

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

ROCHA,

Appellant,

v.

THE STATE OF NEVADA DEPARTMENT OF
HEALTH AND HUMAN SERVICES, DIVISION
OF PUBLIC AND BEHAVIORAL HEALTH,

Respondent.

No. 82485

Electronically Filed
Mar 04 2021 04:18 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
**DOCKETING STATEMENT
CIVIL APPEALS**

GENERAL INFORMATION

Appellant must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court May impose sanctions on counselor appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. **Judicial District:** Eighth **Department:** 25
County: Clark **Judge:** Kathleen E. Delaney
District Ct. Case No.: A-19-804209-J

2. **Attorney filing this docketing statement:**

Attorney: Adam Levine, Esq. **Telephone:** 702-386-0536

Firm: Law Office of Daniel Marks

Address: 610 South Ninth Street

Las Vegas, Nevada 89101

Client(s): Charles Rocha

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. **Attorney(s) representing respondents(s):**

Attorney: Susanne M. Sliwa, Esq. **Telephone:** 702-486-3375

Firm: Office of the Attorney General

Address: 555 E. Washington Avenue, #3900

Las Vegas, Nevada 89101

Client(s): State of Nevada, Division of Public Behavioral Health (DPBH)

4. **Nature of disposition below (check all that apply):**

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |

☐ Grant/Denial of NRC 60(b) relief

☐ Other (specify):

☐ Grant/Denial of injunction

☐ Divorce Decree:

☐ Grant/Denial of declaratory relief

☐ Original ☐ Modification

☐ Review of agency determination

☒ Other disposition

(specify): Order Granting Judicial Review of an Administrative Agency action.

5. Does this appeal raise issues concerning any of the following?

☐ Child Custody

☐ Venue

☐ Termination of parental rights

N/A

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

N/A

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

a. State of Nevada ex. rel, its Department of Health and Human Services Division of Public and Behavioral Health v. Charles Rocha, State of Nevada ex. rel, its Department of Administration Personnel Commission, Hearing Officer, Case No. A-19-804209-J, Eighth Judicial District Court – 10/23/2019.

8. Nature of the action. Briefly describe the nature of the action and the result below:

The State of Nevada Department Health and Human Services ("DHHS") terminated the employment of Appellant, a peace officer, in connection with his use of force on the detainee who attacked him. A State hearing officer found the use of force reasonable and therefore no just cause to terminate. DHHS sought judicial review of the decision.. The district court granted judicial review and ordered the matter remanded back to the hearing officer to

analyze the case under a standard different than for use of force.. The hearing officer subsequently determined, based upon the district court's order, to affirm the termination. Once the proceedings upon remand were final the district court's order granting judicial review became a final and appealable judgment. See e.g. *Bally's Grant Hotel & Casino v. Reeves*, 112 Nev. 1487, 929 P.2d 936 (1996) (orders granting judicial review and remanding for further proceedings are not final and appealable except under very narrow exceptions).

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Did the District Court err in granting judicial review and remanding the matter back for a new hearing based upon the theory that a hearing officer committed clear error by applying a use of force standard to appellant's actions on the job as a peace officer;

Do employees have a fundamental right of self-defense when attacked, and may an employer force the employee to forfeit this fundamental right;

Should this court to revisit its decision in *O'Keefe v. Department of Motor Vehicles*, 134 Nev. 752, 431 P.3d 350 (2018) because the "just cause" standard contained in NRS 284.390(7), as commonly understood through the industrial common law, does not require the level of deference suggested by *O'Keefe*, and the definition of "just cause" from *Southwest Gas Corporation v. Vargas*, 111 Nev. 1064, 901 P.2d 693 (1995), which is cited in *O'Keefe*, only applies to unilateral implied contract of continuing employment and has been rejected for bilateral contracts and job security provisions in other jurisdictions.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

Unknown

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☒ Reversal of well settled Nevada precedent (identify the case(s)): *O'Keefe v. Department of Motor Vehicles*, 134 Nev. 752, 431 P.3d 350 (2018) and *Southwest Gas Corporation v. Vargas*, 111 Nev. 1064, 901 P.2d 693 (1995).

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☒ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this Court's decisions

☐ A ballot question

If so, explain:

1. Forensic Specialists such as Appellant are peace officers and are required to be trained and certified by the standards set by the Nevada Commission on Peace Officers Standards and Training ("POST"). Part of that training and certification involves both defense of tactics and the use of force standard from *Graham v. Connor*, 490 U.S. 386 (1989). When an inmate of the Stein Psychiatric Hospital, which houses criminal defendants not competent to stand trial, attacked Appellant with a stated intention to kill, Appellant utilized force to defend himself. The hearing officer reversed Appellant's termination finding his use of force reasonable. The district court directed the hearing officer to use a different standard which resulted on remand in an affirmation of the termination.

2. Courts in other jurisdictions have recognized that employees have a right to self-defense and to defend others, and that a termination which is based upon the reasonable exercise of that right may result in a tortious discharge. While Appellant was a member of the

classified service, and is limited to the statutory remedy provided for under NRS 284.390, does the right of self-defense still apply.

3. In *O'Keefe v. Department of Motor Vehicles*, 134 Nev. 752, 431 P.3d 350 (2018) this court set a new standard for State hearing officers to utilize in determining whether a suspension, demotion or discharge was supported by just cause. The court's decision was rightly criticized by Justice Pickering in her concurring opinion as deciding an issue not presented by the appeal. In doing so, the majority in *O'Keefe* cited, in dicta, the standard of just cause from *Southwest Gas Corporation v. Vargas*, 111 Nev. 1064, 901 P.2d 693 (1995) ("*Vargas*"). However, *Vargas* only apply to unilateral contracts of continuing employment based upon the theory that the employer did not contract away its fact-finding authority. The term "just cause" has a different meaning under the industrial common law, as developed over the last 90 years in arbitration in both the private and public sectors, when applied to disciplinary cases. Other jurisdictions which have adopted the same standard for implied contracts in *Vargas* have likewise recognized that this standard is inapplicable in other situations. See e.g. *Cotran v. Rollins Hudig Whole International, Inc.*, 948 P.2d 412 (Cal. 1998) (concurrence of Justice Mosk).

As, correctly identified by Justice Pickering in her concurrence, issues of just cause are mixed questions of law and fact. As such, the just cause standard should not be entitled to the employer deferential standard utilized in *Vargas & O'Keefe*. Rather, State hearing officers, who serve the same function as labor arbitrators for those employees who have the benefit of collective bargaining – i.e. determining just cause for discipline – should utilize the same standard as developed under the industrial common law through labor arbitrations. Because employees of the executive branch of state government were granted collective bargaining

rights in the 2019 legislative session (post *O'Keefe*), and because NRS 288.505(3) allows a disciplined employee to grieve the discipline through a collective bargaining agreement, or alternatively NRS 284.390, a failure to revisit *O'Keefe* will result in a situation where two different applications of the just cause standard may be applied depending upon whether the employee elects arbitration as opposed to a state hearing officer.

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance: **See the issues set forth in response to Item No. 12**

14. Trial. If this action proceeded to trial, how many days did the trial last? N/A

Was it a bench or jury trial? N/A

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

N/A

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from: Findings of Fact, Conclusions of Law, Decision and Order on Petition for Judicial Review entered on July 1, 2020,

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served: July 20, 2020.

However, the judgment or order was not appealable as of that date because it remanded the matter for further proceedings. See *Bally's Grant Hotel & Casino v. Reeves*, 112 Nev. 1487,

929 P.2d 936 (1996); *Clark County Liquor and Gaming Licensing Board v. Clark*, 102 Nev. 654, 730 P.2d 443 (1986). The judgment and order became final when decision on remand issued January 12, 2021 (Copy Attached).

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCp 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCp 50(b) Date of filing

☐ NRCp 52(b) Date of filing

☐ NRCp 59 Date of filing

NOTE: Motions made pursuant to NRCp 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ___, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served

Was service by:

☐ Delivery

☐ Mail

N/A

19. Date notice of appeal filed: 02/11/2021 as the judgment of the district court did not become final until the proceedings on remand were decided on January 12, 2021. (See above).

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal: N/A

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other:

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|--|--|
| NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input checked="" type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

NRS 233B.150 authorizes an appeal from a final judgment of the district court in judicial review cases. As set forth above, an order granting judicial review but remanding for further proceedings does not become appealable until those further proceedings are completed.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Charles Rocha
State of Nevada, ex rel, its Department of Health and Human Services
State of Nevada Department of Administration

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

The State of Nevada Department of Administration declined to file a Notice of Intent to Participate as required by NRS 233B.130(3) and did not participate in the proceedings before the district court.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Judicial review was obtained by DHHS which reversed the decision of the hearing officer and remanded the matter for further proceedings. Those further proceedings were completed effective January 12, 2021.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes Effective January 12, 2021.

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

N/A

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, crossclaims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Charles Rocha
Name of appellant

3-1-21
Date

Adam Levine, Esq.
Name of counsel of record


Signature of counsel of record

Nevada, County of Clark
State and county where signed

CERTIFICATE OF SERVICE

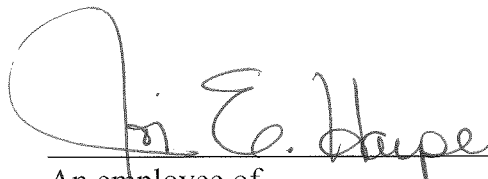
I certify that on the day of ____ day of March 2021 I served a copy of this completed docketing statement upon all counsel of record:

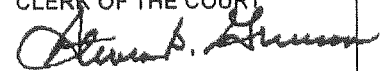
- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following addressees): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Aaron Ford, Sr. Attorney General
Susanne M. Sliwa, Esq.
Deputy Attorney General
Office of the Attorney General

555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
*Attorneys for State of Nevada, Division of
Public and Behavioral Health*

Dated this 4th day of March 2021


An employee of
LAW OFFICE OF DANIEL MARKS



CASE NO: A-19-804209-J
Department 25

1 PTJR

2 AARON D. FORD

3 Attorney General

4 SUSANNE M. SLIWA

5 Senior Deputy Attorney General

6 Nevada Bar No. 4753

7 Las Vegas, NV 89101

8 Telephone: (702) 486-3375

9 Fax: (702) 486-3871

10 Email: ssliwa@ag.nv.gov

11 Attorneys for State of Nevada

12 Department of Health and Human

13 Services, Division of Public and Behavioral Health

9 DISTRICT COURT
10 CLARK COUNTY, NEVADA

11 STATE OF NEVADA ex. rel, its
12 DEPARTMENT OF HEALTH AND
13 HUMAN SERVICES, DIVISION OF
14 PUBLIC AND BEHAVIORAL HEALTH

15 Petitioner,

16 vs.

17 CHARLES ROCHA; STATE OF NEVADA
18 ex rel., its DEPARTMENT OF
19 ADMINISTRATION, PERSONNEL
20 COMMISSION, HEARING OFFICER

21 Respondents.

Case No.:

Dept. No.:

22 PETITION FOR JUDICIAL REVIEW

23 COMES NOW Petitioner, STATE OF NEVADA ex rel. its DEPARTMENT OF HEALTH AND
24 HUMAN SERVICES, DIVISION OF PUBLIC AND BEHAVIORAL HEALTH (hereinafter DPBH) by
25 and through counsel, AARON D. FORD, Attorney General for the State of Nevada, and SUSANNE M.
26 SLIWA, Senior Deputy Attorney General, hereby petitions this Court to review the decision of the State
27 of Nevada Department of Administration, Personnel Commission, Hearing Officer on Petitioner's Petition
28 for Reconsideration which was issued on October 8, 2019.

1. Petitioner requests judicial review of the final decision of the State of Nevada, Department of Administration, Personnel Commission, Hearing Officer in the above mentioned case. The Hearing Officer's decision is dated September 18, 2019, in Case No. 1914774-RZ. See Exhibit 1, attached hereto.
2. Petitioner filed a Petition for Reconsideration on October 4, 2019. That Petition included a request to reopen the record. The Hearing Officer granted the Petition but did not change his ruling. He did not find justification to reopen the record. See Exhibit 2, attached hereto.
3. Pursuant to NRS 233B.130, the Hearing Officer's Decision on the Petition for Reconsideration is the final determination and any Petition for Judicial Review must be filed within 30 days after service of that October 8, 2019 decision.
4. This Court has jurisdiction pursuant to NRS 233B.130.
5. This Petition has been filed in accordance with NRS 233B.130 (1) and (2).
6. Petitioner has been aggrieved by the final decision of the Hearing Officer attached hereto as Exhibit 1, and Petitioner's rights have been prejudiced because the final decision is:
 - a) In violation of constitutional or statutory provisions;
 - b) In excess of the statutory authority of the agency;
 - c) Made upon unlawful procedure;
 - d) Affected by other error of law;
 - e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and/or
 - f) Arbitrary or capricious, and characterized by abuse of discretion.
7. Petitioner will file a Memorandum of Points and Authorities after a copy of the entire record on appeal has been transmitted to the Court in accordance with NRS 233B.133.
8. Petitioner reserves its right to request oral argument in this matter pursuant to NRS 233B.133(4).

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1 WHEREFORE, Petitioner prays as follows:

2 1. That this Court conduct a review of the final decision of the Nevada State Personnel
3 Administrative Hearing Officer pursuant to NRS 233B.135 and enter an Order reversing or setting aside
4 the decision; and

5 2. For such further and other relief as the Court deems legal, equitable and just.

6 Respectfully submitted this 23rd day of October, 2019.

7 AARON D. FORD
8 Attorney General

9 By: /s/ Susanne M. Sliwa
10 SUSANNE M. SLIWA
11 Senior Deputy Attorney General
12 Nevada Bar No.: 4753
13 555 E. Washington Ave., #3900
14 Las Vegas, NV 89101
15 Telephone: (702) 486-3375
16 Fax: (702) 486-3871
17 Email: ssliwa@ag.nv.gov
18 Attorneys for State of Nevada Department
19 of Health and Human Services, Division
20 of Public and Behavioral Health
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CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Office of the Attorney General and that on the 23rd day of October, 2019, I served a copy of the foregoing PETITION FOR JUDICIAL REVIEW by placing a copy of said document in the Nevada State Department of General Services for mailing addressed to:
Angela J. Lizada, Esq.
Lizada Law Firm, LTD.
711 S. 9th St.
Las Vegas, Nevada 89101

/s/ Lanette Davis
An Employee of the Office of the Attorney General



AARON D. FORD
Attorney General
Susanne M. Sliwa
Deputy Attorney General
Nevada Bar No.:4753
Office of the Attorney General
555 E. Washington Ave. #3900
Las Vegas, Nevada 89101
ssliwa@ag.nv.gov
(702) 486-3375
Attorneys for State of Nevada,
Division of Public and
Behavioral Health (DPBH)

**DISTRICT COURT
CLARK COUNTY, NEVADA**

STATE OF NEVADA ex. rel, its DEPARTMENT
OF HEALTH AND HUMAN SERVICES,
DIVISION OF PUBLIC AND BEHAVIORAL
HEALTH,

Petitioner,

vs.

CHARLES ROCHA; STATE OF NEVADA ex rel.,
its DEPARTMENT OF ADMINISTRATION,
PERSONNEL COMMISSION, HEARING
OFFICER,

Respondents.

Case No.: A-19-804209-J

Dept. No.: 25

**FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND
ORDER ON PETITION FOR JUDICIAL REVIEW**

Date of Hearing: May 26, 2020

Time of Hearing: 10:00 a. m.

This matter having come on for hearing on May 26, 2020 for Southern Nevada Adult Mental Health's Motion For Stay before this Honorable Court and Susanne M. Sliwa, Deputy Attorney General, appearing telephonically on behalf of Petitioner State of Nevada Department of Health and Human Services, Division of Public and Behavioral Health (DPBH) and Angela J. Lizada, Esq. on behalf of the Respondent Charles Rocha This Honorable Court having reviewed all the documents, having heard all the evidence and arguments of counsel;

<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Motion to Dismiss by Deft(s)	<input type="checkbox"/> Judgment of Arbitration



06/23/2020

1 **IT IS HEREBY ORDERED AND DETERMINED** that Petitioner's Petition for Judicial
2 Review is GRANTED IN PART and DENIED IN PART.

3 **THE COURT FINDS** that the Hearing Officer committed clear error by ultimately applying a
4 use of force standard to make the determination that the Respondent's actions were justified when the
5 Respondent was actually charged with patient abuse.

6 **THE COURT FURTHER FINDS** that enough evidence has been presented to warrant a stay
7 due to the potential for irreparable harm should Respondent Rocha be returned to his former position.

8 **THE COURT FURTHER FINDS** that, based upon this clear error, the Hearing Officer did not
9 get to the issue of whether the Respondent's actions were justified.

10 **THE COURT FURTHER FINDS** that the Petition for Judicial Review is GRANTED to the
11 extent that the Petitioner is requesting that the decision of the Hearing Officer be REVERSED due to the
12 he fact that the decision was based upon clear error in not applying the court standard of review.

13 **THE COURT FURTHER FINDS** that the Petition for Judicial Review is DENIED as to the
14 Petitioner's request for the Court to enter a different ruling and ultimately decide that there was just cause
15 for the termination of the Respondent and that the termination should be upheld.

16 **IT IS HEREBY ORDERED AND DETERMINED** that this matter shall be REMANDED back
17 to the Hearing Officer for review and to make a determination based upon the proper standard and the
18 actual charges against the Respondent.

19 DATED this day 29th of June, 2020.

20
21 
22 KATHLEEN E. DELANEY
23 DISTRICT COURT JUDGE

24
25 AARON D. FORD
26 Attorney General

27 By: /s/ Susanne Sliwa
28 Susanne M. Sliwa
Deputy Attorney General
Nevada Bar No.:4753
ssliwa@ag.nv.gov
(702) 486-3375
Attorneys for Petitioner,
State of Nevada, Division of Public and
Health (DPBH)



1 **NOTC**
2 AARON D. FORD
3 Attorney General
4 Susanne M. Sliwa
5 Deputy Attorney General
6 Nevada Bar No. 4753
7 Office of the Attorney General
8 555 E. Washington Ave. #3900
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10 Tele.: (702) 486-3375
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13 Attorneys for State of Nevada,
14 Division of Public and
15 Behavioral Health (DPBH)

16 **DISTRICT COURT**
17 **CLARK COUNTY, NEVADA**

18 STATE OF NEVADA ex. rel, its DEPARTMENT
19 OF HEALTH AND HUMAN SERVICES,
20 DIVISION OF PUBLIC AND BEHAVIORAL
21 HEALTH,

22 Petitioner,

23 vs.

24 CHARLES ROCHA; STATE OF NEVADA ex rel.,
25 its DEPARTMENT OF ADMINISTRATION,
26 PERSONNEL COMMISSION, HEARING
27 OFFICER,

28 Respondents.

Case No.: A-19-804209-J

Dept. No.: 25

29 **NOTICE OF ENTRY OF ORDER**

30 Please take notice that on the 1st day of July 2020, the Court entered its Decision on Findings of
31 Fact, Conclusions of Law and Order on Petition for Judicial Review in the above-captioned matter, a copy
32 of which is attached hereto as Exhibit 1.

33 Respectfully submitted this 20th day of July, 2020

34 /s/ Susanne M. Sliwa
35 SUSANNE M. SLIWA (SBN 4753)
36 Deputy Attorney General
37 Office of the Attorney General

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/s/ Cathy L. Mackerl
An Employee of the Office of the
Attorney General

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EXHIBIT 1

EXHIBIT 1



AARON D. FORD
Attorney General
Susanne M. Sliwa
Deputy Attorney General
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Attorneys for State of Nevada,
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**DISTRICT COURT
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<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Motion to Dismiss by Deft(s)	<input type="checkbox"/> Judgment of Arbitration



06/23/2020

1 **IT IS HEREBY ORDERED AND DETERMINED** that Petitioner's Petition for Judicial
2 Review is GRANTED IN PART and DENIED IN PART.

3 **THE COURT FINDS** that the Hearing Officer committed clear error by ultimately applying a
4 use of force standard to make the determination that the Respondent's actions were justified when the
5 Respondent was actually charged with patient abuse.

6 **THE COURT FURTHER FINDS** that enough evidence has been presented to warrant a stay
7 due to the potential for irreparable harm should Respondent Rocha be returned to his former position.

8 **THE COURT FURTHER FINDS** that, based upon this clear error, the Hearing Officer did not
9 get to the issue of whether the Respondent's actions were justified.

10 **THE COURT FURTHER FINDS** that the Petition for Judicial Review is GRANTED to the
11 extent that the Petitioner is requesting that the decision of the Hearing Officer be REVERSED due to the
12 he fact that the decision was based upon clear error in not applying the court standard of review.

13 **THE COURT FURTHER FINDS** that the Petition for Judicial Review is DENIED as to the
14 Petitioner's request for the Court to enter a different ruling and ultimately decide that there was just cause
15 for the termination of the Respondent and that the termination should be upheld.

16 **IT IS HEREBY ORDERED AND DETERMINED** that this matter shall be REMANDED back
17 to the Hearing Officer for review and to make a determination based upon the proper standard and the
18 actual charges against the Respondent.

19 DATED this day 21st of June, 2020.

20
21 
22 KATHLEEN E. DELANEY
23 DISTRICT COURT JUDGE
24 JG

25 AARON D. FORD
26 Attorney General

27 By: /s/ Susanne Sliwa
28 Susanne M. Sliwa
Deputy Attorney General
Nevada Bar No.:4753
ssliwa@ag.nv.gov
(702) 486-3375
Attorneys for Petitioner,
State of Nevada, Division of Public and
Health (DPBH)



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LAW OFFICE OF DANIEL MARKS
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(702) 386-0536; FAX (702) 386-6812
Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel, its DEPARTMENT OF
HEALTH AND HUMAN SERVICES, DIVISION
OF PUBLIC AND BEHAVIORAL HEALTH

Case No.: A-19-804209-J
Dept. No.: 25

Petitioner,

vs.

SUBSTITUTION OF ATTORNEY

CHARLES ROCHA,; STATE OF NEVADA, ex rel.
it's DEPARTMENT OF ADMINISTRATION,
PERSONNEL COMMISSION, HEARING
OFFICER,

Respondents.

SUBSTITUTION OF ATTORNEY

Defendant Charles Rocha hereby substitutes and appoints the Law Office of Daniel Marks to
represent him in the above-entitled action in the place and stead of Angela Lizada, Esq.


DATED this 11 day of February 2021.


CHARLES ROCHA

1 Adam Levine, Esq. of the Law Office of Daniel Marks hereby agrees to represent the Defendant
2 Charles Rocha, in the above-entitled action in the place and stead of Angela Lizada, Esq.

3 DATED this 11th day of February 2021.

4 LAW OFFICE OF DANIEL MARKS

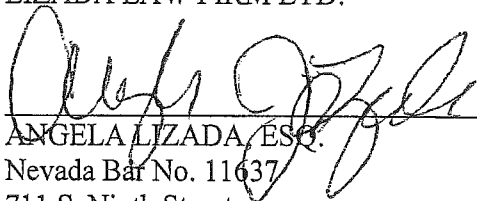


5
6 ADAM LEVINE, ESQ.
7 Nevada State Bar No. 004673
8 610 South Ninth Street
9 Las Vegas, Nevada 89101
10 *Attorney for Defendant*

11 Angela Lizada, Esq., hereby agrees to Adam Levine, Esq. substituting in as counsel on behalf of
12 the Defendant Charles Rocha, in the above-entitled action.

13 DATED this 11th day of February 2021.

14 LIZADA LAW FIRM LTD.

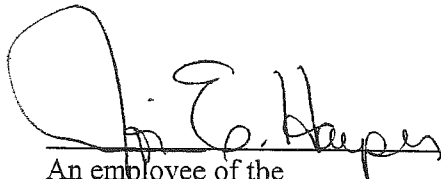


15 ANGELA LIZADA, ESQ.
16 Nevada Bar No. 11637
17 711 S. Ninth Street
18 Las Vegas, Nevada 89101
19
20
21
22
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24

1 **CERTIFICATE OF SERVICE BY ELECTRONIC MEANS**

2 I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 1/14/21
3 day of February 2021, pursuant to NRCP 5(b) and Administrative Order 14-2, I electronically
4 transmitted a true and correct copy of the above and foregoing SUBSTITUTION OF ATTORNEY by
5 way of Notice of Electronic Filing provided by the court mandated E-file & Serve system, to the e-mail
6 address on file for:

7 Aaron D. Ford, Esq.
8 Attorney General
9 Susanne M. Sliwa, Esq.
10 Deputy Attorney General
11 Nevada Bar No. 4753
12 Office of the Attorney General
13 555 E. Washington Avenue, Suite 3900
14 Las Vegas, Nevada 89101
15 Email: ssliwa@ag.nv.gov
16 Attorney for State of Nevada, Division
17 of Public and Behavioral Health

18
19
20
21
22
23
24

An employee of the
LAW OFFICE OF DANIEL MARKS



SUPPL
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Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel, its DEPARTMENT OF
HEALTH AND HUMAN SERVICES, DIVISION
OF PUBLIC AND BEHAVIORAL HEALTH

Case No.: A-19-804209-J
Dept. No.: 25

Petitioner,

vs.

CHARLES ROCHA,; STATE OF NEVADA, ex rel.
it's DEPARTMENT OF ADMINISTRATION,
PERSONNEL COMMISSION, HEARING
OFFICER,

RESPONDENT CHARLES ROCHA'S
SUPPLEMENT TO THE RECORD
FOLLOWING REMAND FROM
DISTRICT COURT

Respondents.

COMES NOW Respondent Charles Rocha by and through undersigned counsel Adam Levine,
Esq. and hereby supplements the Record following the Remand from District Court attached hereto as
follows:

1. Findings of Fact Conclusions of Law Decision and Order Following Remand from
District Court, filed January 12, 2021 [ROCHA00001 – ROCHA00009];
2. Employee's Petition for Reconsideration [ROCHA00010 – ROCHA00017];

1 3. Respondent-Employer's Response to Employee's Petition for Reconsideration
2 [ROCHA00016 – ROCHA00019]; and

3 4. Decision and Order [ROCHA00020 – ROCHA00022].

4 DATED this 11th day of February 2021.

5 LAW OFFICE OF DANIEL MARKS

6 
7 DANIEL MARKS, ESQ.

8 Nevada State Bar No. 002003

9 office@danielmarks.net

10 ADAM LEVINE, ESQ.

11 Nevada State Bar No. 004673

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13 610 South Ninth Street

14 Las Vegas, Nevada 89101

15 Attorneys for Petitioner
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1 BEFORE THE NEVADA STATE PERSONNEL COMMISSION

2 HEARING OFFICER

3 FILED

4 JAN 12 2021

5 Charles Rocha,)

6 Petitioner/Employee,)

7 vs.)

8 STATE OF NEVADA, ex rel. it's
9 DEPARTMENT OF HEALTH AND
10 HUMAN SERVICES.

11 Respondent/Employer)

) Case No.: 2106668-RZ

) FINDINGS OF FACT

) CONCLUSIONS OF LAW

) DECISION AND ORDER FOLLOWING

) REMAND FROM DISTRICT COURT

HEARINGS DIVISION

12 On December 4, 2020 the undersigned received Notice of Entry of Order and the
13 District Court Decision on the Employer's Petition for Judicial Review.

14 On June 29, 2020 the Honorable Kathleen Delaney, Judge of the 8th Judicial District
15 Court, Department 25 "found that the Hearing Officer committed clear error by
16 ultimately applying a use of force standard to make the determination that the
17 Respondent's actions were justified when the Respondent was actually charged with
18 patient abuse." The Court ordered the matter remanded to the undersigned to "make a
19 determination based upon the proper standard and the
20 actual charges against the Respondent."
21

22 On December 9, 2020 a teleconference was conducted with Angela I. Lizada, Esq.,
23 Lizada Law Firm, Ltd for the Employee and Susanne M. Sliwa, Esq., Senior Deputy
24 Attorney General for the Employer. The purpose of this conference was to ensure that
25 the appropriate standard and alleged violation were clearly defined.
26
27
28

1 Counsel submitted that the decision on remand in this case is a determination of
2 whether the termination was justified based upon the charge of patient abuse stated on
3 the NPD-41.
4

5 The parties stipulated that the authority granted the Hearing Officer under NRS
6 284.390(6) is to determine whether the agency had just cause for the discipline "as
7 provided in NRS 284.385." A dismissal for "just cause is one which is not for any
8 arbitrary, capricious, or illegal reason and which is one based upon facts (1) supported by
9 substantial evidence and (2) reasonably believed by the employer to be true." *Sw. Gas*
10 *Corp. v. Vargas*, 111 Nev. 1064, 1077, 901 P.2d 693, 701 (1995).
11

12 *O'Keefe v. State, Dep't of Motor Vehicles*, 134 Nev. 752, 431 P.3d 350
13 (2018) instructs Hearing Officers to utilize a three-step process in deciding when
14 reviewing disciplinary decisions:
15

- 16 1) the Hearing Officer must review, de novo, whether the employee committed
the alleged violation;
- 17 2) whether the alleged violation is a serious violation of law or regulation that
18 would make the most severe discipline appropriate for a first discipline; and
- 19 3) a deferential standard of review is utilized with regards to whether a
20 termination is in the "good of public service."

21 It was stipulated that the above be used in the determination of whether the
22 termination of Charles Rocha for the charge of patient abuse was justified.
23

24 The Hearing Officer set aside his previous evaluation of the facts and policies and
25 made no assumptions regarding the innocence or guilt of the Employee when making a
26 decision in this remanded case. The hearing officer was guided solely by the weight of
27 the evidence and testimony presented at the hearing and pleadings when making these
28

1 Findings of Fact, Conclusions of Law, Decision and Order.¹

2 Pursuant to *O'Keefe v. State*, a de novo review of the essential facts in this matter was
3 conducted.² Patient abuse must be proven by a preponderance of the evidence that the
4 act committed was both willful and unjustified.³ NRS 281A.170.1, defines "Willful
5 violation" as where the public officer or employee, acted intentionally and knowingly.
6 It is clear the Employee intentionally and knowingly struck the Patient in the course of
7 an altercation. However, did the Employee act with the knowledge his acts may violate
8 NRS 433.554, NAC 433.200, DPBH Division Policy CRR-1.2 and SNAMHS Policy
9 OF-LDR-20?
10

11
12 NRS 433.554.5(a) and NAC 433.200 define patient abuse as any willful and
13 unjustified infliction of pain, injury or mental anguish upon a person served by DPBH
14 or contract staff. DPBH Division Policy CRR-1.2 and SNAMHS Policy OF-LDR-20
15 policy expressly prohibit abuse or neglect of any person receiving services. DPBH
16 Division Policy CRR-1.2 further states that agency and contract staff will receive
17 training about use and neglect of consumers. During the hearing the Employee
18 admitted he received the Employer's training regarding the use of force during his
19 employment.⁴
20
21

22
23
24 ¹ Nevada Personnel Commission, Hearing Officer Rules of Procedure Rule 11.1.

25 ² The evidence reviewed for this first step in the process included the hearing testimony, the surveillance
26 video, the pre-hearing statements and the exhibits, and the Employer's policies, the Nevada Revised
Statutes and Nevada Administrative regarding the abuse of patients.

27 ³ NRS 233B.121.9.

28 ⁴ Exhibit F to Employer's Pre-hearing statement.

1 Did the Employee Abuse the Patient?

2 During the hearing the Employer failed to present any evidence regarding the
3 policy and training on the use of force provided all employees or under what
4 conditions would any use of force be justifiable. In the Request for Rehearing or
5 to Reopen the Record post the hearing the Employer submitted SNAMHS Policy
6 Number FF-SP-28 regarding the Use of Force guidelines for all policies. That
7 policy states that it's Conflict Prevention and Response Techniques will be used
8 first in all situations. Excessive force under this policy is defined as any physical
9 act or action which is more than the amount necessary to manage the client or
10 situation.⁵ However, at this time Policy Number FF-SP-28 will be utilized in
11 making the decision. This policy states that the use of force will be equivalent to
12 the threat and will cease upon the threat being reduced." (emphasis added).
13
14

15 It is uncontroverted that the Employee while on the floor struggling with the Patient
16 other employees arrived to assist and they were able to pull the Patient's right arm from
17 the Employee's back. However, the Employee's right arm remained trapped between
18 the Patient and the other employees. The Employee contends that the Patient was
19 spitting in his face during this time, that the Employee was in fear for his life and that
20 he hit the patient in an effort to break free, not to punish him.⁶ The video clearly shows
21 the Patient was moving his face toward the Employee's face and was in close to the
22
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25 ⁵ The request to Reopen the Record was deemed inappropriate due to the fact the Employer failed to
26 submit the evidence during, as an attachment to its pre-hearing statement or during the hearing when it
27 had ample opportunity to do so.

28 ⁶ Spitting on another person is a battery as defined by NRS 200.481, see *Hobbs v. State*, 251 P.3d 177
(Nev. 2011).

1 Employee. That testimony was not contradicted. No other employees directly involved
2 in the altercation reported seeing any abuse or excessive force being used.

3 The Investigator and reviewing officials concluded that the video evidence
4 established the Patient was not struggling or trying to fight back when he was struck
5 and was under control of multiple employees. Therefore, they each decided that the
6 Employee not acting in self-defense or to gain control of the situation but was acting in
7 retaliation and/or to punish the Patient.⁷

8
9 The Hearing Officer reviewed, several times, the surveillance video. The video
10 shows that at the time the Employee struck the Patient there were 4 other employees
11 attempting to restrain the Patient. The Patient did not appear to have completely
12 surrendered or become passive and that significant force was required to keep the
13 Patient in the position on the floor.⁸

14
15 The Employer's policies are permit employees to defend themselves from assault
16 and battery, but they are required to cease the use of force when the threat has been
17 reduced. Here the Employee was being battered when he was being spit on by the
18 Patient. In accordance with the Employer's policies the Employee was entitled to
19 defend himself from that assault and battery, but only by using the minimal force
20 available and he was required to cease the use of force once the threat was reduced.

21
22 As noted above the Patient was restrained by other employees and his only violent
23 conduct toward the Employee was spitting. The Employee had the opportunity and
24

25
26 ⁷ The Hearing Officer does not accept as evidence the conclusions or opinions of the investigator and
27 reviewing officials with respect to the Employee's state of mind in that moment.

28 ⁸ The Patient had to be restrained by employees for approximately 7 minutes and 5 employees were
required to secure the Patient in a restraint chair.

1 obligation to use a reduced level of force to prevent the patient from spitting on him
2 simply using his hand to block the Patient from spitting on him without striking him.
3 Because the Employee had less forceful options and Department training on the use of
4 force, the Employee used excessive force and violated law and policy when he struck
5 the Patient. In accordance with NRS 284.385 and numerous Employer policies the
6 Employee was justifiably subject to discipline for his action.

7
8 **Is this violation a serious violation of law or regulation?**

9
10 Abuse of a patient who is in the care and custody of the State is a violation of the
11 NRS 433.554.2(a) which specifies that it is a gross misdemeanor to abuse a patient
12 when it does not result in substantial bodily harm to the consumer.

13 Therefore, this is a serious violation of law and regulation. Consequently, the
14 Employer has authority to impose the discipline up to dismissal for a first offense.

15
16 **Using a deferential standard of review was
this termination imposed for the "good of public service?"**

17 The decision to terminate the Employee was not made for an arbitrary, capricious, or
18 illegal reason. The decision to terminate the Employee was established by a
19 preponderance of substantial evidence and was reasonably believed by the employer to
20 be true. Utilizing a deferential standard of review this termination was for the "good of
21 public service."
22

23 FINDINGS OF FACT

- 24
- 25 1) The Employee was trained regarding the Employer's use of force policies and the
26 prohibition of the excessive use of force or patient abuse found in the Nevada
Revised Statutes, Nevada Administrative Code and Employer Regulations.
 - 27 2) The Employee willfully struck the Patient in the face twice on October 13, 2018.
- 28

- 1 3) The Patient and Employee were being held in place by multiple employees when
2 the Patient was struck.
- 3 4) Once the Patient's arm was removed from around the Employee's back and was
4 restrained by other employees the significant threat to the Employee was reduced.
- 5 5) The Employee had less forceful options to protect himself from being spit on by the
6 Patient.
- 7 6) The Employee was lawfully entitled to use the minimal force available to protect
8 himself from being spit on by the Patient.
- 9 7) The Patient used excessive force by striking the Patient to protect himself from
10 being spit on.
- 11 8) The preponderance of substantial evidence does not prove the Employee was acting
12 in retaliation or to punish the Patient.

12 CONCLUSIONS OF LAW

- 13 1) Pursuant to NRS 284.383 the Employer has adopted by regulation a system for
14 administering disciplinary measures against a state employee.
- 15 2) Pursuant to NRS 284.385 the appointing authority has discretion to dismiss any
16 permanent classified employee when the good of the public service will be served
17 thereby.
- 18 3) The Employee timely requested in writing a hearing before the hearing officer of
19 the Commission to determine the reasonableness of the action.
- 20 4) The Employer timely filed its Petition for Judicial Review pursuant to NRS 284.383
21 and NRS 233B.130.
- 22 5) The Employee used excessive force in violation of SNAMHS Policy FF-SP-28.
- 23 6) The Employee violated the SNAMHS Code of Ethics and the DPBH Division
24 Policy CRR-1.2.
- 25 7) Substantial evidence of a policy violation justifies the decision to impose discipline
26 pursuant to NRS 284.385.
- 27 8) The Employer's decision to terminate the Employee was for the good of public
28 service pursuant to NRS 284.383.

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1 CERTIFICATE OF SERVICE

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

5 CHARLES ROCHA
6 3710 JULIUS COURT
LAS VEGAS NV 89129

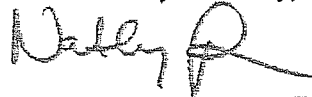
7 ANGELA LIZADA ESQ
8 LIZADA LAW FIRM LTD
9 711 S 9TH STREET
LAS VEGAS NV 89101

10 RICHARD WHITLEY, DIRECTOR
11 DEPARTMENT OF HEALTH AND HUMAN SERVICES
12 4150 TECHNOLOGY WAY
CARSON CITY NV 89706

13 JACKIE ARELLANO, PERSONNEL OFFICER II
14 DEPARTMENT OF HEALTH AND HUMAN SERVICES
15 PUBLIC AND BEHAVIORAL HEALTH/SNAMHS
1321 JONES BLVD
16 LAS VEGAS NV 89146

17 SUSANNE M SLIWA ESQ
18 DEPUTY ATTORNEY GENERAL
19 OFFICE OF THE ATTORNEY GENERAL
555 E WASHINGTON AVE STE 3900
LAS VEGAS NV 89101

20 Dated this 12th day of January, 2020.

21 

22 Nataly Rann, Legal Secretary II
23 Employee of the State of Nevada
24
25
26
27
28

ROCHA00009

1 ANGELA J. LIZADA, ESQ.
2 Nevada Bar No. 11637
3 LIZADA LAW FIRM, LTD.
4 711 S. 9th Street
5 Las Vegas, NV 89101
6 (702) 979-4676
7 Fax: (702) 979-4121
8 Attorney for Employee

9
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11
12 **BEFORE THE NEVADA STATE PERSONNEL COMMISSION**
13 **HEARING OFFICER**
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19 CHARLES ROCHA,

Case No.: 1914774-RZ

20 Employee,

21 v.

22 STATE OF NEVADA DEPARTMENT OF
23 CORRECTIONS,

24 Employer.
25
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28

EMPLOYEE'S PETITION FOR RECONSIDERATION

29 COMES NOW, CHARLES ROCHA, by and through his attorney, ANGELA J.
30 LIZADA, ESQ. of LIZADA LAW FIRM, LTD., and submits his Petition for Reconsideration
31 of the Hearing Officer's Decision filed and served on January 12, 2021 pursuant to NRS
32 233B.130(4).
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MEMORANDUM OF POINTS AND AUTHORITIES

I. STANDARD FOR RECONSIDERATION

NRS 233.130(4) allows a Petition for Reconsideration of Administrative Decisions within 15 calendar days after the date of service of the decision. This decision was filed and served on January 12, 2021, and thus the reconsideration must be submitted by January 27, 2021. Further, a hearing officer is required to grant or deny such a petition at least five days before the expiration of the time for filing a petition for judicial review, thus a decision on this petition must be submitted on or before February 6, 2021.

Reconsideration is appropriate where the final order is: a) in violation of constitutional or statutory provisions; b) in excess of the statutory authority agency; 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. NRS 233B.135(3).

**II. REVERSAL OF PRIOR DECISION WAS COMMITTED WITH CLEAR ERROR IN
VIEW OF THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE ON THE
WHOLE RECORD AND THUS ABUSED HIS DISCRETION**

Mr. Rocha requests reconsideration of the Hearing Officer's January 12, 2021 decision to affirm the Employer's termination of Charles Rocha ("Mr. Rocha"). In that decision, the Hearing Officer found that Mr. Rocha's act was excessive force, because the "Patient was restrained by other employees and his only violent conduct towards Employee was spitting", however, the testimony presented at hearing indicated that the Patient still had his legs wrapped around Mr. Rocha's right leg (ROA page 75, lines 8-10), the Patient's left arm was around Mr. Rocha's back, (ROA Page 76, lines 8-10, 17-18, 20-21; Page 80, Lines 1-20), and the patient was still actively pulling Mr. Rocha's leg outwards in a painful manner (ROA Page 79, Line 12-13; Page 80, Lines 1-20), while pulling Mr. Rocha down with his left arm (ROA Page 79, Line 17-19; Page 80, Lines 1-20), while spitting and continuing to threaten Mr. Rocha verbally while physically fighting to still get at Mr. Rocha. The Patient's act of using both legs on an older and disabled person to

1 forcefully pull his legs apart, even while employees were trying to contain him, while at the same
2 time spitting in his face and pulling Mr. Rocha down towards him while continuing the threats of
3 harm while causing Mr. Rocha harms, shows the spitting was not the only violent action. Further,
4 the hearing officer in the prior (first) decision recognized the "entanglement" and the ongoing
5 resistance and struggling that was STILL occurring until Mr. Rocha struck the patient, but those
6 facts are absent in the new decision. The new decision was based on the same facts and only the
7 standard of review changed, yet the Hearing Officer's new decision completely omits the very
8 relevant facts of the ongoing struggle, including the Patient actively holding Mr. Rocha's leg and
9 pulling it outward and using his arm to pull Mr. Rocha down, trapping one of Mr. Rocha's arms,
10 while still threatening "I'll fucking kill you" while spitting in Mr. Rocha's face at the same time.
11 The Hearing Officer also recognized in the first decision that the amount of force with the strikes
12 was minimal. It is concerning that the Hearing Officer's new decision does not apply the new
13 standard to the finding of facts that was made upon the hearing and review of the evidence, but
14 now completely changes the findings of facts that were made and ignores findings that were made
15 prior that are relevant to properly evaluate the matter and apply the standard of review to the facts.
16 The facts did not change, but the hearing officer no longer mentions or considers the undisputed
17 facts that were presented at the hearing. The failure of the Hearing Officer to even mention these
18 critical facts in the new decision is an abuse of discretion.

22 **II. FAILURE OF EMPLOYER TO PROVIDE EMPLOYEE RIGHTS AS PEACE**
23 **OFFICER REQUIRES THE DISCIPLINE BE VACATED AND THE HEARING**
24 **OFFICER'S NEW DECISION TO AFFIRM THE DISCIPLINE IS IN VIOLATION OF**
25 **STATUTORY PROVISIONS AND THUS THE HEARING OFFICER EXCEEDED HIS**
26 **STATUTORY AUTHORITY**

26 Additionally, even ignoring the discrepancies between the two findings of facts, all based
27 on the same hearing, the record shows that the Employer failed to comply with the notice
28

1 provisions of the Peace Officer Bill of Rights found in Chapter 289 of the Nevada Revised Statutes.
2 Pursuant to NRS 289.240, Forensic Technicians and Correctional Officers employed by the
3 Department of Health and Human Services have the powers of peace officers when performing
4 duties prescribed by the administrator of the division. The evidence at the hearing established that
5 Mr. Rocha was employed as a forensic technician, which is a Category III Nevada POST Certified
6 Peace Officer, working at Stein Hospital. Mr. Rocha was served with a Notice of Employee Rights
7 on November 2, 2018, in accordance with NRS 284.387 stating that Mr. Rocha was the subject of
8 an internal administrative investigation relevant to the allegations of "patient mistreatment and/or
9 abuse, patient endangerment, and failure to follow policies and procedures." Investigators then
10 met with Mr. Rocha on January 15, 2019.

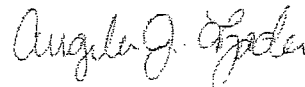
11
12 NRS 289.055 required Employer to have written policies in place, but Employer did not
13 have any such written policies in place. Further, NRS 289.060 and NRS 289.080 provide specific
14 notice requirements and specify that those notice requirements are mandatory and must be
15 followed to the letter. The Notice of Investigation was deficient pursuant to NRS 289 in this case,
16 as it failed to: 1) provide an adequate summary of alleged misconduct to provide Employee with
17 an opportunity to prepare for his interview; 2) inform Employee of his right to have two
18 representatives of his choosing during an interview relating to the investigation; 3) state the name
19 and rank of the officer in charge of the investigation and the officers who will conduct any
20 interrogation or hearing; 4) provide the name of any other person who will be present at the
21 interrogation or hearing; and 5) include a statement setting forth the provisions of subsection 1 of
22 NRS 289.080 regarding the rights of the Employee to have two representatives of his choosing
23 present during any phase of an interrogation.
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1 Pursuant to *Ruiz v. City of North Las Vegas*, the failure of the Employer to comply with
2 those provisions renders the disciplinary decision inappropriate and must be vacated. *Ruiz v. City*
3 *of North Las Vegas*, 127 Nev. 254 (2011). The Nevada Supreme Court found that “the Peace
4 Officer Bill of Rights represents the Nevada Legislature’s recognition that peace officers, because
5 of the important role they play in maintaining public safety, deserve additional protections that are
6 unavailable to other public employees” and that when “our legislature enacts statutes purporting
7 to grant a group of people certain rights, we will construe the statutes in a manner consistent with
8 the enforceability of those rights.”

10 Based on the foregoing, it is clear that the discipline against Mr. Rocha MUST be vacated
11 pursuant to NRS 289 and the Nevada’s Supreme Court decision in *Ruiz*.

13 DATED this 19th day of January, 2021.

14 LIZADA LAW FIRM, LTD.

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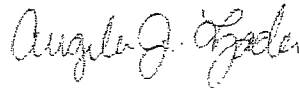
17 ANGELA J. LIZADA, ESQ.
18 Nevada Bar No. 11637
19 711 S. 9th Street
20 Las Vegas, NV 89101
21 angela@lizardalaw.com

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January, 2021, a true and correct copy of the foregoing Pre-Hearing Statement was emailed, with a hard copy also being mailed by USPS first class mail, to the following:

Suzanne Sliwa, Esq.
Senior Deputy Attorney General
ssliwa@ag.nv.gov

Robert Zentz, Esq.
Hearing Officer
rrann@admin.nv.gov



An employee of Lizada Law Firm, Ltd.

1 **BEFORE THE STATE OF NEVADA PERSONNEL COMMISSION**

2 **HEARING OFFICER**

3
4 CHARLES ROCHA,

5 Petitioner,

6 vs.

Case No. 1914774-RZ

7 STATE OF NEVADA, ex rel. its
8 DEPARTMENT OF HEALTH AND
9 HUMAN SERVICES

10 Respondent.
11

12 **RESPONDENT-EMPLOYER'S RESPONSE TO EMPLOYEE'S PETITION FOR**

13 **RECONSIDERATION**

14 COMES NOW, the STATE OF NEVADA, DEPARTMENT OF HEALTH AND HUMAN
15 SERVICES, (hereinafter Employer) by and through its counsel, AARON D. FORD, Attorney General,
16 and SUSANNE M. SLIWA, Deputy Attorney General and submits this Response to Employee's Petition
17 for Reconsideration, filed and served on January 19, 2021 pursuant to NRS 233B.130(4), of the Hearing
18 Officer's Decision on Remand.

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I. STATEMENT OF THE CASE**

21 The Hearing Officer issued a Decision on Remand in this matter on January 12, 2021. This
22 decision reversed his prior decision and upheld the termination of the Employee. The Employee has
23 now submitted a Petition for Reconsideration claiming that the Hearing Officer committed clear error and
24 that the Hearing Officer exceeded his statutory authority. The Employer submits that the Decision on
25 Remand is correct and that the Hearing Officer neither exceeded his statutory authority nor committed
26 clear error.

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1 The record in this matter is closed. The Hearing Officer specifically declined to reopen the record
2 as requested by the Employer in its Petition for Reconsideration. The Hearing Officer should not
3 consider or decide a claim that is being raised for the first time in the Employee's Petition for
4 Reconsideration of the Decision on Remand.

5 The Employee's failure to raise all appealable issues at the administrative hearing level
6 constitutes a waiver of any issues that were not properly raised. The Employee has had ample
7 opportunities to bring forth this claim. The Peace Officer Bill of Rights issue is improper and should not
8 be considered by the Hearing Officer.

9 **III. CONCLUSION**

10 For the foregoing reasons, Southern Nevada Adult Mental Health Services
11 respectfully requests that the Employer's Petition for Reconsideration be denied.

12 RESPECTFULLY SUBMITTED this 25th day of January, 2021.

14 AARON D. FORD
15 Attorney General
16 State of Nevada

17 By: /s/ Susanne Sliwa
18 Susanne M. Sliwa
19 Deputy Attorney General
20 Nevada Bar No.:4753
21 Susanne M. Sliwa
22 555 E. Washington Ave. #3900
23 Senior Deputy Attorney General
24 Nevada Bar No.:4753
25 Attorneys for Employer
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1 excessive by a law enforcement officer. The District Court decision and Parties
2 stipulation limited the Hearing Officer's review to applying the facts solely on the in
3 accordance with a charge of Abuse of a Patient without regard to the Peace Officer use
4 of force standards.
5

6 The Hearing Officer reviewed evidence included hearing testimony, the
7 surveillance video, the pre-hearing statements and the exhibits, and the Employer's
8 policies, the Nevada Revised Statutes and Nevada Administrative regarding abuse of a
9 patient.² It is understandable that the Petitioner is dissatisfied with my decision on
10 remand, however, as noted a complete review of the available evidence argued by the
11 Parties, presented in the prehearing statements or during the hearing led this hearing
12 officer ultimately to a different conclusion. Testimony regarding the position of the
13 Patient and Employee at the moment of the striking took place conflicts with the
14 images on the recording.
15

16
17 During the hearing the Petitioner made clear that he was a peace officer in
18 accordance with NRS 289.240, however at no time were arguments alleging any
19 procedural violations of the Peace Officer Bill of Rights presented or heard until this
20 Petition.
21

22 The District Court Order remanding the matter did not direct consideration of
23 Chapter 289 issues. The District Court specifically stated that the Use of Force by law
24 enforcement officers was not appropriate. When requested for opinion regarding the
25 standard to be applied in this decision, counsel did not mention any application of
26

27
28 ² The Petitioner made references to the Record on Appeal. That record was not available for review by
the Hearing Officer and was therefore not utilized in the decision on remand.

1 Chapter 289 or stipulate that any issues under that chapter of the NRS should be
2 reviewed and ruled upon.

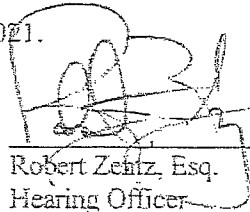
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4 **DECISION and ORDER**

5 Based upon foregoing and good cause appearing therefore,

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

7 The Employee's Petition for Reconsideration is **DENIED**.

8 DATED this 3rd day of February 2021.

9
10 
11 Robert Zentz, Esq.
12 Hearing Officer

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