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IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, ex. Rel. DEPARTMENT OF CORRECTIONS;

Appellant,

v.

JOSE MIGUEL NAVARRETE, an individual;

Respondent.
_____/

Case No. 82113

Appeal from the Eighth Judicial District Court

RESPONDENT'S ANSWERING BRIEF

Docket 82113 Document 2021-16528

I. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or entities, as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Parent Corporations and/or any publically-held company that owns 10% or more of the party's stock

   NONE

2. Law Firms/Attorneys that have represented Respondent Appellant

   Law Office of Daniel Marks, Daniel Marks, Esq., and Nicole M. Young, Esq.

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IV. STATEMENT OF ISSUES PRESENTED FOR REVIEW

NDOC's instant appeal seeks reversal of the hearing officer's decision in this case. Under the first step of *O'Keefe's*[1] three-step review of an employee's dismissal from the State Personnel System, the hearing officer must conduct a de novo review to determine whether the employee did "in fact" commit the alleged violation. This Court's de novo review need only consider:

1. What standard of proof is required to prove the employee did "in fact" commit the alleged violation?
2. Did NDOC prove Navarrete did "in fact" violate NAC 284.650(21) for acts of violence in the workplace based on Officer Valdez' use of force on October 9, 2016?
3. Did NDOC prove Navarrete did "in fact" violate NAC 284.650(10) for dishonesty in his use of force report regarding the October 9, 2016, incident?

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[1] *O'Keefe v. Dept. of Motor Veh.*, 134 Nev. 752, 431 P.3d 350 (2018).

V. STATEMENT OF THE CASE

Appellant State of Nevada ex rel. its Department of Corrections ("NDOC") terminated Respondent Jose Miguel Navarrete's ("Navarrete") employment as a senior corrections officer on April 21, 2017. (JA IV:0856) Navarrete appealed his termination to the Department of Administration Personnel Commission on May 8, 2017, in accordance with NRS 284.390. (JA IV:0856 & JA V:1416.)

On January 29, 2018, the hearing before the State Personnel Commission was stayed pending the resolution of the corresponding criminal case brought by the State of Nevada against Navarrete for the incident at issue in this case. (JA V:1384; and *see St. of Nev. v. Navarrete*, Case No. C-18-333098-2, filed in the Eighth Judicial District Court.) After a jury acquitted Navarrete on all charges, including oppression under color of office, inhumanity to prisoner, and false report by public officer, this case proceeded to hearing before Hearing Officer Mark Gentile ("Gentile"). (JA IV:0956-57.)

The hearing in this case took place on April 2, 2019 and April 16, 2019. Before Gentile issued his decision, the Nevada Supreme Court published its decision in *NDOC v. Ludwick*[2] on May 2, 2019, invalidating AR 339, which was the basis for three of the charges brought against Navarrete in this case. (JA

[2] 135 Nev. Adv. Op. 12, 440 P.3d 43 (2019)

V:1115.) Both parties provided Gentile with supplemental briefing on that issue. (JA IV:0862-79.) Gentile ultimately reversed NDOC's termination of Navarrete. (JA IV:0852-60.)

VI. STATEMENT OF FACTS

Navarrete was terminated for an incident involving another correction officer, Paul Valdez ("Valdez"), and inmate Rickie Norelus ("Norelus") at Southern Desert Correctional Center ("SDCC"). (JA IV:0852.) On October 9, 2016, during the breakfast service, Navarrete and Valdez "were randomly searching [numerous] inmates leaving [the] culinary for contraband." (JA IV:0852-53.) This search, as well as other searches, are "a common occurrence" at SDCC. (JA IV:0852.) A surveillance video recorded the incident from a single perspective with no audio. (JA IV:0852.)

The standard procedure for these searches is to have the inmate place their hands against the wall and submit to a brief pat down search. (JA IV:0853.) While there is no set time frame for each individual search, the process is typically completed in about a minute. (JA IV:0853.)

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During the hearing at issue, Gentile was provided an enhanced and slow motion video of the crucial moments of this incident. (JA IV:0853; IV:0978-80; & VI:1419-20.) Navarrete also provided comprehensive testimony regarding what occurred during each stage of the encounter. (JA IV:0853.) **Gentile found Navarrete credible.** (JA IV:0853.)

Gentile also found, "without question":

> that Mr. Norelus was acting differently than the other inmates when placed on the wall for a pat down. He was clearly agitated and his hands were not in the proper position. He appears to be continually looking around anxiously. There is, unfortunately, no audio and one 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.

(JA IV:0853.) These findings support Navarrete's testimony that Norelus was noncompliant. The hearing officer also found that Norelus' search occurred at the 1:50 minute mark and "that after the search was completed, [Norelus] again, took his hands off the wall and was not complying." (JA IV:0853.) The video supports this finding. (JA IV:0854.) From the 2:00 to 3:00 minute mark, Norelus' agitation and verbal abuse continues. (JA IV:0854.) From the 3:00 to 6:00 minute mark,

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Norelus is moving a lot and there "appears to be a lot of communication between " Norelus and the officers. Norelus continues "to be verbally abusive and agitated." (JA IV:0854.)

Between minutes 6 and 9, Norelus' same conduct continues. (JA IV:0854.) With regard to Navarrete, Gentile specifically finds he "positions himself alongside the inmate and it does appear he is trying to de-escalate the situation, which is what [Navarrete] described." (JA IV:0854.) While this approach does seem to calm Norelus, "there is still a lot of head movements and animated conversation." (JA IV:0854.)

Because it was a relatively minor issue, and Navarrete did not know the inmate because of his recent shift change, Navarrete opted to attempt to build a good rapport with Norelus by counseling him and attempting to de-escalate the situation. (JA II:0376 & II:0378-79.) This conduct is seen throughout the video through Navarrete's calm demeanor, including leaning on the wall to show the inmate he is not a threat. (JA IV:0854.)

Navarrete wanted to obtain the inmate's compliance because SDCC was (1) on partial lock down, (2) short-staffed that day, and (3) cracking down on "contraband"smuggled out of morning chow. (JA II:0381-83.) In situations where an inmate is not compliant, the officers have the option to restrain the inmate and

bring him to the next in command. (JA II:0383 & III:0744.) This process could end up taking longer and would only leave one officer in charge of the other inmates so it is left in the officer's discretion to determine whether such action is appropriate. (JA III:0748-49.) This is not an ideal situation for a prison that is on partial lock down and short-staffed. (JA III:0744-45.)

It is at the 10:40 minute mark that the situation implodes. At that time, "Norelus takes his hand off the wall and looks at his wrist" and "appears to be continually talking." (JA IV:0854.) Valdez then approaches Norelus from behind and tells Norelus he is going to cuff him and bring him to the sergeant. (JA IV:0854.) With regard to this incident, the hearing officer found:

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

(JA IV:0854.)

This all "occurred in a matter of a few seconds." (JA IV:0854.) Valdez immediately cuffed Norelus once on the ground, and Navarrete came over to assist. (JA IV:0854.) Gentile found that even with the enhanced video, Valdez' conduct was unjustified. (JA IV:0854.)

With regard to Navarrete's conduct, however, Gentile found "there is absolutely no evidence to reflect that [Navarrete] personally utilized excessive force." (JA IV:0857 & VII:1515.) Gentile further "found Navarrete could not have anticipated, nor prevented, Valdez's spontaneous use of force." (JA IV:0858 & VII:1515.)

With regard to the post-incident video, that includes audio, Gentile found that while Norelus is leaving the area he is "laughing at the officers and claiming they will 'put his kids through college.'" (JA III:0727-28 & IV:0855.) He also "does not appear injured and his conduct makes it seem as if he may have been baiting the officers to some extent, which according to the testimony is a common occurrence" at SDCC. (JA IV:0855.)

Navarrete later submitted an informational report, which states:

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

(JA IV:0855.)

The shift commander, Sergeant Dean Willett ("Willett") (the acting lieutenant during that shift) reviewed the video of the incident, along with Navarrete's report. (JA II:0384 & II:0410-11.) After reviewing the video with Navarrete's report, Willett concluded Navarrete did not use or permit excessive force. (JA II:0410-11.) Willett also concluded the report was not false or misleading. (JA II:0412-13.)

Gentile specifically found that NDOC failed to establish "factually by a preponderance of the evidence, that [] Navarrete willfully employed or permitted the use of unauthorized or excessive force" and that "there is absolutely no evidence to reflect that he personally utilized excessive force." (JA IV:0857.) This is because Valdez' use of force "was quite sudden and was over in a matter of a few seconds." (JA IV:0858.) Gentile specifically found Navarrete could not have anticipated, nor prevented, Valdez's spontaneous use of force. (JA IV:0858.)

With regard to the charge of dishonesty in relation to Navarrete's use of force report, the hearing officer found, as follows:

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

(JA IV:0859.) He then concluded:

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

(JA IV:0859-60.)

Based on these factual findings, and NDOC's failure to prove otherwise by a preponderance of the evidence, Gentile concluded that Navarrete's dismissal from NDOC be reversed with restoration to his prior position with back pay and benefits. (JA IV:0860.)

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VII. SUMMARY OF THE ARGUMENT

NDOC's Opening Brief argues form over function. It argues its substantial rights were violated, but all arguments under 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.

NAC 284.650(21), AR 339.07.17, and NDOC's interpretation that NAC 284.650(1) (relying on AR 405) all relate to use of violence. Gentile found Navarrete did not permit excessive force or personally use force. These findings required reversal of NDOC's termination under all of these provisions.

NDOC has made this case extremely more difficult than it actually is. Gentile ruled on the merits of the actual conduct. NDOC puts form over function when it claims Gentile relied on AR 339. NDOC charged Navarrete with five

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violations that are redundant of the same two issues, dishonesty and use of force. These arguments have no regard for judicial economy and only seek to multiply these proceedings without justification.

Because Gentile ruled on the actual merits of the conduct at issue, based on *O'Keefe's* first step that requires proof by a preponderance of the evidence, this Court should affirm Gentile's decision.

VIII. LEGAL ARGUMENT

This Court's role in reviewing a petition of judicial review ("PJR") of an administrative agency's decision is identical to the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013).

The final decision of a state agency is "deemed reasonable and lawful" until proven otherwise. NRS 233B.135(2). The party attacking an administrative decision on appeal, after a PJR is denied, bears the burden of proof to invalidate an agency's decision. *Id.* The appellant must prove the agency's decision violates its substantial rights. *Id*.

To meet this burden, the appellant must prove the agency's decision (1) violates the constitution or other statutory provisions, (2) exceeds the agency's statutory authority, (3) is based on an unlawful procedure, (4) constitutes legal

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error, (5) clearly erroneous based on "reliable probative and substantial evidence on the whole record," or (6) "arbitrary and capricious or characterized by abuse of discretion." NRS 233B.135(3).

A decision is "arbitrary and capricious" when it disregards the facts and circumstances of the case. *Meadows v. Civ. Serv. Bd. Of LVMPD*, 105 Nev. 624, 627, 781 P.2d 772 (1989).

NRS 233B.135(3) limits this Court's ability to set aside a state agency's decision. This Court is statutorily prohibited from substituting its judgment on the weight of the evidence or credibility of the witnesses found by the agency to determine a question of fact. *Id*.; *see also Gilman v. Nev. St. Bd. of Veterinary Med. Exam.*, 120 Nev. 263 (2004); *Knapp v. St. Dept. of Prisons*, 111 Nev. 420, 423, 892 P.2d 575 (1995); *Nev. Indust. Commn. v. Williams*, 91 Nev. 686, 541 P.2d 905 (1975).

When the agency's conclusions of law are closely related to the findings of fact, those legal conclusions must also be afforded deference and may not be disturbed if supported by substantial evidence. *Jones v. Rosner*, 102 Nev. 215, 719 P.2d 805 (1986).

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In this case, NDOC has failed to set forth a coherent argument to invalidate Gentile's decision. Gentile's decision analyzes this case on the merits, despite NDOC's failure to properly obtain an extension for its initial decision under NAC 284.6555(1)(b). Gentile's decision also properly decides this case in light of *Ludwick's* invalidation of AR 339.

NDOC would like this Court to ignore *O'Keefe* and *Nassiri* and rubber stamp its initial determination to terminate Navarrete's employment, even though the facts have proven both beyond a reasonable doubt, at the criminal level, and by a preponderance of the evidence, before Gentile, that Navarrete did not do what NDOC claims.

A. NDOC wasted tax payer money when it did not properly obtain an extension for investigations leading to discipline.

In 2011, NRS 284.387 was amended to ensure fairness and due process in connection with internal investigations. To meet this goal, the legislature enacted strict time limits on internal investigations of employees. These time limits require an investigation "be completed and the employee notified of any disciplinary action within 90 days after the employee is provided notice" of the investigation. NRS 284.387(2). An extension of 60 days is only allowed upon a showing of good cause for the delay. *Id*. These time limits were intended to ameliorate the financial

effects of the State keeping employees on prolonged paid administrative leave during the 90 day investigatory period. (*See* Minutes of the Senate Committee on Legislative Operations and Elections, May 10, 2011, 76th Sess, A.B. 179, at pp. 8-9.)

To ensure this legislative goal is met, NAC 284.6555(1)(b) requires an employer requesting an extension to explain "why the appointing authority is unable to complete the internal administrative investigation and make a determination" within the 90 day statutory period.

Navarrete was served with his notice of investigation on October 21, 2016. (JA V:1012.) This meant that he had to be served with an NPD-41 Specificity of Charges by no later than January 17, 2017. *See* NRS 284.387(2).

On January 13, 2017, NDOC requested a 60 day extension from the Division of Human Resource Management. (JA IV:1000-02.) The stated reason for the request was "The Specificity of Charges is currently under review at the Attorney General's Office." (JA IV:1000.) The extension was granted on January 17, 2017. (JA IV:0998 & JA V:1006.)

Pursuant to the plain language of the statute, extensions may not be given based upon mere request; rather such extensions are only granted "upon showing good cause for the delay." An 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". *See Miss. v. Turner*, 498 U.S. 1036, 111 S. Ct. 1032 (1991); *See Pfeiffer v. Merit Sys. Prot. Bd.*, 230 F.3d 1375 (Fed. Cir. 1999).

Here, there was no good cause for a delay requiring an extension, much less a showing of good cause by NDOC when it made its request. Rather, the facts reveal that the Office of the Inspector General completed its investigation and submitted the matter for adjudication to Warden Jo Gentry on December 9, 2016. (JA V:1010.) Warden Gentry sustained the charges on December 13, 2016. (JA II:0358.) This is more than one month before the January 17, 2017, deadline for the NPD-41. It is unclear why NDOC dragged its feet to notify Navarrete regarding the disciplinary action against him when it knew one month prior to its request for the extension that it was sustaining the alleged violations against Navarrete. NDOC violated NRS 284.387(2) because it did not need the extension by virtue of the one-month early completion of the investigation. By obtaining an extension, without good cause, taxpayer money was wasted because Navarrete was still on paid administrative leave.

There was no reason why NDOC could not prepare and have the Attorney General's office review the NPD-41 Specificity of Charges in the one month between December 13, 2016 and January 17, 2017. The e-mails generated in

connection with the requested extension do not purport to claim "good cause for delay"; rather they demonstrate NDOC was making multiple requests in multiple cases. (JA IV:1002.) Because no showing of anything unforeseen, uncontrollable, or complicated was made on January 13, 2017, when the request was sought, the extension was unlawful and the resulting discipline untimely. NDOC violated NRS 284.387, NAC 284.6555(1)(b), and the legislature's intent to save taxpayer money when it granted this 60-day extension without a sufficient showing of a "good cause for delay."

Gentile could have reversed Navarrete's termination based on the improper extension received. Instead, he decided to adjudicate this case on the merits. The timeliness issue shows NDOC has a history of not properly following Nevada law to the tax payer's detriment.

B. NDOC's decision to terminate Navarrete was reversed because it simply could not prove the allegations brought against Navarrete.

The NPD-41 Specificity of Charges, in this case, alleges Navarrete violated the following regulations:

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

The NPD-41 also alleged violations of AR 339.07.9 for false or misleading statements and AR 339.07.17 for unauthorized use of force.

NDOC's reliance on AR 339 is their attempt to skip the progressive discipline mandated by NRS 284.383 and NAC 284.638, which provide for a documented warning or, at worst, a written reprimand. AR 339.07.9 is a "Class 5" offense authorizing termination and AR 339.07.17 is a "Class 4-5" offense authorizing suspension or termination. (JA V:1115.)

AR 339, however, was recently invalidated by the Nevada Supreme Court because it was never submitted to or approved by the Personnel Commission to authorize discipline of an employee. *Ludwick*, 135 Nev. Adv. Op. 12, 440 P.3d 43 (2019).

The alleged violation of NAC 284.650(1) also does not survive the *Ludwick* decision. That statute authorizes discipline for activity incompatible with conditions of employment "established by law" or which violated provisions of

NAC 284.653 or NAC 284.738 to 284.771, inclusive. There is no condition of employment established "by law" implicated in this case.

In order to discipline an employee under NAC 284.650(1), the appointing authority is required to determine the specific activities prohibited by an employee because those activities are "inconsistent, incompatible or in conflict" with the employee's duties. NAC 284.742(1). This is not enforceable against an employee until it is approved by the Personnel Commission. NAC 284.742(1). The appointing authority must also include an explanation of the progressive discipline administered under the policy for the Personnel Commission's approval. NAC 284.742(3).

The best explanation of this process was recently stated in *Ludwick* when it invalidated AR 339 because it was never submitted to or approved by the Personnel Commission.

Because AR 339 was deemed invalid, and NDOC failed to provide any specific facts that Navarrete engaged in activity incompatible with his employment "by law", the alleged NAC 284.650(1) violation does not survive the *Ludwick* decision. Because AR 339 was not properly enacted, the hearing officer could only consider the NAC 284.650 allegations of dishonesty and acts of violence in the workplace.

C. Step one of the *O'Keefe* standard requires NDOC to prove a violation actually occurred under the preponderance of the evidence standard to impose discipline.

NDOC refuses to follow the clear guidance provided by the Nevada Supreme Court to determine the standard of proof in an administrative hearing. In *Nassiri v. Chiropractic Phys. Bd.*, the Court clarified the confusion surrounding issues regarding the standard of proof required during an administrative hearing and the standard of review on a PJR of an administrative decision. 130 Nev. 245, 249-50, 327 P.3d 487 (2014).

The standard of proof applied during an administrative hearing is determined by the governing statute. *Id*. at 250. If a standard of proof is not clearly stated in the governing statutes, then reason and public policy are used to determine the applicable standard of proof. *Id*. at 250-51.

The preponderance of the evidence standard is regularly upheld in Nevada as the "minimum civil standard of proof" consistent with due process *Id*. at 251. Because it is the minimum standard, "[t]here is no lower standard." *Id*. A lower standard "would be nonsensical" and "allow a tribunal to reach a conclusion even after reasoning that the conclusion is more likely to be *incorrect* than" correct. *Id*. at fn 3.

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Because Navarrete is an employee under the State Personnel System, NRS 284.385 and NRS 284.390 are the governing statutes regarding the standard of proof required in a hearing to determine the reasonableness of dismissal. Neither of these statutes explicitly state the standard of proof required in such hearings. Based on *Nassiri's* guidance, this Court must look to reason and public policy to determine the applicable standard of proof based on the language of the statute.

NRS 284.390(7) states:

> If the hearing officer determines that the dismissal . . .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.

NRS 284.385(1)(a) allows the dismissal of an employee if it serves "the good of the public service."

Recently, some deputy attorney generals, including counsel for NDOC, have argued the "just cause" standard from *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 901 P.2d 693 (1995), should apply. The fallacy of this argument is that *Vargas* does not actually hold that an employer's "just cause" for termination need only be proven by substantial evidence. This interpretation fails to consider the crux of *Vargas*, which considers the interplay of the at-will employment doctrine and basic contract principles. *Vargas* carves out a narrow exception to the at-will

doctrine to account for unilateral promises provided to employees by their employer in an employment handbook. Because it is a narrow exception, the basic premise of the at-will doctrine survives; either the employer or the employee may terminate the employment relationship at any time.

The *Vargas* decision is analogous to how federal courts interpret an employer's "legitimate business reason" for termination in employment discrimination cases. In those cases, courts have consistently held they "should not second guess an employer's exercise of its business judgment in making personnel decisions, as long as they are not discriminatory." *EEOC v. Republic Serv. Inc.*, 640 F.Supp.2d 1267, 1313 (D. Nev. 2009). Courts have also held that an employer's decision to terminate an employee need not be wise, correct, or fair. *Cianci v. Pettibone Corp.*, 152 F.3d 723, 726 (7th Cir. 1998). This is because in private sector employment discrimination cases, the court does not "sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers." *Elam v. Reg. Finan. Corp.*, 601 F.3d 873, 880 (8th Cir. 2010).

Unlike in *Vargas*, *Elam*, and *Cianci*, the hearing officer does sit as a super-personnel department reviewing the correctness, fairness, and wisdom of NDOC's termination of Navarrete under the first step of *O'Keefe's* three-step review process under NRS 284.390(1). *See O'Keefe*, 134 Nev. at 759; *see* NAC 284.798.

Under the first step of this review, "the hearing officer reviews de novo whether the employee in fact committed the alleged violation." *Id*. In other words, if the hearing officer finds, based on his de novo review of the evidence, that the violation did not occur, then he does not consider the remaining two steps and must reverse the discipline imposed.

The language of this step mandates the hearing officer utilize the preponderance of the evidence standard because the hearing officer must determine whether the violation did "in fact" occur. There is no lower standard of proof available to meet the level of proof required that a violation did occur. NDOC's argument that the substantial evidence standard applies is "nonsensical" because it would allow the hearing officer or this Court to "reach a conclusion even after reasoning that the conclusion in more likely to be incorrect" than correct. *See Nassiri*, 130 Nev. at fn 3. Use of the substantial evidence standard would violate *O'Keefe's* requirement of a de novo review to determine if the violation actually occurred. 134 Nev. at 759.

In addition to the fact that the Legislature has placed the ultimate fact-finding with hearing officers, it is important to point out that applying the "substantial evidence" standard from *Vargas*, instead of the "preponderance of the evidence" standard from *Nassiri*, would be a federal constitutional violation.

Unlike private sector employees, such as in *Vargas*, post-probationary public sector employees, like Navarrete, have a property interest in their employment within the meaning of the Fourteenth Amendment's Due Process Clause. *See Clev. Bd. of Ed. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985).

The employer seeking to deprive the employee of his property interest (i.e. discharge the employee) bears the burden of proving an actual violation occurred to warrant termination. *See Brown v. City of Los Angeles*, 102 Cal.App 4th 155, 175, 125 Cal. Rptr. 2nd 474, 488 (2003); *See Grievance of Brown*, 177 Vt. 365, 865 A.2d 402, 406 (2004). This is the first step required under *O'Keefe*. 134 Nev. at 759.

NRS 284.390 does not provide a standard of proof. Therefore, under *Nassiri,* the default standard is preponderance of the evidence.130 Nev. at 250-51. Application of a lower standard would violate step one of *O'Keefe* and a public employee's constitutionally protected property interest in their employment under the Fourteenth Amendment. *See O'Keefe*, 134 Nev. at 759; *see Grievance of Muzzy*, 141 Vt. 463, 449 A.2d 970 (1982).

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Ludwick invalidated AR 339, so Gentile could only rely on NAC 284.650(10) and NAC 284.650(21) to determine whether Officer Navarrete was "in fact" dishonest and used excessive force. Because step one under *O'Keefe* considers whether the violation actually occurred, Gentile was required to impose the preponderance of the evidence standard.

D. Gentile correctly found, under step one of *O'Keefe*, that NDOC did not prove the alleged violations actually occurred.

Under Nevada law, peace officers may use "reasonable force" to protect themselves and others. 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).

In *Graham v. Connor*, the Supreme Court reiterated that use of force must be evaluated under a standard of "objective reasonableness". 490 U.S. 386, 391, 109 S.Ct. 1865, 1869 (1989). 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. *Id*. at 396-97. Rather:

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

Id.

Gentile determined that Navarrete was not dishonest and did not use excessive force. (JA IV:0857-60.) The undisputed evidence proved the use of force was initiated by Valdez and that Navarrete did not lay hands on Norelus until after Valdez and the inmate were struggling on the ground. (JA IV:0854 & IV:0857-58.) NDOC failed to prove Navarrete used excessive force.

In addition, Gentile also found that Navarrete was not dishonest in the use of force report he prepared after the incident. (JA IV:0859-60.) He considered the report written by Navarrete after the incident, along with the fact that Navarrete did not review the video before he wrote the report. (JA IV:0859.) He also compared the report to the video in conjunction with Navarrete's testimony, which he found credible. (JA IV:0853 & IV:0859-60.)

It is clear from Gentile's decision that he took *Hudson* and *Graham* into account when he analyzed the issues because the incident took place within a matter of seconds forcing the officers to make split second decisions.

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Based on the above, this Court has no basis to reverse Gentile's decision because NDOC has failed to meet its burden of proving that decision violated its substantial rights under NRS 233B.135(2). First, there is no way for this Court to find the decision violates the constitution or other statutory provisions. NDOC's argument actually calls for the violation of the governing statutes. Second, the decision does not exceed the hearing officer's statutory authority. Gentile confined his decision to the extent of his authority based on the governing statutes and case law. Third, the only unlawful procedure utilized in this case was NDOC's improper extension of time. Fourth, nothing in Gentile's decision constitutes legal error. Gentile reviewed the evidence and made a de novo determination, under step one of *O'Keefe*, that the alleged violations did not occur. Fifth, the reliable probative and substantial evidence of the entire record supports Gentile's decision because an employee should not be terminated for something he did not do. Finally, Gentile's decision is not arbitrary or capricious because it properly takes into account the facts and circumstances of this case.

As such, Gentile's decision should be affirmed as reasonable and lawful under NRS 233B.135(2).

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IX. CONCLUSION

Based on the foregoing, this Court should affirm the district court's denial of NDOC's PJR. NDOC has failed to prove its substantial rights were violated under any of the six grounds enumerated under NRS 233B.135(2).

DATED this 9th day of June, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Times New Roman.

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 proportionately spaced, has a typeface of 14 points or more and contains 5,480 words.

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.

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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 Appellant Procedure.

DATED this 9th day of June, 2021.

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CERTIFICATE OF SERVICE BY ELECTRONIC FILING

I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS, and that on the 9th day of June, 2021, I did serve by way of electronic filing, a true and correct copy of the above and foregoing **RESPONDENT'S ANSWERING BRIEF** on the following:

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I further certify that on the 9th day of June, 2021, the foregoing will be mailed via United States Mail and sent via electronic mail, to the following:

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