualification or recusal of a hearing officer. However, Hearing Officer Rule 2.2(6)(b)
19 states that "if a hearing officer finds it necessary to recuse himself or herself from hearing an appeal, the
20 basis for said recusal shall be documented in writing and addressed to the Senior Appeals Officer of the
21 Hearings Division, who will then provide a new list of hearing officers to the parties in accordance with
22 the provisions of 2.2(a)."

23 NRS 1.230 provides in pertinent part:

24 1. A judge shall not act as such in an action or proceeding when the
25 judge entertains **actual bias or prejudice** for or against one of the parties
to the action.

26 2. A judge shall not act as such in an action or proceeding when
27 **implied bias** exists in any of the following respects:

28 (a) When the judge is a party to or interested in the action or
proceeding.

1 (b) When the judge is related to either party by consanguinity or
affinity within the third degree.

2 (c) When the judge has been attorney or counsel for either of the
3 parties in the particular action or proceeding before the court.

4 (d) When the judge is related to an attorney or counselor for either
of the parties by consanguinity or affinity within the third degree. This
5 paragraph does not apply to the presentation of ex parte or uncontested
6 matters, except in fixing fees for an attorney so related to the judge.

7 A party to an action who seeks to disqualify a judge for actual or implied bias or prejudice must
8 file an affidavit specifying the facts upon which the disqualification is sought not less than 20 days before
9 the date set for trial or hearing or not less than 3 days before the date set for the hearing of any pretrial
10 matter. NRS 1.235.

11 "A judge has as great an obligation not to disqualify himself, when there is no occasion to do so,
12 as he has to do in the presence of valid reasons." *Goldman v. Bryan*, 104 Nev. 644, 649, 764 P.2d 1296,
13 1299 (1988) citing *Amidon v. State*, 604 P.2d 575, 577 (Alaska 1979). A Judge has "a duty to preside ...
14 in the absence of some statute, rule of court, ethical standard, or other compelling reason to the contrary."
15 See *Ham v. District Court*, 93 Nev. 409, 566 P.2d 420 (1977). When a judge determines that he may not
16 voluntarily disqualify himself his decision should be given substantial weight and should not be
17 overturned in the absence of clear abuse of discretion. See *United States v. Haldeman*, 559 F.2d 31, 139
18 (D.C. Cir. 1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2641, 53 L.Ed.2d 250 (1977); *Amidon*, 604 P.2d
19 at 577. A judge is presumed not to be biased and the burden is on the party asserting the challenge to
20 establish sufficient factual grounds warranting disqualification. *Goldman* at 649.

21 Here, Employee does not allege, and there is nothing on the record to indicate, that Hearing
22 Officer Gentile meets any of NRS 1.230 factors. Employee has failed to allege any facts that Hearing
23 Officer Gentile has acted with actual or implied bias. There are no allegations that Hearing Officer Gentile
24 is a party or interested in the appeal. There are no allegations that Hearing Officer Gentile is related to
25 either party. There are no allegations that Hearing Officer Gentile was an attorney for either of the parties
26 in the action. There are no allegations that the hearing officer Gentile is related to any of the attorneys for
27 the parties.

28 ///

1 Instead, Employee is attempting to shop for a new hearing officer because he is dissatisfied with
2 Hearing Officer Gentile's ruling in his co-worker's case where the alleged "new" video was not admitted
3 into evidence. This is an impermissible sort of judicial-shopping. "[R]ulings and actions of a judge
4 during the course of official judicial proceedings do not establish legally cognizable grounds for
5 disqualification." *Matter of Dunleavy*, 104 Nev. 784, 789-90, 769 P.2d 1271, 1275 (1988), *citing United*
6 *States v. Board of Sch. Com'rs, Indianapolis, Ind.*, 503 F. 2d 68, 81 (7th Cir. 1974), *cert. denied*, 439 U.S.
7 824. The personal bias necessary to disqualify must "stem from an extrajudicial source and result in an
8 opinion on the merits on some basis other than what the judge learned from his participation in the case."
9 *Id. citing United States v. Beneke*, 449 F.2d 1259, 1260-61 (8th Cir. 1971). "To permit an allegation of
10 bias, partially founded upon a justice's performance of his constitutionally mandated responsibilities, to
11 disqualify that justice from discharging those duties would nullify the court's authority and permit
12 manipulation of justice, as well as the court." *Id. see also State v. Rome*, 235 Kan. 642, 685 P. 2d 290,
13 295-96 (1984); *Tynan v. United States*, 376 F. 2d 761 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 845.

14 The sole basis for Employee's Motion is to attempt to disqualify a hearing officer that has ruled
15 against his co-worker on the same case and therefore he believes will rule against him. This is an
16 impermissible attempt at manipulating the judicial system, and should not be tolerated. The parties have
17 already had an opportunity to strike a hearing officer when the strike letter was circulated in 2017.
18 Employee cannot strike this hearing officer because he is dissatisfied with the Hearing Officer's decision
19 in Valdez's case. The fact that this video was not in evidence during Valdez's administrative appeal is
20 not relevant to the instant case and does not serve as a basis for disqualification in this case. Employee's
21 hearing before Hearing Officer Gentile is a separate hearing, which will require the submittal of pre-
22 hearing statements and exhibits. Hearing Officer Gentile will need to admit evidence into the record and
23 hear the testimony from witnesses at the hearing. Employee's hearing is not based on the record of
24 Valdez's hearing. Also, if Hearing Officer Gentile allegedly did not have the "complete record" for
25 Valdez but would have a complete record for Employee, then there is no prejudice to Employee because
26 his hearing has not taken place yet. In fact, there is not even a hearing date scheduled. The video at issue
27 could be presented at the hearing and considered for admission into evidence. Certainly, Hearing Officer
28 Gentile can properly review the evidence in Employee's appeal and render a sound decision.

1 Employee's reliance on *FCHI, LLC, v. Rodriguez*, 130 Nev. 425 (2014) is misplaced. In *FCHI*,
2 the Nevada Supreme Court reversed and remanded the District Court's damages award in a premises
3 liability case. The Nevada Supreme Court also granted the reassignment because the judge abused her
4 discretion and excluded a security expert's testimony, excluded testimony of the resort's economic
5 expert, allowed a treating physician to testify as to the appropriateness and value of treatments that the
6 physician did not provide without an expert witness report, and allowed a treating physician to testify as
7 to the mechanism of the injury and whether another physician's treatment was causally related to the
8 initial injury without an appropriate disclosure. Here, Hearing Officer Gentile relied on the evidence
9 before him during the Valdez hearing and issued a decision. The Hearing for Employee has not taken
10 place and Hearing Officer Gentile will have the ability to review the evidence and make a determination.
11 Employee has failed to show any actual or implied bias requiring recusal or disqualification.

12 **CONCLUSION**

13 Based on the foregoing, this Court should deny Employee's Motion to Disqualify Hearing Officer
14 Gentile.

15 DATED this 11th day of January, 2019.

16 AARON D. FORD
17 ATTORNEY GENERAL

18
19 By: /s/ Michelle Di Silvestro Alanis
20 Michelle Di Silvestro Alanis
21 Deputy Attorney General (Bar No. 10024)

22 Attorneys for Respondent-Employer
23 Department of Corrections
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that, on the 11th day of January 2019, service of **NEVADA DEPARTMENT OF CORRECTIONS' OPPOSITION TO MOTION TO DISQUALIFY HEARING OFFICER GENTILE** was made this date by depositing a true copy of the same for mailing, first class mail, at Las Vegas, Nevada, or via e-mail, addressed as follows:

Mark Gentile
Hearing Officer
Department of Administration
2200 S. Rancho Dr., Ste. 220
Las Vegas, Nevada 89101

(U.S. Mail and Email: zmcgough@admin.nv.gov)

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

(U.S. Mail and Email: jflores@danielmarks.net)

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

EXHIBIT 1

EXHIBIT 1

ADAM PAUL LAXALT
Attorney General



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Ave., Ste. 3900
Las Vegas Nevada 89101

J. BRIN GIBSON
First Assistant Attorney General

NICHOLAS A. TRUTANICH
Chief of Staff

KETAN D. BHIRUD
General Counsel

December 27, 2017

Via U.S. Mail

Daniel Marks, Esq.
Law Office of Daniel Marks
610 S. Ninth Street
Las Vegas, Nevada 89101

Re: *Navarrete v NDOC*
Case No. 1713379-MG

Dear Mr. Marks:

Pursuant to your e-mail request dated December 4, 2017, enclosed is the investigatory file in the above referenced matter, bates stamped NDOC 0001-0112. The investigatory file includes both audio interviews and video of the incident.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Michelle Di Silvestro Alanis".
Michelle Di Silvestro Alanis
Deputy Attorney General
702-486-3268
malanis@ag.nv.gov

EXHIBIT 2

EXHIBIT 2

1 **BEFORE THE NEVADA STATE PERSONNEL COMMISSION**

2 **HEARING OFFICER**

JAN 08 2018

3 **PAUL VALDEZ,**

4 **Petitioner-Employee,**

5 **v.**

6 **DEPARTMENT OF CORRECTIONS,**

7 **Respondent-Employer.**

Case No.

HEARINGS DIVISION
1712965-MG

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 December 6, 2017. The hearing
12 was held pursuant to Petitioner-Employee Paul Valdez' appeal of his dismissal from State Service,
13 effective April 21, 2017, for an incident that occurred at Southern Nevada Correctional Center on
14 October 9, 2016, and for alleged irregularities in the subsequent reporting of that incident.

15 **1. PROCEDURAL AND FACTUAL OVERVIEW**

16 Petitioner-Employee Paul Valdez worked for the Nevada Department of Corrections for
17 approximately 3½ years prior to his dismissal. It was established that he had no prior disciplinary
18 record.

19 The conduct at issue occurred during breakfast service at Southern Nevada Correctional
20 Center on October 9, 2016. Correctional Officer Valdez, along with senior Officer Jose Navarrete,
21 were randomly searching inmates leaving culinary for contraband.

22 This matter is somewhat unique in that there was a video camera mounted outside the
23 entrance of the culinary and the incident of October 9, 2016 was recorded on videotape. There is no
24 audio and we are limited to a single perspective. The timeline of what occurred is clearly
25 demonstrated on the video. While certainly not perfect, the essence of what occurred is reflected in
26 the video.

27 The video begins as Officer Valdez and senior Officer Navarrete had a number of inmates
28 leaving culinary place their hands on a wall so that they could be searched. The testimony reflected
that the usual procedure is for inmates to be pulled out of line at random as they were leaving, placed

1 with their hands against a wall, and submitted to brief pat down search. The entire process typically
2 is completed in a minute or so. Every inmate, aside from one, who was pulled out of line on
3 October 9, 2016 was subjected to this process and every inmate, aside from one, was searched and
4 released in a matter of a minute or so.

5 The one exception to this was inmate Rickie Norelus. The testimony was that he is small in
6 stature with some unverified mental health issues. I looked closely at the tape of inmate Norelus'
7 actions as he was placed on the wall. It does appear that he was agitated to some extent as he was
8 initially placed on the wall. His hands were on the wall, but not raised above his head and he appears
9 to be looking around anxiously. There is, unfortunately, no audio and one cannot determine what
10 is being said by the officers or the inmates.

11 Other inmates subjected to search also had their hands low on the wall and were reminded
12 to raise them. Every inmate other than Norelus was checked and released in a matter of minutes.
13 Inmates that were brought to the wall well after Norelus were checked and released, while he was
14 directed to remain against the wall with his hands raised. At the 1:50 minute mark of the tape, he
15 was searched by senior Officer Navarrete and no apparent contraband was found. Unlike the other
16 inmates, he was not released following the search, but was ordered to remain on the wall with his
17 hands raised. There is no sign of resistance by the inmate or of any physical threat to the officers.

18 Between minutes 2 and 3 of the tape, inmate Norelus is the only inmate at the wall. His
19 hands were raised and you can detect that he and Officer Navarrete were communicating. During
20 this time, Officer Valdez positions himself behind inmate Norelus and begins pacing and swinging
21 his arms. There is no sign of any physical threat to the officers.

22 Between minutes 3 and 4 on the tape, inmate Norelus is still the only inmate on the wall.
23 There is communication between inmate Norelus and Officer Valdez. Inmate Norelus seems to be
24 cooperative and compliant. There is no sign of any physical threat to the officers.

25 Between minutes 4 and 5 on the tape, this situation remains essentially the same. Although
26 multiple inmates are seen leaving the culinary, none are stopped or searched. Inmate Norelus
27 remains on the wall and he is communicating with Officer Valdez. There is no sign of resistance by
28 the inmate or of any physical threat to the officers.

1 Between minutes 5 and 6 on the tape, this behavior remains essentially the same. Although
2 multiple inmates are seen leaving the culinary, none are stopped or searched. Inmate Norelus
3 remains on the wall and he is communicating with Officer Valdez. Officer Valdez also seems to be
4 communicating with other inmates as they are leaving culinary. There is no sign of any physical
5 threat to the officers.

6 Between minutes 6 and 7 on the tape, this situation remains essentially the same. It appears
7 that breakfast service was completed as no additional inmates were leaving. Inmate Norelus remains
8 on the wall and he is communicating with Officer Valdez. There is no sign of any physical threat
9 to the officers.

10 Between minutes 7 and 8 on the tape, this situation remains essentially the same. Inmate
11 Norelus remains on the wall and he is communicating with Officer Valdez. There is no sense of
12 urgency. The actions of the officers do not suggest they are reacting to any sort of physical threat.
13 Inmate Norelus does re-position his hands, but they do remain on the wall.

14 Between minutes 8 and 9 on the tape, this situation remains essentially the same. A third
15 guard has entered the area - he has other responsibilities and keeps his back to inmate Norelus and
16 the other officers. Inmate Norelus remains on the wall and he is communicating with Officer
17 Valdez. There is no sign of resistance by the inmate or of any physical threat to the officers.

18 Between minutes 9 and 10 on the tape, this situation remains essentially the same. Inmate
19 Norelus remains on the wall and he is communicating with Officer Valdez. There remains no sense
20 of urgency.

21 Between minutes 10 and 10:50 on the tape, this situation remains essentially the same. At
22 10:50, Officer Valdez comes up quickly behind inmate Norelus and pushes his body into the wall.
23 He then grabs inmate Norelus by the neck and throws him to the ground. I have looked at the video
24 innumerable times and I cannot discern any particular actions from inmate Norelus which would
25 constitute a physical threat - it appears that as Officer Valdez had his arm around inmate Norelus'
26 neck, the last thing to come off the wall were the inmate's hands. Inmate Norelus does not appear
27 to offer resistance to Officer Valdez - he, essentially, was grabbed by the neck almost immediately
28 and wrestled to the ground and then handcuffed by Officer Valdez and senior Officer Navarrete, who

1 came over to assist. Officer Valdez' conduct seems abrupt and unanticipated.

2 Following the incident, Officer Valdez authored a Use of Force Report (Respondent's Exhibit

3 F). This report reads in pertinent part as follows:

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

14 Officer Valdez further described the event at page 4 of 6 in the report as follows:

15 On October 9, 2016 I CO Valdez assigned to Search and Escort from 0500 to 1300.
16 At approximately 0645 when attempting to place inmate Norelus #114527 in
17 restraints inmate Norelus turned aggressively towards me. Fearing for my safety, I
18 placed my arms around his shoulders and attempted to place him on the ground.
19 During the process of placing him to the ground, inmate Norelus turned his body
20 around and I became face to face with the inmate, at this point I wrestled inmate
21 Norelus down forcing him to the ground. Once inmate Norelus was on the ground
22 I have him the order to turn around by rolling to his right side. Using my left hand
23 I reach for my restraints and cuffed his left hand and immediately secured his left
24 hand.

25 On March 16, 2017, Officer Valdez was served with a specificity of charges. He was cited
26 for the following violations:

27 NAC 284.650:

- 28 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.
- 29 10. Dishonesty.
- 30 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 intimidating,
31 assault or battery.

32 He was also charged with the following:

33 AR 339.07.9 False or Misleading Statements

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

1 (Class 5)

2 AR 339.07.17 Unauthorized Use of Force

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

5 **2. LEGAL AUTHORITY**

6 Officer Valdez' appeal to the undersigned Administrative Hearing Officer of the Nevada
7 State Department of Administration was timely filed and the determination of the merits of the
8 appeal is properly within the jurisdiction of the Department.

9 Chapter 284 of the Nevada Revised Statutes addresses the State Personnel System. NRS
10 284.385 authorizes the dismissal, demotion, and suspension of a permanent classified State
11 Employee and states as follows:

- 12 1. An appointing authority may:
 - 13 (a) Dismiss or demote any permanent classified Employee when the
14 appointing authority considers that the good of the public service will
15 be served thereby.
 - 16 (b) Except as otherwise provided in NRS 284.148, suspend without pay,
17 for disciplinary purposes, a permanent Employee for a period not to
18 exceed 30 days.
- 19 2. A dismissal, involuntary demotion or suspension does not become effective
20 until the Employee is notified in writing of the dismissal, involuntary
21 demotion or suspension and the reasons therefor. The notice may be
22 delivered personally to the Employee or mailed to the Employee at the
23 Employee's last known address by registered or certified mail, return receipt
24 requested. If the notice is mailed, the effective date of the dismissal,
25 involuntary demotion or suspension shall be deemed to be the date of
26 delivery or if the letter is returned to the sender, 3 days after mailing.
- 27 3. No Employee in the classified service may be dismissed for religious or racial
28 reasons.

23 NRS 284.383 authorizes the Personnel Commission to adopt a regulation system for the
24 discipline of State Employees stating:

- 25 1. The Commission shall adopt by regulation a system for administering
26 disciplinary measures against a state Employee in which, except in cases of
27 serious violations of law or regulations, less severe measures are applied at
28 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

1 made by an appointing authority or the representative of the appointing
2 authority, if any, regarding proposed disciplinary action.

3 NRS 284.390 establishes a State employee's right to a hearing if the State employee disagrees
4 with the disciplinary action taken by an appointing authority.

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

8 The Nevada Supreme Court recently held hearing officers may determine the reasonableness
9 of disciplinary actions and recommend appropriate levels of discipline, but only appointing
10 authorities have the power to prescribe the actual discipline imposed on permanent classified state
11 employee. *Taylor v. The State Department of Health and Human Services*, 129 Nev. Adv. Op. 99,
12 at 6 (December 26, 2013).

13 The Personnel Commission/Department of Administration has promulgated regulations at
14 NAC 284.638, et al. pursuant to the authority granted it under NRS 284.383, which set forth the
15 specific causes for disciplining the employee. Those regulations have the full force and effect of law.
16 *Turk v. Nevada State Prison*, 94 Nev. 101 (1978), (holding that the regulations prescribed by the
17 Department of Personnel have the "force and effect of law"). *Id.* at 104.

18 NAC 284.650 sets forth causes for which disciplinary action can be taken against a person
19 legally holding a position in the public service.

20 NAC 284.642 sets forth the basis for suspending and demoting a person legally holding a
21 position in public service.

22 NAC 284.794 sets forth the evidence a hearing officer is to consider in determining the
23 validity of a disciplinary action.

24 NAC 284.656(b)(3) sets forth the following notice requirements to an Employee being
25 dismissed, demoted or suspended: "Specify the charges, the reasons for them and the cause of action
26 contained in NAC 284.650 on which the proposed action is based."

27 NAC 284.794 sets forth the evidence a hearing officer is to consider in determining the
28 validity of a disciplinary action stating in paragraph 1:

1 The hearing officer shall determine the evidence upon the charges and specifications
2 as set forth by the appointing authority in the appropriate documents, and shall not
consider any additional evidence beyond the scope of charges.

3 In reviewing the actions taken by the employer against the employee, it is the duty of the
4 Administrative Hearing Officer to make an independent determination as to whether there is
5 evidence showing the discipline would serve the good of the public service. *Knapp v. State Dep't*
6 *of Prisons*, 111 Nev. 420 (1995).

7 In discussing the evidence that a hearing officer can consider, the Nevada Supreme Court,
8 in *Dredge v. State ex tel. Dep't of Prisons*, 105 Nev. 39, 43 (1989), held details not contained in the
9 specification of charges should be considered as long as they support the grounds charged. The
10 Nevada Supreme Court stated:

11 Dredge was specifically charged with unauthorized association with an ex-inmate.
12 Details in support of the charge that were presented at the hearing but not included
13 within the specification of charges were not properly excluded under Schall. We
therefor agree with the district court that the hearing officer erroneously failed to
consider substantive evidence in reaching his decision.

14 In discussing cause for discipline, the Nevada Supreme Court held that a showing of "legal
15 cause" was cause "specifically and substantially relating to and affecting the qualifications for, or
16 the performance of, the position." *Whalen v. Wellivet*, 60 Nev. 154, 159 (1940).

17 The employer has the burden of proof to present evidence and argument to prove the
18 allegations presented in the specificity of charges and whether there is "just cause" to discipline the
19 employee.

20 The Nevada Supreme Court recently issued a decision addressing the standard of proof in
21 these type of hearings. In *Nassiri and Johnson v. Chiropractic Physicians' Board of Nevada*, 130
22 Nev. Adv. Op. 27 (April 3, 2014), the Court held that the standard of proof is the degree or level of
23 proof demanded to prove a specific allegation and that the preponderance of the evidence is the
24 standard of proof for an agency to take disciplinary action against an employee. The preponderance
25 of evidence standard is described as "more probable than not."

26 In order to act arbitrarily and capriciously, an administrative agency must act in disregard of
27 the facts and circumstances involved. *Meadow v. Civil Service Bd. Of Las Vegas Metro. Police*
28 *Dept.*, 105 Nev. 624, 627 (1989).

1 As previously noted, the authority granted the hearing officer, pursuant to NRS 384.390(6),
2 is to determine whether the agency had just cause for the discipline "as provided in NRS 284.385."
3 NRS Chapter 284 is the enabling legislation granting authority for the executive department of state
4 government to establish conditions of service and uniform job classifications for all state employees.
5 NRS 284.383, et seq. is the statutory scheme enabling the establishment of a system of disciplinary
6 proceedings against state employees.

7 The case of *State Ex Re Dept. of Prisons v. Jackson* 111 Nev. 770, 895 P 2d 1296 (1995)
8 reflects that deference to the appointing authority's determination is appropriate where the facts of
9 a case indicate or involve a clear and serious security threat.

10 **4. DISCUSSION**

11 Among the Exhibits offered by the Department of Corrections was Exhibit H, which was a
12 report of a criminal investigation into the conduct of Officer Valdez with respect to this incident.
13 The document contains summaries of interviews with inmate Norelus; other inmates who witnessed
14 the incident and with Officer David Wachter who had some prior interactions with Officer Valdez
15 in the past. I would note that this report is technically under the rules of evidence a hearsay
16 documents, and I typically would afford interviews of non testifying witnesses little weight. In this
17 particular case, however, the inmates stated that for weeks prior to the incident, Officers Valdez and
18 Navarrete seemed to be singling out Norelus for searches and were subjecting him to verbal abuse.

19 The comments of the inmates seem to reflect what one is viewing on the videotape - that
20 inmate Norelus was being singled out and subjected to inappropriate treatment for no objective
21 reasons. The investigator's findings that the October 9, 2016 video footage involving Navarrete,
22 Valdez, and inmate Norelus clearly depicted what orchestrated an apparent, premeditated
23 unnecessary use of force against Norelus, certainly resonate. The entirety of the conduct, including
24 the ultimate grabbing of inmate Norelus by the neck and wrestling of him to the ground, simply
25 does not appear warranted or justified.

26 I believe that without a doubt that the descriptions of the incident authored by Officer Valdez
27 in the use of force report are false and misleading, as the video in this case flatly contradicts Officer
28 Valdez' statements that inmate Norelus moved his hands off the wall and turned in an aggressive

1 manner which resulted in and justified his spontaneous use of force. There is nothing in the video
2 to justify or substantiate the statement that "at approximately 0645 when attempting to place inmate
3 Norelus #114527 in restraints, inmate Norelus turned aggressively towards me. Fearing for my
4 safety, I placed my arms around his shoulders and attempted to place him on the ground. During the
5 process of placing him to the ground, inmate Norelus turned his body around and I became face to
6 face with the inmate. At this point, I wrestled inmate Norelus down and forced him to the ground."
7 This is quite clearly and obviously not at all what occurred.

8 **5. FACTUAL FINDINGS**

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

10 A. The facts established, by a preponderance of the evidence, are that inmate Norelus
11 was singled out on October 9, 2016 and unreasonably forced to stand with his hands raised against
12 a wall for an extended period of time.

13 B. NDOC has established, by a preponderance of the evidence, that Officer Valdez' use
14 of force in grabbing inmate Norelus by the neck and throwing him to the ground was unnecessary,
15 unauthorized, and excessive.

16 C. The preponderance of evidence in this matter establishes that the physical force
17 initiated by Officer Valdez against inmate Norelus was not necessary to protect himself or another
18 individual from physical harm. The use of force by Officer Valdez against inmate Norelus did not
19 constitute a spontaneous use of force to respond to an emergency situation. There was nothing to
20 reflect the existence of any physical resistance by inmate Norelus justifying the use of force.

21 D. NDOC has established, by a preponderance of the evidence, that Officer Valdez
22 knowingly provided false and misleading statements in his use of force report with respect to the
23 subject incident of October 9, 2016. The description of the incident in the report is clearly
24 contradicted by the contents of the video of the incident.

25 **6. CONCLUSIONS OF LAW**

26 A. I find, based on the documents and testimony presented, that Petitioner-Employee
27 Valdez' actions, as set forth herein, were in violation of the regulations and codes as set forth in the
28 specificity of charges, specifically, Nevada Administrative Code 284.650 and NDOC Administrative

1 Regulation 339.07.09 and AR 339.07.17.

2 B. I find that the discipline of termination from State service is the mandatory discipline
3 imposed in the regulatory scheme for a class 5 offense as set forth under NDOC regulation 339. The
4 violations set forth in this matter, particularly with respect to AR 339.07.9, constitute a class 5
5 offense. There is no provision for lesser discipline for this violation under this scheme.

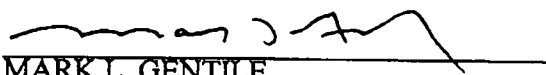
6 C. As use of force review and criteria are essential to the safety and security of an
7 institution, the determinations of the appointing authority must be viewed with deference.

8 D. It is clearly reflected, by a preponderance of the evidence, that the discipline imposed
9 was proper and justified by the regulatory scheme in place and imposed in furtherance of the good
10 of the public service. I do not find, under the circumstances, that Respondent-Employer NDOC,
11 acted arbitrarily or capriciously in dismissing Officer Valdez from State service.

12 **ORDER**

13 The decision of NDOC to dismiss Paul Valdez from State service is hereby AFFIRMED.

14 DATED this 5th day of January, 2018.

15
16 
17 **MARK L. GENTILE**
Hearing Officer

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

CERTIFICATE OF SERVICE

I hereby certify that, on the 8th day of January, 2018, service of a true and correct copy of the foregoing **DECISION AND ORDER** was made by first class mail, postage prepaid, to:

Paul Valdez
10282 Wolves Den Lane
Las Vegas, Nevada 89178

and by first class mail, postage prepaid, and email to:

Ross C. Goodman, Esquire
520 South Fourth Street
Las Vegas, Nevada 89101
Email: ross@rosscgoodman.com

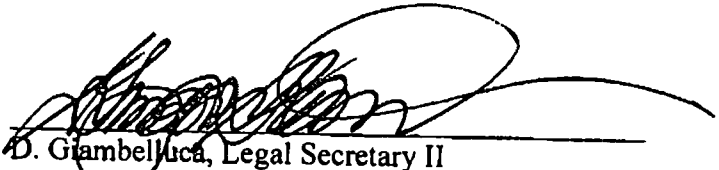
and by interdepartmental mail to:

James Dzurenda, Director
Department of Corrections
3955 West Russell Road
Las Vegas, Nevada 89118

David Wright, Human Resources Manager II
Nevada Department of Corrections
5500 Snyder Avenue, Building 17
Carson City, Nevada 89702

and by interdepartmental mail and email to:

Theresa Haar, Senior Deputy Attorney General
555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
Email: thaar@ag.nv.gov


D. Giambelluca, Legal Secretary II
Employee of the State of Nevada

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 **MOTION TO DISQUALIFY HEARING OFFICER GENTILE**

10 Petitioner/Employee Jose Miguel Navarrete ("NAVARRETE") by and through the undersigned
11 attorney Daniel Marks, Esq. of the Law Office of Daniel Marks hereby submits this Motion to
12 Disqualify Hearing Officer Gentile from hearing the Jose Navarrete hearing.

13 **BACKGROUND**

14 Jose Navarrete was terminated for an incident at Indian Spring Prison involving another
15 correction officer, Valdez. That hearing occurred on October 9, 2018. The termination of Valdez was
16 affirmed by the hearing officer on January 5, 2018. Both Navarrete and Valdez had appealed their
17 hearings to the State Hearing Officer level. Valdez and Navarrete were prosecuted by the Attorney
18 General's Office. Both were found not guilty. During discovery in the criminal case, the parties
19 realized there was a new video tape which was not previously disclosed. This video tape is relevant to
20 the termination issue and supports Mr. Navarrete's position that he should have not been terminated
21 (See Affidavit of Attorney Cottner attached).

22 ////

23 ////

24 ////

25 ////

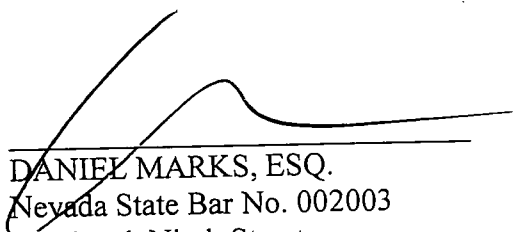
25 DEC 31 P 12:52

000026

1 While there is no specific case or point regarding Hearing Officers, the reasoning behind
2 seeking a new hearing officer is found in *FCHI, LLC v. Rodriguez*, 130 nv 425, 325 p3d 183 (2014),
3 335 P.3d 183. The Supreme Court reversed and remanded for a new trial and new judge where a
4 District Court had failed to review certain evidence and did review evidence in error. Based on that
5 reasoning, a new Hearing Officer should be appointed to hear the Navarrete case. At page 8 of the
6 *Valdez* decision by Hearing Officer Gentile, the Hearing Officer concluded "The investigator's
7 findings that the October 9, 2016 video footage involving Navarrete, Valdez, and inmate Novelus
8 clearly depicted what orchestrated an apparent, premeditated unnecessary use of force against Novelus,
9 certainly resonate." Based on this decision in the *Valdez* case, Hearing Officer Gentile has already
10 made up his mind in the Navarrete case, and should recuse and allow a new Hearing Officer to hear the
11 case.

12 DATED this 28 day of December, 2018.

13 LAW OFFICE OF DANIEL MARKS

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

SWORN AFFIDAVIT OF KYLE P. COTTNER

I was retained by Mr. Jose Navarrete to represent him in Case No. C-18-333098-2.

For several months the Attorney General's Office and its attorneys claimed there was only one video of the October 9, 2016, use of force on Inmate Norelus which Jose was implicated in. For several months I vehemently disagreed with this proposition, filed a discovery motion and sent numerous emails to the Attorney General's Office. In their numerous responses to my emails and my discovery motion, the Attorney General denied the existence of a second video. Judge Elissa Cadish eventually ordered the Attorney General's Office to make further efforts to locate the existence of the video or she would consider granting an adverse inference jury instruction at trial.

Surprisingly just days after Judge Cadish's Order, on November 28, 2018, the Attorney General reluctantly turned over a second video of the post-incident response. This so happened to be the same video I had been requesting for months and also the same video the Attorney General's Office had been claiming never existed.

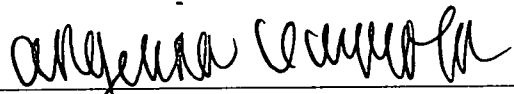


Kyle P. Cottner, Esq.

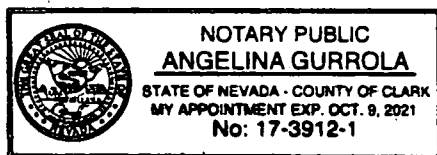
STATE OF NEVADA)
) SS.
COUNTY OF CLARK)

Subscribed and Sworn To Before Me

This 20 day of December, 2018



Notary Public In and For The County of Clark,
State of Nevada




1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS and on the
28 day of December 2018, I did serve the above and foregoing **MOTION TO DISQUALIFY**
HEARING OFFICER GENTILE by way of email and did depositing a true and correct copy with
first class postage fully prepaid thereon with the United States Post Office at Las Vegas, Nevada to the
following addresses:

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

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


An employee of the
LAW OFFICE OF DANIEL MARKS

BEFORE THE NEVADA STATE PERSONNEL COMMISSION

HEARING OFFICER

FILED

JAN 29 2018

HEARINGS DIVISION

JOSE MIGUEL NAVARRETE

Petitioner-Employee

vs.

DEPARTMENT OF CORRECTIONS

Respondent-Employer.

Appeal No: 1713379-MG

ORDER FOR STAY

This matter was set for a hearing to begin on January 25, 2018. Pursuant to the Stipulation of the parties and good cause appearing;

IT IS HEREBY ORDERED that Appeal No. 1713379-MG be stayed pending the resolution of a criminal matter against the Petitioner.

IT IS SO ORDERED this 24 day of January, 2018.


MARK GENTILE, ESQ.
HEARING OFFICER

DOC027

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

01116
JA 1385

ADAM PAUL LAXALT
Attorney General



NICHOLAS A. TRUTANICH
Chief of Staff

KETAN D. BHIRUD
General Counsel

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

555 E. Washington Ave. #3900
Las Vegas, Nevada 89101

December 15, 2017

FILED

DEC 15 2017

HEARINGS DIVISION

Via Electronic Mail: dgiambelluca@admin.nv.gov

Hearing Officer Mark Gentile
Department of Administration
Appeals Division
2200 S. Rancho Dr. Ste. 220
Las Vegas, Nevada 89101

Re: *Jose Navarrete v NDOC*
Appeal No.: 1713379-MG

Dear Hearing Officer Gentile:

Please be advised that I have been reassigned to the above-referenced matter.

Please forward all future correspondence and pleadings to my attention to the State of Nevada, Office of the Attorney, 555 E. Washington Avenue, Suite 3900, Las Vegas, Nevada, 89101 or to malanis@ag.nv.gov with a courtesy copy to my secretary, Anela Kaheaku at akaheaku@ag.nv.gov.

Thank you for your attention to this matter.

Sincerely,

ADAM PAUL LAXALT
Nevada Attorney General

A handwritten signature in cursive script that reads "Michelle Di Silvestro Alanis".
Michelle Di Silvestro Alanis
Deputy Attorney General
702-486-3268

000028
cc: Daniel Marks (email: office@danielmarks.net and gguo@danielmarks.net)

NOV 03 2017

BEFORE THE NEVADA STATE PERSONNEL COMMISSION
HEARINGS DIVISION

HEARING OFFICER

JOSE MIGUEL NAVARRETE

Petitioner-Employee

vs.

DEPARTMENT OF CORRECTIONS

Respondent-Employer.

Appeal No: 1713379-MG

NOTICE OF HEARING

The hearing in the above entitled action is scheduled to begin on Thursday, January 25, 2018 at 9:00 a.m. pursuant to the Nevada Personnel Commission Hearing Officer Rules of Procedure at the following location:

State of Nevada
Department of Administration
2200 South Rancho Drive, Suite 220
Las Vegas, Nevada 89102

On or before January 10, 2018, Pre-Hearing Statements must be served and filed setting forth the following matters in the following order:

- a) A statement of admitted or undisputed facts.
- b) A concise statement of the claimed facts supporting the party's claims or defenses.
- c) A statement of issues of law with supporting case and statutory authority (memorandum of authorities) and appropriate supporting legal argument.
- d) All Exhibits intended to be introduced with an explanation of each Exhibit's relevance to the party's case.
- e) The names and addresses of all witnesses.
- f) Any other appropriate comment, suggestion, or information for the assistance of the hearing officer in the hearing of the case.
- g) Certification by counsel that discovery has been completed, unless late

000029

01118

JA 1387

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

discovery has been allowed by order of the hearing officer.

A hard copy of the Pre-Hearing Statement and any Exhibits must be filed with the State of Nevada Department of Administration at 2200 South Rancho Drive, Suite 220, Las Vegas, Nevada, 89102. Pre-Hearing Statements and Exhibits must be served upon the opposing party. In addition, an electronic copy of Pre-Hearing Statements and Exhibits must be sent to the Hearing Officer's designated assistant.

If either party needs the Hearing Officer to issue Subpoenas, the original Subpoenas must be presented for issuance no later than January 3, 2018.

Motions must be filed no later than December 7, 2017.

If either party needs additional assistance of the Hearing Officer to resolve any disputes regarding this matter, please contact the Hearing Officer to schedule a conference call.

DATED this 3rd day of November, 2017.



MARK GENTILE, ESQ.
HEARING OFFICER

CERTIFICATE OF SERVICE

The undersigned, an employee of the State of Nevada, Department of Administration, Appeals Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing **NOTICE OF HEARING** was duly mailed, postage prepaid, **OR** transmitted via interoffice mail to the following:

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

DANIEL MARKS
610 S NINTH ST
LAS VEGAS NV 89101

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

SHARLET GABRIEL, HR ADMINISTRATOR
DEPARTMENT OF CORRECTIONS
3955 W RUSSELL RD
LAS VEGAS NV 89118

THERESA HAAR, SENIOR DEPUTY ATTORNEY GENERAL
555 E WASHINGTON AV #3900
LAS VEGAS NV 89101

Dated this, 3rd day of November, 2017.

D Giambelluca, Legal Secretary II
Employee of the State of Nevada

SEP 22 2017

HEARINGS DIVISION

BEFORE THE NEVADA STATE PERSONNEL COMMISSION

HEARING OFFICER

JOSE MIGUEL NAVARRETE

Petitioner-Employee

vs.

DEPARTMENT OF CORRECTIONS

Respondent-Employer.

Appeal No: 1713379-MG

NOTICE OF EARLY CASE CONFERENCE

A telephonic Early Case Conference has been scheduled for October 10, 2017 at 2:00 p.m. Please use the following conference call information to participate:

DIAL IN: 702-251-8445

I request that counsel be prepared to discuss the pending Motion to Dismiss and Opposition thereto, scheduling, discovery issues and any other matters either side wants to discuss.

Dated this 22nd day of September, 2017.



MARK GENTILE, ESQ.
HEARING OFFICER

000030

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

Adam Levine, Esquire
Law Office of Daniel Marks
610 South 9th Street
Las Vegas Nevada 89101
Email: alevine@danielmarks.net

Theresa Haar, Senior Deputy Attorney General
555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
Email: thaar@ag.nv.gov


D. Giambelluca, Legal Secretary II
Employee of the State of Nevada

DANIEL MARKS

Attorneys at Law
610 South Ninth Street
Las Vegas, Nevada 89101
e-mail: office@danielmarks.net
(702) 386-0536
Fax (702) 386-6812

Daniel Marks
Adam Levine
Christopher L. Marchand
Nicole Young
Teletha L. Zupan

September 8, 2017

VIA FACSIMILE: 702-486-2879
and email: cbeals@admin.nv.gov

Hearing Officer Paul Lychuck
State of Nevada
Department of Administration
Appeals Division
2200 S. Rancho Drive, Suite 220
Las Vegas, Nevada 89102

Re: Jose Navarrete v. Dept. of Corrections
Case No. 1713379-PL

Dear Hearing Officer Lychuck:

Please be advised that our office has recently been retained to represent Mr. Jose Navarrete in the above referenced matter. All future communications and correspondence regarding this matter should be directed to my office.

It is my understanding that the hearing in this matter is being held in abeyance until a decision has been rendered in a companion case *Paul Valdez v. Dept. of Corrections* which is being heard today, September 8, 2017. However, at this time Mr. Navarrete is requesting that a hearing be set in his matter.

Very truly yours,

LAW OFFICE OF DANIEL MARKS



DANEIL MARKS

AL/gg

Cc Cameron P. Vandenberg, Chief Deputy Attorney General (via email only)
Jose Navarrete

000031

STATE OF NEVADA
DEPT. OF ADMINISTRATION
HEARINGS DIVISION
SEP - 8 AM 9:25
RECEIVED
AND
FILED

01123
JA 1392

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2

3

4

+

5

6

/

8

9

10
11
12
13
14
15
16

17

18
19
20
21
22
23

24
25
26
27
28

1 Officer should take judicial notice that the Appeal Form would have arrived on the 5th or 6th, and
2 was evidently delivered to the Administrator on the 8th as mail takes approximately two to three
3 days' time to arrive from southern Nevada to norther Nevada. There is no untimely action, here.

4 **CONCLUSION**

5 Employer's Motion to Dismiss is misplaced. Employee timely requested an appeal of his
6 hearing by mail. The Motion must be denied.

7
8 DATED this 26th day of May, 2017.

HATFIELD & ASSOCIATES, LTD.

/s/ Trevor J. Hatfield

By: 

TREVOR J. HATFIELD

Nevada Bar No. 7373

703 South Eighth Street

Las Vegas, Nevada 89101

(702) 388-4469 Tel.

(702) 386-9825 Fax

thatfield@hatfieldlawassociates.com

Attorneys for Employee

1
2 **CERTIFICATE OF SERVICE**

3
4 I CERTIFY that I am an employee of Hatfield & Associates, Ltd., and that I served a copy
5 of the foregoing on the 6th day of June, 2017, I served a copy of the foregoing OPPOSITION TO
6 MOTION TO DISMISS, by causing to be delivered a true copy via e-mail on the 6th day of June,
7 2017, to the following:

8 Paul S. Lychuk, Esq.
9 Hearing Officer
10 2200 S. Rancho Drive, Suite 220
11 Las Vegas, Nevada 89102
pslychuk@hearings.state.nv.us

12 Christopher Beals
13 Legal Secretary II
14 2200 S. Rancho Drive, Suite 220
15 Las Vegas, Nevada 89102
cbeals@admin.nv.gov

16 Department of Corrections
17 Adam Paul Laxalt
18 Attorney General for the State of Nevada
19 Cameron P. Vandenberg
20 Senior Deputy Attorney General
21 Bureau of Litigation, Personnel Division
22 5420 Kietzke Lane, Suite 202
23 Reno, Nevada 89511
CVandenberg@ag.nv.gov
24 *Attorney for Employer*

25 DATED: June 6, 2017

HATFIELD & ASSOCIATES, LTD.

26 /s/ Freda P. Brazier

27 By: _____
28 An employee of Hatfield & Associates, Ltd.

EXHIBIT ONE

1 **BEFORE THE NEVADA STATE PERSONNEL COMMISSION**

2 **HEARING OFFICER**

3 JOSE MIGUEL NAVARRETE,

CASE NO: 1713379-PL

4 Employee,

5 vs.

6 STATE OF NEVADA, *ex rel* its
7 DEPARTMENT OF CORRECTIONS,

8 Employer.

9 **DECLARATION OF RONALD HIRSCH**

10 STATE OF NEVADA)
11)ss.
12 COUNTY OF CLARK)

13 RONALD HIRSCH, being first duly sworn deposes and says:

14 1. I am a paralegal employed with Hatfield & Associates, Ltd., the attorney of record
15 for the appealing Employee NAVARRETE. I am over the age of eighteen and I am competent to
16 testify to the matters contained in this Declaration upon my own personal knowledge.

17 2. Upon information and belief, NAVARRETE had ten (10) working days from an
18 effective date of April 21, 2017 to appeal the disciplinary action he was appealing. NAVARRETE
19 could either present or mail "Formal Appeal Form" (NPD 54) (hereinafter "Appeal Form") to the
20 Administrator, Division of Human Resource Management (hereinafter the "Administrator") in
21 Carson City, Nevada, by May 5, 2017.

22 3. On May 4, 2017, I spoke with NAVARRETE twice to review and correct his
23 Appeal Form and received his approval as to form and content. I presented the draft Appeal Form
24 to Mr. Trevor J. Hatfield, Esq., NAVARRETE's attorney who approved the Appeal Form and
25 directed me to serve it to the Administrator. After receiving approval from Mr. Hatfield, Esq., I
26 then personally deposited NAVARRETE's Appeal Form into a United States Postal Service
27
28

1 mailbox located at the downtown United States Postal Service office at 201 Las Vegas Boulevard
2 South, Las Vegas, Nevada, 89101 on Thursday, May 4, 2017 between at about three o'clock p.m.
3 I was not aware that the Appeal Form could be served by facsimile or email.

4 4. Mr. Hatfield, Esq. received Employer NEVADA's Motion to Dismiss on or about
5 May 31, 2017. He requested that I call the Administrator to ask if the postmarked envelope was
6 retained as independent proof of service. I spoke to Ms. Nora Johnson from the Administrator
7 who said stated that Navarrete's appeal was received May 8, 2017 by mail, and was stamped
8 "Received" that day in Carson City, but that the envelope with the postmark was apparently
9 thrown away.
10

11 I declare under the penalty of perjury under the law of the State of Nevada that the
12 foregoing is true and correct. Further this Declarant sayeth naught.
13

14 DATED this 6th day of June, 2017.

/s/ Ronald J. Hirsch

An employee of Hatfield & Associates, LTD.

HATFIELD & ASSOCIATES, LTD.
703 South Eighth Street, Las Vegas, Nevada 89101
(702) 388-4469 Tel. (702) 386-9825 Fax

TREVOR J. HATFIELD, ESQ.
thatfield@hatfieldlawassociates.com

June 8, 2017

VIA US MAIL

Christopher Beals
Legal Secretary II
State of Nevada Hearings and Appeals Division
2200 S. Rancho Drive, Suite 210
Las Vegas, NV 89102

RE: Jose Miguel Navarrete v. State of Nevada, Department of Corrections
Case No. 1713379-PL

Dear Mr. Beals:

Pursuant to your request, enclosed is an original signed copy of Mr. Navarrete's Opposition to Motion to Dismiss.

Sincerely,

HATFIELD & ASSOCIATES, LTD.

/s/ Freda P. Brazier

Freda P. Brazier, Legal Assistant

Enclosure (1)

STATE OF NEVADA
CLERK OF SUPERIOR COURT
JUN-9 PM 1:13
RECEIVED
AND
FILED

1 **BEFORE THE NEVADA STATE PERSONNEL COMMISSION**

2 **HEARING OFFICER**

3
4 JOSE MIGUEL NAVARRETE)

Case No. 1713379-PL

5 Employee,)

6 vs.)

7 STATE OF NEVADA, *ex rel* its)
8 DEPARTMENT OF CORRECTIONS,)

9 Employer.)

FILED

MAY 31 2017

APPEALS OFFICE

10 **MOTION TO DISMISS**

11 The Employer, Department of Corrections (NDOC), by and through counsel, Adam Paul Laxalt,
12 Attorney General for the State of Nevada, and Cameron P. Vandenberg, Supervising Senior Deputy
13 Attorney General, moves to dismiss Employee Jose Navarrete's appeal for failure to comply with NRS
14 284.390(1) and NAC 284.6561(9) and for the Hearing Officer's subsequent lack of jurisdiction.

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 "Within 10 working days after the effective date of an employee's dismissal, demotion or
17 suspension pursuant to NRS 284.385, the employee who has been dismissed, demoted or suspended
18 may request in writing a hearing before the hearing officer of the Commission to determine the
19 reasonableness of the action." NRS 284.390(1). "An employee who has been dismissed, demoted or
20 suspended may request a hearing before the hearing officer of the Division of Human Resource
21 Management pursuant to NRS 284.390 within 10 working days after the effective date of his or her
22 dismissal, demotion or suspension." NAC 284.6561(8).

23 Employee Jose Navarrete (Employee) was dismissed from state service effective April 21,
24 2017.¹ The last day to request a hearing pursuant to NRS 284.390 was May 5, 2017. Employee
25 submitted an appeal form to the Division of Human Resource Management (DHRM) on May 8, 2017,
26 one working day past the 10-day deadline for requesting a hearing.²

27 ///

28 ¹ See Exhibit A, copy of Employee's final dismissal notice dated April 19, 2017.

² See Exhibit B, copy of Employee's Appeal of Dismissal, Suspension, Demotion or Involuntary Transfer.

1 The Personnel Commission/DHRM Hearing Officer has no authority or discretion to disregard
2 the 10-day deadline or forgive an employee's failure to comply with said deadline.

3 **CONCLUSION**

4 Because Employee's appeal is untimely, the Hearing Officer lacks jurisdiction to conduct a
5 hearing regarding Employee's dismissal. Accordingly, NDOC respectfully requests that Jose
6 Navarrete's request for hearing be dismissed with prejudice.

7 RESPECTFULLY SUBMITTED this 31st day of May, 2017.

8 ADAM PAUL LAXALT
9 Attorney General

10 By: Cameron Vandenberg
11 CAMERON P. VANDENBERG
12 Senior Deputy Attorney General
13 Bureau of Litigation, Personnel Division
14 5420 Kietzke Lane, Suite 202
15 Reno, NV 89511
16 775-687-2132
17 *Attorneys for Employer*
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that I served a copy of the foregoing **MOTION TO DISMISS**, by causing to be delivered a true copy via e-mail on the 31st of May, 2017 to the following:

Paul S. Lychuk, Esq.
Hearing Officer
2200 S. Rancho Drive, Suite 220
Las Vegas, Nevada 89102
pslychuk@hearings.state.nv.us

Christopher Beals
Legal Secretary II
2200 S. Rancho Drive, Suite 220
Las Vegas, Nevada 89102
cbeals@admin.nv.gov

Trevor Hatfield, Esq.
Hatfield & Associates, Ltd.
703 S. 8th Street
Las Vegas, Nevada 89101
thatfield@hattfieldlawassociates.com
(Via e-mail and U.S. Mail)

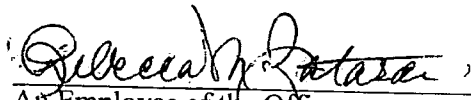

An Employee of the Office
of the Attorney General

EXHIBIT A

Northern Administration
5500 Snyder Ave.
Carson City, NV 89701
(775) 887-3204

Southern Administration
3955 W. Russell Rd.
Las Vegas, NV 89118
(702) 486-9906



State of Nevada
Department of Corrections

Brian Sandoval
Governor

James Dzurenda
Director

Sharlet Gabriel
HR Administrator

April 10, 2017

Jose Navarrete
7547 Rolling River Drive
Las Vegas, Nevada 89131

RE: Specificity # SP 1642S

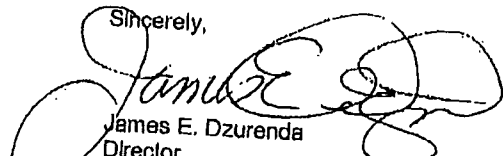
Dear Mr. Navarrete:

On March 16, 2017, you were served a specificity of charges for alleged violations of NAC 284.850 and AR 339.

A pre-disciplinary hearing was scheduled for you on April 12, 2017 with Perry Russell, AW. After review of the specificity of charges and the pre-disciplinary hearing report, it is the Department's decision that you be terminated from State service effective April 21, 2017.


This is to inform you that you have ten (10) working days to appeal this disciplinary action from the effective date of April 21, 2017. If you wish to appeal, such request must be on the prescribed "Formal Appeal Form" (NPD 54) and addressed to the Administrator, Division of Human Resource Management at 100 North Stewart Street, Suite 200, Carson City, NV 89701, phone number 775-684-0109.

Sincerely,


James E. Dzurenda
Director
Nevada Department of Corrections

JD/ns

Enc: Pre-disciplinary Hearing Officer Report

Refused
To Sign


Human Resources Division
Las Vegas, NV
3955 W. Russell Road
Las Vegas, Nevada 89118
Phone (702) 486-9914
Fax (702) 486-9974

Human Resources Office
Carson City, Nevada
P.O. Box 7011
Carson City, Nevada 89702
Phone (775) 887-3204
Fax (775) 887-3391

Human Resources Office
Lovelock, Nevada
1200 Prison Rd
Lovelock, Nevada 89419
Phone (775) 273-4232
Fax (775) 273-4228

Human Resources Office
Ely, Nevada
P.O. Box 1989
Ely, Nevada 89301
Phone (775) 289-1218
Fax (775) 289-2121

01135

JA 1404

EXHIBIT B

**APPEAL OF
DISMISSAL, SUSPENSION, DEMOTION,
OR INVOLUNTARY TRANSFER**

RECEIVED
MAY 8 2017

This form is required for an employee or former employee to request a hearing to determine the reasonableness of his or her dismissal, suspension, demotion, or involuntary transfer.

NEVADA DIV. OF HUMAN RESOURCE MANAGEMENT
GRIEVANCES ADMINISTRATION
CARSON CITY, NEVADA

Appellant Information (required section)

Name: JOSE MIGUEL NAVARRETE

Mailing Address: 5917 Pearlre Way Ct North Las Vegas NV 89081

Contact Phone: 702-510-3618

Email: Jose.M.Navarrete57@gmail.com

Employee I.D. #: 41181

Department/Agency at time of Action: Dept. of Corrections NDOC

Appeal Information (required section)

I am appealing the action of: ☒ Dismissal ☐ Suspension ☐ Demotion ☐ Involuntary Transfer

The effective date of the action was: 4/21/2017

Note: The appeal will be deemed timely if it is postmarked or received by the Administrator of the Division of Human Resource Management within the first 10 working days after the effective date of the action.

Immediately prior to the action, were you a permanent, classified, State employee? ☒ Yes ☐ No

Note: Employees who were probationary, unclassified, or not employed by the Executive Branch or the Nevada System of Higher Education are not eligible to appeal the action.

The remedy I seek is:

- ☒ For the dismissal, suspension or demotion to be set aside; and to be reinstated with full pay and benefits for the period the action was in effect. - WITH CONSIDERATION GIVEN TO TRANSFER
- ☐ For the involuntary transfer to be set aside; to be returned to my former position; and if entitled, receive a per diem allowance and travel expenses paid for the period the transfer was in effect.
- ☐ Other: _____

Note: "Other" remedies may not be within the jurisdiction of the hearing officer to grant.

Briefly explain why you believe the action taken against you was not reasonable; in the case of an involuntary transfer, please explain how the transfer was made to discipline and/or harass you. Please reference any statute, regulation, policy, or procedure you believe was violated. Attachments may be added. THE ACTION TAKEN AGAINST ME IS UNREASONABLE BECAUSE I DID NOT INTENTIONALLY MAKE FALSE OR MISLEADING STATEMENTS ON MY USE OF FORCE REPORT. AS A 9 YEAR VETERAN, PROGRESSIVE DISCIPLINE WOULD HAVE BEEN FAIR.

NRS 284.390 states, "Hearing to determine reasonableness of dismissal, demotion or suspension; judicial review.

1. Within 10 working days after the effective date of an employee's dismissal, demotion or suspension pursuant to NRS 284.385, the employee who has been dismissed, demoted or suspended may request in writing a hearing before the hearing officer of the Commission to determine the reasonableness of the action. The request may be made by mail and shall be deemed timely if it is postmarked within 10 working days after the effective date of the employee's dismissal, demotion or suspension.
2. The hearing officer shall grant the employee a hearing within 20 working days after receipt of the employee's written request unless the time limitation is waived, in writing, by the employee or there is a conflict with the hearing calendar of the hearing officer, in which case the hearing must be scheduled for the earliest possible date after the expiration of the 20 days.
3. The employee may represent himself or herself at the hearing or be represented by an attorney or other person of the employee's own choosing.
4. Technical rules of evidence do not apply at the hearing.
5. After the hearing and consideration of the evidence, the hearing officer shall render a decision in writing, setting forth the reasons therefor.
6. 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.
7. The decision of the hearing officer is binding on the parties.
8. Any petition for judicial review of the decision of the hearing officer must be filed in accordance with the provisions of chapter 233B of NRS."

NRS 284.376 states, "Involuntary transfer; hearing; remedies.

1. Within 10 working days after the effective date of a transfer pursuant to the provisions of NRS 284.375, a permanent classified employee who has been transferred without the employee's consent may request in writing a hearing before the hearing officer of the Commission to determine whether the transfer was made for the purpose of harassing the employee. The request may be made by mail and shall be deemed timely if it is postmarked within 10 working days after the effective date of the employee's transfer. The hearing must be conducted in accordance with the procedures set forth in NRS 284.390 to 284.405, inclusive.
2. If the hearing officer determines that the transfer was made for the purpose of harassing the employee, the transfer must be set aside and the employee must be returned to the employee's former position. If the transfer caused the employee to be away from the employee's original headquarters, the employee is entitled to receive the per diem allowance and travel expenses provided for state officers and employees generally for the period the transfer was in effect.
3. The decision of the hearing officer is binding on the parties."

NAC 284.778 states in part, "Request for hearing and other communications.

1. A request for an appeal must be addressed to the Administrator and submitted on the form provided by the Division of Human Resource Management."

Appellant Representation (required section)

You may represent yourself or be represented by an attorney or other person of your choosing. A representative may be designated at a later date. I choose to:

☐ Represent myself

☒ Designate the following representative to act on my behalf during the course of this appeal:

Name: TREVOR L. HATFIELD, ESQ
Address: HATFIELD & ASSOCIATES, LTD
703 S. 8th Street, LAS VEGAS, NV 89101

Phone: 702-388-4469

Fax: 702-386-9825

Email: thetfield@hathfieldlawassociates.com

Signature (required section)

By signing this form you are requesting a hearing to determine the reasonableness of the action and affirming that the information you provided is true and correct.

Appellant Signature: [Signature]

Date: 5/4/2017

Appeal Instructions

General: Permanent, classified State employees are eligible to file an appeal. Attachments to this form may be provided however, evidence and back-up documents need not be provided at this time; prior to the hearing, the clerk will send a request for any supporting material. If you have received a Specificity of Charges or written notice of involuntary transfer, please attach it to this appeal. Notification of a hearing will be sent to you or your designated representative by regular mail.

The appeal procedures and statements made on this form do not include all of the rights available to an appellant. It is advisable to review NRS 284 and NAC 284 prior to requesting a hearing. Appeal hearings are open to the public and decisions by a hearing officer are public information.

When to File an Appeal: The appeal will be deemed timely filed if it is either postmarked or received by the Administrator of the Division of Human Resource Management during the period beginning on the first working day after the effective date of the action that is being appealed and ending on the 10th working day after the effective date. Appeals received before or after this period may be dismissed as untimely.

Whistleblower Retaliation Appeal: If you believe the action you are appealing was based on retaliation due to your disclosure of information concerning improper governmental action, please submit your appeal on the NPD-53 form, "Appeal of Whistleblower Retaliation Under the Provisions of NRS 281.641."

Where to File an Appeal: The appeal may be submitted by mail, email, fax or hand delivery. Please submit the appeal to:

Administrator, Division of Human Resource Management
c/o Employee and Management Services
100 N. Stewart St., Suite 200
Carson City, Nevada 89701-4204
Fax (775) 684-0118 Phone (775) 684-0135
Email: HearingClerk@admin.nv.gov

Brian Sandoval
Governor



Patrick Cates
Director

Bryan Nix, Esq.
Senior Appeals Officer

Northern Nevada:
Hearing Office
1050 E. Williams St. Ste. 400
Carson City, Nevada 89701
(775) 687-8440 | Fax (775) 687-8441

Appeals Office
1050 E. Williams St. Ste. 450
Carson City, Nevada 89701
(775) 687-8420 | Fax (775) 687-8421

STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION

Hearings Division

<http://hearings.state.nv.us/>

May 24, 2017

Southern Nevada:
Hearing Office
2200 S. Rancho Drive, Ste. 210
Las Vegas, Nevada 89102
(702) 486-2525 | Fax (702) 486-2879

Appeals Office
2200 S. Rancho Drive, Ste. 220
Las Vegas, Nevada 89102
(702) 486-2527 | Fax (702) 486-2555

Trevor J. Hatfield, Esquire
Hatfield & Associates, Ltd.
703 South 8th Street
Las Vegas, Nevada 89101

Cameron P. Vandenberg, Senior Deputy Attorney General
Bureau of Business and State Services - Personnel Division
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511

Re: Jose NAVARRETE vs NDOC

Dear Mr. Hatfield and Ms. Vandenberg:

The State of Nevada Hearings Division has assigned this matter to Paul S. Lychuk to serve as the Hearing Officer.

We will schedule an Early Case Conference to discuss the case and to arrange a mutually convenient time for the hearing. Services for preparation of audio recording of the hearing will be provided. In addition, court reporters may be used in such proceedings, upon the request of either party and at the party's or parties' own expense.

Should you have any questions please contact Paul Lychuk's assistant, Christopher Beals, at (702) 486-2527.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Giambelluca".

D. Giambelluca, Judicial Assistant

cc: Jose Navarrete
jose.mnavarrete57@gmail.com
James Dzurenda, Director
jedzurenda@doc.nv.gov
Sharlet Gabriel, HR Administrator
sgabriel@doc.nv.gov

00C035

01140
JA 1409

Deborah Giambelluca

From: Cameron P. Vandenberg <CVandenberg@ag.nv.gov>
Sent: Sunday, May 21, 2017 7:47 PM
To: Deborah Giambelluca
Cc: Rebecca M. Zatarain; James Dzurenda; 'Sharlet Gabriel'; Lino Jasso
Subject: RE: Jose NAVARRETE vs NDOC

Good morning Deborah,

The employer, NDOC, elects to strike hearing officer Robert Zentz, Esq.

Thanks,

Ms. Cameron Vandenberg

Supervising Senior Deputy Attorney General
Nevada Office of the Attorney General
Bureau of Business & State Services
Personnel Division
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
(775) 687-2192 (phone)
(775) 688-1822 (fax)
cvandenberg@ag.nv.gov



Notice: The information in this transmittal may be confidential and/or attorney privileged. If you are not the intended recipient, or the agent responsible for delivering it to the intended recipient, you must not read, use or disseminate the information. Although this email and any attachments are believed to be free of any virus or other defect that might affect any computer into which it is received and opened, it is the responsibility of the recipient to ensure it is virus free, and no responsibility is accepted by the Nevada Office of the Attorney General for any loss or damage arising in any way from its use. If you have received this communication in error, please immediately notify the sender at 775-688-1815 or by electronic mail (cvandenberg@ag.nv.gov), and delete the message and attachments. Thank You.

From: Trevor Hatfield [<mailto:thatfield@hatfieldlawassociates.com>]
Sent: Friday, May 19, 2017 11:54 AM
To: Deborah Giambelluca
Cc: Jose Miguel Navarrete (jose.mnavarrete57@gmail.com); James Dzurenda; Sharlet Gabriel (sgabriel@doc.nv.gov); Cameron P. Vandenberg; Anela P. Kaheaku; Traci A. Plotnick; Lino Jasso
Subject: Re: Jose NAVARRETE vs NDOC

Please find attached to this email Mr. Navarette's response. Thank you.

Trevor J. Hatfield, Esq.,
HATFIELD & ASSOCIATES, LTD.
703 S. Eighth St.
Las Vegas, NV 89101
(702) 388-4469

DOC036

thatfield@hatfieldlawassociates.com

This e-mail communication is a confidential attorney communication intended only for the person to whom it is addressed above. Any dissemination, distribution, or copying of this communication is strictly prohibited.

IRS Circular 230 Notice: To ensure compliance with requirements imposed by the IRS, you are hereby informed that any federal tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

On Thu, May 11, 2017 at 3:04 PM, Deborah Giambelluca <dgiambelluca@admin.nv.gov> wrote:

Good Afternoon,

Attached is the strike list for the above mentioned Hearing request. Please do not hesitate to contact me if you have any questions or concerns.

Thank you.

D. Giambelluca, Legal Secretary II

State of Nevada, Department of Administration, Appeals Division

2200 South Rancho Drive, Suite 220, Las Vegas, Nevada 89102

Direct: 702-486-2933/Main: 702-486-2527/FAX: 702-486-2555

dgiambelluca@admin.nv.gov

Brian Sandoval
Governor



Patrick Cates
Director

Bryan Nix, Esq.
Senior Appeals Officer

Northern Nevada:
Hearing Office
1050 E. Williams St. Ste. 400
Carson City, Nevada 89701
(775) 687-8440 | Fax (775) 687-8441

Appeals Office
1050 E. Williams St. Ste. 450
Carson City, Nevada 89701
(775) 687-8420 | Fax (775) 687-8421

STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION
Hearings Division

<http://hearings.state.nv.us/>

Southern Nevada:
Hearing Office
2200 S. Rancho Drive, Ste. 210
Las Vegas, Nevada 89102
(702) 486-2525 | Fax (702) 486-2879

Appeals Office
2200 S. Rancho Drive, Ste. 220
Las Vegas, Nevada 89102
(702) 486-2527 | Fax (702) 486-2555

May 11, 2017

Jose Miguel Navarrete
5917 Pearlie May Court
North Las Vegas, Nevada 89081

James Dzurenda, Director
Department of Corrections (NDOC)
3955 West Russell Road
Las Vegas, Nevada 89118

Re: Jose NAVARRETE vs NDOC

Dear Messrs. Navarrete and Dzurenda:

Please be advised that in response to Jose Navarrete's request for a hearing received by our office on May 10, 2017, we are providing you a list of potential Hearing Officers pursuant to NAC 284 and the Personnel Commission's *Hearing Officer Rules of Procedure*.

You may each strike one name from the list of potential Hearing Officers provided below. *We suggest the appellant consult with their representative and the employer consult with the Office of the Attorney General prior to making a strike selection.* Please indicate your strike by drawing a line through the person's name. Once you have made your choice please sign and date the strike list below.

Please return this strike list within 7 working days from receipt of this letter by either email to dgiambelluca@admin.nv.gov or by faxing to our office at (702) 486-2555. If you do not choose to strike a name, the Hearing Officer will be selected based on our procedures.

000037

Strike one name:

~~Gara Brown, Esq.~~

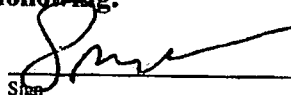
Paul S. Lychuk, Esq.

Robert Zentz, Esq.

Please complete the following:

Sign

Date


Trevor J. Hatfield, Esq.

5/19/17

☒ Appellant ☒ Representative ☐ Employer ☐ DAG

Print Name

703 S. 8th St.

Address

Las Vegas, NV 89101

Address

(702) 388-4469

Phone Number

thatfield@hatfieldlawassociates.com

Email Address

Thank you,



D. Giambelluca
Judicial Assistant

cc: Trevor J. Hatfield, Esquire:
thatfield@hatfieldlawassociates.com
Sharlet Gabriel, HR Administrator:
sgabriel@doc.nv.gov
Cameron P. Vandenberg, Senior Deputy Attorney General:
cvandenberg@ag.nv.gov

Brian Sandoval
Governor



Patrick Cates
Director

Bryan Nix, Esq.
Senior Appeals Officer

Northern Nevada:
Hearing Office
1050 E. Williams St. Ste. 400
Carson City, Nevada 89701
(775) 687-8440 | Fax (775) 687-8441

Appeals Office
1050 E. Williams St. Ste. 450
Carson City, Nevada 89701
(775) 687-8420 | Fax (775) 687-8421

STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION

Hearings Division

<http://hearings.state.nv.us/>

Southern Nevada:
Hearing Office
2200 S. Rancho Drive, Ste. 210
Las Vegas, Nevada 89102
(702) 486-2525 | Fax (702) 486-2879

Appeals Office
2200 S. Rancho Drive, Ste. 220
Las Vegas, Nevada 89102
(702) 486-2527 | Fax (702) 486-2555

May 11, 2017

Jose Miguel Navarrete
5917 Pearlle May Court
North Las Vegas, Nevada 89081

James Dzurenda, Director
Department of Corrections (NDOC)
3955 West Russell Road
Las Vegas, Nevada 89118

Re: Jose NAVARRETE vs NDOC

Dear Messrs. Navarrete and Dzurenda:

Please be advised that in response to Jose Navarrete's request for a hearing received by our office on May 10, 2017, we are providing you a list of potential Hearing Officers pursuant to NAC 284 and the Personnel Commission's *Hearing Officer Rules of Procedure*.

You may each strike one name from the list of potential Hearing Officers provided below. ***We suggest the appellant consult with their representative and the employer consult with the Office of the Attorney General prior to making a strike selection.*** Please indicate your strike by drawing a line through the person's name. Once you have made your choice please sign and date the strike list below.

Please return this strike list within 7 working days from receipt of this letter by either email to dgiambelluca@admin.nv.gov or by faxing to our office at (702) 486-2555. If you do not choose to strike a name, the Hearing Officer will be selected based on our procedures.

00C038

01145
JA 1414

Strike one name:

Cara Brown, Esq.

Paul S. Lychuk, Esq.

Robert Zentz, Esq.

Please complete the following:

Sign

Date

Print Name

☐Appellant ☐Representative ☐Employer ☐DAG

Address

Address

Phone Number

Email Address

Thank you,



D. Giambettuca
Judicial Assistant

cc: Trevor J. Hatfield, Esquire:
thatfield@hatfieldlawassociates.com
Sharlet Gabriel, HR Administrator:
sgabriel@doc.nv.gov
Cameron P. Vandenberg, Senior Deputy Attorney General:
cvandenberg@ag.nv.gov

**APPEAL OF
DISMISSAL, SUSPENSION, DEMOTION,
OR INVOLUNTARY TRANSFER**

Date Received:

RECEIVED

MAY 8 2017

This form is required for an employee or former employee to request a hearing to determine the reasonableness of his or her dismissal, suspension, demotion, or involuntary transfer.

NEVADA DIV. OF HR MANAGEMENT
GRIEVANCES APPEALS
CARSON CITY, NEVADA

Appellant Information (required section)

Name: JOSE MIGUEL NAVARRETE

Mailing Address: 5917 Pearlre Way Ct North Las Vegas NV 89081

Contact Phone: 702-510-3618

Email: Jose.M.Navarrete57@gmail.com

Employee I.D. #: 41181

Department/Agency at time of Action: Dept. of Corrections NDOC

Appeal Information (required section)

I am appealing the action of: ☒ Dismissal ☐ Suspension ☐ Demotion ☐ Involuntary Transfer

The effective date of the action was: 4/21/2017

Note: The appeal will be deemed timely if it is postmarked or received by the Administrator of the Division of Human Resource Management within the first 10 working days after the effective date of the action.

Immediately prior to the action, were you a permanent, classified, State employee? ☒ Yes ☐ No

Note: Employees who were probationary, unclassified, or not employed by the Executive Branch or the Nevada System of Higher Education are not eligible to appeal the action.

The remedy I seek is:

- ☒ For the dismissal, suspension or demotion to be set aside; and to be reinstated with full pay and benefits for the period the action was in effect. - WITH CONSIDERATION GIVEN TO TRANSFER -
- ☐ For the involuntary transfer to be set aside; to be returned to my former position; and if entitled, receive a per diem allowance and travel expenses paid for the period the transfer was in effect.

☐ Other:

Note: "Other" remedies may not be within the jurisdiction of the hearing officer to grant.

Briefly explain why you believe the action taken against you was not reasonable; in the case of an involuntary transfer, please explain how the transfer was made to discipline and/or harass you. Please reference any statute, regulation, policy, or procedure you believe was violated. Attachments may be added. THE ACTION TAKEN AGAINST ME IS UNREASONABLE BECAUSE I DID NOT INTENTIONALLY MAKE FALSE OR MISLEADING STATEMENTS ON MY USE OF FORCE REPORT. AS A 9 YEAR VETERAN, PROGRESSIVE DISCIPLINE WOULD HAVE BEEN FAIR.

NRS 284.390 states, "Hearing to determine reasonableness of dismissal, demotion or suspension; judicial review.

1. Within 10 working days after the effective date of an employee's dismissal, demotion or suspension pursuant to NRS 284.385, the employee who has been dismissed, demoted or suspended may request in writing a hearing before the hearing officer of the Commission to determine the reasonableness of the action. The request may be made by mail and shall be deemed timely if it is postmarked within 10 working days after the effective date of the employee's dismissal, demotion or suspension.
2. The hearing officer shall grant the employee a hearing within 20 working days after receipt of the employee's written request unless the time limitation is waived, in writing, by the employee or there is a conflict with the hearing calendar of the hearing officer, in which case the hearing must be scheduled for the earliest possible date after the expiration of the 20 days.
3. The employee may represent himself or herself at the hearing or be represented by an attorney or other person of the employee's own choosing.
4. Technical rules of evidence do not apply at the hearing.
5. After the hearing and consideration of the evidence, the hearing officer shall render a decision in writing, setting forth the reasons therefor.
6. 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.
7. The decision of the hearing officer is binding on the parties.
8. Any petition for judicial review of the decision of the hearing officer must be filed in accordance with the provisions of chapter 233B of NRS."

NRS 284.376 states, "Involuntary transfer; hearing; remedies.

1. Within 10 working days after the effective date of a transfer pursuant to the provisions of NRS 284.375, a permanent classified employee who has been transferred without the employee's consent may request in writing a hearing before the hearing officer of the Commission to determine whether the transfer was made for the purpose of harassing the employee. The request may be made by mail and shall be deemed timely if it is postmarked within 10 working days after the effective date of the employee's transfer. The hearing must be conducted in accordance with the procedures set forth in NRS 284.390 to 284.405, inclusive.
2. If the hearing officer determines that the transfer was made for the purpose of harassing the employee, the transfer must be set aside and the employee must be returned to the employee's former position. If the transfer caused the employee to be away from the employee's original headquarters, the employee is entitled to receive the per diem allowance and travel expenses provided for state officers and employees generally for the period the transfer was in effect.
3. The decision of the hearing officer is binding on the parties."

NAC 284.778 states in part, "Request for hearing and other communications.

1. A request for an appeal must be addressed to the Administrator and submitted on the form provided by the Division of Human Resource Management."

Appellant Representation (required section)

You may represent yourself or be represented by an attorney or other person of your choosing. A representative may be designated at a later date. I choose to:

☐ Represent myself

☒ Designate the following representative to act on my behalf during the course of this appeal:

Name: TREVOR L. HATFIELD, ESQ
Address: HATFIELD + ASSOCIATES, LTD
703 S. 8th Street, Las Vegas, NV 89101

Phone: 702-388-4469

Fax: 702-386-9825

Email: thatfield@thatfieldlawassociates.com

Signature (required section)

By signing this form you are requesting a hearing to determine the reasonableness of the action and affirming that the information you provided is true and correct.

Appellant Signature: _____

Date: 5/4/2017

Appeal Instructions

General: Permanent, classified State employees are eligible to file an appeal. Attachments to this form may be provided however, evidence and back-up documents need not be provided at this time; prior to the hearing, the clerk will send a request for any supporting material. If you have received a Specificity of Charges or written notice of involuntary transfer, please attach it to this appeal. Notification of a hearing will be sent to you or your designated representative by regular mail.

The appeal procedures and statements made on this form do not include all of the rights available to an appellant. It is advisable to review NRS 284 and NAC 284 prior to requesting a hearing. Appeal hearings are open to the public and decisions by a hearing officer are public information.

When to File an Appeal: The appeal will be deemed timely filed if it is either postmarked or received by the Administrator of the Division of Human Resource Management during the period beginning on the first working day after the effective date of the action that is being appealed and ending on the 10th working day after the effective date. Appeals received before or after this period may be dismissed as untimely.

Whistleblower Retaliation Appeal: If you believe the action you are appealing was based on retaliation due to your disclosure of information concerning improper governmental action, please submit your appeal on the NPD-53 form, "Appeal of Whistleblower Retaliation Under the Provisions of NRS 281.641."

Where to File an Appeal: The appeal may be submitted by mail, email, fax or hand delivery. Please submit the appeal to:

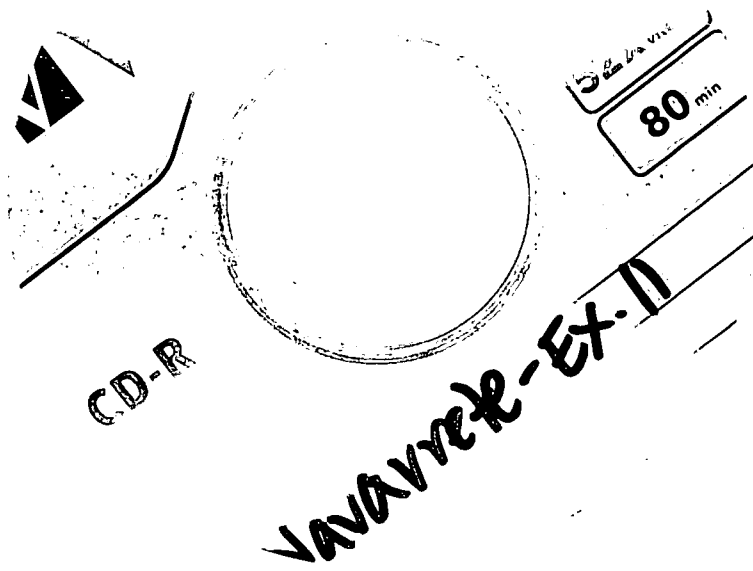
Administrator, Division of Human Resource Management
c/o Employee and Management Services
100 N. Stewart St., Suite 200
Carson City, Nevada 89701-4204
Fax (775) 684-0118 Phone (775) 684-0135
Email: HearingClerk@admin.nv.gov

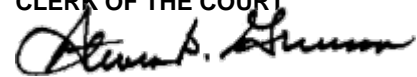
NAVARRETE, JOSE
APPEAL NO. 1713379-MG
VIDEO OF EVENT

EXHIBIT 11

Petitioner's EXHIBIT # 11

DOC040





1 COT
2 APPEALS OFFICE
3 2200 S. Rancho Drive Suite 220
4 Las Vegas NV 89102
5 (702) 486-2527

6 DISTRICT COURT
7 CLARK COUNTY, NEVADA

8 STATE OF NEVADA ex rel. its
9 DEPARTMENT OF CORRECTIONS,

10 Petitioner,

11 vs.

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

16 Respondents.

Case No.: A-19-797661-J
Dept. No.: 16
ROA No.: 2000026-MG

17 CERTIFICATION OF TRANSMITTAL

18 I certify that the hereto attached Transcripts, and attached papers are all papers and
19 exhibits relating to the above-captioned action filed with the Appeals Officer.

20 Dated this 14th day of August, 2019.



21 Zoe McGough, Legal Secretary II
22 An Employee of the Hearings Division

23 DOC042
24 01153

25 JA 1421

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF MAILING

The undersigned, an employee of the State of Nevada, Department of Administration, Hearings Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing was filed with the Clerk of the Court using the Court's Odyssey eFileNV, an electronic filing system. Parties that are registered with Odyssey eFileNV will be served electronically. For those parties not registered, service was made by depositing a copy for mailing in the United States Mail, postage prepaid to the following:

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

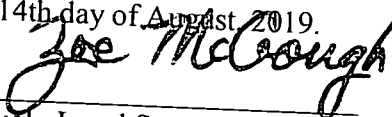
DANIEL MARKS ESQ
LAW OFFICE OF DANIEL MARKS
610 S NINTH ST
LAS VEGAS NV 89101

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

MICHELLE DI SILVESTRO ALANIS ESQ
SENIOR DEPUTY ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
555 EAST WASHINGTON AVE STE 3900
LAS VEGAS NV 89101

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

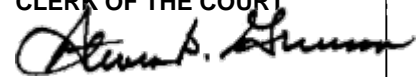
Dated this 14th day of August 2019.



Zoe McGough, Legal Secretary II
Employee of the State of Nevada

01154

JA 1422



1 **AFFT**
2 **APPEALS OFFICE**
3 **2200 S. Rancho Drive Suite 220**
4 **Las Vegas NV 89102**
5 **(702) 486-2527**

6 **DISTRICT COURT**

7 **CLARK COUNTY, NEVADA**

8 STATE OF NEVADA ex rel. its)
9 DEPARTMENT OF CORRECTIONS,)

10 Petitioner,)

11 vs.)

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

16 Respondents.)
17)
18)
19)
20)
21)
22)
23)
24)
25)
26)
27)
28)

Case No.: A-19-797661-J

Dept. No.: 16

ROA No.: 2000026-MG

29 **AFFIDAVIT & CERTIFICATION**

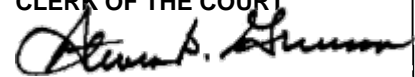
30 This is to certify that the documents for the aforementioned Record on Appeal have
31 been reviewed by the Department of Administration, Hearings Division, and to the best of my
32 knowledge, all personal identifying information has been redacted, and that the enclosed
33 Record on Appeal is a certified copy of the original on file with this agency.

34 DATED this 14th day of August, 2019.

35 
36 Zoe McGough, Legal Secretary II
37 An Employee of the Hearings Division

38 **DOC041**
01152

JA 1423



1 **SUPP**
2 **DEPARTMENT OF ADMINISTRATION**
3 **HEARINGS DIVISION**
4 **2200 S. Rancho Drive Suite 220**
5 **Las Vegas NV 89102**
6 **(702) 486-2527**

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 STATE OF NEVADA ex rel. its)
10 DEPARTMENT OF CORRECTIONS,)

11 Petitioner,)

12 vs.)

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

17 Respondents.)

Case No.: A-19-797661-J

Dept. No.: 16


ROA No.: 2000026-MG

18 **SUPPLEMENTAL TRANSMITTAL OF RECORD ON APPEAL**

19 TO: STEVEN GRIERSON, Clerk of the above-captioned Court:

20 The Department of Administration, Hearings Division, hereby supplements the Record
21 on Appeal that was filed on August 14, 2019, to include the document listed in the index
22 included with this Supplemental Transmittal of Record on Appeal.

23 DATED this 20th day of November, 2019.

24 
25 Zoe McGough, Legal Secretary
26 An Employee of the Hearings Division

27 **SUPPDO001**
28 **00001**

INDEX

ROA NUMBER: 2000026-MG
Appeal No.: 1713379-MG

<u>DESCRIPTION</u>	<u>SUPP'DOC #</u>	<u>PAGE NUMBERS</u>
SUPPLEMENTAL TRANSMITTAL OF RECORD ON APPEAL	001	00001
STIPULATION TO STAY THE ABOVE ENTITLED MATTER PENDING THE RESOLUTION OF A CRIMINAL MATTER AGAINST PETITIONER	002	00002-00003
AFFIDAVIT AND CERTIFICATION	003	00004
CERTIFICATION OF TRANSMITTAL	004	00005-00006

ORIGINAL

FILED

JAN 17 2018

HEARINGS DIVISION

BEFORE THE NEVADA STATE PERSONNEL COMMISSION
MARK GENTILE, HEARING OFFICER

JOSE MIGUEL NAVARRETE,

Case No.: 1713379-MG

Petitioner/Employee,

v.

DEPARTMENT OF CORRECTIONS,

Respondent/Employer

**STIPULATION TO STAY THE ABOVE ENTITLED MATTER PENDING THE
RESOLUTION OF A CRIMINAL MATTER AGAINST PETITIONER**

COMES NOW Petitioner Jose Navarette, by and through his counsel Daniel Marks, Esq., and Nicole M. Young, Esq., of the Law Office of Daniel Marks, and Respondent Department of Corrections, by and through its counsel Michelle Di Silvestro Alanis, Esq., of the Nevada Attorney General's Office, submit as follows:

WHEREAS, Petitioner Jose Navarette is currently the subject of a criminal matter in Las Vegas Justice Court, Case No. 17F20960B, relating to the allegations at issue in the above-captioned matter and does not wish to waive his 5th Amendment right against self-incrimination.

IT IS STIPULATED AND AGREED that the hearing presently scheduled for January 25, 2018, be continued and stayed until the resolution of the criminal matter.

IT IS FURTHER STIPULATED AND AGREED that Petitioner's counsel shall immediately advise the Hearing Officer once the criminal matter has been resolved.

IT IS FURTHER STIPULATED AND AGREED that should Petitioner's discipline be overturned and employment reinstated, 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 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).

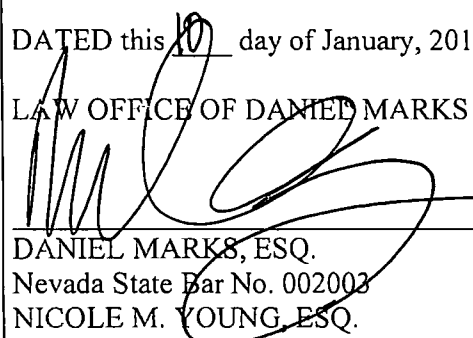
5 IT IS FURTHER STIPULATED AND AGREED that Petitioner waives his right to make any
6 arguments contrary to this stipulation regarding his back pay in any subsequent pleading, motion or
7 appeal brought as a result of this matter.


8 DATED this 10 day of January, 2018.

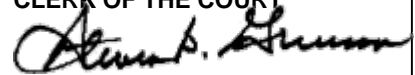
DATED this 9th day of January, 2018.

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/Employee


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 COT
2 DEPARTMENT OF ADMINISTRATION
3 HEARINGS DIVISION
4 2200 S. Rancho Drive Suite 220
5 Las Vegas NV 89102
6 (702) 486-2527

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 STATE OF NEVADA ex rel. DEPARTMENT)
10 OF PUBLIC SAFETY,)
11)
12 Petitioner,)

13 vs.)


14 KAREN J. HAYCOX, an individual; STATE OF)
15 NEVADA ex rel., DEPARTMENT OF)
16 ADMINISTRATION, PERSONNEL)
17 COMMISSION, HEARING OFFICE,)
18)
19 Respondents.)
20)
21)
22)
23)
24)
25)
26)
27)
28)

Case No.: A-18-785698-J
Dept. No.: 4
ROA No.: 1908085-RZ
Appeal No.: 1809372-RZ

29 CERTIFICATION OF TRANSMITTAL

30 I certify that the hereto attached papers are all papers and exhibits relating to the above-
31 captioned action filed with the Department of Administration, Hearings Division.

32 Dated this 20th day of November, 2019.

33 
34 Zoe McGough, Legal Secretary II
35 An Employee of the Hearings Division

36 SUPPDOC005
37 00005

38 JA 1428

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

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

DANIEL MARKS ESQ
LAW OFFICE OF DANIEL MARKS
610 S NINTH ST
LAS VEGAS NV 89101

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

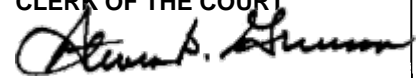
MICHELLE DI SILVESTRO ALANI
SENIOR DEPUTY ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
555 EAST WASHINGTON AVE STE 200
LAS VEGAS NV 89101

CHRISTINA LEATHERS
HUMAN RESOURCES MANAGER
NEVADA DEPARTMENT OF CORRECTIONS
3955 W RUSSELL RD
LAS VEGAS NV 89118-2316

Dated this 20th day of November, 2019.

Zoe McGough
Zoe McGough, Legal Secretary of
An Employee of the Hearings Division

00006



1 **AFFT**
2 **DEPARTMENT OF ADMINISTRATION**
3 **HEARINGS DIVISION**
4 **2200 S. Rancho Drive Suite 220**
5 **Las Vegas NV 89102**
6 **(702) 486-2527**

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 STATE OF NEVADA ex rel. its)
10 DEPARTMENT OF CORRECTIONS,)

11 Petitioner,)

12 vs.)

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


17 Respondents.)

Case No.: A-19-797661-J
Dept. No.: 16
ROA No.: 2000026-MG

18 **AFFIDAVIT & CERTIFICATION**

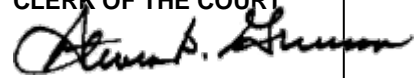
19 This is to certify that the documents included in this Supplemental Record on Appeal
20 have been reviewed by the Department of Administration, Hearings Division, and to the best of
21 my knowledge, all personal identifying information has been redacted, and that the enclosed
22 Supplemental Record on Appeal is a true and correct copy of the original on file with this
23 agency.

24 DATED this 20th day of November, 2019.

25 
26 Zoe McGough, Legal Secretary II
27 An Employee of the Hearings Division

28 **SUPPDOC003**
00004

JA 1430



AARON D. FORD
Attorney General
MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)
Supervising Senior Deputy Attorney General
State of Nevada
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas NV 89101-1068
(702) 486-3268 (phone)
(702) 486-3773 (fax)
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 OPENING BRIEF

TABLE OF CONTENTS

MEMORANDUM OF POINTS AND AUTHORITIES	1
I. STATEMENT OF JURISDICTION	1
II. STATEMENT OF ISSUES	1
III. STATEMENT OF THE CASE	1
IV. STATEMENT OF FACTS	2
A. Employment with NDOC	2
B. Misconduct.....	3
C. Random Search of Inmates	6
D. Restraining an Inmate and Using Force.....	7
E. Accurate and Truthful Report Writing.....	10
F. Disciplinary Process.....	12
G. Appeal Hearing	13
V. SUMMARY OF ARGUMENT	18
VI. LEGAL ARGUMENT	18
A. Standard of Review	18
B. The Hearing Officer’s Reliance on NDOC AR 339 was a Clear Error of Law.....	19
C. The Hearing Officer Violated Statutory Provisions and Committed Clear Error when He Failed to Consider Whether Employee Violated NAC 284.650 (1), (10) and (21)	20
D. The Hearing Officer Clearly Erred When He Used the Preponderance of the Evidence Standard..	21
E. The Hearing Officer’s Decision was Arbitrary and Capricious and Clearly Erroneous In View of the Reliable, Probative, and Substantial Evidence On the Whole Record.....	24
1. Violations of NDOC regulations on use of force and restraints	25
2. Violations of dishonesty	26
VII. CONCLUSION	28
CERTIFICATE OF COMPLIANCE	29
CERTIFICATE OF SERVICE	30

TABLE OF AUTHORITIES

CASES

<i>Bisch v. Las Vegas Metro. Police Dep't</i> , 129 Nev. 328, 302 P.3d 1108 (2013)	19
<i>Clark Cnty. Educ. Ass'n v. Clark Cnty. Sch. Dist.</i> , 122 Nev. 337, 131 P.3d 5 (2006)	24
<i>Dep't of Corr. v. Ludwick</i> , 135 Nev. Adv. Op. 12, 440 P.3d 43(2019)	19, 20, 21, 23
<i>Dredge v. State, ex rel., Dep't of Prisons</i> , 105 Nev. 39, 769 P.2d 56 (1989).....	18, 19
<i>Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy</i> , 124 Nev. 701, 191 P.3d 1159 (2008)	19
<i>Nassiri v. Chiropractic Physician's Board of Nevada</i> , 130 Nev. 245, 327 P.3d 487 (2014)	21, 22
<i>Nevada Dep't of Motor Vehicles v. Adams</i> , No. 68057, 2017 WL 521774, at 2 (Nev. App. Jan. 30, 2017)	23
<i>O'Keefe v. Dep't. of Motor Vehicles</i> , 134 Nev. Adv. Op. 92, 431 P.3d 350 (Dec. 6, 2018).....	20, 23, 24
<i>Richardson v. Perales</i> , 402 U.S. 389 (1971).....	22, 24
<i>Robertson Transp. Co. v. P.S.C.</i> , 39 Wis.2d 653, 159 N.W.2d 636 (1968).....	22
<i>Southwest Gas Corp. v. Vargas</i> , 111 Nev. 1064, 901 P.2d 693 (1995)	19, 22
<i>State, Emp. Sec. Dep't v. Hilton Hotels</i> , 102 Nev. 606, 792 P.2d 497 (1986)	22, 24
<i>Taylor v. Dep't. of Health & Human Servs.</i> , 129 Nev. 928, 314 P.3d 949 (2013)	19
<i>Whalen v. Welliver</i> , 60 Nev. 154, 104 P.2d 188 (1940)	22

STATUTES

NRS 233B.010	1, 18
NRS 233B.130	1
NRS 233B.135.....	19, 24
NRS 284.383.....	24
NRS 284.385.....	19
NRS 284.390.....	1, 13, 19, 21, 22

OTHER AUTHORITIES

NAC 284.650	1, 12, 18, 20, 21, 23, 27
NAC 284.656(3)(c)	20
NAC 284.794(1)	20

REGULATIONS

AR 339	passim
AR 340	3
AR 405	passim

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **STATEMENT OF JURISDICTION**

4 This Court has jurisdiction pursuant to NRS 233B.130(2)(b). Petitioner, State of Nevada ex. rel.
5 Department of Corrections (NDOC), timely filed a Petition for Judicial Review on June 28, 2019, within
6 30 days of the Nevada State Personnel Commission Hearing Officer's Decision and Order dated May 30,
7 2019. *See* NRS 233B.130(2)(d).

8 **II.**

9 **STATEMENT OF ISSUES**

- 10 1. Was the hearing officer reliance on NDOC AR 339 a clear error of law?
- 11 2. Was the hearing officer's decision in violation of statutory provisions and a clear error of law
- 12 when he failed to consider whether Employee violated NAC 284.650(1), (10), and (21)?
- 13 3. Did the hearing officer clearly err when he used a preponderance of the evidence standard?
- 14 4. Was the hearing officer's decision clearly erroneous in view of the reliable, probative and
- 15 substantial evidence on the whole record and arbitrary and capricious or an abuse of discretion.

16 **III.**

17 **STATEMENT OF THE CASE**

18 NDOC dismissed Respondent, Jose Miguel Navarrete (Employee), from State service effective
19 April 21, 2017, for various acts of misconduct. ROA 845-906. Employee appealed his dismissal to the
20 Department of Administration Personnel Commission hearing officer pursuant to NRS 284.390. ROA
21 1147-1149. A hearing was held on April 2, 2019 and April 16, 2019 before Hearing Officer Mark
22 Gentile. ROA 1082-1084, 611-612, 283-582, 3-282. On May 30, 2019, the hearing officer entered his
23 Decision and Order (Decision), which reversed Employee's dismissal and restored him to his prior
24 position as a senior correctional officer with back pay and benefits in accordance with the prior stipulation
25 of the parties. ROA 583-592. NDOC filed a Petition for Judicial Review pursuant to NRS 284.390(9)
26 and NRS 233B.010, et. seq. NDOC requests that this Court set aside the hearing officer's Decision in
27 whole, as NDOC's substantial rights have been prejudiced, and affirm NDOC's decision to dismiss
28 Employee from state service.

1 IV.

2 **STATEMENT OF FACTS**

3 **A. Employment with NDOC**

4 NDOC hired Employee on May 5, 2008 as a correctional officer trainee. ROA 96-97, 847. After
5 one year, Employee advanced to a correctional officer. ROA 97. In 2013, Employee was promoted to
6 senior correctional officer. ROA 97. Throughout his employment with NDOC, Employee worked at
7 Southern Desert Correctional Center (SDCC). ROA 97.

8 As a senior correctional officer, Employee was the first line supervisor for other staff present and
9 was responsible for training junior staff. ROA 491. A senior officer can make snap decisions on the spot
10 when a sergeant is not present and even sometimes may have to serve as an acting sergeant. ROA 491.
11 A senior officer has increased responsibility because they are dealing with the line staff. ROA 501.

12 At all relevant times, Employee was assigned to the Search and Escort post. ROA 113. On the
13 day in question, Employee was the Lead Search and Escort Officer. ROA 101, 857. A senior officer
14 typically serves as the Lead Search and Escort Officer because he will serve as the first line supervisor
15 for the day and take lead in the Search and Escort operations. ROA 100, 500, 783. The Lead Search and
16 Escort Officer direct other officers' activities, trains other officers, and has a duty to ensure that officers
17 comply with NDOC policies. ROA 26-27. The obligations of a senior officer or a lead officer are higher.
18 ROA 27.

19 Employee read and signed his Work Performance Standards for the senior correctional officer
20 position on November 18, 2014. ROA 927-929. Employee indicated he understood that job element one
21 - custodial responsibilities - included complying with Administrative Regulations and NDOC procedures
22 for control on inmate activities, assuring proper supervision of inmates, ensuring safety for staff and
23 inmate population, and submitting written documentation of any deficiencies. ROA 185, 927. Employee
24 indicated he understood that job element two - training - included serving as a lead worker for subordinate
25 officers and provides on the job training to subordinate officers on duties of assigned areas. ROA 185-
26 186, 928. Employee further indicated he understood that job element three - legal responsibilities -
27 includes reporting and documenting all violations. ROA 186, 928. Employee indicated he also understood
28 that job element ten - work ethic - included using available resources. ROA 186, 929. Lastly, employee

1 understood that job element thirteen - professionalism - included displaying a professional demeanor at
2 all times when interacting with staff and inmates. ROA 186-187, 929.

3 Employee also read and signed his Administrative Regulations Acknowledgment, which
4 acknowledges that he must read and familiarize himself with the regulations listed, including AR 339,
5 Code of Ethics; Employee Conduct; Prohibitions and Penalties and AR 340, Employee Complaint
6 Reporting and Investigation. ROA 925.

7 **B. Misconduct**

8 On October 9, 2016, Employee was the lead Search and Escort Officer on day shift. ROA 101,
9 747, 846, 857. Employee was working with Correctional Officer Paul Valdez (Valdez). ROA Employee
10 worked with Valdez for about one year. ROA 194. Search and Escort duties include monitoring inmate
11 movement during the morning meal and conducting random pat down searches for contraband. ROA
12 117-119, 435.

13 The incident in question occurred during the breakfast service outside of the SDCC culinary.
14 ROA 341, 583, 783. Employee and Valdez were randomly searching inmates leaving the culinary for
15 contraband. ROA 838, 857, 861. It was common practice to randomly pat search inmates leaving the
16 culinary. ROA 809, 435-436. The usual process includes randomly pulling an inmate out of line, placing
17 the inmate on the wall with their hands against the wall and legs spread, and patting him down. ROA
18 344, 350, 437. Once the pat down is complete, “then normally we just send them on their way after that.”
19 ROA 437. The entire process is expedient and takes no more than a couple of minutes. ROA 437, 447,
20 811. One at a time, every inmate aside from one was pulled out of line, searched and released. ROA 584,
21 838. One particular inmate, Rickie Norelus, was searched but not released. *Id.* Instead, Norelus was
22 required to stand facing the wall, with his arms above his head on the wall for approximately eleven
23 minutes. ROA 346, 584, 838.

24 Outside of the culinary, a video camera mounted on the wall recorded the entire incident;
25 however, there is no audio. ROA 838¹. The video starts with several inmates leaving the culinary, a few
26 inmates on the wall and Employee conducting random pat searches. ROA 838 at 00:01. Employee was
27 the correctional officer wearing a black hat. *Id.* Valdez is towards the top of the video randomly pulling
28 inmates out of line for a pat search. *Id.* When the video starts, **Norelus was already on the wall** and

¹ ROA 838 is the Video of the incident, which the hearing division delivered to the Court on CD for review.

1 becomes more visible at approximately eleven seconds into the video. *Id.* at 00:11. At approximately
2 1:47, Employee completes the pat down search of Norelus, who is now the only inmate remaining on the
3 wall. *Id.* at 1:47. Despite the pat down being complete, Employee did not release Norelus. *Id.* At
4 approximately 1:59, both Employee and Valdez turn around with their backs towards Norelus and walk
5 away from him. *Id.* at 1:59. At approximately 2:44, Valdez begins to swing his arms back and forth
6 repeatedly. *Id.* at 2:44. During this time, no other inmates are randomly selected for a pat down search
7 despite several of them leaving the culinary. *Id.* At approximately 3:17, Valdez walked towards Norelus,
8 grabbed what appears to be a lunch sack, and threw it in the trash. *Id.* Norelus was found to have had
9 extra food in his lunch sack, which is considered contraband. ROA 783. For the next couple of minutes,
10 Norelus remains on the wall, Valdez continued to swing his arms, and other inmates leave the culinary,
11 but neither Employee nor Valdez conduct any other pat searches. ROA 838 at 3:17-6:14. Based on the
12 body language depicted, there are conversations between Employee, Valdez and Norelus. *Id.* Other
13 inmates also seem to be talking as they walk by. *Id.* From about two to six minutes into the recording,
14 Navarrete did not search any other inmates and continued to keep Norelus on the wall. *Id.* at 2:00-6:00.
15 At approximately 6:15, Correctional Officer David Wachter (Wachter) exits the culinary and shuts the
16 door. *Id.* Wachter walks by and then goes out of view. *Id.* At this juncture, about four and a half minutes
17 have passed since Employee completed Norelus' random search; yet Norelus remained on the wall. *Id.*
18 at 6:15. During the four and a half minutes, Employee and Valdez did not search other inmates. *Id.* At
19 about 6:58, Wachter walks over towards Employee and Valdez. *Id.* At approximately 7:23, in the upper
20 right corner of the video, other inmates have started to walk towards the culinary. *Id.* At approximately
21 7:50, Wachter begins to walk away. *Id.* Throughout the last couple of minutes, Valdez continues to swing
22 his arms. *Id.* At approximately, 8:12, Norelus is moving his head from side to side, but keeps his hands
23 on the wall. *Id.* At approximately 9:50, Norelus appears fidgety but does not remove his hands from the
24 wall or show any signs of physical threat to the officers. *Id.* Valdez continues to swing his arms. *Id.* From
25 approximately 10:39 to 10:45, Norelus looks at his left wrist about three times. *Id.* At approximately
26 10:49, with Employee leaning on the wall nearby, watching, Valdez walks toward Norelus and, using
27 both hands, pushes Norelus into the wall. *Id.* Valdez then puts his right arm around Norelus' neck, pulls
28 him back and whips him around until both fall to the ground. *Id.* At about 10:57, Norelus is on his back

1 on the ground and does not appear to be resisting the officers. *Id.* At about 11:03, Employee and Valdez
2 roll Norelus over onto his stomach and restrain him with no incident. *Id.* For the next three minutes,
3 Norelus is face down on the ground in wrist restraints while Employee and Valdez wait for the sergeant
4 and medical officer to arrive. *Id.* At approximately 15:20, the golf cart arrives with the sergeant and
5 medical officer. *Id.* The video concludes at 16:36 with the cart driving away. *Id.* The take down or force
6 used by Valdez was not any accepted methodology taught by NDOC. ROA , 357, 360, 446, 539, 860.

7 Employee never contacted the shift sergeant during the almost 11 minutes the inmate was on the
8 wall. ROA 195. Employee could restrain an inmate if the inmate was noncompliant. ROA 196-197. Once
9 an inmate is in restraints, he could be taken to the on duty shift sergeant. ROA 197. Alternatively, the
10 shift sergeant could come to where the inmate has been restrained. ROA 197. Employee did not restrain
11 the inmate. ROA 197. Employee did not have the sergeant come to him or take the inmate to the sergeant.
12 ROA 197.

13 Following the incident, the shift sergeant reported to the scene with the correctional officer
14 assigned to medical. ROA 197-198. Once the medical officer arrived on scene, he recorded the interaction
15 with the inmate while transporting him to the infirmary. ROA. During this time, Norelus states, "I hadn't
16 made any threatening moves, whatsoever. Your officers here grabbed me by the throat and slammed me
17 down...thank you buddy, you probably paid my son's education. This was unwarranted, my hands did
18 not leave the wall whatsoever." ROA 413. Despite the inmate's remarks following Valdez's unjustified
19 force, all of the witnesses testified that inmates regularly mouth off and will try to bait the officers. ROA
20 421, 438, 513, 543-544. Wachter testified that inmates will make inappropriate verbal comments, use
21 foul language, and escalate the comments all of the time in an attempt to get under the officer's skin.
22 ROA 438. Wachter testified that NDOC trained officers on how to effectively deal with inmates who
23 mouth off. ROA 438-439.

24 Wachter also worked with Valdez. ROA 441-442. Wachter testified that, in his experience
25 working with Valdez, Valdez always had to get in the last word with the inmates; even if the inmate was
26 complying, Valdez would make a remark that would get the inmate more riled up. ROA 449, 813.
27 Wachter further testified he had previously counseled Valdez that it is his job to deescalate and quell
28 situations with the inmates, not rile them up. ROA 449, 813.

1 As Associate Warden (AW) of Operations at SDCC, Minor Adams (Adams) was required to
2 review reports in the Nevada Offender Tracking Information System (NOTIS). ROA 484. Adams worked
3 at NDOC for 32 years and was the AW of SDCC for four years. ROA 483. This case came across Adams'
4 desk a couple days later because Norelus filed a grievance. ROA 505-507. As a result, Adams' reviewed
5 all the reports associated with the incident and the video. ROA 507. After reviewing the video and
6 comparing it to the officer's reports, Adams' believed to find discrepancies. ROA 510. Both Valdez and
7 Employee's report stated that while Valdez was attempting to restrain Norelus he resisted and/or moved.
8 However, when Adams watched the video, he said, "restraints were never attempted to be applied until
9 the guy was on the ground in the dirt." ROA 510. Adams also testified that Valdez's body language
10 shows he is agitated because he was swinging his arms back and forth. ROA 512. An officer's training
11 would recognize that Valdez is agitated and Employee, as the senior officer, should have intervened,
12 handcuffed the inmate, and taken him to the sergeant. ROA 512-513. The inmate in the video is against
13 the wall and faced away from the officers at all times, so he could not have been a physical threat. ROA
14 517. Valdez's use of both his hands to push the inmate into the wall was not authorized because only one
15 hand is needed. ROA 539. Putting an arm around the inmate's neck or using a chokehold is not
16 authorized. ROA 539.

17 After reviewing the video of the incident, Adams referred the case for an internal investigation
18 with the Inspector General's office because, in his experience, the reports did not "look right." ROA 511,
19 809.² While use of force occurs often at the prison, in Adams' opinion, what occurred as depicted in the
20 video with Norelus was unauthorized and did not happen often. ROA 513.

21 **C. Random Search of Inmates**

22 Employee testified that placing an inmate on the wall is part of his job and that by placing inmates
23 on the wall for random searches he will find contraband because inmates always try to push the system.
24 ROA 121. He stated that it is part of his job to search and it is in the very title of his position -"Search"
25 and Escort officer. *Id.* Yet, from the time Employee completed the random search of Norelus at 1:47 in
26 the video to the time Wachter shut the culinary door at 6:19, there were approximately 50 inmates who

27 ² NDOC also referred this incident to the Inspector General's office for a criminal investigation. ROA803-
28 815. Supervisor David Molnar conducted the criminal investigation. *Id.* Unlike the internal administrative
investigation, the Investigator in the criminal investigation makes findings and recommendations. *Id.* at 813-815.
Molnar recommended Employee and Valdez be charged with Oppression under the Color of Office, Battery, and
False Report by Public Officer. ROA 815.

1 walked out of culinary, but neither Employee nor Valdez randomly searched a single one of those
2 inmates. ROA 830 from 1:47 to 6:19. Instead, Employee and Valdez were solely focused on Norelus. *Id.*

3 Wachter testified when an inmate is told to get on the wall, they have to put their hands on the
4 wall and spread their legs apart to make sure they are not going to make any sudden movements. ROA
5 437. The officer will then ask for the inmate's information such as ID so that the officer can get an idea
6 of what kind of inmate they are dealing with. *Id.* Then the officer will conduct a pat search on the inmate
7 and send them on their way. *Id.* If the officer finds something in the sack lunch, then the officer instructs
8 the inmate to take the item out and throw it away. *Id.* The officer will write up the inmate for the violation
9 and give them a "Notice of Charges." *Id.* An officer who conducts a pat search would normally be the
10 same officer to release the inmate from the wall. ROA 466. Wachter stated that this process takes about
11 3-4 minutes if nothing is found and 4-5 minutes if something is found. ROA 447. Wachter testified that
12 having an inmate on the wall for 11 minutes, even if the inmate had extra food in his sack, is excessive.
13 ROA 447, 460. During the hearing, Wachter watched the video again and noted that Employee completed
14 the random pat down of Norelus at two minutes into the video, which is less than he estimated. ROA
15 462-463. Wachter testified that after the pat down was complete, there was no reason to keep an inmate
16 on the wall unless the officer would counsel the inmate but even then, it would be no more than a couple
17 more minutes. ROA 464. An officer does not have time to counsel for ten minutes when there are other
18 duties to attend to, including maintaining safety and security of the prison. ROA 464. Wachter further
19 testified that as a senior officer present at the scene, Employee could have intervened and taken over if
20 he observed that Valdez was keeping the inmate on the wall for too long. ROA 448-449.

21 **D. Restraining an Inmate and Using Force**

22 Officers receive training on use of force beginning at the Peace Officers Standard and Training
23 (POST) Academy. ROA 488-489. Thereafter, officers receive a yearly refresher on use of force and AR
24 405. ROA 489. Use of Force training does not include a chokehold technique. ROA 489. A chokehold is
25 not authorized and is illegal. ROA 490.

26 AR 405, Use of Force, provides NDOC's policy on the use of force permitted by correctional
27 staff. ROA 908-923. AR 405 defines excessive force as "the use of more force than an objective [sic]
28 trained and competent correctional peace officer faced with similar facts and circumstances would use to

1 subdue an attacker, overcome resistance, affect custody or gain compliance with a lawful order.” ROA
2 908. AR 405 further defines reasonable force as “force which is objectively reasonable based on the
3 totality of the circumstances and the facts known to the officer at the time to subdue an attacker, overcome
4 resistance, affect custody, or gain compliance with a lawful order.” ROA 909. AR 405.03 provides that
5 staff may use force to protect himself or any other individual from physical harm by an inmate and will
6 be proportionate to the threat exhibited by the inmate. ROA 910. AR 405.03 further states that any staff
7 witnessing a Use of Force that is either excessive or unnecessary is **required to immediately report**
8 **their observations** to the shift supervisor both verbally and, subsequent to the incident, in a written
9 report. ROA 910 (emphasis added). Employee was familiar with AR 405 and understood that force is
10 proportionate to the threat. ROA 189.

11 SDCC Operational Procedure (OP) 405 similarly provides SDCC policies on use of force by
12 correctional staff. ROA 642-643³. Specifically, OP 405 authorizes employees to use as much force as is
13 reasonably necessary to perform their duties and protect themselves from harm, with the amount of
14 reasonable force depending on the circumstances of a particular incident. *Id.* at 2. The controlling factors
15 are the degree of force threatened or used by the individual such as whether they possess a weapon, the
16 employee’s reasonable perception of the danger of death or serious physical injury, and the alternatives
17 available to control the situation or defuse the conflict without the use of force. *Id.* at 2-3. Employee was
18 familiar with OP 405 and understood his job duties required he comply with its policies and procedures.
19 ROA 187-188.

20 SDCC OP 407 provides SDCC policies on use of handcuffs and restraints. ROA 645-648.
21 Handcuffs are the standard items of restraint and the only restraint used unless authorization is obtained
22 for additional restraint. ROA 646. Employee was also familiar with OP 407 and understood his job duties
23 required compliance with the policies and procedures in OP 407. ROA 189.

24 A Post Order is a breakdown of what the duties are for a specific post. ROA 487. Officers are
25 required to read the post order when they first take that particular post and sign the acknowledgment.
26 ROA 499. Thereafter, every time the officer resumes that post he is required to review the post order and
27 look for any changes. ROA 499. Employee was also familiar with and understood his job duties required
28

³ OP 405 is confidential and the hearing officer admitted the document under seal. The hearings division delivered a hard copy of OP 405 to the Court. Any citations to OP 405 will include a page number.

1 compliance with the Search and Escort Post Order. ROA 190. Employee understood that the Post Order
2 required Employee to be familiar and comply with all rules, regulations, and orders of the institution.
3 ROA 191, 649-650, OP at 3. Employee also understood he was to avoid turning minor problems into
4 major confrontations. *Id.* The Post Order required Employee to restrict use of force to the minimum
5 degree necessary to regain control or to repel an attack. ROA 192. **The Post Order further required**
6 **Employee to notify a shift supervisor and obtain appropriate back up if an inmate refuses to**
7 **comply.** ROA 191 (emphasis added). On the date of the incident with Inmate Norelus, Employee signed
8 and acknowledged Search and Escort Post Order, which governed his job duties that day. ROA 193.

9 The Post Order provides that Search and Escort officers will enforce all rules, regulations, and
10 procedures and counsel inmates in a **discreet and timely manner.** ROA 649-650, Post Order at 4
11 (emphasis added). The Post Order further states that use of force will be restricted to the minimum degree
12 necessary to regain control. ROA 649-650, Post Order at 14. If an inmate refuses to comply with an order,
13 the shift supervisor will be notified and appropriate back up obtained. *Id.*

14 Wachter testified that if an inmate gets mouthy and moves his hands while on the wall, the officer
15 may place the inmate in restraints and take the inmate to operations to talk to shift command. ROA 439-
16 440. Wachter testified that when he restrains an inmate who is already on the wall, he would have **one**
17 **hand** on the inmate's back to feel any movements, use his other hand to take out his restraints, and then
18 help the inmate bring his arms behind his back into the restraints. ROA 440, 474-475. (Emphasis added).
19 He further testified that he uses one hand to apply some pressure so he can better feel the inmate's
20 movements. ROA 441. Wachter further testified that he was not trained to put his arm around an inmate's
21 neck and it is not an approved NDOC technique. ROA 446, 450. Wachter said that Valdez approaching
22 the inmate with both hands and pushing him up against the wall was not how to restrain an inmate. ROA
23 450. Wachter testified that based on his review of the video, Valdez used unnecessary force. ROA 448.
24 He further testified that Employee **could have deescalated and quelled** the situation with inmate
25 Norelus, including intervening. ROA 449, 456, 467 (emphasis added). Wachter was surprised that there
26 was a commotion between Valdez and Norelus because he did not recall hearing anything that made the
27 situation seem like it was agitated. ROA 450. Typically, when an inmate is agitated they get loud and
28 irate, move in an agitated manner, and could pose a physical threat. ROA 450-452. Wachter further

1 testified that when an inmate is a physical threat, he would not walk away from the inmate as Employee
2 did in the video. ROA 462-463. Wachter noted that the inmate's movements in the video were not
3 agitated. ROA 467. Officer Wachter testified that Valdez's action in the video do not show that he is
4 using his restraints and it did not appear that Valdez was restraining the inmate. ROA 477. Even if the
5 inmate was non-compliant, Valdez's response to use two hands and push the inmate on the wall was
6 unnecessary and not restraining the inmate. ROA 477.

7 Supervisory Criminal Investigator Rod Moore conducted the internal administrative
8 investigation. ROA 336. At the hearing, Moore testified that he had restrained an inmate three months
9 prior to the hearing. ROA 365. Moore testified that when an officer restrains an inmate or is about to
10 restrain an inmate, the officer would have his restraints out and would tell the inmate, "I am going to put
11 restraints on you." ROA 365. Moore further testified that in this case with both officers nearby after
12 verbally notifying the inmate they would be restraining him, they would grab the inmate's right hand, the
13 other officer grabs the left hand and they bring both hands to the inmate's back for handcuffing. ROA
14 430. Restraining does not include pushing an inmate into a wall or putting an arm around the inmate's
15 neck. ROA 430.

16 AW Adams testified at the hearing that officers use a spontaneous use of force in an emergency,
17 such as an inmate trying to escape, inmate assault on another inmate, or inmate assault on staff. ROA
18 493. It is used in a situation where an officer is required to act immediately and does not have time to
19 stop, think, and formulate a plan. ROA 493-495. If an officer believes there is resistance when restraining
20 an inmate, Adams stated, "the least amount of force would be to lay your shoulder into his shoulders and
21 push him against the wall and cuff him." ROA 546. Adams further testified that "[i]f there's an issue or
22 what have you, [a senior officer on scene] should intervene, intercede and say, you know, hey, this is
23 what's happening or you're not doing this. Why don't you take a break and I'll deal with this inmate
24 myself...then if he can't deal with the situation or he can't resolve it then he takes the inmate down to
25 the Sergeant's office." ROA 501.

26 **E. Accurate and Truthful Report Writing**

27 Following the incident, Employee prepared the following report in NOTIS:

28 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**

1 **Culinary wall while C/O Valdez was attempting to restrain him**
2 **resulting in a spontaneous use of force.** When inmate Norelus came off
3 the wall he was resisting and both he and C/O Valdez went to the ground. I
4 then assisted in holding the inmates upper body down so that C/O Valdez
5 could restrain him. I notified supervisors and called medical so that they
6 could respond to the scene. Medical responded and inmate Norelus was
7 escorted to the infirmary to be further evaluated.

8
9 ROA 872 (Emphasis added).

10 AW Adams testified that correctional officers have an obligation to report any kind of use of force
11 whether it is authorized, unauthorized, or excessive. ROA 541. When completing a report, an officer is
12 required to include **as much detail as possible**, particularly when reporting a use of force. ROA 541. In
13 Employee's report, there was no reference to the 11 minutes prior to the use of force. ROA 872, 543.

14 Current SDCC Warden Jerry Howell testified that the officers have an obligation to report
15 violations. ROA 22. Howell testified that NDOC has to be able to believe an officer's report and that if
16 an officer loses credibility it decreases the effectiveness of the institution because they have to take the
17 report on its face as true and believe the officers are truthful. ROA 29. Having an untruthful officer affects
18 the whole workforce. ROA 30-31. He further testified that in Employee's report there are omissions on
19 how did the officer attempt to restrain and why was the inmate being restrained. ROA 25 Howell further
20 noted that there was nothing on the video to indicate that the officers were attempting to restrain the
21 inmate. ROA 25.

22 Wachter testified that based on his review of the video, it did not look as though the inmate came
23 off the wall and did not look like Valdez was trying to restrain the inmate. ROA 478-480. Wachter
24 testified that Norelus was not a physical threat to the officers. ROA 452. Moore testified that in his
25 experience after he gathered all of the facts in this investigation, he believed Employee's report and the
26 video were two different versions of the event. ROA 364.

27 Warden Perry Russell testified that as an officer, particularly a senior officer, Employee had an
28 obligation to be honest and put forth a correct report and to alert supervisory staff of what had occurred.
ROA 562. Russell further testified that NDOC relies on officers to adhere to rules and procedures and
NDOC has to be able to rely on the reports prepared by the officers. ROA 563. Russell testified that he
sustained the recommendation of termination because the report said Norelus was resisting while being
restrained but he did not see any of that on video, which spoke to the integrity of the officer. ROA 56.

1 **F. Disciplinary Process**

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

4 **NAC 284.650 Causes for disciplinary action (NRS 284.065, 284.155,**
5 **284.383). Appropriate disciplinary or corrective action may be taken**
6 **for the following causes:**

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

10 NAC 284.650(10) Dishonesty.

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

14 **Nevada Department of Corrections Administrative Regulations**
15 **AR 339.07 CLASS OF OFFENSE GUIDELINES**

16 **AR 339.07.9 FALSE OR MISLEADING STATEMENTS**

17 A. Knowingly providing false or misleading statements, including
18 omissions, either verbally or in written reports or other documents,
19 concerning actions related to the performance of official duties. Or
20 knowingly providing false or misleading statements, including omissions,
21 in response to any question or request for information in any official
22 investigation interview, hearing, or judicial proceeding. CLASS 5

23 **AR 339.07.17 UNAUTHORIZED USE OF FORCE**

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

26 ROA845-906.

27 A Pre-Disciplinary Review took place on April 17, 2017. ROA 841-842. Warden Perry Russell,
28 then Associate Warden of High Desert State Prison, served as the Pre-Disciplinary Officer. ROA 555,
841-842. Russell reviewed the SOC, the investigation and the video. ROA 555. At the Pre-Disciplinary
Review, the Employee presented his side of the events and any mitigating factors. ROA 556, 841-842.
After reviewing the SOC and hearing from Employee, the Pre-Disciplinary Review Officer prepared a
report and concurred with the recommended discipline of dismissal from State service. ROA 559, 841-
842. The Pre-Disciplinary Review Officer found that Employee "completed and submitted a report
documenting the events of the Use of Force that were not compatible or consistent with what is viewed

1 in the video.” *Id.* The Pre-Disciplinary Review Officer concluded that it would be in the best interest of
2 the State for Employee to be dismissed because the Employee allowed excessive force and wrote a report
3 that did not accurately depict what occurred. *Id.* On April 19, 2017, Director James Dzurenda notified
4 Employee of NDOC’s decision to dismiss Employee effective April 21, 2017. ROA 840.

5 **G. Appeal Hearing**

6 Employee appealed his dismissal pursuant to NRS 284.390 on May 11, 2017. ROA 1147-1149.⁴
7 During the Appeal Hearing in this matter, NDOC called the following witnesses to testify: Senior
8 Investigator Rod Moore, Correctional Officer David Wachter, former Associate Warden Minor Adams,
9 Warden Perry Russell, Warden Jerry Howell, and Employee. ROA 3-282, 283-582. Additionally, during
10 the hearing significant documents were admitted into evidence, including but not limited to, the
11 investigative file, which included the criminal investigation report and summary of witness interviews
12 with inmates Norelus, Michael White, Lawrence Williams, and Ralph Jackson, all of whom were
13 randomly searched that day. ROA 729-929. Despite this evidence, the Decision is devoid of any specific
14 mention of the testimony of Moore, Wachter, AW Adams, Warden Russell, and Warden Howell, and all
15 of the inmates who provided statements in the criminal investigation. ROA 583-592. Additionally, at the
16 hearing, NDOC AR 405, Use of Force, OP 405, OP 407 and Search and Escort Post Order were admitted
17 into evidence. ROA 286-287, 908-923. Yet, there was no discussion about these policies. ROA 583-592.

18 The hearing officer found that there was no signs that Valdez actually had his handcuffs in hand
19 and that the inmate’s “hands remain on the wall.” ROA 585. The hearing officer further found that
20 Valdez’s conduct “upon close review of the enhanced video, continues to appear unjustified.” *Id.* The
21 hearing officer found that there is no rule on the length of time an inmate could be kept on the wall. ROA
22 589. Yet, as noted above, the hearing officer heard testimony from multiple witnesses that there was no
23 reason for Norelus to have been on the wall for over ten minutes. The Post Order also said to counsel
24
25

26 ⁴ NDOC also dismissed Valdez from State service and Valdez appealed his discipline. ROA 1100-1110.
27 Hearing Officer Gentile also presided over Valdez’s hearing but upheld the dismissal. *Id.* Hearing Officer Gentile
28 found that Valdez engaged in unnecessary, unauthorized and excessive force. ROA 1108. Hearing Officer Gentile
found that Valdez provided false and misleading statements because the report is contradicted by the video. ROA
1108. Interestingly enough, Valdez also described that he “attempted to place [Norelus] in restraints” and “when
attempting to place inmate Norelus #114527 in restraints [he] turned aggressively towards me.” ROA 1103.
Gentile found those statements were not supported by the video. ROA 1108.

1 inmates in a discreet and timely manner. Despite this evidence, the hearing officer found that Employee
2 did not permit the use of unauthorized force. ROA 589.

3 As stated above, the hearing officer **found that the inmate's hands remained on the wall and**
4 **that there was no evidence that Valdez was restraining the inmate.** ROA 585 (emphasis added).
5 However, despite these findings, the hearing officer did not find that Employee's statement that the
6 "inmate... came off the wall while C/O Valdez was attempting to restrain him" to be false or misleading.
7 ROA 590-591. Instead, the hearing officer after "much soul searching" found the report to be factually
8 accurate. ROA 590.

9 Despite the substantial evidence in the record, the hearing officer found that "NDOC has not met
10 its burden of proving, by a preponderance of the evidence, that Mr. Navarrete willfully employed or
11 permitted the use of unauthorized force" and that "NDOC has not met its burden of proving, by a
12 preponderance of the evidence, that Mr. Navarrete knowingly and intentionally submitted a report with
13 false or misleading information." ROA 591.

14 In the investigative file, Norelus stated that Employee and Valdez **routinely singled him out** for
15 random pat searches for the past two weeks and routinely called him names. ROA 811 (emphasis added).
16 On the day in question, Norelus stated that Employee and Valdez called him "fag" and "bitch" and told
17 him "I can't believe no one's beat your ass yet." ROA 811. Norelus agreed with the comments, saying
18 "Ya, I'm a fag," which he believed made Valdez angry. ROA 811. Norelus stated he did nothing to
19 provoke Valdez into using excessive force. ROA 811.

20 Inmate White was identified in the video and stated that Employee and Valdez **were always**
21 "going at it" with Norelus. ROA 811 (emphasis added). White stated he heard the officers call Norelus
22 gay words. ROA 811. White further stated that he told the officers in the past that Norelus had mental
23 issues but they continued to harass Norelus. ROA 811.

24 Inmate Williams stated that Norelus had mental issues. ROA 811. On the day of the incident,
25 Williams saw Employee and Valdez had Norelus on the wall for an **extended** period. ROA 811 (emphasis
26 added). He also overheard one of the officers say "I am surprised no one has beat your ass yet." ROA
27 811.

28 Inmate Jackson stated that on the day in question he overheard an officer say, "I'm surprised no

1 one has whooped your ass yet because you have a smart-assed mouth.” ROA 811. Jackson also prepared
2 a letter, which alleged that staff as SDCC were targeting African American inmates and forcing them to
3 stand on the wall for extended periods of time. ROA 811-812.

4 Evidence was admitted showing that inmate Norelus was small in stature and had mental health
5 issues. ROA 811, 835. Evidence was also admitted that Valdez and Employee had previously engaged
6 in name-calling and singling Norelus out. ROA 811. Furthermore, Wachter testified he had to counsel
7 Valdez on his interactions with inmates and said “our job is to quell situations, not get them riled up.”
8 ROA 813. Employee admitted he had worked with Valdez for over one year. Exhibit 2, NDOC 129.
9 Thus, Employee likely knew of Valdez’s negative interactions with inmates.

10 Employee admitted the inmate’s movements were slight. ROA 203. Employee further admitted
11 that the last time the inmate looked at his wrist was at about 10:45 in the video and, by 10:50, Valdez
12 was behind the inmate with his hands on his back. ROA 204. Employee admitted that the last movement
13 the inmate made was at least five seconds before Valdez approached from behind. ROA 204.

14 Employee testified that he believed the inmate’s movements to be threatening. ROA 209. Yet,
15 despite this “perceived” threat, Employee turned his back on the inmate and walked away several times
16 during the 11 minutes the inmate was on the wall. ROA 209-210. Employee claimed he had to walk away
17 to perform other duties, yet at about 6:49, Employee walks away from the inmate when there are no other
18 inmates around. ROA 210. Furthermore, for the last several minutes in the video, no other inmates are
19 searched. ROA 838.

20 Moore testified that he believed Employee and Valdez singled out Norelus. ROA 346. Moore
21 testified that “[t]hey pat him down. They physically put his hands higher up on the wall. And then they
22 knowingly and intentionally turned their back on him and walk away from him. Now, they’re at four,
23 five, ten feet.” ROA 346. Moore also testified that this was significant to him as the investigator because
24 it showed that Employee did not believe the inmate to be a threat or did not believe him to be non-
25 compliant because of Employee’s informal approach and that Employee turned and walked away. ROA
26 346-347. Moore testified, “[t]hat’s not something you would do with an agitated inmate or somebody
27 that’s a threat.” ROA 347. Moore also testified Employee and Valdez singled out Noreulus because, in
28 his experience, there were several inmates released but this one inmate was left on the wall and now all

1 the other inmates exiting culinary and walking by can observe the inmate who has remained on the wall
2 and start "jawing back" at him or the officers. ROA 349-350.

3 Moore testified that keeping an inmate on the wall for seven minutes was not customary. ROA
4 352. Moore testified that notably at 10:40 on the video of the incident, Employee is leaning with his left
5 shoulder against the wall and his feet slightly crossed. ROA 356. Moore acknowledged that Norelus was
6 slightly moving and was likely talking back to the officers, but despite the slight movement by Norelus,
7 nothing portrayed in the video should have resulted with Valdez pushing Norelus into the wall and
8 grabbing the inmate by the neck. ROA 357. Moore testified that Norelus did not "come off the wall."
9 ROA 424. Norelus's fingers were still on the wall while his palms came off and, even if his hands came
10 off the wall an inch or two, Norelus did not make a furtive movement to strike an officer. ROA 424. If
11 the way he moved his hands was thirteen times as presented by Employee, Valdez and Employee should
12 not have waited that long and should have handcuffed the inmate right away. ROA 424. The technique
13 used by Valdez -right arm around the neck- was not an NDOC approved technique. ROA 357, 360.
14 Valdez was not using his restraints until the inmate was down on the ground. ROA 358.

15 Moore testified that a correctional officer's job is to deescalate and contain every situation. ROA
16 363, 418. Moore testified that if Norelus had extra food the officers should have taken the food, gotten the
17 inmate's ID number, and written the inmate up for the infraction. ROA 418. He further testified that if
18 the inmate is non-compliant then he could go on the wall or maybe be subject to a more thorough search
19 or could have been placed in restraints and taken to the sergeant's office so a supervisor could handle it.
20 ROA 418-419. Moore testified the culinary is the most volatile place in a prison, and by keeping the
21 inmate on the wall for an extended period of time with both officers' attention on one inmate instead of
22 the culinary was not justified. ROA 418-419. Moore testified:

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

27 ROA 363-364.
28

1 During the investigation, Valdez stated on a scale of one to ten, with ten being agitated, Norelus
2 was at a ten. ROA 785-787. However, Moore noted that what was depicted in the video did not show
3 Norelus being at a ten. Moore testified that if Norelus was at a ten and highly agitated, Employee would
4 not be casually leaning against the wall next to the inmate and the officer would likely not have kept the
5 inmate on the wall for over ten minutes, as the inmate would have become violent and acted out. ROA
6 365-366.

7 Adams, with over 30 years' experience in NDOC and as the associate warden of operations, stated
8 that in his opinion as a senior officer, Employee permitted unnecessary force to occur which was a
9 violation of NDOC policies. ROA 540. Further, Employee's reporting that the inmate came off the wall
10 while Valdez was attempting to restrain him was not an accurate report, also in violation of NDOC
11 policies. ROA 540-541.

12 Russell testified that he concurred with Employee's dismissal because the inmate was on the wall
13 for 10 minutes before Valdez walked up from behind, grabbed the inmate around the neck and tumbled
14 to the ground. ROA 561. Russell testified that Employee as the senior officer had a responsibility and
15 obligation during that 10 minute period to do something different and to do anything from preventing a
16 use of force. ROA 561. Russell testified that "at no time did I see [Norelus] resist and according to the-
17 the report, he was resisting when he was trying to be restrained and I didn't see any of that in the report
18 [sic], which spoke to the integrity of both officers." ROA 561.

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

20 Because omission is a deception. I mean, none of that was brought forth
21 and it should've been. After reviewing the video and the investigation, that
22 report should've included at least that the inmate was on the wall for 10-
23 15 minutes or 15-16 minutes. And that the officer then pushed the inmate
24 forward. There was no resistance, grabbed around the neck and threw to
the ground, which is not what the training is taught...It was an assault
basically.

25 ROA 562-563.

26 Russell testified that Employee's report not only included false and misleading statements but
27 also omissions. ROA 563. Russell further testified that the misconduct at issue is egregious because he
28 relies on the officers to adhere to NDOC rules and regulations. ROA 564. Russell expects a senior officer

1 to prevent the use of force from occurring in that 10 minute period, let supervisory staff know of what
2 occurred, and report it accurately. ROA 563-564. Russell testified that any of the violations alone was
3 enough to support Employee's dismissal. ROA 564.

4 **V.**

5 **SUMMARY OF ARGUMENT**

6 The hearing officer's decision substantially violated the rights of NDOC because the decision was
7 in violation of constitutional or statutory provisions, affected by other error of law and clearly erroneous
8 in view of the reliable, probative and substantial evidence of the whole record. First, the hearing officer
9 erroneously relied on AR 339 following the Nevada Supreme Court's ruling in *Ludwick* that AR 339 is
10 invalid and it is clear error for the hearing officer to rely on AR 339 for *any* purpose. Second, the hearing
11 officer violated statutory provisions and committed clear error when he failed to consider whether the
12 Employee violated NAC 284.650(1), (10) and (21) as identified in his Specificity of Charges. Third, the
13 hearing officer erred when he used a preponderance of evidence standard when the correct standard is
14 substantial evidence. Fourth, the hearing officer's decision was arbitrary, capricious, and clearly
15 erroneous in view of the reliable, probative, and substantial evidence in the whole record. NDOC
16 presented both documentary evidence and testimony demonstrating that Employee's conduct was
17 seriously in violation of both the law and NDOC regulations and policy. The substantial evidence in the
18 record supported the discipline imposed on Employee and NDOC had just cause for imposing the
19 dismissal on an employee who they believe allowed unauthorized, excessive use of force on an inmate
20 and who subsequently was dishonest in reporting the use of the force and the circumstances leading up
21 to the incident. Accordingly, the Decision must be set aside in whole as the substantial rights of NDOC
22 were prejudiced by requiring NDOC to reinstate an employee who engaged in such egregious
23 misconduct.

24 **VI.**

25 **LEGAL ARGUMENT**

26 **A. Standard of Review**

27 The standard of review for evaluating a hearing officer's decision is governed by the Administrative
28 Procedure Act, as set forth in NRS 233B.010, et seq. *See Dredge v. State, ex rel., Dep't of Prisons*, 105

1 Nev. 39, 43, 769 P.2d 56, 58 (1989). Pursuant to NRS 233B.135(3), a reviewing court may remand or affirm
2 a final decision of a hearing officer, or set it aside in whole or in part, if the substantial rights of the petitioner
3 have been prejudiced because the final decision of an 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 evidence
on the whole record; or
- 9 (f) Arbitrary or capricious or characterized by abuse of discretion.

8 NRS 233B.135 (3).

9 The District Court “defer[s] to an agency’s interpretation of its governing statutes or regulations
10 if the interpretation is within the language of the statute.” *Taylor v. Dep’t. of Health & Human Servs.*,
11 129 Nev. 928, 930, 314 P.3d 949, 951 (2013) (quoting *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of*
12 *Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008)). The District Court reviews other questions
13 of law de novo. *See Bisch v. Las Vegas Metro. Police Dep’t*, 129 Nev. 328, 334, 302 P.3d 1108, 1112
14 (2013). The District Court will uphold findings of fact when supported by substantial evidence, which is
15 defined as “evidence that a reasonable person would accept as adequate to support [the] conclusion.” *Id.*

16 The authority granted the hearing officer under NRS 284.390(6) is to determine whether the
17 agency had just cause for the discipline “as provided in NRS 284.385.” A dismissal for “just cause is one
18 which is not for any arbitrary, capricious, or illegal reason and which is one based upon facts (1) supported
19 by substantial evidence and (2) reasonably believed by the employer to be true.” *Sw. Gas Corp. v. Vargas*,
20 111 Nev. 1064, 1077, 901 P.2d 693, 701 (1995).

21 **B. The Hearing Officer’s Reliance on NDOC AR 339 was a Clear Error of Law**

22 The hearing in this case concluded on April 16, 2019. On May 2, 2019, prior to the hearing officer
23 issuing his Decision, the Nevada Supreme Court issued its Opinion in *NDOC v. Ludwick*, holding that
24 NDOC Administrative Regulation (AR) 339 is “invalid and of no legal effect for purposes of employee
25 discipline” because AR 339 has not been approved by the Personnel Commission. *NDOC v. Ludwick*,
26 135 Nev. Adv. Op. 12, ___ P.3d ___ (May 2, 2019). *Ludwick* held it was “**a clear error of law**
27 **warranting remand**” for a hearing officer to rely on AR 339 “for any purpose.” *Ludwick* at 9 (emphasis
28 added). *Ludwick* further held that the hearing officer must address whether the employee’s actions

1 constitute violations of NAC 284.650 as listed in the specificity of charges. *Ludwick* at 9. If the hearing
2 officer finds that the employee violated the relevant NAC provisions, the hearing officer must then apply
3 the remaining two steps outlined in *O’Keefe*⁵ to determine whether those violations warranted
4 termination as a first-time disciplinary action. *Ludwick* at 9 (emphasis added).

5 On May 2, 2019, Employee filed a Supplemental Brief Regarding Change of Law, advising the
6 hearing officer that he could not rely on AR 339 for employee discipline and doing so would be a clear
7 error of law. ROA 597-610. On May 3, 2019, NDOC filed its Response noting that while AR 339 was
8 invalidated, the hearing officer was required to address whether the Employee violated NAC 284.650 as
9 charged in the SOC and could rely on other NDOC administrative regulations, including AR 405, OP
10 405 and OP 407, as well as the Post Order for the Search and Escort Unit, which do not require approval
11 of the Personnel Commission. ROA 593-596.

12 Despite this change in law and direction from the Nevada Supreme Court, the hearing officer did
13 not address whether Employee’s actions violated NAC 284.650. Instead, the hearing officer made factual
14 findings, using the specific language found in AR 339.07.9(A) and AR 339.07.17(A). ROA 591.
15 Accordingly, the hearing officer’s analysis and reliance on both AR 339.07.9(A) and AR 339.07.17(A),
16 which formed the sole basis for his Decision, was legal error.

17 **C. The Hearing Officer Violated Statutory Provisions and Committed Clear Error when He**
18 **Failed to Consider Whether Employee Violated NAC 284.650 (1), (10) and (21)**

19 NAC 284.794(1) specifically instructs that “the hearing officer shall determine the evidence upon
20 the charges and specifications as set forth by the appointing authority in the appropriate documents . . .”
21 In accordance with NAC 284.656(3)(c), NDOC served Employee with a Specificity of Charges on March
22 16, 2017, recommending his dismissal from state service for having violated NAC 284.650(1), NAC
23 284.650(10), NAC 284.650(21), AR 339.07.9(A) and AR 339.07.17(A). ROA 845-906. It was upon this
24 basis that Employee was later dismissed from state service on April 21, 2017. ROA 844. Employee then
25 appealed his dismissal and generally disputed his violation of the above-noted regulations. ROA 1147-
26

27 ⁵ 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 1149. Not only were Employee's violations of NAC 284.650(1), NAC 284.650(10) and NAC
2 284.650(21) specifically stated in the SOC, but they were also discussed in NDOC's Prehearing
3 Statement, testimony was elicited from Warden Howell on these violations, and even the Decision
4 recognized that these violations were at issue. ROA 19-31, 586, 715-1019. Nevertheless, the hearing
5 officer failed to rule on (or even consider) whether Employee violated NAC 284.650(1), NAC
6 284.650(10) and/or NAC 284.650(21). ROA 583-592. In doing so, the Hearing Officer neglected his
7 statutory duty to rule on all the contested violations at issue. *See* NRS 284.390(1); *see also* NRS
8 284.390(7). The Hearing Officer's failure to even consider these NAC 284.650 violations is even more
9 significant following the recent *Ludwick* decision, in which the Supreme Court emphasized that a hearing
10 officer must rule on such violations listed in the specificity of charges. *Ludwick* at 9.

11 Moreover, the Hearing Officer's failure to consider these NAC 284.650 violations was not
12 harmless error, since substantial evidence showed that Employee violated: NAC 284.650(1) by
13 permitting the use of unnecessary, unauthorized or excessive force against an inmate in direct violation
14 of the 8th Amendment, AR 405, SDCC OP 405 SDCC OP 407 and Search and Escort Post Order; NAC
15 284.650(21) by permitting an act of violence, including intimidation, assault or battery, to occur in the
16 performance of his duties; and NAC 284.650(1) by submitting a report containing false and/or misleading
17 statements as well as omissions. Employee reported that "[Norelus] came off the Culinary wall while
18 C/O Valdez was attempting to restrain him." ROA 872. As stated above, the hearing officer found that
19 the inmate's hands remained on the wall and that there was no evidence that Valdez was restraining the
20 inmate. ROA 585. However, despite these findings, the hearing officer did not find that Employee was
21 dishonest in violation of NAC 284.650(10).

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

25 **D. The Hearing Officer Clearly Erred When He Used the Preponderance of the Evidence**
26 **Standard**

27 In his Decision, the hearing officer found that the pursuant to *Nassiri v. Chiropractic Physician's*
28 *Board of Nevada*, that "preponderance of evidence is the standard of proof for an agency to take

1 disciplinary action against an employee.” ROA 588. The hearing officer goes on to hold that NDOC did
2 not establish by a preponderance of the evidence that Employee permitted or employed the use of
3 unauthorized force. ROA 588-589, 591. The hearing officer further held that NDOC did not meet its
4 burden by a preponderance of evidence that Employee submitted a report with false or misleading
5 information. ROA 591.

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

10 The standard of proof in a hearing conducted under NRS and NAC Chapter 284 is substantial
11 evidence of “just cause.” NRS 284.390(7). “Just cause” is synonymous with “legal cause.” *Whalen v.*
12 *Welliver*, 60 Nev. 154, 104 P.2d 188, 191 (1940). “A discharge for ‘just’ or ‘good’ cause is one which is
13 not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) *supported by*
14 *substantial evidence*, and (2) reasonably believed by the employer to be true.” *Southwest Gas Corp. v.*
15 *Vargas*, 111 Nev. 1064, 1078, 901 P.2d 693, 701 (1995) (emphasis added). Substantial evidence has been
16 defined as that which “a reasonable mind could accept as adequately supporting an agency’s
17 conclusions.” *Nassiri v. Chiropractic Physicians’ Bd.*, 130 Nev. 245, 248, 327 P.3d 487, 489 (2014); *see*
18 *also, State, Emp. Sec. Dep’t v. Hilton Hotels*, 102 Nev. 606, 608, 792 P.2d 497, 498 (1986), citing
19 *Richardson v. Perales*, 402 U.S. 389 (1971). Substantial evidence was well defined in *Robertson Transp.*
20 *Co. v. P.S.C.*, 39 Wis.2d 653, 159 N.W.2d 636, 638 (1968):

21 [S]ubstantial evidence [does] not include the idea of this court weighing the
22 evidence to determine if a burden of proof was met or whether a view was
23 supported by the preponderance of the evidence. Such tests are not
24 applicable to administrative findings and decisions. We [equate] substantial
25 evidence with that quantity and quality of evidence which a reasonable man
26 could accept as adequate to support a conclusion. And, in this process, sec.
27 227.20(1)(d) Stats. providing that the decision of an agency may be reversed
28 if unsupported by substantial evidence in view of the entire record as
submitted ***does not permit this court to pass on credibility or to reverse an
administrative decision because it is against the great weight and clear
preponderance of the evidence, if there is substantial evidence to sustain
it.*** [Emphasis added.]

1 Recent Nevada Supreme Court and Nevada Court of Appeals opinions outlining the role of
2 hearing officers confirm that the standard is substantial evidence. *See O'Keefe v. Dep't. of Motor*
3 *Vehicles*, 134 Nev. Adv. Op. 92, 431 P.3d 350 (Dec. 6, 2018) (noting a discharge for just cause is one
4 that is supported by substantial evidence) and *Dep't of Corr. v. Ludwick*, 135 Nev. Adv. Op. 12, 440 P.3d
5 43, 45 (2019). *See also Nevada Dep't of Motor Vehicles v. Adams*, No. 68057, 2017 WL 521774, at 2
6 (Nev. App. Jan. 30, 2017) (unpublished) (noting *Nassiri* may have caused confusion because it noted
7 the standard of proof was by a preponderance of the evidence, but that was in relation to the agency's
8 determination for its [occupational] licensing [revocation] proceedings; ***"substantial evidence" is the***
9 ***proper standard of review to be used during the hearing officer's review***).

10 Here, the hearing officer made findings of fact that NDOC did not meet its burden of proving by
11 *preponderance of the evidence* that the Employee permitted use of force or knowingly and intentionally
12 submitted a report with false or misleading information. The hearing officer used a burden that is not
13 supported by state law or the recent Nevada Supreme Court and Nevada Court of Appeals opinions
14 outlining the role of the hearing officers.

15 In this case, NDOC's factual determinations were reasonably supported by evidence of sufficient
16 quality and quantity. In making its decision to dismiss Employee, NDOC reviewed the reports and video
17 evidence, and conducted an investigation, which included interviews of several inmates and the officers
18 present on the scene. All of the evidence showed that Employee and Valdez singled out Norelus. NDOC
19 witnesses testified that the length of time the inmate was on the wall was excessive and that the inmate
20 did not pose a threat. The evidence showed Employee could have taken other steps to deescalate the
21 situation but instead required the inmate to stay on the wall long after his pat search was over. NDOC
22 reasonably believed the evidence to support the violations in the SOC. Additionally, NDOC Wardens
23 and Associate Wardens involved in the disciplinary matter testified on why the evidence they reviewed
24 demonstrated egregious misconduct, warranting dismissal. Under the appropriate evidentiary standard,
25 it is clear that Employee violated policies, was dishonest, and allowed an assault to occur.

26 Thus, it was clear error for the hearing officer to rely on an improper standard of proof and the
27 District Court should reverse and remand to the hearing officer to determine whether substantial evidence
28 supported NDOC's determination that Employee violated NAC 284.650(1), (10), and (21).

E. The Hearing Officer's Decision was Arbitrary and Capricious and Clearly Erroneous In View of the Reliable, Probative, and Substantial Evidence On the Whole Record

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

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

Here, the hearing officer only reached step one under *O’Keefe*. The hearing officer determined that Navarrete did not commit the alleged violations. ROA 583-591. However, the hearing officer’s Decision was arbitrary, capricious, and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The substantial evidence in the record demonstrates that

1 NDOC's decision to dismiss Employee was reasonable and based on just cause. The substantial evidence
2 in the record does not support the hearing officer's findings and conclusions.

3 **1. Violations of NDOC regulations on use of force and restraints**

4 The hearing officer held that Employee did not willfully employ or permit the use of unauthorized
5 force. ROA 589. This holding is contradictory to the hearing officer's other findings and the evidence in
6 the record. Specifically, the hearing officer found that a random pat search typically is completed in a
7 minute or so. ROA 584. The hearing officer further found, although the pat down was completed less
8 than two minutes into the incident, Norelus was kept on the wall because he was not complying, verbally
9 abusive, and agitated. ROA 584-585. The video evidence of the event does not support this finding.
10 Additionally, at the hearing, Moore, Wachter, Adams, Russell and Howell testified that Norelus, while
11 fidgety, was not agitated, did not pose a physical threat, and even if not complying should not have stayed
12 on the wall for over ten minutes. The post order requires counseling to be discreet and timely. The hearing
13 officer goes on to find that Employee's "testimony was that Officer Valdez verbally told the inmate he
14 was going to cuff him and take him to the sergeant, **yet, there was no signs that Officer Valdez actually**
15 **had his handcuffs in hand.**" ROA 585 (emphasis added). Indeed, the testimony from at least five other
16 witnesses supported NDOC's conclusion that Valdez was not attempting to restrain the inmate until after
17 the force was used and that Valdez's actions on the video did not conform to NDOC's policies and
18 training on restraining an inmate. Interestingly enough, the hearing officer found that Valdez's conduct
19 continues to appear unjustified. Yet, despite the substantial evidence that Employee as a senior officer is
20 held to a higher standard and had an obligation to intervene, and the evidence that Employee could have
21 restrained the inmate immediately and taken the inmate to the on duty sergeant, rather than keep him on
22 the wall for an extended period of time, the hearing officer concluded Employee did nothing wrong. The
23 Decision completely ignores any of the testimony provided by five witnesses from NDOC ranging in
24 rank from officer to warden. The hearing officer found that Employee had the discretion to keep the
25 inmate on the wall for the extended period of time and that there is no rule to immediately bring a non-
26 compliant inmate to the sergeant. ROA 589. Again, the hearing officer completely ignored the undisputed
27 evidence and testimony.

28 NDOC AR 405 Use of Force, OP 405 Use of Force, OP 407 Use of Restraints, Search and Escort

1 Post Order were all admitted into evidence. These policies and procedures are substantial evidence that
2 the force used was not a spontaneous use of force, because there was no emergency. These policies and
3 procedures further exhibited that the force used was not reasonable and was in fact excessive because
4 Norelus was not a physical threat to the officers and the testimony of other NDOC staff stated that the
5 force used was not reasonable in light of the circumstances. Additionally, the policies and procedures, as
6 well as the substantial evidence and testimony, show that Valdez was not “attempting to restrain”
7 Norelus. Valdez did not have his handcuffs out and did not approach the inmate in a way to indicate he
8 was going to restrain him. In fact, the hearing officer found there were no signs that Valdez actually had
9 his handcuffs in hand. ROA 585. The testimony of Wachter, Moore, Adams, Russell and Howell further
10 showed that Employee’s actions were in violation of policy and custom and that he should have taken
11 different action and should not have kept the employee on the wall.

12 **2. Violations of dishonesty**

13 The hearing officer held that Employee did not knowingly and intentionally submit a report with
14 false or misleading information. ROA 591. This holding is contradictory to the hearing officer’s other
15 findings and the evidence in the record. Specifically, the hearing officer found that there was no signs
16 that Officer Valdez actually had his handcuffs in hand. ROA 585 (emphasis added). Yet, the hearing
17 officer found Employee’s report that the inmate “came off the Culinary wall while C/O Valdez was
18 **attempting to restrain** him resulting in a spontaneous use of force” to be honest. Wachter, Moore,
19 Adams, Howell, and Russell testified that the evidence did not show Valdez was attempting to restrain
20 the inmate. The testimony of Adams, Howell and Russell stated that Employee’s report was not only
21 false and misleading, but contained glaring omissions regarding the events leading up to the use of force.
22 The hearing officer disregarded this undisputed testimony and relied on the testimony of Dean Willett,
23 the direct supervisor who was on duty that day but not present at the incident with inmate Norelus. Willett
24 testified that when he reviewed Employee’s report that day, he believed it to be sufficient. ROA 143-144.
25 However, Willett also testified that the main objective when reviewing a report is whether it flows, that
26 it’s written properly, and that grammar’s correct. ROA 144. Willett did not review Employee’s report in
27 conjunction with watching the video. ROA 147. Willett said that the description of the force, such as
28 putting an arm around the inmates’ neck, should be in the report. ROA 150. However, Willett was not

1 reviewing the report for violations of NAC 284.650. In fact, the testimony was that AW Adams was in
2 charge of reviewing the reports in NOTIS and saw concerns with the video and report and referred for
3 investigation. Willett had no involvement in the investigation, adjudication or determination of discipline.
4 ROA 151-152. The testimony from Moore, Wachter, Adams, Russell and Howell supported NDOC's
5 conclusion that Employee's report was not accurate or truthful. Despite this overwhelming evidence, the
6 hearing officer after "much soul searching" found Employee's report factually accurate. ROA 590.

7 As stated at length above, there was significant testimony and evidence admitted supporting that
8 the Employee committed the alleged violations. The video of the use of force in this case was admitted
9 into evidence. The video clearly shows that inmate Norelus was singled out to stay on the wall for over
10 ten minutes after his pat down search was complete. While the video shows inmate Norelus fidgeting
11 some, the video clearly shows that the inmate was not acting in a threatening manner to the officers. In
12 fact, the hearing officer found that the inmate "did not appear to be a physical threat." ROA 589.

13 Additionally, evidence showed Valdez and Employee had previously engaged in name-calling
14 and singling Norelus out. ROA 811. Wachter testified he had to counsel Valdez on his interactions with
15 inmates and said "our job is to quell situations, not get them riled up." ROA 813.

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

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

28 The hearing officer found that there were no signs that Officer Valdez actually had his handcuffs

1 in hand and that the inmate's "hands remain on the wall." The hearing officer further found that Valdez's
2 conduct appears to be "unjustified." *Id.* The hearing officer found that there is no rule on the length of
3 time an inmate could be kept on the wall. *Id.* at 7. Yet, the hearing officer heard ample testimony that
4 there appeared to be no reason for Norelus to have been on the wall for over ten minutes. Despite this
5 evidence, the hearing officer found that Employee did not permit the use of unauthorized force.

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

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

17 VII.

18 CONCLUSION

19 This Court's review of the Record on Appeal will show that the Findings of Fact, Conclusions of
20 Law Decision and Order of the administrative hearing officer below contains errors of law, and the
21 hearing officer abused his discretion and acted arbitrarily and capriciously in setting aside the dismissal.
22 Therefore, Petitioner respectfully requests entry of this Court's Order granting Petitioner's Petition for
23 Judicial Review and reversing and setting aside the hearing officer's Decision in its entirety.

24 DATED November 27, 2019.

25 AARON D. FORD
26 Attorney General

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

CERTIFICATE OF COMPLIANCE

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

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 12 pt. Times New Roman; or

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

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

☐ Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

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

☒ Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED November 27, 2019.

AARON D. FORD
Attorney General

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

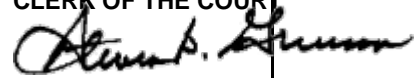
CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 27th day of November 2019 I electronically filed the foregoing **PETITIONER'S OPENING BRIEF** with the Clerk of the Court by using the 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 pre-paid, at Las Vegas, Nevada to the following:

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

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

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



LAW OFFICE OF DANIEL MARKS
DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
NICOLE M. YOUNG, ESQ.
Nevada State Bar No. 12659
610 South Ninth Street
Las Vegas, Nevada 89101
E-Mail: Office@danielmarks.net
Telephone: (702) 386-0536
Facsimile: (702) 386-6812
Counsel for Respondent Jose Miguel Navarrete

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, ex. Rel. Case No. A-19-797661-J
DEPARTMENT OF PUBLIC SAFETY; Dept. No. XVI

Petitioner,

v.

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

Respondent.

RESPONDENT'S ANSWERING BRIEF

COMES NOW the Respondent, Jose Miguel Navarrete, and hereby submits
his Answering Brief, in accordance with NRS 233B.133.

DATED this 26th day of February, 2020.

LAW OFFICE OF DANIEL MARKS

/s/ Nicole M. Young

DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
NICOLE M. YOUNG, ESQ.
Nevada State Bar No. 12659
610 South Ninth Street
Las Vegas, Nevada 89101
Attorneys for Defendant

TABLE OF CONTENTS

TABLE OF AUTHORITIES	3-4
I. STATEMENT OF ISSUES PRESENTED FOR REVIEW	5
II. STATEMENT OF THE CASE	5-6
III. STATEMENT OF FACTS	6-10
IV. SUMMARY OF THE ARGUMENT	10-11
V. LEGAL ARGUMENT	11-21
A. NDOC wants this Court to allow it to continue to waste tax payer money for not properly obtaining extensions for investigations leading to discipline.	12-14
B. NDOC's decision to terminate Navarrete was reversed because NDOC simply could not prove the allegations brought against Navarrete.	14-16
C. Step one of the <i>O'Keefe</i> standard requires NDOC to prove a violation actually occurred under the preponderance of the evidence standard to impose discipline.	16-19
D. The hearing officer correctly found, under step one of <i>O'Keefe</i> , that NDOC did not prove the alleged violations actually occurred by a preponderance of the evidence.	20-21
VI. CONCLUSION	22
CERTIFICATE OF SERVICE	23

TABLE OF AUTHORITIES

Cases

<i>Brown v. City of Los Angeles</i> 102 Cal.App 4th 155, 125 Cal. Rptr. 2nd 474 (2003)	19
<i>Cianci v. Pettibone Corp.</i> 152 F.3d 723 (7 th Cir. 1998)	18
<i>Cleveland Board of Education v. Loudermill</i> 470 U.S. 532, 105 S. Ct. 1487 (1985)	19
<i>EEOC v. Republic Serv. Inc.</i> 640 F.Supp.2d 1267 (D. Nev. 2009)	18
<i>Elam v. Reg. Finan. Corp.</i> 601 F.3d 873 (8 th Cir. 2010)	18
<i>Gilman v. Nev. St. Bd. of Veterinary Med. Exam.</i> 120 Nev. 263 (2004)	12
<i>Graham v. Connor</i> 490 U.S. 386, 109 S.Ct. 1865 (1989)	20
<i>Grievance of Brown</i> 177 Vt. 365, 865 A.2d 402 (2004)	19
<i>Grievance of Muzzy</i> 141 Vt. 463, 449 A.2d 970 (1982)	19
<i>Hudson v. McMillian</i> 503 U.S. 1, 112 S.Ct. 995 (1992)	20
<i>Jones v. Rosner</i> 102 Nev. 215, 719 P.2d 805 (1986)	12
<i>Knapp v. St. Dept. of Prisons</i> 111 Nev. 420, 892 P.2d 575 (1995)	12
<i>Meadows v. Civ. Serv. Bd. Of LVMPD</i> 105 Nev. 624, 781 P.2d 772 (1989)	11
<i>Miss. v. Turner</i> 498 U.S. 1036, 111 S. Ct. 1032 (1991)	13
<i>Nassiri v. Chiropractic Phys. Bd.</i> 130 Nev. 245, 327 P.3d 487 (2014)	12, 16, 17, 19
<i>NDOC v. Ludwick</i> 135 Nev. Adv. Op. 12, 440 P.3d 43 (2019)	6, 12, 15, 19
<i>Nev. Indust. Commn. v. Williams</i> 91 Nev. 686, 541 P.2d 905 (1975)	12

1	<i>O’Keefe v. Dept. of Motor Veh.</i>	
2	134 Nev. 752, 431 P.3d 350 (2018)	5, 11, 12, 18, 19, 21
3	<i>Pfeiffer v. Merit Sys. Prot. Bd.</i>	
4	230 F.3d 1375 (Fed. Cir. 1999)	13
5	<i>Southwest Gas Corp. v. Vargas</i>	
6	111 Nev. 1064, 901 P.2d 693 (1995)	17, 18

Statutes

6	NRS 233B.135	11, 12, 21, 22
7	NRS 284.383	15
8	NRS 284.385	17
9	NRS 284.387	12-14
10	NRS 284.390	17-18

Regulations

12	NAC 284.638	15
13	NAC 284.650	5, 10, 11, 14, 15, 19
14	NAC 284.6555	12-14
15	NAC 284.742	15-16
16	NAC 284.798	18

Legislative History

18	Minutes of the Senate Committee on Legislative	
19	Operations and Elections, May 10, 2011, 76 th Sess,	
20	A.B. 179	13

1 **I. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

2 Under the first step of *O’Keefe’s*¹ three-step review of an employee’s
3 dismissal from the State Personnel System, the hearing officer must conduct a de
4 novo review to determine whether the employee did “in fact” commit the alleged
5 violation. On this Petition for Judicial Review (“PJR”), this Court need only
6 consider:

- 7 1. What standard of proof is required to prove the employee did “in
8 fact” commit the alleged violation?
9 2. Did NDOC prove Navarrete did “in fact” violate NAC 284.650(21)
10 for acts of violence in the workplace based on Officer Valdez’ use of
11 force on October 9, 2016?
12 3. Did NDOC prove Navarrete did “in fact” violate NAC 284.650(10)
13 for dishonesty in his use of force report regarding the October 9,
14 2016, incident?

15 **II. STATEMENT OF THE CASE**

16 Petitioner State of Nevada ex rel. its Department of Corrections (“NDOC”)
17 terminated Respondent Jose Miguel Navarrete’s (“Navarrete”) employment as a
18 senior corrections officer on April 21, 2017. (ROA 587.) Navarrete appealed his
19 termination to the Department of Administration Personnel Commission on May
20 8, 2017, in accordance with NRS 284.390. (ROA 587 & 1147.)

21 On January 29, 2018, the hearing before the State Personnel Commission
22 was stayed pending the resolution of the corresponding criminal case brought by
23 the State of Nevada against Navarrete for the incident at issue in this case. (ROA
24 1115; and *see St. of Nev. v. Navarrete*, Case No. C-18-333098-2, filed in the
25 Eighth Judicial District Court.) After a jury acquitted Navarrete on all charges,
26 including oppression under color of office, inhumanity to prisoner, and false report
27 by public officer, this case proceeded to hearing before Hearing Officer Mark
28 Gentile (“Gentile”). (ROA 687-88.)

¹ *O’Keefe v. Dept. of Motor Veh.*, 134 Nev. 752, 431 P.3d 350 (2018).

1 The hearing in this case took place on April 2, 2019 and April 16, 2019.
2 Before Gentile issued his decision, the Nevada Supreme Court published its
3 decision in *NDOC v. Ludwick*² on May 2, 2019, where it invalidated AR 339,
4 which was the basis for three of the charges brought against Navarrete in this case.
5 (ROA 846.) Both parties provided Gentile with supplemental briefing on this
6 issue. (ROA 593-610.) The decision at issue was filed on May 30, 2019. (ROA
7 583.)

8 **III. STATEMENT OF FACTS**

9 Navarrete was terminated for an incident involving another correction
10 officer, Paul Valdez (“Valdez”), and inmate Rickie Norelus (“Norelus”) at
11 Southern Desert Correctional Center (“SDCC”). (ROA 583.) On October 9, 2016,
12 during the breakfast service, Navarrete and Valdez “were randomly searching
13 [numerous] inmates leaving [the] culinary for contraband.” (ROA 583-84.) This
14 search, as well as other searches, are “a common occurrence” at SDCC. (ROA
15 583.) A surveillance video recorded the incident from a single perspective with no
16 audio. (ROA 583.)

17 The standard procedure for these searches is to have the inmate place their
18 hands against the wall and submit to a brief pat down search. (ROA 584.) While
19 there is no set time frame for each individual search, the process is typically
20 completed in about a minute. (ROA 584.)

21 During the hearing at issue, Gentile was provided an enhanced and slow
22 motion video of the crucial moments of this incident. (ROA 584, 709-11 & 1150-
23 51.) Navarrete also provided comprehensive testimony regarding what occurred
24 during each stage of the encounter. (ROA 584.) **Gentile found Navarrete**
25 **credible.** (ROA 584.)

26 ////

27 ////

28 ////

² 135 Nev. Adv. Op. 12, 440 P.3d 43 (2019)

1 Gentile also found, “without question”:

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

7 (ROA584.) These findings support Navarrete’s testimony that Norelus was
8 noncompliant. The hearing officer also found that Norelus’ search occurred at the
9 1:50 minute mark and “that after the search was completed, [Norelus] again, took
10 his hands off the wall and was not complying.” (ROA 584.) The video supports
11 this finding . (ROA 585.) From the 2:00 to 3:00 minute mark, Norelus’ agitation
12 and verbal abuse continues. (ROA 585.) From the 3:00 to 6:00 minute mark,
13 Norelus is moving a lot and there “appears to be a lot of communication between “
14 Norelus and the officers. Norelus continues “to be verbally abusive and agitated.”
15 (ROA 585.)

16 Between minutes 6 and 9, Norelus’ same conduct continues. (ROA 585.)
17 With regard to Navarrete, Gentile specifically finds he “positions himself
18 alongside the inmate and it does appear he is trying to de-escalate the situation,
19 which is what [Navarrete] described.” (ROA 585.) While this approach does seem
20 to calm Norelus, “there is still a lot of head movements and animated
21 conversation.” (ROA 585.)

22 Because it was a relatively minor issue, and Navarrete did not know the
23 inmate because of his recent shift change, Navarrete opted to attempt to build a
24 good rapport with Norelus by counseling him and attempting to de-escalate the
25 situation. (ROA 107 & 109-10.) This conduct is seen throughout the video through
26 Navarrete’s calm demeanor, including leaning on the wall to show the inmate he is
27 not a threat. (ROA 585.)

28 ////

1 Navarrete wanted to obtain the inmate's compliance because SDCC was (1)
2 on partial lock down, (2) short-staffed that day, and (3) cracking down on
3 "contraband" smuggled out of morning chow. (ROA 112-14.) In situations where
4 an inmate is not compliant, the officers have the option to restrain the inmate and
5 bring him to the next in command. (ROA 114 & 475.) This process could end up
6 taking longer and would only leave one officer in charge of the other inmates so it
7 is left in the officer's discretion to determine whether such action is appropriate.
8 (ROA 479-80.) This is not an ideal situation for a prison that is on partial lock
9 down and short-staffed. (ROA 475-76.)

10 It is at the 10:40 minute mark that the situation implodes. At that time,
11 "Norelus takes his hand off the wall and looks at his wrist" and "appears to be
12 continually talking." (ROA 585.) Valdez then approaches Norelus from behind
13 and tells Norelus he is going to cuff him and bring him to the sergeant. (ROA
14 585.) With regard to this incident, the hearing officer found:

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

21 (ROA 585.)

22 This all "occurred in a matter of a few seconds." (ROA 585.) Valdez
23 immediately cuffed Norelus once on the ground, and Navarrete came over to
24 assist. (ROA 585.) Gentile found that even with the enhanced video, Valdez'
25 conduct was unjustified. (ROA 585.)

26 With regard to the post-incident video, that includes audio, Gentile found
27 that while Norelus is leaving the area he is "laughing at the officers and claiming
28 they will 'put his kids through college.'" (ROA 586.) He also "does not appear

////

////

1 injured and his conduct makes it seem as if he may have been baiting the officers
2 to some extent, which according to the testimony is a common occurrence” at
3 SDCC. (ROA 586.)

4 Navarrete later submitted an informational report, which states:

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

16 (ROA 586.)

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

25 With regard to the charge of dishonesty in relation to Navarrete’s use of
26 force report, the hearing officer found, as follows:

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

33 (ROA 590.) He then concluded:

34 /////

35 /////

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

20 (ROA 590-91.)

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

25 **IV. SUMMARY OF THE ARGUMENT**

26 In the almost 30 pages of NDOC's Opening Brief, NDOC argues form over
27 function. It argues its substantial rights were violated, but all arguments under
28 NRS 233B.135 are merely conclusory statements referencing the various ways a
party's substantial rights could be violated. NDOC never states **how** or **why** any of
its rights were violated by Gentile to support the reversal of Gentile's decision.

The violations brought against Navarrete by NDOC are redundant. NAC
284.650(10) and AR 339.07.9 both relate to dishonesty. Gentile ultimately found
Navarrete's report did not include false or misleading statements, which means he
was not dishonest.

////

////

////

1 NAC 284.650(21), AR 339.07.17, and NDOC”s interpretation that NAC
2 284.650(1) (relying on AR 405) all relate to uses of violence. Gentile found
3 Navarrete did not permit excessive force or personally use force. These findings
4 require reversal of NDOC’s termination under all of these provisions.

5 NDOC has made this case extremely more difficult than it actually is.
6 Gentile ruled on the merits of the actual conduct. NDOC puts form over function
7 when it claims Gentile relied on AR 339. NDOC charged Navarrete with five
8 violations that are redundant of the same two issues, dishonest and use of force.
9 These arguments have no regard for judicial economy and seek to multiply these
10 proceedings without justification.

11 Because Gentile ruled on the actual merits of the conduct at issue under the
12 standard required by the first step of *O’Keefe*, which requires proof by a
13 preponderance of the evidence, this Court should affirm Gentile’s decision.

14 **V. LEGAL ARGUMENT**

15 The final decision of a state agency is “deemed reasonable and lawful” until
16 proven otherwise. NRS 233B.135(2). The party attacking the decision on a PJR
17 bears the burden of proof to invalidate an agency’s decision. *Id.* On a PJR, the
18 petitioner must prove the agency’s decision violates its substantial rights. *Id.* To
19 meet this burden, the petitioner must prove the agency’s decision (1) violates the
20 constitution or other statutory provisions, (2) exceeds the agency’s statutory
21 authority, (3) is based on an unlawful procedure, (4) constitutes legal error, (5)
22 clearly erroneous based on “reliable probative and substantial evidence on the
23 whole record,” or (6) “arbitrary and capricious or characterized by abuse of
24 discretion.” *Id.* A decision is “arbitrary and capricious” when it disregards the
25 facts and circumstances of the case. *Meadows v. Civ. Serv. Bd. Of LVMPD*, 105
26 Nev. 624, 627, 781 P.2d 772 (1989).

27 ////

28 ////

1 NRS 233B.135(3) limits this Court's ability to set aside a state agency's
2 decision. This Court is statutorily prohibited from substituting its judgment on the
3 weight of the evidence or credibility of the witnesses found by the agency to
4 determine a question of fact. *Id.*; see also *Gilman v. Nev. St. Bd. of Veterinary*
5 *Med. Exam.*, 120 Nev. 263 (2004); *Knapp v. St. Dept. of Prisons*, 111 Nev. 420,
6 423, 892 P.2d 575 (1995); *Nev. Indust. Commn. v. Williams*, 91 Nev. 686, 541
7 P.2d 905 (1975).

8 When the agency's conclusions of law are closely related to the findings of
9 fact, those legal conclusions must also be afforded deference and may not be
10 disturbed if supported by substantial evidence. *Jones v. Rosner*, 102 Nev. 215, 719
11 P.2d 805 (1986).

12 In this case, NDOC has failed to set forth a coherent argument to allow this
13 court to invalidate Gentile's decision. That decision analyzes this case on the
14 merits, despite NDOC's failure to properly obtain an extension for its initial
15 decision under NAC 284.6555(1)(b). That decision also properly decides this case
16 in light of *Ludwick's* invalidation of AR 339 after this case was submitted for
17 decision.

18 NDOC would like this Court to ignore *O'Keefe* and *Nassiri* and rubber
19 stamp its initial determination to terminate Navarrete's employment, even though
20 the facts have proven both beyond a reasonable doubt, at the criminal level, and by
21 a preponderance of the evidence, before Gentile, that Navarrete did not do what
22 NDOC claims.

23 **A. NDOC wants this Court to allow it to continue to waste tax payer**
24 **money for not properly obtaining extensions for investigations**
leading to discipline.

25 In 2011, NRS 284.387 was amended to ensure fairness and due process in
26 connection with internal investigations. To meet this goal, the legislature enacted
27 strict time limits on internal investigations of employees. These time limits require
28 an investigation "be completed and the employee notified of any disciplinary

1 action within 90 days after the employee is provided notice” of the investigation.
2 NRS 284.387(2). An extension of 60 days is only allowed upon a showing of good
3 cause for the delay. *Id.* These time limits were intended to ameliorate the financial
4 effects of the State keeping employees on prolonged paid administrative leave
5 during the 90 day investigatory period. (*See Minutes of the Senate Committee on*
6 *Legislative Operations and Elections, May 10, 2011, 76th Sess, A.B. 179, at pp. 8-*
7 *9.*)

8 To ensure this legislative goal is met, NAC 284.6555(1)(b) requires an
9 employer requesting an extension to explain “why the appointing authority is
10 unable to complete the internal administrative investigation and make a
11 determination” within the 90 day statutory period.

12 Navarrete was served with his notice of investigation on October 21, 2016.
13 (ROA 743.) This meant that he had to be served with an NPD-41 Specificity of
14 Charges by no later than January 17, 2017. *See NRS 284.387(2).*

15 On January 13, 2017, NDOC requested a 60 day extension from the
16 Division of Human Resource Management. (ROA 731-33.) The stated reason for
17 the request was “The Specificity of Charges is currently under review at the
18 Attorney General’s Office.” (ROA 731.) The extension was granted on January 17,
19 2017. (ROA 729 & 737.)

20 Pursuant to the plain language of the statute, extensions may not be given
21 based upon mere request; rather such extensions are only granted “upon showing
22 good cause for the delay.” An overextended caseload is not “good cause” for
23 delay. Good cause must be “the result of the events unforeseen and uncontrollable
24 by both counsel and client”. *See Miss. v. Turner*, 498 U.S. 1036, 111 S. Ct. 1032
25 (1991); *See Pfeiffer v. Merit Sys. Prot. Bd.*, 230 F.3d 1375 (Fed. Cir. 1999).

26 Here, there was no good cause for a delay requiring an extension, much less
27 a showing of good cause by NDOC when it made its request. Rather, the facts
28 reveal that the Office of the Inspector General completed its investigation and

1 submitted the matter for adjudication to Warden Jo Gentry on December 9, 2016.
2 (ROA 741.) Warden Gentry sustained the charges on December 13, 2016. (ROA
3 89.) This is more than one month before the January 17, 2017, deadline for the
4 NPD-41. It is unclear why NDOC was dragging its feet and essentially wasting tax
5 payer money by keeping Navarrete on paid administrative leave when it knew one
6 month prior to its request for the extension that it was sustaining the alleged
7 violations against Navarrete.

8 There was no reason why NDOC could not prepare and have the Attorney
9 General's office review the NPD-41 Specificity of Charges in the one month
10 between December 13, 2016 and January 17, 2017. The e-mails generated in
11 connection with the requested extension do not purport to claim "good cause for
12 delay"; rather they demonstrate that NDOC was making multiple requests in
13 multiple cases. (ROA 733.) Because no showing of anything unforeseen,
14 uncontrollable, or complicated was made on January 13, 2017, when the request
15 was sought, the extension was unlawful and the resulting discipline untimely.
16 NDOC violated NRS 284.387, NAC 284.6555(1)(b) and the legislature's intent to
17 save taxpayer money when it granted this 60-day extension without a sufficient
18 showing of a "good cause for delay."

19 While it is understood Gentile did not make a decision on this issue and
20 opted to decide this case on the merits, the timeliness issue shows NDOC has a
21 history of not properly following Nevada law, in this case, to the tax payer's
22 detriment.

23 **B. NDOC's decision to terminate Navarrete was reversed because it**
24 **simply could not prove the allegations brought against Navarrete.**

25 The NPD-41 Specificity of Charges, in this case, alleges Navarrete violated
26 the following regulations:

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

1 NAC 284.650(10) Dishonesty

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

6 The NPD-41 also alleged violations of AR 339.07.9 for false or misleading
7 statements and AR 339.07.17 for unauthorized use of force.

8 NDOC's reliance on AR 339 is their attempt to skip the progressive
9 discipline mandated by NRS 284.383 and NAC 284.638, which provide for a
10 documented warning or, at worst, a written reprimand. AR 339.07.9 is a "Class 5"
11 offense authorizing termination and AR 339.07.17 is a "Class 4-5" offense
12 authorizing suspension or termination. (ROA 846.)

13 AR 339, however, was recently invalidated by the Nevada Supreme Court
14 because it was never submitted to or approved by the Personnel Commission to
15 authorize discipline of an employee. *Ludwick*, 135 Nev. Adv. Op. 12, 440 P.3d 43
16 (2019).

17 The alleged violation of NAC 284.650(1) also does not survive the *Ludwick*
18 decision. That statute authorizes discipline for activity incompatible with
19 conditions of employment "established by law" or which violated provisions of
20 NAC 284.653 or NAC 284.738 to 284.771, inclusive. There is no condition of
21 employment established "by law" implicated in this case.

22 In order to discipline an employee under NAC 284.650(1), the appointing
23 authority is required to determine the specific activities prohibited by an employee
24 because those activities are "inconsistent, incompatible or in conflict" with the
25 employee's duties. NAC 284.742(1). This is not enforceable against an employee
26 until it is approved by the Personnel Commission. NAC 284.742(1). The

27 ////

28 ////

1 appointing authority must also include an explanation of the progressive discipline
2 administered under the policy for the Personnel Commission's approval. NAC
3 284.742(3).

4 The best explanation of this process was recently stated in *Ludwick* when it
5 invalidated AR 339 because it was never submitted to or approved by the
6 Personnel Commission.

7 Because AR 339 was deemed invalid, and NDOC failed to provide any
8 specific facts that Navarrete engaged in activity incompatible with his employment
9 "by law", the NAC 284.650(1) alleged violation does not survive the *Ludwick*
10 decision. Because AR 339 was not properly enacted, the hearing officer could only
11 consider the NAC 284.650 allegations of dishonesty and acts of violence in the
12 workplace.

13 **C. Step one of the *O'Keefe* standard requires NDOC to prove a**
14 **violation actually occurred under the preponderance of the**
15 **evidence standard to impose discipline**

16 NDOC refuses to follow the clear guidance provided by the Nevada
17 Supreme Court to determine the standard of proof in an administrative hearing. In
18 *Nassiri v. Chiropractic Phys. Bd.*, the Court clarified the confusion surrounding
19 issues regarding the standard of proof required during an administrative hearing
20 and the standard of review on a PJR of an administrative decision. 130 Nev. 245,
21 249-50, 327 P.3d 487 (2014).

22 The standard of proof applied during an administrative hearing is
23 determined by the governing statute. *Id.* at 250. If a standard of proof is not clearly
24 stated in the governing statutes, then reason and public policy are used to
25 determine the applicable standard of proof. *Id.* at 250-51.

26 The preponderance of the evidence standard is regularly upheld in Nevada
27 as the "minimum civil standard of proof" consistent with due process *Id.* at 251.
28 Because it is the minimum standard, "[t]here is no lower standard." *Id.* A lower

1 standard “would be nonsensical” and “allow a tribunal to reach a conclusion even
2 after reasoning that the conclusion is more likely to be *incorrect* than” correct. *Id.*
3 at fn 3.

4 Because Navarrete is an employee under the State Personnel System, NRS
5 284.385 and NRS 284.390 are the governing statutes regarding the standard of
6 proof required in a hearing to determine the reasonableness of dismissal. Neither
7 of these statutes explicitly state the standard of proof required in such hearings.
8 Based on *Nassiri*’s guidance, this Court must look to reason and public policy to
9 determine the applicable standard of proof based on the language of the statute.

10 NRS 284.390(7) states:

11 If the hearing officer determines that the dismissal . . . was without
12 just cause as provided in NRS 284.385, the action must be set aside
13 and the employee must be reinstated, with full pay for the period of
dismissal, demotion or suspension.

14 NRS 284.385(1)(a) allows the dismissal of an employee if it serves “the good of
15 the public service.”

16 Recently, some deputy attorney generals, including counsel for NDOC, have
17 argued the “just cause” standard from *Southwest Gas Corp. v. Vargas*, 111 Nev.
18 1064, 901 P.2d 693 (1995), should apply. The fallacy of this argument is that
19 *Vargas* does not actually hold that an employer’s “just cause” for termination need
20 only be proven by substantial evidence. This interpretation fails to consider the
21 crux of *Vargas*, which considers the interplay of the at-will employment doctrine
22 and basic contract principles. *Vargas* carves out a narrow exception to the at-will
23 doctrine to account for unilateral promises provided to employees by their
24 employer in an employment handbook. Because it is a narrow exception, the basic
25 premise of the at-will doctrine survives; either the employer or the employee may
26 terminate the employment relationship at any time.

27 ////

28 ////

1 The *Vargas* decision is analogous to how federal courts interpret an
2 employer's "legitimate business reason" for termination in employment
3 discrimination cases. In those cases, courts have consistently held they "should not
4 second guess an employer's exercise of its business judgment in making personnel
5 decisions, as long as they are not discriminatory." *EEOC v. Republic Serv. Inc.*,
6 640 F.Supp.2d 1267, 1313 (D. Nev. 2009). Courts have also held that an
7 employer's decision to terminate an employee need not be wise, correct, or fair.
8 *Cianci v. Pettibone Corp.*, 152 F.3d 723, 726 (7th Cir. 1998). This is because in
9 private sector employment discrimination cases, the court does not "sit as super-
10 personnel departments reviewing the wisdom or fairness of the business judgments
11 made by employers." *Elam v. Reg. Finan. Corp.*, 601 F.3d 873, 880 (8th Cir. 2010).

12 Unlike in *Vargas*, *Elam*, and *Cianci*, the hearing officer does sit as a super-
13 personnel department reviewing the correctness, fairness, and wisdom of NDOC's
14 termination of Navarrete under the first step of *O'Keefe's* three-step review
15 process under NRS 284.390(1). *See O'Keefe*, 134 Nev. at 759; *see* NAC 284.798.

16 Under the first step of this review, "the hearing officer reviews de novo
17 whether the employee in fact committed the alleged violation." *Id.* In other words,
18 if the hearing officer finds, based on his de novo review of the evidence, that the
19 violation did not occur, then he does not consider the remaining two steps and
20 must reverse the discipline imposed.

21 The language of this step mandates the hearing officer utilize the
22 preponderance of the evidence standard because the hearing officer must
23 determine whether the violation did "in fact" occur. There is no lower standard of
24 proof available to meet the level of proof required that a violation did occur.
25 NDOC's argument that the substantial evidence standard applies is "nonsensical"
26 because it would allow the hearing officer or this Court to "reach a conclusion
27 even after reasoning that the conclusion is more likely to be incorrect" than

28 ////

1 correct. *See Nassiri*, 130 Nev. at fn 3. Use of the substantial evidence standard
2 would violate *O’Keefe’s* requirement of a de novo review to determine if the
3 violation actually occurred. 134 Nev. at 759.

4 In addition to the fact that the Legislature has placed the ultimate fact-
5 finding with hearing officers, it is important to point out that applying the
6 “substantial evidence” standard from *Vargas*, instead of the “preponderance of the
7 evidence” standard from *Nassiri*, would be a federal constitutional violation.
8 Unlike private sector employees, such as in *Vargas*, post-probationary public
9 sector employees, like Navarrete, have a property interest in their employment
10 within the meaning of the Fourteenth Amendment’s Due Process Clause. *See Clev.*
11 *Bd. of Ed. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985).

12 The employer seeking to deprive the employee of his property interest (i.e.
13 discharge the employee) bears the burden of proving an actual violation occurred
14 to warrant termination. *See Brown v. City of Los Angeles*, 102 Cal.App 4th 155,
15 175, 125 Cal. Rptr. 2nd 474, 488 (2003); *See Grievance of Brown*, 177 Vt. 365,
16 865 A.2d 402, 406 (2004). This is the first step required under *O’Keefe*. 134 Nev.
17 at 759.

18 NRS 284.390 does not provide a standard of proof. Therefore, under
19 *Nassiri*, the default standard is preponderance of the evidence. 130 Nev. at 250-51.
20 Application of a lower standard would violate step one of *O’Keefe* and a public
21 employee’s constitutionally protected property interest in their employment under
22 the Fourteenth Amendment. *See O’Keefe*, 134 Nev. at 759; *see Grievance of*
23 *Muzzy*, 141 Vt. 463, 449 A.2d 970 (1982).

24 Because *Ludwick* invalidated AR 339, Gentile could only rely on NAC
25 284.650(10) and NAC 284.650(21) to determine whether Officer Navarrete was
26 “in fact” dishonest and used excessive force.

27 ////

28 ////

1 **D. The hearing officer correctly found, under step one of *O’Keefe*,**
2 **that NDOC did not prove the alleged violations actually occurred**
3 **by a preponderance of the evidence.**

4 Under Nevada law, peace officers may use “reasonable force” to protect
5 themselves and others. The United States Supreme Court has recognized that in
6 evaluating whether force is reasonable “corrections officials must make their
7 decisions ‘in haste, under pressure, and frequently without the luxury of a second
8 chance’.” *Hudson v. McMillian*, 503 U.S. 1, 6, 112 S.Ct. 995 (1992).

9 In *Graham v. Connor*, the Supreme Court reiterated that use of force must
10 be evaluated under a standard of “objective reasonableness”. 490 U.S. 386, 391,
11 109 S.Ct. 1865, 1869 (1989). The Supreme Court emphasized that the
12 “reasonableness of a particular use of force must be judged from the perspective of
13 a reasonable officer on the scene, rather than with the 2020 vision of hindsight”
14 and “not every push or shove, even if it may later seem unnecessary in the peace of
15 a judge’s chambers” is unreasonable. *Id.* at 396-97. Rather:

16 The calculus of reasonableness must embody allowance for the fact
17 that police officers are often forced to make split-second
18 judgments—in circumstances that are tense, uncertain, and rapidly
19 evolving—about the amount of force that is necessary in a particular
20 situation.

21 *Id.*

22 Gentile determined that Navarrete was not dishonest and did not use
23 excessive force. (ROA 588-91.) The undisputed evidence proved the use of force
24 was initiated by Valdez and that Navarrete did not lay hands on Norelus until after
25 Valdez and the inmate were struggling on the ground. (ROA 585 & 588-89.)
26 NDOC failed to prove Navarrete used excessive force.

27 In addition, Gentile also found that Navarrete was not dishonest in the use
28 of force report he prepared after the incident. (ROA 590-91.) He considered the
report written by Navarrete after the incident, along with the fact that Navarrete

////

////

1 did not review the video before he wrote the report. (ROA 590.) He also compared
2 the report to the video in conjunction with Navarrete's testimony, which he found
3 credible. (ROA 584 & 590-91.)

4 It is clear from Gentile's decision that he took *Hudson* and *Graham* into
5 account when he analyzed the issues because the incident took place within a
6 matter of seconds forcing the officers to make split second decisions.

7 Based on the above, this Court has no basis to grant the instant PJR because
8 NDOC has failed to meet its burden of proving the decision at issue violated its
9 substantial rights under NRS 233B.135(2). First, there is no way for this Court to
10 find the decision violates the constitution or other statutory provisions. NDOC's
11 argument actually calls for the violation of the governing statutes. Second, the
12 decision does not exceed the hearing officer's statutory authority. Gentile confined
13 his decision to the extent of his authority based on the governing statutes and case
14 law. Third, the only unlawful procedure utilized in this case were based on
15 NDOC's improper extension of time. Fourth, nothing in this decision constitutes
16 legal error. Gentile reviewed the evidence and made a de novo determination,
17 under step one of *O'Keefe*, that the alleged violations did not occur. Fifth, the
18 reliable probative and substantial evidence of the entire record supports the
19 decision at issue because an employee should not be terminated for something he
20 did not do. Finally, the decision is not arbitrary or capricious because it properly
21 takes into account the facts and circumstances of this case.

22 As such, Gentile's decision should be affirmed as reasonable and lawful
23 under NRS 233B.135(2).

24 ////

25 ////

26 ////

27 ////

28 ////

1 **VI. CONCLUSION**

2 Based on the foregoing, this Court should deny the instant PJR and affirm
3 Gentile's decision. NDOC has failed to prove its substantial rights were violated
4 under any of the six grounds enumerated under NRS 233B.135(2), and any further
5 entertainment of this PJR would be a continued waste of tax payer money.

6 DATED this 26th day of February, 2020.

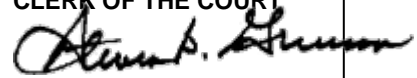
7 LAW OFFICE OF DANIEL MARKS

8
9 /s/ Nicole M. Young
10 DANIEL MARKS, ESQ.
11 Nevada State Bar No. 002003
12 NICOLE M. YOUNG, ESQ.
13 Nevada State Bar No. 12659
14 610 South Ninth Street
15 Las Vegas, Nevada 89101
16 Attorneys for Respondent
17
18
19
20
21
22
23
24
25
26
27
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

Michelle Di Silvestro Alanis, Esq.
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Ave., Suite 3900
Las Vegas, Nevada 89101-1068
Attorney for Petitioner

/s/ Nicole M. Young
An employee of the
LAW OFFICE OF DANIEL MARKS



AARON D. FORD
Attorney General
MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)
Supervising Senior Deputy Attorney General
State of Nevada
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas NV 89101-1068
(702) 486-3268 (phone)
(702) 486-3773 (fax)
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 REPLY BRIEF

TABLE OF CONTENTS

I.	STATEMENT OF FACTS.....	1
II.	LEGAL ARGUMENT	6
A.	Hearing Officer’s Decision substantially prejudiced NDOC’s rights.....	6
B.	Employee raises issues in his Answering Brief that are not properly before this court. ...	6
C.	The Hearing Officer’s Reliance on NDOC AR 339 was Clear Error of Law	8
D.	The Hearing Officer Violated Statutory Provisions and Committed clear Error when He Failed to Consider Whether Employee Violated NAC 284.650 (1), (1) and (21).	8
E.	The Hearing Officer Clearly Erred and Abused his Discretion When He Used the Preponderance of the Evidence Standard.	9
F.	The Hearing Officer’s Decision was Arbitrary and Capricious and Clearly Erroneous In View of the Reliable, Probative, and substantial Evidence on the Whole Record.	12
1.	Violation of NAC 284.650 (1)	13
2.	Violation of NAC 284.650 (10)	15
3.	Violation of NAC 284.650 (21)	16
G.	It was clear error and an abuse of discretion for the Hearing Officer to rely on his “soul searching” in determining whether Employee was dishonest.....	17
III.	CONCLUSION	18
	CERTIFICATE OF COMPLIANCE	19
	CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

CASES

<i>Allied-Signal, Inc. v. Nuclear Reg. Comm'n</i> , 988 F.2d 146 (D.C. Cir. 1993)	13
<i>Holohan v. Massanari</i> , 246 F.3d 1195 (9th Cir. 2001)	13
<i>NDOC v. Ludwick</i> , 135 Nev. 99, 440 P.3d 43 (2019)	8
<i>Nassiri v. Chiropractic Physician's Board of Nevada</i> , 130 Nev. 245, 327 P.3d 487 (2014)	9
<i>Nevada Dep't of Motor Vehicles v. Adams</i> , No. 68057, 2017 WL 521774 (Nev. App. Jan. 30, 2017)	10
<i>O'Keefe v. Dep't. of Motor Vehicles</i> , 134 Nev. 752, 431 P.3d 350 (2018)	11
<i>Southwest Gas Corp. v. Vargas</i> , 111 Nev. 1064, 901 P.2d 693 (1995)	10
<i>Turk v. Nevada State Prison</i> , 94 Nev. 101 575 P.2d 599 (1978)	14
<i>United States v. Dierckman</i> , 201 F.3d 915 (7th Cir. 2000)	13
<i>Whalen v. Welliver</i> , 60 Nev. 154, 104 P.2d 188 (1940)	10

STATUTES

NRS 209.111	13
NRS 209.131	13
NRS 233B	11
NRS 233B.130	6
NRS 284.385	7, 10
NRS 284.387	6, 7, 8
NRS 284.390	10, 11, 17

OTHER AUTHORITIES

NAC 284.650	8, 9, 13, 14, 15, 16, 17
NAC 284.653	13
NAC 284.738	13
NAC 284.771	13
NAC 284.794	9
NAC 284.798	12

REGULATIONS

AR 339	8
AR 405	8, 13, 14

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

Employee asserts he was terminated for an incident involving *another* officer, Paul Valdez, and an inmate, Rickie Norelus, implying Employee had zero involvement in the incident. *See* Answering Brief at 6. Yet, it is clear from the evidence Employee was directly involved. As the Lead Search and Escort Officer, ROA 100-101, Employee was Valdez's first line supervisor on the day of the incident. ROA 500, 783. As depicted in the video of the incident, Employee was the one who searched Norelus for contraband and kept Norelus on the wall after the pat down was completed. ROA 838 at 1:28, 1:47-1:50. Employee continued to approach and talk to Norelus during the 10+ minutes Norelus was required to remain on the wall. ROA 838 at 2:30-10:50. After Valdez used excessive, unnecessary force to grab Norelus by the neck and throw him on the ground, Employee assisted Valdez placing restraints on Norelus, while Employee kneeled on Norelus' back. ROA 838 10:50-11:31. Because of Employee's involvement, he had to complete an incident report. ROA 872. Thus, it is very clear Employee's termination was a result of his *direct involvement* in the excessive use of force against Norelus.

Employee does not dispute that several witnesses provided substantial testimony at the hearing on behalf of NDOC. *See* Answering Brief at 6-10. Employee instead focuses on the hearing officer finding Employee credible. *See* Answering Brief at 6. While the hearing officer found Employee credible (ROA 584), the hearing officer completely failed to consider the witness testimony and the substantial documentary evidence in the record, which included transcripts of interviews with several inmate witnesses, including Norelus. Senior Investigator Rod Moore, Correctional Officer David Wachter, former Associate Warden Minor Adams, Warden Perry Russell, and Warden Jerry Howell testified at the hearing and contradicted the alleged "credible" testimony of Employee. ROA 3-282, 283-582. Without discussing or noting any of the specific witness testimony that Employee engaged in misconduct, the Hearing Officer simply summarized the evidence in support of NDOC. Additionally, the investigative file admitted into evidence included the criminal investigation report and summary of witness interviews with inmates Norelus, Michael White, Lawrence Williams, and Ralph Jackson, all of whom were randomly searched that day and all of whom provided statements that Employee and Valdez were

1 singling out Norelus and harassing him. ROA 729-929, 811-812. The hearing officer's Decision fails to
2 acknowledge or consider this overwhelming evidence. ROA 583-592. Additionally, at the hearing,
3 NDOC AR 405, Use of Force, OP 405, OP 407 and Search and Escort Post Order were admitted into
4 evidence. ROA 286-287, 908-923. Yet, there was no discussion about these policies and how they applied
5 to the incident. ROA 583-592.

6 In his brief, Employee further noted that the hearing officer found Norelus was acting differently
7 than the other inmates, his hands were not in the proper position, and he was looking around anxiously.
8 ROA 584. Yet, the testimony at the hearing showed that Norelus' behavior of looking around anxiously
9 and not placing his hands on the wall correctly did not justify keeping him on the wall for over ten
10 minutes. ROA 452, 464, 561. Norelus' fidgeting did not pose a physical threat to the officers and the use
11 of excessive and unauthorized was not justified. ROA 346, 452. In fact, the evidence at the hearing
12 showed that if the inmate was "non-compliant" or a "threat" to the officers, Employee would not have
13 turned his back several times and walked away from the inmate. ROA 209-210.

14 Employee testified that random searches prevent distribution of contraband. ROA 99. "That day
15 in particular, we were informed to **crack down** on any contraband coming out of the culinary because of
16 that week, we had numerous incidents between black and white inmates..." ROA 113 (emphasis added).
17 Yet, from the time Valdez pulled the last inmate for a random search at 00:08 in the video to the time
18 Wachter shut the culinary door at 6:19, **over 120 inmates walked out but neither Employee nor Valdez**
19 **randomly selected** a single one of those inmates for a random search. ROA 830, 00:08 to 6:19 (emphasis
20 added). According to Employee, the culinary contained over 200 inmates. ROA 125. Wachter testified,
21 as a search and escort officer, he would randomly pull every third inmate exiting culinary and, on some
22 days, it might be every tenth inmate. ROA 436. Under the instruction to "crack down on contraband,"
23 Valdez and Navarrete should have randomly selected anywhere from 10 to 40 inmates out of the
24 approximate 120 inmates that exited culinary in that six minute span. Instead, Employee and Valdez were
25 solely focused on Norelus. ROA 838. While focusing solely on Norelus, Employee and Valdez allowed
26 over half of the inmates to walk out of culinary without any random searches. ROA 830 from 1:47 to
27 6:19. Norelus told investigators he had been singled out for searches for two weeks. ROA 811. White
28 confirmed that Employee and Valdez were always going at it with Norelus. ROA 811. Jackson even said

1 staff targeted African American inmates and required them to stay on the wall for extended periods. ROA
2 811-812. The video of the incident supports Jackson's testimony: At approximately 1:40, only Norelus
3 remained on the wall for alleged "non-compliance." The *white* inmate on the wall next to Norelus, on the
4 other hand, simply had his hands adjusted by Employee when he was non-complaint and was then
5 searched and released. ROA 838 at 0:29-31ROA 838 00:58-1:25.

6 The video of the incident, while lacking audio, supports that Employee concluded the pat search
7 within 30 seconds and required Norelus to stand against the wall with his arms raised over his head for
8 over 10 minutes, while over 120 other inmates left the culinary without being searched. The evidence in
9 the record not only supports that Norelus should not have been on the wall for an extended time but also
10 that he was likely targeted and kept on the wall intentionally. Despite this evidence, the hearing officer
11 failed to address the testimony and documented evidence supporting that this "random search" may not
12 have been random.

13 Employee argued he did not want to restrain the inmate and take him to the sergeant because he
14 claimed they were short staffed and he was supposed to be "cracking down contraband out of the morning
15 chow" so it would take too long, leaving the search and escort without enough manpower. This argument
16 is belied by the fact, as explained above, that Employee and Valdez did not conduct any other searches.
17 Further, Adams testified that correctional officers would place non-compliant inmates in restraints and
18 take them to the operational sergeant "*often*." ROA 525. Moore, Wachter, and Adams all testified
19 keeping Norelus on the wall for over ten minutes, even if non-compliant, was an excessive amount of
20 time, and Employee could have placed Norelus in restraints and taken him to the shift command. ROA
21 196-197. Employee allowed Valdez to become agitated and the situation to escalate without cause,
22 resulting in an unnecessary use of force that required the shift sergeant to respond to the scene and disrupt
23 the entire operation of the facility. ROA 196-197, 838 at 15:20.

24 The hearing officer found, "At minute 10:40 on the tape, inmate Norelus takes his hand off the
25 wall and looks at his wrist. He appears to be continually talking. Shortly thereafter, Officer Valdez
26 approaches the inmate from behind. Unfortunately, there is no audio. The testimony was that Officer
27 Valdez verbally told the inmate he was going to cuff him and take him to the sergeant, yet, **there was no**
28 **signs that Officer Valdez actually had his handcuffs in hand.**" ROA 585 (emphasis added). The

1 hearing officer further noted that, while Valdez abruptly approaches the inmate from behind, the **inmate's**
2 **hands remain on the wall.** ROA 585 (emphasis added). The hearing officer further found that there was
3 no sign of physical resistance by the inmate or any physical threat to the officers, but found the testimony
4 was that he continued to be verbally abusive and agitated. ROA 585. Moore, Wachter, Adams, Russell
5 and Howell testified that the inmate was *not* agitated, and even if the inmate was agitated, he should not
6 have been kept on the wall and Employee should have intervened. ROA 448-449, 501, 540, and 561.

7 The hearing officer stated as "Valdez abruptly approaches the inmate from behind, the inmate
8 does move backward slightly off the wall and looks over his left shoulder. You can see the inmate's left
9 arm and shoulders slightly moving backwards, but the hands remain on the wall." The video contradicts
10 the hearing officer's finding and shows that Norelus moved *after* Valdez had his arm around Norelus'
11 neck, pulling him back. Further, AW Adams clarified that, if an inmate is on the wall and resists physical
12 cuffing, then an officer could use force. However, AW Adams further clarified that an inmate "turning
13 his shoulder" is not resisting. ROA 525. "If the inmate's back is to you, he cannot pose you a physical
14 threat. If an inmate turns more than halfway around, then he may be able to take an aggressive stance
15 motion." ROA 525. Thus, the hearing officer's finding of "slight movement" completely fails to justify
16 the excessive force or the lack of reporting on the excessive force.

17 Navarrete was taught how to write a report in the academy and had refresher training every year
18 through POST. ROA 98-99. He wrote hundreds of reports throughout his time at NDOC. ROA 99

19 Employee prepared the following report in NOTIS:

20
21 On October 9, 2016 I, Senior Correctional Officer Navarrete was assigned
22 to Search and Escort at Southern Desert Correctional Center. At
23 approximately 06:45 hours inmate Norelus #1104257 **came off the**
24 **Culinary wall while C/O Valdez was attempting to restrain him**
25 **resulting in a spontaneous use of force.** When inmate Norelus **came off**
26 **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.

26 ROA 872 (Emphasis added).

27 In his brief, Employee notes the hearing officer found this report to be brief and factually accurate
28 given what he reasonably could have expected to perceive at that time. ROA 590-591. The hearing officer

1 repeats that Employee only had 2-3 seconds to perceive what occurred before completing his report.
2 However, the video recording shows the hearing officer erred in determining the period of Employee's
3 perception was only 2-3 seconds.

4 Employee's appeal hearing lasted over two days where significant testimony was heard about the
5 11+-minute incident Employee was directly involved during the entire incident. He did not suddenly
6 walk up at the last few seconds or just walk by when the incident occurred. Employee conducted the
7 search of Norelus. Employee should have released Norelus. Employee engaged in discussions with
8 Noreulus and heard Norelus and Valdez have discussions. He saw that Norelus did not pose a threat.
9 However, Employee allowed things to escalate between Norelus and Valdez. Lastly, Employee was
10 leaning on the wall facing the inmate just a couple feet away and saw that Norelus's hands remained on
11 the wall when Valdez "abruptly approach Norelus from behind." For the hearing officer to conclude that
12 Employee only perceived the incident for 2-3 seconds is contrary to the evidence in the record.

13 Furthermore, the hearing officer came to this conclusion "after much soul searching," which was
14 not necessary or appropriate when the overwhelming evidence demonstrated that Employee's report was
15 grossly inaccurate. The evidence and testimony showed that Norelus did not come off the wall as stated
16 in the report and that Valdez was not "attempting to restrain" Norelus. The report had significant
17 omissions of the events leading up to the use of force. While the actual use of force may have lasted only
18 a few seconds, the events leading up to the use of force occurred over an 11- minute period and Employee
19 was present for the entirety of the incident. His recitation of what occurred was dishonest. The hearing
20 officer's reliance on "soul searching" to make findings and conclusions regarding the accuracy of
21 Employee's report was error. The hearing officer should rely only on the evidence before him.

22 Employee noted in his brief that a jury acquitted him of his criminal charges. The outcome of
23 employee's criminal case has no relevance to his administrative hearing. The hearing officer erred when
24 he allowed evidence of the jury's decision into evidence as well as Norelus' criminal history but excluded
25 evidence of a grievance history report showing that other inmates complained of Employee's actions.

26 ///

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

II.

LEGAL ARGUMENT

A. The Hearing officer's Decision substantially prejudiced NDOC's rights.

Employee takes the unsupported position NDOC has not shown it has been substantially prejudiced by the hearing officer's decision. There is no dispute NDOC dismissed employee for dishonesty and actions incompatible with the regulations governing his employment, which allowed an act of violence to occur against inmate Norelus. There is also no dispute that the Decision reversed the dismissal, requiring NDOC to reinstate an employee who committed serious violations of policy, engaged in dishonesty and allowed excessive force to be used. Additionally, NDOC has to pay Employee for back pay and benefits for the time Employee was dismissed. Moreover, the substantial and overwhelming testimony in the record supported that Employee engaged in misconduct and the reliable probative and substantial evidence in the record supported the discipline imposed. Yet, despite this uncontroverted evidence, the hearing officer found that NDOC did not meet its burden under an incorrect standard, relied on invalid regulations, making errors of law, and made findings of fact and conclusions that were arbitrary, capricious, and characterized by an abuse of discretion.

B. Employee raises issues in his Answering Brief that are not properly before this court.

In his Answering Brief, Employee asserts NDOC did not have a proper extension of time to serve Employee with discipline per NRS 284.387. This assertion is not only without merit but improperly raised in this appeal.

First, when it filed its petition for judicial review, NDOC did not raise an issue with the hearing officer's interpretation of NRS 284.387 or NAC 284.6555. Employee cannot raise new issues in response to NDOC's petition. If Employee believed an error existed regarding NRS 284.387, then Employee should have filed his own petition for review or a cross petition for judicial review.

A petition for judicial review must be filed within 30 days after service of the final decision of the agency, and cross petitions for judicial review must be filed within 10 days after service of the petition for judicial review. NRS 233B.130(2)(d). Here, the hearing officer entered his final decision on May 30, 2019. ROA 583-592. NDOC filed its petition for judicial review on June 28, 2019. If Employee disagreed with the hearing officer's ruling, he was required to file a petition no later than July 1, 2019. Alternatively,

1 if Employee disagreed with the issues on appeal, Employee could have filed a cross-petition no later than
2 July 15, 2019. Employee did not file a petition for review or a cross petition for review. Therefore,
3 Employee's assertion that NDOC did not have a proper extension of time to serve Employee with
4 discipline per NRS 284.387 must be rejected. Second, NDOC's extension pursuant to NRS 284.387 was
5 not a basis for the hearing officer's decision to reverse the dismissal. In fact, Employee acknowledges in
6 his Brief, "While it is understood Gentile did not make a decision on this issue and opted to decide this
7 case on the merits, the timeliness issue shows NDOC has a history of not properly following Nevada law,
8 in this case, to the tax payer's detriment." Answering brief at 14. Since Employee prevailed before the
9 hearing officer and this was not a basis for the hearing officer's decision, any question regarding the
10 suitability of the NRS 284.387 extension is a red herring and is not properly before this court.

11 Third, assuming this issue is properly before the Court, NDOC obtained an extension and timely
12 served Employee with discipline in accordance with NRS 284.387. At the time of Employee's discipline,
13 NRS 284.387(2) provided in pertinent part:

14 2. An internal administrative investigation . . . and any determination made
15 as a result of such an investigation must be completed and the employee
16 notified of any disciplinary action within 90 days after the employee is
17 provided notice of the allegations . . . **If the appointing authority cannot**
complete the investigation and make a determination within 90 days
after the employee is provided notice of the allegations . . . , the
appointing authority may request an extension of not more than 60
days from the Administrator upon showing good cause for the delay.

19 Here, NDOC served Employee with his notice of allegations on October 21, 2016. ROA 757-759.
20 The 90 day period under NRS 284.387 expired on January 19, 2017, but NDOC obtained, in advance, a
21 valid extension in accordance with NRS 284.387 and NAC 284.6555. ROA 729-731. First, on January
22 13, 2017, NDOC submitted a request to the Administrator of the Division of Human Resource
23 Management on the prescribed form seeking a 60-day extension. ROA 731-740. Second, NDOC
24 explained the need for more time was that "[T]he Specificity of Charges is currently under review by the
25 Attorney General's office." ROA 731. Pursuant to NRS 284.385, NDOC is required to consult with the
26 Attorney General's Office before dismissing, demoting or suspending a permanent classified employee.
27 On January 17, 2017, the **Administrator found good cause and granted the 60-day extension**, making
28 the new deadline to serve Employee March 20, 2017. ROA 729. NDOC served Employee with the

Specificity of Charges, recommending dismissal, on March 16, 2017. ROA 844-845. Thus, not only is this issue improperly raised in Employee's Answering Brief, it is also wholly without merit as NDOC fully complied with NRS 284.387.

C. The Hearing Officer's Reliance on NDOC AR 339 was Clear Error of Law

The hearing officer very clearly relied on and cited to the language of AR 339.07.9 and AR 339.07.17 in the "Factual Findings" of his Decision. ROA 591. In *Dep't. of Corr. v. Ludwick*, the Nevada Supreme Court held that AR 339 is invalid and of no legal effect for purposes of employee discipline." *NDOC v. Ludwick*, 135 Nev. 99, 103, 440 P.3d 43, 47 (2019). *Ludwick* further held it was "**a clear error of law warranting remand**" for a hearing officer to rely on AR 339 "for any purpose related to the disciplinary charges in this case." *Id.* at 104, 47. (emphasis added).

In his Answering Brief, Employee **does not dispute** that the hearing officer improperly relied on AR 339 but instead argues that NDOC failed to show that Employee violated the provisions of NAC 284.650. NDOC charged Employee with violations of NAC 284.650(1), (10), and (21) and AR 339.07.9(A) and AR 339.07.17(A). ROA 845-906. Citing provisions of both NAC 284.650 and AR 339 was not redundant but rather comprehensive of the charges against Employee because it included violation of State regulations and NDOC policies. Following the Supreme Court's decision in *Ludwick*, the parties briefed the hearing officer of this supplemental authority and advised the hearing officer he could not rely on AR 339 for any purpose. ROA 593-610. NDOC noted that while AR 339 had been invalidated, NDOC's other ARs, including AR 405, had not been invalidated. Pursuant to *Ludwick*, the hearing officer had to determine whether, Employee violated NAC 284.650(1), (10), and (21). Yet, the hearing officer never made findings regarding the NAC 284.650 causes for discipline. Instead, the hearing officer made factual findings, using specific language found in AR 339.07.9(A) and AR 339.07.17(A). ROA 591. The hearing officer's reliance on AR 339 was the sole basis for his decision and was legal error warranting remand.

D. The Hearing Officer Violated Statutory Provisions and Committed Clear Error when He Failed to Consider Whether Employee Violated NAC 284.650 (1), (10) and (21)

As noted above, the hearing officer was supposed to determine whether Employee engaged in the violations specifically stated in the SOC: NAC 284.650(1), (10) and (21). The hearing officer's Decision

1 does not address these three violations. Employee makes conclusory statements that the charges are
2 redundant and that NDOC failed to prove Employee violated NAC 284.650(1), (10), and (21) rather than
3 addressing the hearing officer's failure to make findings and conclusions with respect to the three charges.

4 NAC 284.794(1) specifically instructs that "the hearing officer shall determine the evidence upon
5 the charges and specifications as set forth by the appointing authority in the appropriate documents . . ."
6 NDOC served Employee with an SOC recommending his dismissal from state service for having violated
7 **NAC 284.650(1), NAC 284.650(10), NAC 284.650(21)**, AR 339.07.9(A) and AR 339.07.17(A). ROA
8 845-906. The hearing officer's Decision does not determine the evidence upon the charges of NAC
9 284.650(1), (10), and (21).

10 *Ludwick* held that the hearing officer **must** address whether the employee's actions constitute
11 violations of NAC 284.650 as listed in the specificity of charges without any reliance on AR 339. *Ludwick*
12 at 104, 47-48. The hearing officer failed to consider these violations and makes no mention of them in
13 his findings, conclusions or decision aside from noting the violations were listed in the SOC. ROA 583-
14 592.

15 Moreover, the hearing officer's failure to consider the NAC 284.650 violations was not harmless
16 error, since substantial evidence¹ showed that Employee violated NAC 284.650(1), NAC 284.650(10)
17 and NAC 284.650(21). Therefore, it was a violation of the hearing officer's statutory duties and clear
18 error of law pursuant to *Ludwick*.

19 **E. The Hearing Officer Clearly Erred and Abused his Discretion When He Used the**
20 **Preponderance of the Evidence Standard**

21 The hearing officer erred and acted arbitrarily and capriciously thereby abusing his discretion
22 when he used a preponderance of the evidence standard. The correct standard for the hearing officer to
23 make a de novo determination if Employee engaged in misconduct under step one of *O'Keefe* is
24 substantial evidence.

25 Employee incorrectly argues that *Nassiri* requires a preponderance of the evidence standard to
26 determine if the misconduct occurred. However, *Nassiri* did not involve an agency taking disciplinary
27 action against an employee. *Nassiri v. Chiropractic Physician's Bd*, 130 Nev. 245, 327 P.3d 487 (2014).
28 Instead, *Nassiri* held that the standard of proof in an agency's **occupational license revocation hearing**

¹ The substantial evidence supporting these violations will be addressed in section F.

1 in absence of a governing statute is a preponderance of the evidence standard of proof. *Id* at, 251, 491.
2 This case does not involve an occupational license revocation hearing. This case involves a hearing under
3 NRS 284.390(1) to determine the reasonableness of an employee's dismissal and the existence of just
4 cause.

5 Employee admits NRS 284.385 and NRS 284.390 are the governing statutes regarding the
6 dismissal of a State employee. *See* Answering Brief at 17. NRS 284.390 states "[i]f the hearing officer
7 determines that the dismissal, demotion or suspension *was without just cause as provided in NRS*
8 *284.385*, the action must be set aside and the employee must be reinstated, with full pay for the period of
9 dismissal, demotion or suspension." NRS 284.390(6) (emphasis added). In turn, NRS 284.385(1)(a)
10 provides that "[a]n appointing authority may...[d]ismiss or demote any permanent classified employee
11 when the appointing authority considers that the good of the public service will be served thereby."

12 "Just cause" is synonymous with "legal cause." *Whalen v. Welliver*, 60 Nev. 154, 104 P.2d 188,
13 191 (1940). A discharge for just cause "is one which is not for any arbitrary, capricious, or illegal reason
14 and which is one based on facts (1) supported by *substantial evidence*, and (2) reasonably believed by
15 the employer to be true.' " *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 1078, 901 P.2d 693, 701
16 (1995).

17 The Court of Appeals in a recent unpublished decision noted that a hearing officer is to review
18 factual determination based on **substantial evidence** rather than preponderance of the evidence.

19 In this case, the hearing officer applied the incorrect standard of review in
20 his factual determinations. Critically, the hearing officer found that the
21 DMV failed to prove by a preponderance of the evidence that Adams and
22 the customer she helped serve were not mere acquaintances. Instead, the
23 **hearing officer should have ruled on whether substantial evidence**
24 supported the DMV's contention that Adams and the customer were close
25 friends. And **since the preponderance-of-the-evidence standard is**
26 **higher than the substantial-evidence standard**, we must reverse and
27 remand this matter for the hearing officer to utilize the correct standard of
28 review.² *See Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 501
n.12, 117 P.3d 193, 198 n.12 (2005). Had the hearing officer applied the
correct standard of review, he may have concluded that there was
substantial evidence that Adams and the customer were close friends, and
thus found the DMV's actions were supported by just cause.

Nevada Dep't of Motor Vehicles v. Adams, No. 68057, 2017 WL 521774, at *1–2 (Nev. App. Jan. 30,
2017) (unpublished).

1 In footnote 2, the *Adams* Court noted:

2 Substantial evidence is “evidence that a reasonable mind could accept as
3 adequately supporting the agency’s conclusions.” *Nassiri v. Chiropractic*
4 *Physicians’ Bd.*, 130 Nev. —, —, 327 P.3d 487, 489 (2014). We
5 recognize that *Nassiri* may have caused confusion because it noted the
6 standard of proof was by a preponderance of the evidence, but that was in
7 relation to the agency’s determination for its licensing proceedings;
8 **“substantial evidence” is the proper standard of review to be used**
9 **during the hearing officer’s review.** *See Morgan*, 2016 WL 2944701, at
10 *1.

11 *Id.* at 2 (emphasis added).

12 *Adams* involved an appeal hearing pursuant to NRS 284.390(1). Employee argues that the
13 preponderance of the evidence standard set forth in *Nassiri*, supra, rather than the substantial evidence
14 standard set forth in *Southwest Gas* and *Adams*, is the correct standard to apply in determining the
15 existence of just cause to terminate Employee. *See* Answering Brief at 18. On the one hand, Employee
16 attempts to distinguish *Southwest Gas* from this case because *Southwest Gas* did not involve NRS
17 Chapter 284 and involved a private employer. Then, on the other hand, Employee attempts to support
18 his position by citing cases from other jurisdictions which also do not involve NRS Chapter 284 and
19 which have no persuasive value to the instant appeal. None of those cases sets forth a standard of
20 preponderance of the evidence. Furthermore, the fact that *Southwest Gas* involved a private employment
21 contract rather than government employment in the classified system is not relevant because it simply
22 defines the just cause standard. The *Nassiri* case, which Employee claims is the controlling case, did not
23 involve employment at all; rather, *Nassiri* concerned a license revocation hearing pursuant to NRS 233B.
24 *Nassiri* did *not* establish a standard for an employee’s hearing regarding a dismissal from State service
25 pursuant to NRS 284.390.

26 In *O’Keefe v. Dep’t of Motor Vehicles*, the Nevada Supreme Court established a three-step review
27 hearing officers should conduct when evaluating a dismissal. *See O’Keefe v. Nevada Department of*
28 *Motor Vehicles*, 134 Nev. 752, 431 P.3d 350 (2018). First, the hearing officer reviews *de novo* whether
the employee in fact committed the alleged violation. *Id.* at 759, 356. Second, the hearing officer
determines whether the 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.* Third, the hearing officer

1 applies a deferential standard of review to the agency’s determination that the termination is for the “good
2 of the public service.” *Id.* *O’Keefe* **did not** establish that the standard under step one was preponderance
3 of the evidence. *Id.* In fact, *O’Keefe* never once mentions “preponderance of the evidence.” Instead,
4 *O’Keefe* cites to NAC 284.798, which states the hearing officer shall make no assumptions of innocence
5 or guilt but shall be guided in his decision by the weight of the evidence as it appears to him at the hearing.
6 NAC 284.798. Furthermore, *O’Keefe*, repeatedly refers to “substantial evidence” and noted that a
7 “discharge for “just” or “good” cause is one which is not for any arbitrary, capricious, or illegal reason
8 and which is based on facts **supported by substantial evidence**. *O’Keefe* at 758, 355.

9 As noted in *Adams*, it was error for the court to make a determination under the preponderance of
10 the evidence standard because it was a higher standard. Here, the hearing officer ruled that NDOC did
11 not prove by a preponderance of the evidence that Employee allowed or permitted the use of force or
12 submitted a false report. It was clear error for the hearing officer to use the wrong standard under step
13 one of *O’Keefe*.

14 **F. The Hearing Officer’s Decision was Arbitrary and Capricious and Clearly Erroneous In**
15 **View of the Reliable, Probative, and Substantial Evidence On the Whole Record**

16 The substantial evidence in the record does not support the hearing officer’s Decision. The
17 substantial evidence in the record demonstrates NDOC’s decision to dismiss Employee was reasonable
18 and based on just cause. In his Answering Brief, Employee argues NDOC failed to prove employee used
19 excessive force. NDOC never tried to prove that Employee used excessive force as Employee was not
20 accused of *using* excessive force. Rather, NDOC proved by the substantial evidence in the record that
21 Employee, as a senior office and supervisor, *allowed and/or permitted* Valdez to use excessive force.
22 Additionally, NDOC demonstrated, as a senior officer and supervisor, Employee should have first
23 released the inmate and then intervened and deescalated the situation that culminated over the course of
24 approximately 11 minutes to prevent the excessive force from happening. Furthermore, NDOC proved
25 by the substantial evidence in the record that Employee’s actions were incompatible with the conditions
26 of his employment as established by law when Employee violated all applicable ARs, OPs and post order
27 on use of force restraints, and reporting use of force. Lastly, NDOC proved by the substantial evidence
28 that Employee was dishonest in his report because he made false and/or misleading statements and