IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA ex rel. its DEPARTMENT OF CORRECTIONS, Appellant, vs. JOSE MIGUEL NAVARRETE, an individual, Respondent.	Supreme Court Case No.: 82113 District Court Case No: A-19-797661-J

APPELLANT'S REPLY BRIEF

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STATEMENT OF FACTS

NDOC dismissed Employee because as a senior correctional officer he had an obligation to intervene before excessive force was used on an inmate and to submit a truthful report on the use of force. Employee did neither one. Employee asserts he was terminated for an incident involving *another* officer, Valdez, and an inmate, Norelus, implying Employee was not involved. *See* Answering Brief at 3. Yet, it is clear from the evidence Employee was directly involved. As the lead search and escort, Employee was Valdez's first line supervisor that day. JA Vol. II, 369-70, Vol. IV 769. As depicted in the video, Employee was the one who searched Norelus for contraband and kept Norelus on the wall after the pat down was completed. JA Vol. V, 1107 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 rather than restrain him and take him to the sergeant for his alleged "noncompliance". *Id.* 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. *Id.* at 10:50-11:31. Because of Employee's involvement, he had to complete an incident report. JA Vol. V, 1016. Thus, it is very clear Employee's dismissal was a result of his *direct involvement* in the failure to prevent excessive force against Norelus and failure to accurately report.

Employee does not dispute that several witnesses provided substantial testimony at the hearing on behalf of NDOC. *See* Answering Brief at 3-9. Employee instead focuses on the hearing officer finding Employee credible. *See* Answering Brief at 3. While the hearing officer found Employee credible, the hearing officer failed to make specific findings on the other witness testimony and the substantial documentary evidence, which included transcripts of interviews with several inmates. Instead, the hearing officer included a cursory summary of NDOC's evidence despite NDOC calling five witnesses and admitting hundreds of pages of documents. JA Vol. IV, 858-859. Senior Investigator Rod Moore, Officer David Wachter, retired Associate Warden Minor Adams, Warden Perry Russell, and Warden Jerry Howell testified at the hearing and contradicted the alleged "credible" testimony of Employee. JA Vol. II, 272-309, Vol. III 552-752, Vol. IV 753-851. Among the exhibits admitted into evidence by NDOC was the administrative investigation file which included a report of the criminal investigation into the conduct of Valdez and Employee. JA Vol. IV, 997-1002 Vol. V, 1003-1085. The criminal investigation report included summaries of witness interviews with inmates Norelus, Michael White, Lawrence Williams and Ralph Jackson, all of whom witnessed the incident. JA Vol. V, 1072-1085. The inmate summaries stated for weeks prior, Valdez and Employee were singling out Norelus for searches and subjecting him to verbal abuse. JA Vol. V, 1080-82. The Decision fails to

acknowledge the criminal report and witness summaries. JA Vol. IV, 852-861. Additionally, AR 405, Use of Force, OP 405, OP 407 and Search and Escort Post Order were admitted into evidence. JA Vol. III, 556, Vol. V 1177-1192, Vol. IV 911-919. Yet, there was no discussion about these policies and how Employee violated them. JA Vol. IV, 852-861.

Employee further noted that the hearing officer found Norelus was acting differently than the other inmates, his hands were not in the proper position, and he was looking around anxiously. JA Vol. IV 853. Yet, the testimony at the hearing showed that Norelus' behavior of looking around anxiously and not placing his hands on the wall correctly did not justify keeping him on the wall for over ten minutes. JA Vol. III, 721, 733; Vol. IV 830. Norelus' fidgeting did not pose a physical threat to the officers and the use of excessive and unauthorized force was not justified. JA Vol. III, 615, 721. In fact, the evidence at the hearing showed if the inmate was "non-compliant" or a "threat" to the officers, Employee would not have turned his back several times and walked away from the inmate. JA Vol. II, 478-480, Vol. III 615-616.

Employee testified random searches prevent distribution of contraband. JA Vol. II 378. "That day in particular, we were informed to crack down on any contraband coming out of the culinary because of that week, we had numerous incidents between black and white inmates…" JA Vol. II 382. Yet, from the time

Valdez pulled the last inmate for a random search at 00:08 in the video to the time Wachter shut the culinary door at 6:19, **over 120 inmates walked out but neither Employee nor Valdez randomly searched them**. JA Vol. V, 1107 at 00:08 to 6:19 (emphasis added). According to Employee, the culinary contained over 200 inmates. JA Vol. II, 394. Wachter testified he would randomly pull every third inmate exiting culinary and, on some days, it might be every tenth inmate. JA Vol. III, 705. Under the instruction to "crack down on contraband," Valdez and Navarrete should have randomly selected a minimum of 10 to 40 inmates out of the approximate 120 inmates that exited culinary in that six-minute span. Instead, Employee and Valdez were targeting Norelus and allowed over half of the inmates to walk out of culinary without being searched. JA Vol. V, 1107 from 1:47 to 6:19. Norelus told investigators he had been singled out for two weeks. JA Vol. V 1080. White confirmed Employee and Valdez were always going at it with Norelus. *Id*. Jackson even said staff targeted African American inmates and required them to stay on the wall for extended periods. *Id.* 811-812. The video of the incident supports Jackson's testimony: at approximately 1:40, only Norelus, the African American inmate remained on the wall for alleged "non-compliance." JA Vol. V, 1107. The *Caucasian i*nmate on the wall next to Norelus, on the other hand, simply had his hands adjusted by Employee when he was non-complaint and was then searched and released. JA Vol. V, 1107 at 0:29-31, 00:58-1:25.

The video, while lacking audio, supports Employee concluded the pat search within 30 seconds and required Norelus to stand against the wall with his arms raised over his head for over 10 minutes, while over 120 other inmates left the culinary without being searched. The evidence not only supports that Norelus should not have been on the wall for an extended time but also, he was likely targeted and kept on the wall intentionally. Despite this evidence, the hearing officer failed to address the testimony and documentation supporting that the "random search" may not have been random.

Employee argued he did not want to restrain the inmate and take him to the sergeant because he claimed they were short staffed and he was supposed to be "cracking down contraband" so it would take too long, leaving the search and escort without enough manpower. *See* Answering Brief at 5-6. This argument is belied by the fact, as explained above, Employee and Valdez did not conduct any other searches. Further, Adams, who worked in corrections for 32 years (JA Vol. III, 752), testified correctional officers would place non-compliant inmates in restraints and take them to the operational sergeant "***often***." JA Vol. IV 794. Moore, Wachter, and Adams all testified keeping Norelus on the wall for over ten minutes, even if non-compliant, was an excessive amount of time, and Employee could have placed Norelus in restraints and taken him to the shift command. JA Vol. III, 632-633, 687-688,717-718, 729-733; Vol. IV 780-782. Even Employee testified he could have

placed the inmate in restraints and taken him to the shift sergeant. JA Vol. II, 465-466. In fact, OP 407 states if an inmate refuses to comply, the shift supervisor will be notified and appropriate back up obtained. JA Vol. II 461. Employee allowed Valdez to become agitated and the situation to escalate without cause, resulting in an unnecessary use of force that required the shift sergeant to respond to the scene and disrupt the entire operation of the facility. JA Vol. II, 465-467, Vol. V, 1107 at 15:20.

The hearing officer found:

> The testimony was that Officer Valdez verbally told the inmate he was going to cuff him and take him to the sergeant, yet, **there was no signs that Officer Valdez actually had his handcuffs in hand**."

JA Vol. IV 854 (emphasis added).

The hearing officer further noted, while Valdez abruptly approaches the inmate from behind, the **inmate's hands remain on the wall**. *Id.* (emphasis added). The hearing officer further found there was no sign of physical resistance by the inmate or any physical threat to the officers, but found the testimony was he continued to be verbally abusive and agitated. *Id*. Moore, Wachter, Adams, Russell and Howell testified the inmate was *not* agitated, and even if the inmate was agitated, he should not have been kept on the wall and Employee should have intervened. JA Vol. III, 630-633, 717-721, Vol. IV, 770, 779-783, 808, 830-831, Vol. II, 295-296.

The hearing officer stated as "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." The video contradicts the hearing officer's finding and shows Norelus moved *after* Valdez had his arm around Norelus' neck, pulling him back. Further, Adams clarified, if an inmate is on the wall and resists physical cuffing, then an officer could use proportioned force. JA Vol. IV 794-795. However, Adams further clarified an inmate "turning his shoulder" is not resisting. JA Vol. IV 794. "If the inmate's back is to you, he cannot pose you a physical threat. If an inmate turns more than halfway around, then he may be able to take an aggressive stance motion." *Id*. Thus, the hearing officer's finding of "slight movement" completely fails to justify the unnecessary force or the lack of reporting on the unauthorized use of force.

Navarrete was taught how to write a report in the academy and had refresher training every year through POST. JA Vol. II 367-68. He wrote hundreds of reports while at NDOC. JA Vol. II, 368. Employee reported:

> At approximately 06:45 hours inmate Norelus #1104257 **came off the Culinary wall while C/O Valdez was attempting to restrain him** resulting in a spontaneous use of force. When inmate Norelus came off the wall he was resisting and both he and C/O Valdez went to the ground…

JA Vol. V 1016. (Emphasis added).

In his brief, Employee notes the hearing officer found his report to be brief and factually accurate given what he reasonably could have expected to perceive at that time. JA Vol. IV 859-860. The hearing officer repeats Employee only had 2-3 seconds to perceive what occurred before completing his report. *Id.* However, the video recording shows the hearing officer erred in determining the period of Employee's perception was only 2-3 seconds.

Employee's appeal hearing lasted over two days where significant testimony was heard about the 11+-minute incident and Employee was directly involved during the entire incident. He did not suddenly walk up at the last few seconds or just walk by when the incident occurred. Employee conducted the search of Norelus. Employee should have released Norelus. Employee engaged in discussions with Noreulus and heard Norelus and Valdez have discussions. He saw Norelus did not pose a threat. However, Employee allowed things to escalate between Norelus and Valdez. Lastly, Employee was leaning on the wall facing the inmate just a couple feet away and saw Norelus's hands remained on the wall when Valdez "abruptly approach Norelus from behind." For the hearing officer to conclude Employee only perceived the incident for 2-3 seconds is contrary to the evidence.

Furthermore, the hearing officer came to this conclusion "after much soul searching," which was error when the overwhelming evidence demonstrated Employee's report was grossly inaccurate. The evidence and testimony showed

Norelus did not come off the wall as stated in the report and Valdez was not "attempting to restrain" Norelus. The report had significant omissions of the events leading up to the use of force. While the actual use of force may have lasted only a few seconds, the events leading up to the use of force occurred over an 11- minute period and Employee was present the entire time. His recitation of what occurred was dishonest. The hearing officer should rely *only* on the evidence before him not his personal opinion.

Employee noted in his brief a jury acquitted him of his criminal charges. The outcome of employee's criminal case has no relevance to his administrative hearing. The hearing officer erred when he allowed evidence of the jury's decision into evidence as well as Norelus' criminal history but excluded evidence of a grievance history report showing other inmates complained of Employee's actions.

II.
LEGAL ARGUMENT

A. THE DISTRICT COURT'S ORDER AND THE HEARING OFFICER'S DECISION PREJUDICED NDOC'S SUBSTANTIAL RIGHTS.

This Court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced NRS 233B.135(3). The substantial rights are prejudiced if the final decision of the agency is: (a) In violation of constitutional or statutory provisions. . .(d) Affected by other error of

law; (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or (f) Arbitrary or capricious or characterized by abuse of discretion. *Id.*

Employee argues "NDOC never states how or why any of its rights were violated by Gentile to support the reversal of Gentile's Decision." *See* Answering Brief at 10. Yet, NDOC's Opening Brief not only includes the above-referenced standard of review, but also makes five legal arguments to show how NDOC's substantial rights were prejudiced. NDOC argues that it was clear error to rely on AR 339. *See* Opening Brief at 36. NDOC argues that the hearing officer violated statutory provisions and erred when he failed to consider whether Employee violated NAC 284.650(1), (10) and (21). *Id.* at 38. NDOC also argued that the District Court and hearing officer clearly erred when using a preponderance of the evidence standard. *Id*. at 40. NDOC further argued that the hearing officer's decision was arbitrary and capricious, an abuse of discretion and clearly erroneous in light of reliable probative and substantial evidence in the record. *Id*. at 46. Lastly, NDOC argued that it was clear error and an abuse of discretion for the hearing officer to "soul search." *Id.* at 58. There is no dispute NDOC dismissed Employee for actions incompatible with his employment, dishonesty and allowing violence to occur. There is also no dispute the hearing officer's Decision reversed the dismissal, requiring NDOC to reinstate an employee who committed serious violations of

policy and issue back pay and benefits for the time Employee was dismissed. Thus, this Court should reverse the District Court's order and set aside the Decision in whole because NDOC's substantial rights have been prejudiced.

B. EMPLOYEE CANNOT RAISE ISSUES OUTSIDE OF THE SCOPE OF THE APPEAL

In his Brief, Employee asserts NDOC did not have good cause for an extension of time to serve Employee with discipline pursuant to NRS 284.387. *See* Answering Brief at 13-16. This assertion is not only without merit but improperly raised in this appeal. At the time of Employee's discipline, NRS 284.387(2) provided:

> 2. An internal administrative investigation . . . 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 . . . 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.**

Here, NDOC requested a 60-day extension, and the Administrator approved a 60 day extension. JA Vol. IV 998-1000.

First, NDOC's extension pursuant to NRS 284.387 was not a basis for the hearing officer's decision to reverse the dismissal or the district court's order

denying the petition for judicial review. *See* JA Vol. IV 852-861, Vol. VII. 1513-1517. In fact, Employee acknowledges the hearing officer did not make any findings or conclusions with respect to the extension. *See* Answering Brief at 16. More importantly, Employee admits NDOC was granted an extension pursuant to NRS 284.387. *Id.* at 15. Since the extension was not a basis for the Decision or the Court's Order, any question regarding the suitability of the NRS 284.387 extension is not properly before this Court.

Second, when NDOC filed its petition for judicial review, NDOC did not raise an issue with the extension under NRS 284.387. Employee cannot raise new issues in response to NDOC's petition. If Employee believed an error of law existed, 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, 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. JA Vol. IV 852-861. NDOC filed its petition for judicial review on June 28, 2019. JA Vol. I, 1-14. If Employee disagreed with the hearing officer's ruling, he was required to file a petition no later than July 1, 2019. Alternatively, if Employee disagreed with the issues on appeal, Employee could have filed a cross-petition no later than July 15,

2019. Employee did not file a petition for review or a cross petition for review. Therefore, Employee's assertion NDOC did not have a proper extension of time to serve Employee with discipline per NRS 284.387 must be rejected as it is not properly before this Court.

Third, assuming this issue is properly before the Court, it is without merit as NDOC obtained a valid extension and timely served Employee with discipline in accordance with NRS 284.387. Furthermore, the hearing officer does not have authority to review good cause. Based on the plain language of NRS 284.387(2), it is up to the Administrator to find good cause and to grant an extension-not a hearing officer.

Here, NDOC served Employee with his notice of allegations on October 21, 2016. JA Vol. V 1026-1028. The 90-day period under NRS 284.387 would have expired on January 19, 2017, but NDOC obtained, in advance, a valid extension in accordance with NRS 284.387 and NAC 284.6555. JA Vol. IV 998. On January 13, 2017, NDOC submitted a request to the Administrator of the Division of Human Resource Management on the prescribed form seeking a 60-day extension. JA Vol. IV 731-733, Vol. V 737-739. NDOC explained "[T]he Specificity of Charges is currently under review by the Attorney General's office." JA Vol. IV 1000. Pursuant to NRS 284.385(2), NDOC **must** consult with the Attorney General's Office before dismissing, demoting or suspending a permanent classified employee. Thus, NDOC

required an extension to comply with the statute. On January 17, 2017, the **Administrator found good cause and *granted* the 60-day extension,** making the new deadline to serve Employee March 20, 2017. JA Vol. IV 998. NDOC served Employee with the SOC, recommending dismissal, on March 16, 2017. JA Vol. V 114. 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, received an extension and served Employee timely.

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. JA Vol. IV 860. In *Dep't. of Corr. v. Ludwick,* this Court held 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.

In his Brief, Employee does not dispute the hearing officer improperly relied on AR 339 but instead argues that NDOC failed to show Employee violated the provisions of NAC 284.650 and the NAC 284.650 violations and the AR 339 violations are redundant. 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). JA Vol. V, 1114-1175. 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. JA Vol. IV 862-879. NDOC noted while AR 339 had been invalidated, NDOC's other ARs, including AR 405, had not been invalidated. JA Vol. IV 862-864. The hearing officer made factual findings, using specific language found in AR 339.07.9(A) and AR 339.07.17(A). JA Vol. IV 860. 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)

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 does not address these violations. Employee makes conclusory statements that the charges are redundant and NDOC failed to prove Employee violated NAC 284.650(1), (10), and (21) rather than addressing the hearing officer's failure to make findings and conclusions with respect to the

charges.

NAC 284.794(1) specifically instructs "the hearing officer shall determine the evidence upon the charges and specifications as set forth by the appointing authority in the appropriate documents . . ." NDOC served Employee with an SOC recommending his dismissal from state service for having violated NAC 284.650(1), NAC 284.650(10), NAC 284.650(21), AR 339.07.9(A) and AR 339.07.17(A). JA Vol. V 1114-1175. The hearing officer's Decision does not determine the evidence upon the charges of NAC 284.650(1), (10), and (21). *See* JA Vol. IV 852-861. *Ludwick* held the hearing officer **must** address whether the employee's actions constitute violations of NAC 284.650 as listed in the specificity of charges without any reliance on AR 339. *Ludwick* at 104, 47-48. The hearing officer failed to consider these violations and makes no mention of them in his findings, conclusions or decision aside from noting the violations were listed in the SOC. *See* JA Vol. IV 852-861.

Moreover, the hearing officer's failure to consider the NAC 284.650 violations was not harmless error, since substantial evidence showed Employee violated NAC 284.650(1), NAC 284.650(10) and NAC 284.650(21).[1] In his Brief, Employee argues there is no condition of employment established by law would be

[1] The substantial evidence supporting these violations will be addressed in section F.

implicated in this case to show a violation of NAC 284.650(1). Employee is incorrect. The laws governing the conditions of employment are not only found in the prohibitions and penalties or NDOC's AR 339 but other NDOC regulations and laws. The conditions of employment for a correctional worker are governed by NDOC Administrative Regulations (AR), including AR 405, which have been approved by the Board of Prison Commissioners. "Those rules, mandated by the legislature and adopted in accordance with statutory procedures, have the force and effect of law. NRS 284.155; *Turk v. Nevada State Prison*, 94 Nev. 101, 104, 575 P.2d 599, 601 (1978). Further, the Eighth Amendment protects prisoners from cruel and unusual punishment and a correctional officer must carry out his duties without violating prisoner's rights as established by law. Specifically in this case, NDOC presented evidence showing Employee violated AR 405 and Employee's action allowed the occurrence of unauthorized force. Therefore, it was a violation of the hearing officer's statutory duties and clear error of law pursuant to *Ludwick* when the hearing officer failed to make findings on whether Employee violated NAC 284.650(1), (10) and (21).

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E. THE HEARING OFFICER CLEARLY ERRED AND ABUSED HIS DISCRETION WHEN HE USED THE PREPONDERANCE OF THE EVIDENCE STANDARD

The hearing officer erred and acted arbitrarily and capriciously thereby abusing his discretion when he used a preponderance of the evidence standard. The correct standard for the hearing officer to make a de novo determination if Employee engaged in misconduct under step one of *O'Keefe* is substantial evidence.

Employee incorrectly argues *Nassiri* requires a preponderance of the evidence standard to determine if the misconduct occurred. However, *Nassiri* did not involve an agency taking disciplinary action against an employee. *Nassiri v. Chiropractic Physician's Bd,* 130 Nev. 245, 327 P.3d 487 (2014). Instead, *Nassiri* held the standard of proof in an agency's ***occupational license revocation hearing*** in absence of a governing statute is a preponderance of the evidence standard of proof. *Id* at 251, 491. This case does not involve an occupational license revocation hearing. This case involves a hearing under NRS 284.390(1) to determine the reasonableness of an employee's dismissal and the existence of just cause.

Employee admits NRS 284.385 and NRS 284.390 are the governing statutes regarding the dismissal of a state employee. *See* Answering Brief at 20. NRS 284.390 states "[i]f 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." NRS 284.390(6) (emphasis added). In turn, NRS 284.385(1)(a) provides "[a]n appointing authority may…[d]ismiss or demote any permanent classified employee when the appointing authority considers that the good of the public service will be served thereby."

"Just cause" is synonymous with "legal cause." *Whalen v. Welliver*, 60 Nev. 154, 104 P.2d 188, 191 (1940). A discharge for just cause "is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by ***substantial evidence***, and (2) reasonably believed by the employer to be true.' " *Southwest Gas Corp. v. Vargas,* 111 Nev. 1064, 1078, 901 P.2d 693, 701 (1995).

The Nevada Court of Appeals already determined that the appropriate evidentiary standard in a disciplinary hearing pursuant to NRS 284.390 is substantial evidence. *Nevada Dep't of Motor Vehicles v. Adams*, No. 68057, 2017 WL 521774, at *1–2 (Nev. App. Jan. 30, 2017) (unpublished).[2] In *Adams*, the Court of Appeals found:

> In this case, the hearing officer applied the incorrect standard of review in his factual determinations. Critically, the hearing officer found that the DMV failed to prove by a preponderance of the evidence that Adams and the customer she helped serve were not mere acquaintances. Instead, the **hearing officer**

[2] NDOC cites to this unpublished decision as it believes it falls under the exception found in NRAP 36(3).

> **should have ruled on whether substantial evidence** supported the DMV's contention that Adams and the customer were close friends. And **since the preponderance-of-the-evidence standard is higher than the substantial-evidence standard**, we must reverse and remand this matter for the hearing officer to utilize the correct standard of review. *See Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 501 n.12, 117 P.3d 193, 198 n.12 (2005).

Nevada Dep't of Motor Vehicles v. Adams, No. 68057, 2017 WL 521774, at *1–2 (Nev. App. Jan. 30, 2017) (unpublished)(emphasis added).

In footnote 2, the *Adams* Court noted:

> Substantial evidence is "evidence that a reasonable mind could accept as adequately supporting the agency's conclusions." We recognize that *Nassiri* may have caused confusion because it noted the standard of proof was by a preponderance of the evidence, but that was in relation to the agency's determination for its licensing proceedings; **"substantial evidence" is the proper standard of review to be used during the hearing officer's review**.

Id. at 2 (internal citations omitted)(emphasis added).

Adams involved an appeal hearing pursuant to NRS 284.390(1). Employee argues the preponderance of the evidence standard set forth in *Nassiri,* supra, rather than the substantial evidence standard set forth in *Southwest Gas* and *Adams*, is the correct standard to apply in determining the existence of just cause to terminate Employee. *See* Answering Brief at 19-20. On the one hand, Employee attempts to distinguish *Southwest Gas* from this case because *Southwest Gas* did not involve NRS Chapter 284 and involved a private employer. Then, on the other hand, Employee attempts to support his position by citing cases from other jurisdictions

which also do not involve NRS Chapter 284 and which have no persuasive value to the instant appeal. None of those cases sets forth a standard of preponderance of the evidence. Furthermore, the fact that *Southwest Gas* involved a private employment contract rather than government employment in the classified system is not relevant because it simply defines the just cause standard. The *Nassiri* case, which Employee claims is the controlling case, did not involve employment at all; rather, *Nassiri* concerned a license revocation hearing pursuant to NRS 233B. *Nassiri* did *not* establish a standard for an employee's hearing regarding a dismissal from State service pursuant to NRS 284.390.

In *O'Keefe v. Dep't of Motor Vehicles*, the Nevada Supreme Court established a three-step review hearing officers should conduct when evaluating a dismissal. *See O'Keefe v. Nevada Department of Motor Vehicles*, 134 Nev. 752, 431 P.3d 350 (2018). *O'Keefe* **did not** establish the standard under step one was preponderance of the evidence. *Id.* In fact, *O'Keefe* never once mentions "preponderance of the evidence." Instead, *O'Keefe* cites to NAC 284.798, which states the hearing officer shall make no assumptions of innocence or guilt but shall be guided in his decision by the weight of the evidence as it appears to him at the hearing. NAC 284.798. Furthermore, *O'Keefe*, repeatedly refers to "substantial evidence" and noted a "discharge for "just" or "good" cause is one which is not for any arbitrary,

capricious, or illegal reason and which is based on facts supported by substantial evidence. *O'Keefe* at 758, 355.

Here, the hearing officer ruled NDOC did not prove by a preponderance of the evidence that Employee allowed or permitted the use of force or submitted a false report. Thus, it was clear error for the hearing officer to use the wrong standard under step one of *O'Keefe* and the Decision must be set aside in its entirety.

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

The substantial evidence does not support the hearing officer's Decision. The substantial evidence demonstrates NDOC's decision to dismiss Employee was reasonable and based on just cause. In his Brief, Employee argues NDOC failed to prove employee used excessive force. *See* Answering Brief at 25. NDOC never tried to prove Employee used excessive force as Employee was not accused of *using* excessive force. Rather, NDOC proved by the substantial evidence Employee, as a senior officer and supervisor, *allowed and/or permitted* Valdez to use excessive and/or unauthorized force. Additionally, NDOC demonstrated, as a senior officer and supervisor, Employee should have first released the inmate and then intervened and deescalated the situation that culminated over the course of approximately 11

minutes to prevent the use of force from happening. Furthermore, NDOC proved by the substantial evidence that Employee's actions were incompatible with the conditions of his employment as established by law when Employee violated all applicable ARs, OPs and post order on use of force restraints, and reporting use of force. Lastly, NDOC proved by the substantial evidence that Employee was dishonest in his report because he made false and/or misleading statements and glaring omissions regarding the incident.

The hearing officer consistently discussed the testimony of Employee in his Decision but completely ignored the testimony of Moore, Wachter, Adams, Russell and Howell. In his Decision, the hearing officer finds Employee was credible but makes no determination regarding the substantial evidence presented by NDOC. Agencies must explain what justifies their determinations with actual evidence beyond a "conclusory statement." *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993).

Here, the hearing officer failed to explain how he reached the conclusion that Employee did not engage in any wrongdoing when the testimony of at least five other people and the criminal investigative report supported that Employee engaged in misconduct. The hearing officer's failure to analyze the other evidence in the record renders his findings and conclusions arbitrary and capricious as a matter of law.

1. Violation of NAC 284.650 (1)

NDOC found Employee violated NAC 284.650(1), activity which is incompatible with an employee's conditions of employment established by law. These conditions of employment include Employee's compliance, as a correctional officer, with the 8th Amendment as well as NDOC AR 405, Use of Force, and its corresponding operational policies and procedures. NDOC's ARs were approved by the Board of Prison Commissioners and have the force and effect of law. *See* NRS 209.111(3), NRS 209.131(6); *Turk v. Nevada State Prison*, 94 Nev. 101, 104, 575 P.2d 599, 601 (1978).

Employee singled out inmate Norelus by patting him down but not releasing him, keeping him on the wall for an excessive amount of time with his hands raised and allowing a situation to escalate resulting in Valdez using excessive and unauthorized force. Employee's actions were incompatible with his conditions of employment because it violated NDOC AR 405 and according to the testimony the chokehold used was unlawful and an assault potentially violating the inmates civil rights. JA Vol. IV, 759, 831-832.

AR 405.03 outlines use of force policies and procedures. JA Vol. V 1179. According to AR 405.03, Employee was required to immediately report excessive or unnecessary force to his supervisor and in a report. *Id.* Employee was familiar with AR 405 and understood the policy. JA Vol. II 458-59. The Search and Escort

post order required Employee to restrict use of force to the minimum degree necessary to regain control or to repel an attack. JA Vol. II 461. The post order further required Employee to notify a shift supervisor and obtain appropriate back up if an inmate refuses to comply. JA Vol. II 460. The post order states Search and Escort officers will enforce all rules, regulations, and procedures and counsel inmates in a discreet and timely manner. JA Vol. IV 919-920.

Employee did not comply with AR 405 or the Search and Escort Post Order. Employee kept Norelus on the wall because he was allegedly "non-compliant." Yet, Employee's decision to keep Norelus on the wall for an extended period time was contrary to the policies governing his post. JA Vol. II 461, Vol. IV 919-920. Employee was required to notify a shift supervisor and obtain appropriate back up for non-compliance. Instead, Employee kept Norelus on the wall, allowing Valdez to get riled up and letting the situation escalate to the point where Valdez used excessive force. This was incompatible with Employee's conditions of employment and a violation of NAC 284.650(1).

2. Violation of NAC 284.650(10)

NDOC found Employee violated NAC 284.650(10), dishonesty. As a peace officer, Employee is expected to adhere to a high level of honesty. Employee's report of the incident never explained why the inmate was on the wall or that the inmate was non-compliant. With respect to the use of force, Employee reported, "At

approximately 06:45 hours inmate Norelus #1104257 came off the Culinary wall while C/O Valdez was attempting to restrain him resulting in a spontaneous use of force." JA Vol. V 1141.

The hearing officer **found the inmate's hands remained on the wall and that there was no evidence that Valdez was restraining the inmate**. JA Vol. IV 854 (emphasis added). However, despite these findings, the hearing officer did not find Employee's statement to be false or misleading. Instead after "much soul searching," the hearing officer found the report accurate. JA Vol. IV 859. It was noted that Employee's direct supervisor found the report to be sufficient. JA Vol. II 412-413. However, Willett was not reviewing the report for violations of NAC 284.650; he was only reviewing the flow and that the grammar was correct. *Id.*

The hearing officer did not need to search his soul because the evidence made Employee's dishonesty clear:

- Russell testified he did not see Norelus resist but according to the report, Norelus was resisting when he was being restrained which he did not see in the video, and it spoke to the integrity of both officers. JA Vol. IV 830.

- Russell testified omission is deception. The report should have included that the inmate was on the wall for 10-15 minutes, Valdez pushed the inmate, there was no resistance, he grabbed him around the neck and threw him to the ground. JA Vol. IV 831-32.

- Wachter and Moore testified Norelus did not come off the wall and Valdez was not attempting to restrain because Valdez did not have his restraints out and did not use the approved technique to restrain. JA Vol. III 699, 717-719, 746.

- Adams testified when completing a report, an officer is required to include as much detail as possible, particularly in use of force. JA Vol. IV 810.

- Howell testified NDOC has to be able to believe an officer's report and if an officer loses credibility, it decreases the effectiveness of the institution. JA Vol. II 298-299.

- Russell testified as a senior officer, Employee had an obligation to be honest, submit a correct report and alert supervisory staff of what occurred. JA Vol. IV 831.

The substantial evidence in the whole record supported Employee was dishonest and violated NAC 284.650(10).

3. Violation of NAC 284.650(21)

NDOC found Employee violated 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, conduct that is threatening or intimidating, assault, or battery. While NDOC did not charge Employee with placing hands on Norelus, NDOC was charging him for allowing/permitting the violence to occur. The hearing officer found there was no set time to keep an inmate on the wall. But the evidence supported that the inmate was on the wall for an **excessive** amount of time:

- Wachter testified it was excessive to keep Norelus on the wall for an additional eight minutes because there is not time to counsel for ten minutes when there are other duties such as safety and security of the prison. JA Vol. III, 733.

- Moore testified keeping an inmate on a wall for seven minutes was not customary and would agitate the inmate. JA Vol. III 632-633 ROA 452.

- The video shows the actual search only about 30 seconds. JA Vol. V 1107.

The hearing officer found Employee could not have prevented the excessive use of force. But the evidence contradicted this finding and showed, as the supervisor, Employee should have released the inmate and intervened:

- Wachter testified as a senior officer, Employee could have intervened and taken over if he observed Valdez was keeping the inmate on the wall for too long. JA Vol. III 717.

- Adams testified Employee as the senior officer should intervene and tell the other officer to take a break and take the inmate to the sergeant's office. JA Vol. IV 770.

- Moore testified it was Employee's job to deescalate and contain the situation. JA Vol. III 632, 687.

- Adams with over thirty years' experience at NDOC testified that his opinion was Employee permitted the unnecessary force to occur. JA Vol. IV 809.

- Russell testified Employee as the senior had a responsibility and obligation to do something different during the 10 minutes to prevent force. JA Vol. IV 830.

Furthermore, Russell testified the actions were an assault and Adams testified the choke hold was unlawful, which supports the violation under NAC 284.650(21).

The hearing officer did not determine whether Norelus was targeted; however, the evidence supported Norelus was singled out and harassed:

- Norelus said he was routinely singled out by Employee and Valdez. JA Vol. V 1080

- White said Employee and Valdez were routinely going at it with Norelus. *Id.*

- Jackson said staff singled out black inmates. *Id.*

- Wachter testified Valdez always had to get the last word. JA Vol. V 1082.

- Moore testified keeping an inmate on the wall for an excessive period is singling out the inmate in front of other inmates. JA Vol. III 632-633.

- The video shows despite Employee and Valdez's job to search inmates and crack down on contraband, over 120 inmates left culinary without being searched. JA Vol. V 1107

The substantial evidence established Employee violated NAC 284.650(21) when he engaged in act of violence against Norelus, including harassing him, singling him out, and allowing excessive force.

G. IT WAS CLEAR ERROR AND AN ABUSE OF DISCRETION FOR THE HEARING OFFICER TO CONDUCT "SOUL SEARCHING"

NRS 284.390(6) provides, after the hearing and consideration of the evidence, the hearing officer shall render a decision in writing, setting forth the reasons therefor. The hearing officer is not to consider his personal feelings or soul searching. Employee does not dispute that the hearing officer erred when he did soul searching to determine if the report was truthful. Thus, Employee has admitted this error of law. It was clear error for the hearing officer to search his soul for his

findings and conclusions rather than the reliable, probative and substantial evidence in the record that revealed Employee was dishonest in his report.

III.

CONCLUSION

Based on the foregoing, NDOC respectfully requests this Court reverse the District Court's Order denying NDOC's Petition for Judicial Review and set aside the hearing officer's Decision in its entirety as the substantial rights of NDOC were violated.

DATED August 6, 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:

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

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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:

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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

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

DATED August 6, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELLANT'S REPLY BRIEF** with the Clerk of the Court by using the electronic filing system on the 6th day of August, 2021.

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

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Via Email to:

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Hearing Officer
Hearings Division
nrann@admin.nv.gov

I further certify that on August 10, 2021 the foregoing will be mailed by United States Mail to the following:

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