IN THE SUPREME COURT OF THE STATE OF NEVADA

Docket No.: 82485

CHARLES ROCHA

Appellant,

v.

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

Respondent.

Eighth Judicial District Court Case No.: A-19-804209-J

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

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

1. Daniel Marks, Esq. and Adam Levine, Esq. of the Law Office of Daniel Marks. There are no parent corporations.

Attorneys of Record for Appellant Charles Rocha.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRS 233B.150. Petitioner, Charles Rocha, timely filed his Notice of Appeal from the judgment of the district court on February 11, 2021 (APP Vol. 2 at 350), within 30 days of the Nevada State Personnel Administrative Hearing Officer's final decision following remand from the district courts' judgments granting a Petition for Judicial Review. (APP Vol. II at 329-353). The Order on Petition for Judicial Review (APP Vol. II at 324-325) was not appealable as a final judgment at the time that it issued because it remanded the matter back to the Hearing Officer 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).

ROUTING STATEMENT

This matter should stay with the Supreme Court because, assuming the Court does not dispose of the case on jurisdictional grounds for DHHS' failure to serve the agency and all parties with its Petition For Judicial Review, the appeal raises a substantial issue of first impression and public policy, and further argues for reversal of case law from the Supreme Court, specifically *O'Keefe v. Department of Motor Vehicles*, 134 Nev. 752, 431 P.3d 350 (2018) (hereafter "*O'Keefe*") and *Southwest Gas Corporation v. Vargas*, 111 Nev. 1064, 901 P.2d 693 (1995) (hereafter "*Vargas*").

Appellant was a peace officer required to be certified as Category III (Corrections) by the Nevada Commission on Peace Officers Standards and Training. Use of force is among the areas of certification and officers are instructed. After Appellant used force to defend himself against an inmate who attacked him with a stated intent to kill, a State Personnel Hearing Officer reversed the termination finding he acted in self-defense. The district court granted Respondent's Petition for Judicial Review and reversed.

All persons, including employees, have a right of self-defense. While the issue has never been addressed in Nevada, courts in other jurisdictions addressing private sector employment have recognized that a tortious discharge occurs when an employer terminates an employee who acts in self-defense or in defense of others. While Appellant is a member of the classified service, and presumably limited to the statutory remedy under NRS 284.390, this Appeal presents as an issue of first impression whether that right of self-defense applies.

The appeal further seeks to reverse *O'Keefe*, supra as the facts of this case illustrate the wisdom of Justice Pickering's concurring decision in that case. *O'Keefe* overturned twenty three (23) years of precedent set by *Knapp v. State Department of Prisons*, 111 Nev. 420, 892 P.2d 575 (1995) that hearing officers are to make "an independent determination as to whether there is sufficient evidence that the discipline would serve the good of the public service" and adopted a framework whereby, with regard to all issues other than the factual

determination as to whether a regulation or rule was violated, hearing officers are to defer to the appointing authorities. However, *O'Keefe* was decided on a Petition for Review from an Order of Affirmance by the Court Appeals. Neither the briefing before the Court Appeals, nor the supplemental briefing ordered by this Court after the matter was transferred from the Court Appeals, addressed the issue as to whether 23 years of precedent under *Knapp* should be reversed.

The Court in *O'Keefe* further cited to *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 1078, 901 P.2d 693, 701-02 (1995) for a definition of just cause which gave an extremely high level of deference to the employer. However, this Court overlooked the fact that the standard in *Vargas* was limited only to implied contracts of continuing employment arising out of employee handbooks, and that the just cause standard has a very different and non-deferential meaning in other contexts.

Because all of these issues cannot be addressed or resolved by the Court Appeals, this case should stay with the Supreme Court.

STATEMENT OF ISSUES FOR REVIEW

1. Did Respondent DHHS fail to properly invoke the jurisdiction of the district court in its Petition for Judicial Review by failing to serve the Personnel Commission and Department of Administration with the Petition as required by NRS 233B.130(5)?

2. If the jurisdiction of the District Court was properly invoked, did the district court err and/or abuse its discretion by granting judicial review and reversing the Hearing Officer's determination that the dismissal of Charles Rocha was not reasonable because Rocha justifiably acted in self-defense?

3. Do employees in the classified service have a right to use force in self-defense?

4. Should this Court revisit its decision in *O'Keefe v. Department of Motor Vehicles*, 134 Nev. 752, 431 P.3d 350 (2018)?

5. Does the standard of just cause from *Southwest Gas Corporation v. Vargas*, 111 Nev. 1064, 901 P.2d 693 (1995) apply where the Legislature has determined the issue of just cause is to be decided by an independent neutral third party?

6. Does the deferral to the employer imposed under *O'Keefe v. Department of Motor Vehicles* violate due process of law.

STATEMENT OF THE CASE

Appellants Charles Rocha was a member of the classified service of the State of Nevada who dismissed pursuant to NRS 284.385. He timely filed an appeal under NRS 284.390 requesting that the dismissal be set aside. (APP Vol. I at 246). Following a hearing, a State of Nevada Hearing Officer set aside the dismissal. (APP Vol. I at 132-149). Respondents State of Nevada Department of Health and Human Resources ("DHHS") filed a Petition for Judicial Review.

(APP Vol. I at 004-006). The Petition was granted and remanded the matter back to the Hearing Officer with directions to apply a different standard. (APP at 319-320). Following remand and application of a different standard as directed by the district court the Hearing Officer affirmed the dismissal. (APP Vol. II at 332-340). Thereafter, a Notice of Appeal from the district court's granting of judicial review was filed. (APP Vol. II at 355).

STATEMENT OF FACTS

Charles Rocha was employed as a Forensic Specialist at the Stein Psychiatric Hospital (hereafter "Stein") which is a facility where criminal defendants with mental health issues are incarcerated while receiving treatment. (APP Vol. I at 029, 041). Prior to transferring to Stein, Rocha was a Corrections Officer with Nevada Department Corrections ("NDOC"). (APP Vol. I at 042-043).

Forensic Specialists like Corrections Officers are Category III required to be certified by the Nevada Commission on Peace Officers Standards and Training ("POST"). Category III POST certification is a requirement for the job. (APP Vol. I at 069, 072). The job duties of a Forensic Specialist are the same as a Corrections Officer – to maintain safety and order in the facility. (APP Vol. I at 042).

Rocha obtained his Category III certification through the Academy of NDOC. (APP Vol. I at 071). As part of their training Category III peace officers are taught "Use of force", "Tactics for the arrest and control of suspects, including,

without limitation, methods for arrest and the use of less than lethal weapons" and "Training concerning active assailants". See NAC 289.160(1)(d) and (3)(c) and (d). In Charles Roca's case this included hand strikes, kicks and baton strikes. (APP Vol. I at 075).

On October 13, 2018 an inmate at Stein, who had a history of violence, walked up to Rocha, stated "I'm going to fucking kill you" and proceeded to physically attack Rocha.[1] The inmate struck Rocha several times in the face and wrapped his leg around Roca's leg causing Rocha to fall to the floor on an already injured hip. Other Forensic Specialists rushed to Roca's aid and attempted to restrain the inmate. However, the inmate continue to keep his legs wrapped around Roca's leg, and his arm across Rocha's back, such that Roca could not escape. While Roca was trapped on the ground, the inmate was spitting in Roca's face and continuing to articulate threats. (APP Vol. I at 079, 083-084, 087-096, 100). Because Rocha was trapped and in reasonable fear for his life/safety, he administered two (2) strikes to the inmate's face in order to break free and gain the inmate's compliance. (APP Vol. I at 047, 100).

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[1] At the hearing, DHHS objected to the term "inmate" claiming that they are "patients" or "clients". (APP Vol. I at 044). However, criminal defendants at Stein are transported there from other detention facilities such as Clark County Detention Center ("CCDC"), they are not free to leave, and force may be utilized to prevent an escape. (APP Vol. I at 044, 127). Thus, they do not magically lose their inmate status. While not adequately reflected in the record, there are also some persons who have been convicted who are housed at Stein for treatment.

DHHS terminated Rocha's employment. Rocha appealed his termination to a State Personnel Hearing Officer under NRS 284.390. (APP Vol. I at 246). At his appeals hearing DHHS' investigator opined that Roca's strikes constituted "excessive force". (APP Vol. I at 055-056, 060). Rocha testified that he had never been instructed by DHHS that he could not use his POST training and techniques, and that he utilized those techniques because he feared for his life and was trying to break free of the inmate so he could assist the other Forensics Specialists to gain compliance of the inmate. (APP Vol. I at 094-095, 098, 100).

In closing arguments Rocha's counsel argued the objective reasonableness standard for use of force from *Graham v. Connor*, 490 U.S. 386 (1989) should be applied. (APP Vol. I at 103-105). DHHS's counsel *agreed* that the Hearing Officers should review the use of force case law, but argued that under such standard the force was "clearly excessive". (APP Vol. I at 110).

The Hearing Officer did decide the case under a use of force standard, but nonetheless ruled in favor of Rocha on a theory of self-defense, and reversed the termination and ordered Roca reinstated with back pay and benefits. (APP Vol. I at 132-149). Specifically the Hearing Officer concluded:

> Contrary to the Employer's conclusion that the Employee struck the Patient in retaliation for the attached there is ample evidence to conclude the Employee was acting in self-defense at the time he struck the Patient.

(APP Vol. I at 144).

Following the Hearing Officer's Decision DHHS filed a Petition for Reconsideration arguing that DHHS has not alleged a violation of this Use of Force Policy, but rather alleged "client abuse". The Petition attached the DHHS Use of Force Policy. (APP Vol. I at 118-131). The Hearing Officer denied the petition. (APP Vol. I at 113 -117). In denying the Petition the hearing officer did re-review the record and concluded:

> Reconsideration of the record confirms that no substantial evidence was presented which established by a preponderance of the evidence that the Employee's actions were unjustified. If Employee's actions were not unjustified it follows that Employee did not violate policy or State law and could not be disciplined for his conduct and no further consideration is required.

(APP Vol. I at 115).

DHHS filed a Petition for Judicial Review. (APP Vol. I at 004-007). While that Petition named both Charles Roca, the State of Nevada Department of Administration and the Personnel Commission, only Rocha was served with the Petition as required by NRS 233B.130(5). Without providing the Department of Administration or Personnel Commission notice or an opportunity to file a Notice of Intent to participate under NRS 233B.130(3), DHHS argued that the Hearing Officer erred by applying a use of force analysis. (APP Vol. II at 282-292). The district court agreed with DHHS, stayed and reversed the decision of the Hearing Officer holding:

> THE COURT FINDS that the Hearing Officer committed clear error by ultimately applying a use of force standard to make the

determination that Respondent's actions were justified when the Respondent was actually charged with patient abuse.

The District Court remanded the matter back to the Hearing Officer to make a determination based upon "the proper standard and the actual charges against the Respondent". (APP Vol. II at 319-320). Following remand, and applying the standard as directed by the district court, the Hearing Officer affirmed the dismissal. (APP Vol. II at 255-262).

STANDARD OF REVIEW

Questions of subject matter jurisdiction are reviewed de novo. *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009).

When considering an appeal from a district court order granting judicial review, the Supreme Court stands in the position as the district court with his review limited to the record before the administrative agency and a presumption that the agency decision is valid. *State ex. rel. State Bd. of Equalization v. Barta*, 124 Nev. 612, 188 P.3d 1092 (2008). The court reviews issues of law, including questions of statutory construction, de novo. *Public Agency Compensation Trust v. Blake*, 127 Nev. 863, 866, 265 P.3d 694, 696 (2011).

SUMMARY OF ARGUMENT

The jurisdiction of the district court to grant judicial review was never properly invoked. NRS 233B.130(5) requires that any Petition for Judicial Review be served "must be served upon the agency and every party within 45 days after

the filing of the petition". The Petition contained a Certificate of Service indicating it was mailed to Rocha's former counsel only. No other Proof of Service was filed with the district court showing service upon the Personnel Commission or Department of Administration.

Even if the district court's jurisdiction had been properly invoked, it was the district court which erred, and not the Hearing Officer, when the district court concluded that the case was improperly decided under a use of force standard. During the appeals hearing, DHHS' claim of abuse or neglect was premised upon its assertion that the force utilized was excessive. Not only did DHHS witnesses specifically claim that the force was excessive, but in closing argument DHHS' counsel urged the court to review *Graham v. Connor*, supra and claimed that under that standard the force was excessive.

However, the Hearing Officer did not decide the case under a use of force standard. He decided it based upon principles of self-defense.

Had the Hearing Officer utilized a use of force standard, this would not have been improper. Forensic Specialists are peace officers. They are trained to use force and undergo mandatory annual defense of tactics training in order to maintain their POST Category III certification. The undisputed testimony at the hearing was that DHHS has never informed in its Forensic Specialist that they could not utilized their tactics and training in connection with their jobs. The *Graham v. Connor* standard is one of the "objective reasonableness". If the use of

force was objectively reasonable, by definition include not constitute "abuse" or the violation of a rule.

Employees when they accept State employment, do not give up their right of self-defense. In the private sector other jurisdictions have recognized that a tortious discharge in violation of public policy occurs where an employee is terminated for legitimately protecting themselves or other persons. If Charles Rocha was acting in self-defense, as found by the hearing officer, by definition he could not be engaging in client abuse.

The Hearing Officer's decision on remand from the district court to affirm the dismissal was arbitrary and capricious. In concluding that lesser force could've been utilized in the form of placing his hand out to block any spit, the Hearing Officer ignored the fact that (1) Charles Roca was still trapped by the inmate and in danger; (2) the purpose of the strikes were to permit Rocha to free himself; and (3) placing his hand out to block any spit would not assist in removing Rocha from the danger he was in, and would actually increase the danger. The Hearing Officer further down played the significance of spitting.

The twisted outcome whereby the hearing officer finds that Charles Rocha should be reinstated because he acted reasonably in self-defense, but is compelled to affirm the dismissal when limited only to an analysis of whether a rule is violated, is a product of the mistaken and overly mechanical *O'Keefe* analysis, and

illustrates why Justice Pickering's concurring opinion in *O'Keefe* was correct and why *O'Keefe* should be overruled.

NRS 284.390 requires a hearing officer to determine the "reasonableness" of a suspension, demotion or dismissal. Subsection (7) adopts the "just cause" standard. The terms are synonymous as the reasonableness of the discipline decided by management is an essential component of the "just cause" standard as that term has been defined by 80 years of industrial common law by arbitrators.

However, when the Court crafted its *O'Keefe* analysis, it concluded terms such as "reasonableness" of just cause" indicate a high level of deference to the employer. In support of this the Court cited the definition of just cause from *Southwest Gas Corp. v. Vargas* without any critical analysis.

The *O'Keefe* Court overlooked the fact that the deferential standard in *Vargas* was based solely upon the unique circumstances of contracts of continuing employment based upon unilateral declaration by private sector employers. Other courts adopting the same standard as in *Vargas* have correctly concluded that such a definition of just cause would not apply in other contexts.

The just cause language in NRS 284.390 predates *Vargas*. There is no reason to believe that when the Legislature adopted such language, that it intended a definition anything other than that which has evolved under the industrial common law which does not require deference to the employer.

Finally, in applying such a deferential standard of just cause under *Vargas*, the Court in *O'Keefe* gave no consideration to the due process implications which are unique to public sector employment. *Vargas* arose in the private sector. However, state employees with a property interest in their employment received the protections of the 14th Amendment's Due Process Clause. The appeals hearing provided for under NRS 284.390 does not exist solely by grace of a legislative enactment. Due process requires a post-deprivation evidentiary hearing before a neutral party. In no other circumstance when the State deprives a person of a property interest does the neutral decision maker to defer to one party. There is no reason why that should be any different when the property interest at issue is employment.

ARGUMENT

I. THE DISTRICT COURT NEVER HAD JURISDICTION TO GRANT JUDICIAL REVIEW BECAUSE DHHS NEVER SERVED THE PERSONNEL COMMISSION OR DEPARTMENT OF ADMINISTRATION WITH ITS PETITION.

NRS 233B.130(2)(a) requires a Petition for Judicial Review to "Name as respondents the agency and all parties of record to the administrative proceeding". Subsection (5) states that "The petition for judicial review and any cross-petitions for judicial review must be served upon the agency and every party within 45 days after the filing of the petition, unless, upon a showing of good cause, the district court extends the time for such service." Service upon the agency requires service

upon "The person serving in the office of administrative head of the named agency". NRS 233B.130(2)(c)(2).

Respondent DHHS named both the Personnel Commission and the Department of Administration as a parties in its Petition. (APP Vol. I at 004-005). However, the Certificate of Mailing which was filed with the Petition reveals that it was only served by mail upon a Rocha's former counsel Angela Lizada, Esq. and not the Personnel Commission or Department of Administration. Likewise, DHHS did not list the Personnel Commission or Department of Administration on its Certificate of Mailing when it filed its Motion For Stay of the Hearing Officer's decision. (APP Vol. I at 007A-007K). No other Proof(s) of Service demonstrating service upon the Chairman of the Personnel Commission or Director of the Department of Administration were ever filed with the District Court. (APP Vol. I at 001-002).

Under NRS 233B.130(3) "The agency and any party desiring to participate in the judicial review must file a statement of intent to participate in the petition for judicial review and serve the statement upon the agency and every party within 20 days after service of the petition." Angela Lizada, Esq. did so as she was served with the Petition. (APP Vol. I at 008-009). The Personnel Commission and the Department of Administration did not file any such Statement of Intent as they were never actually served with the Petition.

Recently in *Whitfield v. Nevada State Personnel Commission et al.*, 137 Nev.Adv.Op. 34 (July 29, 2021) this court reiterated "If a party fails to strictly comply with the statutory requirements for judicial review, the courts have no jurisdiction over the case." *Whitfield* at p. 5 citing *Washoe County v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 725 (2012). Strict compliance requires more than simply naming a party; it requires that the named party actually be served and provided an opportunity to participate.

Because the Personnel Commission and Department of Administration were never served, the district court never properly acquired subject matter jurisdiction over the decision of the Hearing Officer. Issues relating to subject matter jurisdiction are never waived and may be raised on appeal for the first time. *Garmong v. Lyon County Bd. of Commissioners*, 439 P.3d 962 (2019).

II. THE DISTRICT COURT ERRED IN GRANTING JUDICIAL REVIEW BECAUSE THE HEARING OFFICER DECIDED THE CASE BASED UPON SELF-DEFENSE AND NOT A USE OF FORCE ANALYSIS.

DHHS claimed to the district court in its petition for judicial review that its NPD-41 Specificity of Charges did not allege a violation of use of force but rather "client abuse". This was not completely accurate. Review of the NPD-41 Specificity of Charges (APP Vol. I at 180-185) reveals multiple charges under NAC 284.650 and other alleged policy violations. Amongst those was a definition of "Excessive force" within the NPD-41 Specificity which stated "The use of

excessive force when placing a consumer physical restraints or in seclusion". (APP Vol. I at 183).

At Rocha's appeal hearing, DHHS did not call any witnesses who were peace officers trained in use of force. Instead, it called a civilian investigator Linda Edwards, who is a psychiatric nurse. (APP Vol. I at 150). The following was Ms. Edwards testimony:

> Sliwa: Did your investigation conclude that during the altercation, Mr. Rocha it's the client while he was being restrained on the floor?
>
> Edwards: Yes, two times.
>
> Sliwa: Two times. To your knowledge, injure review of policies, did that violate agency policy?
>
> Edwards: Most definitely.
>
> Sliwa: How so?
>
> Edwards: Because its excessive use of force.
>
> Sliwa: And, what-why-why did you believe that it constituted excessive use of force?
>
> Edwards: Because the patient was restrained and was already subdued and that's when the patient was then struck by the employee. There would've been no need at that time for the patient to have been hit at that time because he was already restrained on the floor.

(APP Vol. I at 055-056). Under cross examination Edwards repeated her opinion that she believed it was excessive force based upon her belief that the inmate was not resisting. (APP Vol. I at 060).

Charles Rocha testified to the contrary that at the time he struck the inmate, the inmate was still resisting and that Rocha was still trapped by the inmate and was being spit upon and in fear for his life. (APP Vol. I at 094-095, 098, 100).

In closing argument Rocha's counsel directed the Hearing Officer's attention to *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor* 490 U.S. 386 (1989) and which address use of force by peace officers and what force is "reasonable". (APP Vol. I and 103-105, 108). DHHS' counsel did not object to the application of such a standard. To the contrary, DHHS' attorney Susanne Sliwa in her rebuttal argument stated:

> Your Honor has heard a lot of argument about use of force and I invite you to look at that use of force case law and factors and again, you will see that Mr. Rocha's his actions were excessive.

(APP Vol. I at 109-110).

After being invited by *both parties* to analyze Rocha's actions under the standards for use of force, the Hearing Officer did not do so. Rather, he decided the case based upon the issue of justifiable self-defense writing:

> Defusing hostile situations with non-violent measures is preferable for everyone, however, there will be situations such as this in which the patient dictates how the event progresses. **Employees are not required to be passive victims to violent attacks**.
>
> However, employees must be mindful that willful and unjustified infliction of pain, injury or mental anguish upon a patient is more than a simple policy violation, it may be charged as a criminal offense.

To constitute abuse it must be proven by a preponderance of the evidence that the use of force was both willfully and unjustified. Willful is defined as acting intentionally and knowingly. Infliction of bodily injury may be justifiable if, in good faith, **the person believes that it is absolutely necessary to use force to save one's own life, or to prevent great bodily harm**. Similarly, peace officers may use force however they are justified in only using the minimum amount of force necessary to control the situation **and protect themselves** or others.

Here, the Employee testified and during his interview and stated that during this altercation he was in fear for his life. His right arm was pending, he was unable to break free from the Patient, he was being threatened and spit on. That testimony was not contradicted. The review of the surveillance video and the statements of fellow employees present at the time **support the Employee's contention that his belief that he was in danger of great bodily harm**.

Contrary to the Employer's conclusion that the Employee struck the Patient in retaliation for the attack there is ample evidence to conclude **the Employee was acting in self-defense** at the time he struck the Patient. The altercation between the Employee and Patient lasted approximately 2:04 minutes. The alleged abuse and/or use of excessive force occurred at approximately 31 seconds after the attack on the Employee. Numerous employees were involved at different times in attempting to gain control and restrain the Patient. The video shows that the Patient was resisting and not cooperating while the Employee was entangled with him on the floor. Multiple employees continued to hold the Patient on the floor until he was safely placed in a restraint chair. It is clear that five employees were needed to safely secure the Patient in the restraint chair.

The Employee hit the Patient while they were still entangled on the floor struggling. The Employee's right arm/hand was pinned between the Patient's chest and another employee. The Employee used his left hand to hit the Patient. The amount of force in those punches was minimal. The blood on the floor was not visible until after the hitting occurred and Employee was free from the altercation. That however does not establish that the blood and Patient's injuries were caused by the punches and not the fault of the floor.

(APP Vol. I at 143-145 **emphasis added**).

In its briefing in support of its Petition for Judicial Review, DHHS falsely claimed that the Hearing Officer improperly applied a use of force analysis. (APP Vol. II at 282-292). This is clearly incorrect. Nowhere in the Hearing Officer's Decision in Order does he even mention *Graham v. Connor*, much less address the factors set forth in that case.[2]

However, the district court, without any analysis in its decision, granted judicial review incorrectly holding "*that the Hearing Officer committed clear error by ultimately applying the use of force standard to make the determination that Respondent's actions were justified when the Respondent was actually charged with patient abuse*". (APP Vol. II at 320). Given the indisputable fact that nowhere in the Hearing Officer's Decision in Order is there any discussion about use of force standards, and the Hearing Officer concluded there was no "abuse" because Rocha acted in self-defense, the only conclusion that can be reached is that the district court issued its decision without actually reviewing the record.

It should be emphasized that had the Hearing Officer decided the case under *Graham v. Connor*, this would be entirely appropriate. Forensic Specialists are peace officers trained in use of force and specifically the *Graham v. Connor*

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[2] *Tennessee v. Garner*, supra cited by Rocha's attorney at the appeal hearing would not apply. *Garner* addresses the standards for use of deadly force. There is no suggestion that Charles Rocha utilized deadly force.

standard. *Graham v. Connor* holds that uses of force are to be analyzed under a standard of "objective reasonableness" from "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." The Supreme Court further elaborated:

> With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.

490 U.S. at 396-397.

DHHS requires its Forensic Specialists to be peace officers certified by POST. This Court has recently held that such certification is so important that the failure to obtain it may justify discharge of the Forensic Specialists even if that failure is of no fault of the employee. See *Pratt v. State*, 2020 Nev. Unpub. LEXIS 442, 2020 WL 2026736 (dismissal of forensic specialist upheld where a database error of which he was unaware incorrectly listed him as a convicted felon such that he could not purchase a firearm which was unnecessary for his job in any event).[3] Where peace officers are instructed in the *Graham v. Connor* standard in their POST certification, and trained to apply that standard, it could not be error

[3] Undersigned counsel represented David Pratt in that case.

for a Hearing Officer to analyze the "reasonableness" of DHHS' disciplinary decision within the *Graham v. Connor* context even if the Hearing Officer in this case did not actually do so.[4]

III. DHHS WAIVED ANY ARGUMENT THAT A USE OF FORCE STANDARD WAS INAPPROPRIATE WHEN IT TRIED ITS CASE UNDER SUCH A STANDARD.

As set forth above, the Hearing Officer decided the case under a theory of self-defense and not a use of force analysis. However, even if the Hearing Officer had decided the case under such a standard, DHHS waived any claims of error by trying its case under such a standard.

Graham v. Connor expressly equates "excessive" force with that which is objectively unreasonable. 490 U.S. at 397 ("the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation"). As set forth above, DHHS' witnesses asserted that the appeals hearing that they believed Rocha's force was "excessive". (APP Vol. I at 55-56, 60). In closing arguments DHHS' attorney expressly invited the Hearing Officer to analyze the use of force

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[4] It should be pointed out that *Graham v. Connor* analyzed the standard to be applied in the force used to seize a "free citizen". 490 U.S. at 394-395. Criminal defendants incarcerated at Stein should not have *greater* rights than free citizens.

case law and argue that if he did so he would find the forced to be "excessive". (APP Vol. I at 109-110).

While DHHS had no business arguing to the district court that it should grant judicial review because the Hearing Officer applied a use of force analysis when this was demonstrably untrue, even if the Hearing Officer had done so DHHS waived any basis to object based upon its evidence and arguments presented. See e.g. *Haynes v. Golub Corp.*, 166 Vt. 228, 692 A.2d 377 (1997) ("Where the trial court proceeds upon a theory of the case, and the theory is acquiesced in by the parties, the theory becomes the law of the case.").

IV. EMPLOYEES DO NOT SURRENDER THE RIGHT OF SELF-DEFENSE OR DEFENSE OF OTHERS BY VIRTUE OF THEIR EMPLOYMENT.

No public policy is more basic than the fundamental right to self-defense and/or the defense of others from the criminal acts of a third party. Article 1, § 1 of Nevada's Constitution expressly recognizes the right to defend life and liberty; and the right to pursue and obtaining safety as inalienable rights. Further, NRS 193.230 expressly states that it is lawful for a party who is about to be injured or any other person to resist the commission of a public offense. Further, NRS 193.250 provides that any other person may use sufficient resistance to prevent an offense to aid or defend a person that is about to injured. Therefore, the inalienable right of self-defense and/or the defense of others presents a strong and

compelling public policy under Nevada law, pursuant to Nevada's Constitution and NRS 193.230 and NRS 193.250.

Courts in other jurisdictions considering the issue have found that a tortious discharge in violation of public policy occurs where in the private sector an at will employee is terminated for engaging in a legitimate exercise of the right of self-defense or defense of others. See e.g., *Ray v. Walmart Stores, Inc.*, 359 P.3d 614, 619 (Utah 2015); *Feliciano v. 7-Eleven, Inc.*, 559 S.E. 2d 713, 722 (W. Va. 2001); *Cocchi v. Circuit City Stores, Inc.*, 2006 WL 870736 (N.D. Cal. 2006); *Wounaris v. W. Virginia State Coll.*, 588 S.E.2d 406, 408 (W. Va.2003); and *Gardner v. Loomis Armored Inc.*, 913 P.2d 377, 383 (Wash. 1996).

Charles Rocha is not asking this Court to recognize a tort claim that he may bring as his remedy is statutory under NRS 284.390. However, he asking this Court to recognize the right of self-defense is inherent in the just cause analysis under NRS 284.390(7). If, as the Hearing Officer concluded, Rocha acted legitimately in self-defense, his dismissal was not reasonable or supported by just cause within the meaning of NRS 284.390(1) and (7).

V. THE DECISION OF THE HEARING OFFICER ON REMAND FROM THE DISTRICT COURT WAS ARBITRARY AND CAPRICIOUS.

As set forth above, the district court directed the Hearing Officer to decide the case based upon DHHS abuse charge, despite the fact that the plain language of the Hearing Officer's decision stated that it was not abuse because Rocha was

acting in self-defense. (APP Vol. I at 144). Because of this instruction by the district court on remand, the Hearing Officer relied solely upon DHHS' abuse and neglect policy concluding:

> The Employer's policies permit employees to defend themselves from assault and battery, but they are required to cease the use of force when the threat has been reduced area and hear the When he was being battered when he was being spit on by the Patient. In accordance with the Employer's policies the Employee was entitled to defend himself on that assault and battery, but only by using the minimal force available as he was required to cease the use of force once the threat was reduced.
>
> As noted above the Patient was restrained by other employees and his only violent conduct toward the Employee was spitting. The Employee had the opportunity and obligation to use a reduced level of force to prevent the patient from spitting on him simply using his hand to block the patient from spitting on him without striking him. Because the Employee had less forceful options and Department training on the use of force, the Employee used excessive force and violated law and policy when he struck the Patient. In accordance with NRS 284.385 in numerous Employer policies the Employee was justifiably subject to discipline for his action.

(APP Vol. I1 at 259-260). Thereafter the hearing officer deferred to the appointing authority under *O'Keefe* with regard to the seriousness of the offense and the appropriate level of discipline.

First, the Hearing Officer's conclusion that the "only violent conduct" directed toward Rocha was spitting was not correct. The inmate ("Patient" in the words of the Hearing Officer) was deliberately holding onto Rocha's leg with his own legs, and kept his arm on Rocha's back so as to prevent Rocha from standing and/or escaping. (APP Vol. I at 089-090). Because of this, one of Rocha's arm

was not available to him because it was pinned between the inmate's chest and another employee. (APP Vol. I at 144-145). The fact that Rocha was pinned and unable to escape was specifically recognized by the Hearing Officer in his initial decision (APP. Vol. I at 144), but this is ignored in his decision on remand.

Second, the Hearing Officer ignored the fact that it had only been 31 seconds since the inmate articulated an intent to kill Rocha and punched him in the face more than once. (APP Vol. I at 084). The purpose of Rocha's strikes was not to prevent the inmate from continuing to spit on Rocha; the purpose was to break away and escape. (APP Vol. I at 95, 100).[5]

The Hearing Officer in his initial Decision correctly noted that the evidence supported "the Employee's contention that [it was] his belief that he was in danger of great bodily harm." (APP Vol. I at 144). Placing his hand out with the single arm that he had available to potentially block any spit this would not assist in his being able to escape so as to reduce or eliminate the threat of great bodily harm.

Third, extending his hand towards the face of the inmate to block any spit would continue to place Rocha in danger of great bodily harm. Again, the inmate

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[5] It is well documented that an attack of the sort experienced by Charles Rocha causes physiological effects on the sympathetic nervous system (SNS) which is colloquially known as the "fight or flight response". See e.g. Anderson and Gustafsberg, *A Training Method to Improve Police Use Of Force Decision Making: A Randomized Controlled Trial* (SAGE 2016). https://journals.sagepub.com/doi/full/10.1177/2158244016638708 . Because his leg and arm were pinned, "flight" was not an option.

had already articulated an intent to kill, and was continuing to make verbal threats while struggling and resisting. (APP Vol. I at 090-091). Extending his arm with his hand toward the inmate's face would only place Rocha's hand in danger of being bitten. There was no evidence presented that "spit blocking with hand" was an approved technique taught to and trained by peace officers employed at Stein.

As set forth above, the *Graham v. Connor* standard in which all peace officers are trained, and which was referenced in closing arguments by both parties, correctly recognizes that officers "are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation". As noted by the Supreme Court in *Hudson v. McMillian*, 503 U.S. 1, 6, 112 S. Ct. 995 (1992) "corrections officials must make their decisions 'in haste, under pressure, and frequently without the luxury of a second chance'" citing *Whitley v. Albers*, 475 U.S. 312, 320, 106 S.Ct. 1078, 1084 (1986). That is exactly what occurred in this case.

Fourth, the hearing officer minimizes the significance of spitting. Because the inmate was in "lawful confinement" at Stein, propelling any bodily fluid violates NRS 212.189 and may be a felony (depending upon prior offenses or status as a "prisoner"). As noted by the testimony at the hearing, it was unknown whether the inmate carried any communicable diseases. (APP Vol. I at 095). Under NRS 212.189(4) if a prisoner who spits has a communicable disease, it is a

Category A felony potentially punishable by a life sentence.[6] Placing one's hand out to block the spit does not lessen the seriousness of the offense as the criminal violation is not dependent upon which portion of the victim's body is contacted. See NRS 212.189(d)(1) ("with the intent to have the...bodily fluid come in to contact *with any portion* of the body of another person")

Finally, the Hearing Officer's conclusion that Rocha had "Department training on the use of force" was directly contradictory to the evidence in the record. The undisputed testimony was that Rocha's training on use of force occurred through his POST Academy at the Department of Corrections, and not through DHHS. (APP Vol. I at 42-43, 71-72). The training he received by DHHS, known as CPART, was training to "avoid situations" and "to de-escalate", but that it is not always possible to de-escalate. (APP Vol. I at 43, 73).[7] The un-contradicted testimony was that Rocha was never instructed by DHHS that he could not utilize his POST training and techniques in connection with use of force. (APP Vol. I at 75-76).

In short, the Hearing Officer's original analysis, that Rocha's actions were reasonable and in self-defense, was correct. DHHS' argument at the hearing was

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[6] Whether the inmates at Stein are a "prisoner" within the subsection of the statute making it a felony or providing for life sentence does not need to be decided in this case.

[7] CPART cannot be used to avoid a situation or de-escalate when an inmate is attempting to kill you and already has you trapped on the floor.

that the force was "excessive" and constituted "abuse" because Rocha "was in absolutely danger" and allegedly lost his temper and struck the inmate out of anger and "to punish and retaliate". (APP Vol. I at 019, 055-058, 067, 102). No such findings were made by the Hearing Officer on remand, and the Hearing Officer left his findings from the first Decision regarding Rocha being pinned by the inmate, and being in reasonable fear for his safety, undisturbed. This makes the Decision on Remand arbitrary and capricious.

VI. THIS NRS COURT'S DECISION IN *O'KEEFE V. DEPARTMENT OF MOTOR VEHICLES* SHOULD BE OVERRULED AND THE CONCURRING OPINION OF JUSTICE PICKERING ADOPTED.

In *Whitfield*, supra, this Court stated:

> "[U]nder the doctrine of stare decisis, we will not overturn [precedent] absent compelling reasons for so doing." *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (footnote omitted). But while we are loath to depart from the doctrine of stare decisis, we also cannot adhere to the doctrine so stridently that the law is everlasting. *Adam v. State*, 127 Nev. 601, 604, 261 P.3d 1063, 1065 (2011); *Rupert v. Stienne*, 90 Nev. 397, 400, 528 P.2d 1013, 1015 (1974). A prior holding that has proven "badly reasoned" or "unworkable should be overruled. *State v. Lloyd*, 129 Nev. 739, 750, 312 P.3d 467, 474 (2013) (internal quotation marks omitted).

137 Nev.Adv.Op. 34 at p. 6. The decision in *Prevost v. State, Department of Administration*, 134 Nev. 326, 418 P.3d 675 (2018), which was overturned by *Whitfield*, was decided the same year as *O'Keefe.*

This case is a perfect illustration of the failure of the overly mechanical *O'Keefe* three part test. Under that test, the only issue a Hearing Officer reviews

de novo is "whether the employee in fact committed the alleged violation". However, under *O'Keefe* hearing officers must defer to the appointing authority as to the severity of the offense and whether the sanction (suspension, demotion or dismissal) is for the good of the public service.

As pointed out in Justice Pickering's concurring opinion, the majority in *O'Keefe*, in overruling *Knapp v. State*, 111 Nev. 420, 769 P.2d 56 (1995), "decide[d] an issue not presented by [that] appeal". In overruling twenty three (23) years of precedent holding that Hearing Officers are to take a "new and impartial view of the evidence" including whether dismissal was "reasonable" and supported by "just cause" (the standard under NRS 284.390(7)) this Court determined that the just cause standard requires "a high level of deference" to the appointing authority's decision. 134 Nev. at 757, 431 P.3d at 354. In support of this requirement of "a high level of deference", this Court cited to its decision in *Southwest. Gas Corp. v. Vargas*, 111 Nev. 1064, 1078, 901 P.2d 693, 701-02 (1995) that a "discharge for just' or 'good' 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." 134 Nev. at 757-758, 431 P.3d at 355.

In so doing, the court decided an issue which was never adequately briefed (because as Justice Pickering pointed out the issue was not presented by the appeal). The "just cause" standard as developed by the industrial common law

does not include a "high level of deference" to the employer by neutral decision makers (usually professional labor arbitrators), and the analysis in *Vargas* was expressly based upon the unilateral nature of the employer's declaration which was given "some degree" of contractual effect.

Finally, the decision in *O'Keefe* regarding "high level of deference" never recognized that public sector employment differs significantly from that in the private sector. Serious disciplinary decisions such as suspensions, demotions and dismissals of the deprivation of property interests and are therefore constrained by the requirements of the 14th Amendment's Due Process Clause.

A. Under The Just Cause Standard, A Neutral Decision Maker Does Not Defer To The Employer.

NRS 284.390(1) provides that a post-probationary member of the classified service who has been suspended, demoted or dismissed may appeal to a hearing officer to determine the "reasonableness of the action". Subsection (7) of the same statute provides "If the hearing officer determines that the dismissal, demotion or suspension was without just cause as provided in NRS 284.385, the action must be set aside and the employee must be reinstated, with full pay for the period of dismissal, demotion or suspension." Thus the reference to "good of the public service" in NRS 284.385 and "reasonableness" in NRS 284.390(1) is the "just cause" standard referenced in NRS 284.390(7).

While all employment in Nevada is presumptively "at will", see e.g. *Vancheri v. GNLV Corp.*, 105 Nev. 417, 777 P.2d 366 (1989), this was not always the rule under the Anglo-American common-law. As detailed by arbitrators Norman Brand and Melissa Biren in their treatise *Discipline and Discharge In Arbitration* (ABA Section of Labor and Employment 3rd ed. 2015):

> The concept of just cause draws its origin from the Statute of Laborers enacted in 1562. This statute prohibited employers from discharging employees without "reasonable cause". While most American jurisdictions initially followed this rule, it was replaced by the employment at-will doctrine in 1877.
>
> Just cause resurfaced in the 1930s when unions, concerned about their members' job security, began including just cause provisions in their collective bargaining agreements.

Discipline and Discharge in Arbitration at Chapter 2 p. 4.[8]

There is no "mechanical" test for just cause.[9] However, as noted by Brand and Biren:

> This 1947 statement is typical:

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[8] This Treatise has been cited by federal courts. See e.g. *Hartco Flooring Co. v. United Paperworkers of Am., Local 14597*, 192 Fed. Appx. 387 (6th Cir. 2006); *Pan Am v. Air Line Pilots Ass'n*, 206 F.Supp.2d 12 (D.DC. 2002). Its editor, Arbitrator Norman Brand, is no stranger to Nevada. He is on the permanent panel of arbitrators maintained between Clark County and Service Employees International Union Local 1107. Undersigned counsel formally served as General Counsel for SEIU Local 1107.

[9] A 1989 study revealed that he closest thing to a mechanical application, the famous "7 Part" test developed by Northwestern Professor Caroll Daugherty, is only used by a small percentage of arbitrators. Proceedings of the 42nd Annual Meeting of the National Academy of Arbitrators, at http://www.naarb.org/proceedings/pdfs/1989-23.pdf.

> It is ordinarily the function of an Arbitrator in interpreting a contract provision which requires "sufficient cause" as a condition precedent to discharge not only to determine whether the employee involved is guilty of wrongdoing but also to safeguard the interests of the discharged employee by making reasonably sure that the cause for discharge or just and equitable and such as would appeal to a reasonable and fair-minded person as warranting discharge. To be sure, no standards exist to aid an Arbitrator in finding a conclusive answer to such a question and, therefore, or has the best he can do is to decide what a reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community, ought to have done under similar circumstances and in that light decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just.

Chapter 2 at pp. 4-5. The standard is, in short, exactly as described by Justice Pickering in her *O'Keefe* concurring opinion – a mixed question of law and fact.

However, one aspect of the "just cause" analysis carries near universal support – that arbitrators do not defer to the employer as to the reasonableness of the discipline. As noted by Elkouri & Elkouri, *How Arbitration Works* (6th ed.) at p. 953 "Court decisions recognize broad arbitral discretion to review the reasonableness of the penalty imposed by the employer in relation to the employee's wrongful conduct".[10] See e.g. *Bridgeport Board of Education v. Nage, Local RI-200*, 160 Conn. App. 482, 491, 125 A.3d 658, 666 (2015) ("we are

[10] This Court has repeatedly recognized *How Arbitration Works* as authoritative. See *City of Reno v. Reno Fire Department Administrative Association*, 111 Nev. 1004, 899 P.2d 1115 (1995); *International Association of Firefighters Local 1285 v. Las Vegas*, 107 Nev. 906, 823 P.2d 877 (1991).

mindful that the fact that an employee's misconduct implicates public policy does not require the arbitrator to defer to the employer's chosen form of discipline for such misconduct"); *Fraternal Order of Police v. City of Cincinnati*, 164 Ohio App. 3d. 579, 582, 843 N.E.2d 240, 243 (2005) ("Absent language in a collective-bargaining agreement that restricts the arbitrator's power to review, if the arbitrator determines there was just cause to discipline an employee, the arbitrator is not required to defer to the employer as to the type of discipline imposed").

B. *O'Keefe*'s Conclusion That The Employer Is Entitled To Deference Based Upon The Definition Of Just Cause Under *Vargas* Was Error.

Nothing within the plain language of NRS 284.385 or 284.390 supports *O'Keefe*'s conclusion that the statutory scheme requires "a high level of deference" to the appointing authority's decision. To the contrary, courts in other jurisdictions have expressly rejected such arguments. In *Portland Police Association v. City of Portland*, 270 Ore. App. 700, 365 P.3d 1123 (2015) the Oregon Court of Appeals rejected the argument that NRS 243.706(1), which authorizes public sector arbitration of misconduct cases stating:

> First, as always, the best indicator of the legislature's intent is the text of the statute itself [citation omitted], and nothing about the text of ORS 243.706(1) indicates that the legislature intended to require arbitrators to defer to public employers' decisions on whether their employees have engaged in misconduct. *The legislature easily could have said that if that is what it intended.*

270 Ore. App. At 712, 365 P.3d at 1130 (*emphasis added*). Likewise, in *Pima County v. Pima County Law Enforcement Merit System*, 211 Ariz. 224, 119 P.3d 1027 (2005) the Arizona Supreme Court expressly rejected the argument that a deferential standard is appropriate holding:

> When enacting Ariz. Rev. Stat. § 38-1003, the legislature did not provide a standard of review for law enforcement merit system councils. *The legislature, by statute, could have dictated that merit system councils defer to the employers' disciplinary decisions.* Instead, the legislature opted to let the councils set their own standards, as long as the standards of review chosen fall within recognized merit system principles of public employment. Employing a reasoned standard less deferential to the employer's chosen discipline is consistent with recognized merit system principles because it does not deny merit system employees treatment based on merit or deprive them of a decision by a neutral reviewing body.

211 Ariz. at 230, 119 P.3d at 1033 (*emphasis added*)

In overruling twenty three (23) years of precedent under *Knapp*, the *O'Keefe* Court did look at any other jurisdictions to ascertain whether public sector commissions or merit system boards defer to the employer. They do not.

Instead, *O'Keefe* based its deference conclusions on *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 1078, 901 P.2d 693, 701-02 (1995) noting "[A] discharge for 'just' or 'good' 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." *O'Keefe*, 134 Nev. 757-758, 431 P.3d at 355. However, other courts have recognized that the term "just cause"

may have different meanings in different contexts. See *Adams v. Harding Machine Co., Inc.*, 56 Ohio JA.3d 150, 565 N.E.2d 858 (1989) ("just cause" as used in the unemployment compensation statute has a different meaning than as that term is used in an employment contract); *Vann v. Town of Cheswold*, 945 A. 2d 1118 (De. 2008); *Cotran v. Rollins Hudig Hall International, Inc.*, 69 Cal. Rptr. 2nd 900, 948 P.2d 412 (1998) (J. Mosk concurring).

A critical examination of *Vargas* leads to the inescapable conclusion that it is entirely incompatible with the term "just cause" as is utilized in NRS 284.390(7). This Court's decision in *Vargas* arose in the private sector where employment is presumptively at will, and involved a unilateral promise made in an employee handbook. The approach from *Vargas* was taken from the Oregon Supreme Court's decision in *Simpson v. Western Graphics Corp.*, 643 P.2d 1276 (Or. 1982) which addressed the extent to which a unilateral promise made in an employer's handbook should be given contractual effect. 111 Nev. at 1073, 901 P.2d at 699. The *Simpson* decision relied upon by this Court stated:

> Although an employer's statement of employment policy has a degree of contractual effect, see *Yartzoff v. Democrat-Herald Publishing Co.*, supra, its terms are not necessarily to be construed in the same way as those of a negotiated labor contract. The handbook was not negotiated. It is a unilateral statement by the employer of self-imposed limitations upon its prerogatives. It was furnished to plaintiffs after they were hired and the evidence *affords no inference that they accepted or continued in employment in reliance upon its terms*. In such a situation, the meaning intended by the drafter, the employer, is controlling and there is no reason to infer that the employer intended to surrender its power to determine whether facts

> constituting cause for termination exist. Nor is there evidence of extrinsic agreement, practice or mutual understanding to that effect. In the absence of any evidence of express or implied agreement whereby the employer contracted away its fact-finding prerogative to some other arbiter, we shall not infer it.

643 P.2d at 1297 (Emphasis added).

In adopting the *Simpson* approach for giving a degree of contractual effect to employer declarations in handbooks, the *Vargas* Court explained:

> In comparatively recent years, Oregon and many other jurisdictions including Nevada, have crafted exceptions to the common law at-will doctrine in order to give contractual effect to company termination policies upon which employees rely. *Unfortunately, such exceptions have spawned the additional task of defining the extent to which employees should be afforded traditional contract rights in connection with that reliance.*

111 Nev. at 1074-1075, 901 P.2d at 699. (*Emphasis added*).

The *Vargas* Court further recognized "There are obvious policy concerns implicated in treating an employment contract implied from an employee manual *in the same manner as a negotiated contract.*" *Id.* at 1075, 901 P.2d at 699. Agreeing with the Oregon Court of Appeals that an employer's unilateral declaration in an employee handbook should not be construed as contracting away the employer's fact-finding prerogative the *Vargas* Court held:

> We believe that a qualified *Simpson* approach strikes the proper balance between a recognition of the legitimate business judgment of employers and the contractual rights of employees impliedly or expressly grounded in employee handbooks and other forms of evidence of continuing employment. Therefore, absent substantial evidence of an express or implied agreement contracting away its

> fact-finding prerogatives to some other arbiter, the employer is the ultimate finder of facts constituting good cause for termination.

Id.

Three (3) years after this Court's decision in *Vargas*, the California Supreme Court adopted the same definition of "just cause" for such implied contracts in *Cotran v. Rollins Hudig Hall International, Inc.*, 69 Cal. Rptr. 2nd 900, 948 P.2d 412 (1998). However, even the California Supreme Court recognized at the time of its adoption that it was limited to implied promises. Footnote 1 to the opinion states "[w]rongful termination claims founded on an explicit promise that termination will not occur except for just or good cause may call for a different standard, depending upon the precise terms of the contract provision." 69 Cal. Rptr. 2d 900, 948 P.2d 412. Justice Mosk in his concurring opinion specifically noted "nothing in the majority opinion is intended to alter the different manner in which the term "good cause" is construed by arbitrators pursuant to a collective bargaining agreement". 69 Cal. Rptr. 2nd at 912, 948 P.2d at 424.

However, after the adoption of the *Simpson/Vargas/Cotran* definition of just cause, trial courts began making the same mistake made in *O'Keefe*; they assumed this definition of just cause applied in all contexts. As a result, the Oregon appellate court, which developed the legal theory in *Simpson* upon which *Vargas* was based, was subsequently forced to reject application of this standard

to traditional contracts. As explained by the Oregon Court of Appeals in *Janoff, DDS v. Gentle Dental, P.C.*, 986 P.2d 1278 (Or. App. 1999):

> The obvious, and decisive, distinction between *Simpson* and this case is that plaintiff's right not to be terminated does not come from a unilaterally adopted employee handbook, which formed no basis of the employee's decision to accept employment, but from a bilateral employment contract that the parties executed as part of the hiring process. In that contract, defendant gave up its prerogative to make factual determinations about termination in a way that the employer in *Simpson* did not. Under paragraph 5 of that contract, defendant may terminate plaintiff before the contract's natural expiration only if he "consistently fails" to render proper treatment or to adhere to written policies. There is no reason to treat that contract differently from every other contract, including plaintiff's right to a judicial determination of all factual issues related to whether he had consistently failed to do what the contract required or whether, in contrast, defendant breached its provisions when it terminated his employment.

986 P.2d at 1280. Similarly, the California Court of Appeals in *Khajavi v. Feather River Anesthesia Medical Group*, 84 Cal. JA. 4th 32, 100 Cal.Rptr.2nd 627 (2000) held *Cotran*'s approach was limited to "implied-employment agreements" and not traditional contracts. 84 Cal. App. 4th at 57-58, 100 Cal. Rptr. 2nd at 645-646.

In *Vetter v. Cam Wall Electric Cooperative, Inc.*, 711 N.W.2d 612 (2006) the Supreme Court of South Dakota held that the *Vargas/Cotran* "just cause" standard would not be applied where a collective bargaining agreement negotiated by the parties stated that the employer was empowered to "reprimand, suspend, discharge or otherwise discipline employees for cause."

The entire premise of the holding in *Vargas* was that a unilateral declaration by an employer in an employee handbook that it would not discharge an otherwise private sector at will employee without cause, without more, did not permit a second-level fact finder such as a jury to review the employer's decision. This was made clear by the Court in *Vargas* when it stated "Therefore, *absent substantial evidence of an express or implied agreement contracting away its fact-finding prerogatives to some other arbiter*, the employer is the ultimate finder of facts constituting good cause for termination." 111 Nev. at 1075, 901 P.2d at 700 (*Emphasis added*).

This rationale from private sector contract law has no application to appeals of disciplinary action in the classified service of the State of Nevada. The right of Charles Rocha not to be suspended, demoted or dismissed without just cause did not arise from a unilateral declaration by DHHS; rather, such job protections are statutorily conferred by the Legislature under NRS 284.390(1) and (7).

Moreover, unlike the private sector where a unilateral promise, without more, will not be deemed to contract away the employer's "fact-finding prerogatives to some other arbiter", the Nevada Legislature has statutorily removed the ultimate fact-finding prerogative from the appointing authority and vested it with State Hearing Officers pursuant to NRS 284.390, and now arbitrators under the 2019 amendments to NRS Chapter 288. See NRS 288.505(3) (permitting employees who are suspended, demoted or dismissed to elect to

appeal under the grievance and arbitration mechanism of a collective bargaining agreement or NRS 284.390). [11]

The just cause language now found in NRS 284.390(7) was adopted in 1973 some twenty two (22) years before *Vargas*. See *1973 Statutes of Nevada, Page 590* (Chapter 414, SB 173). In 1973 members of the classified service of the State of Nevada did not have collective-bargaining rights like their local government counterparts under Nevada's Employee Management Relations Act, NRS Chapter 288, passed in 1969.[12] Thus, the Legislature provided through Chapter 284 for the same type of rights as local government employees received through collective bargaining. NAC Chapter 284 provides for a grievance process for lesser discipline up through and including written reprimands. See NAC 284.658 through 284.697. Hearing Officers serve the same purpose in deciding the issue of just cause for suspensions, demotions and dismissals that labor arbitrators do in the unionized workplaces.

There is nothing in the legislative history to suggest that the Legislature intended the term "just cause" in 1973 to mean anything different than what it meant for other employees who have the issue of just cause decided by a neutral third party. The Legislature in NRS 284.390 clearly was utilizing the term "just

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[11] As addressed below, such a removal of the ultimate fact-finding prerogative is required by federal constitutional law.

[12] This changed in the 2019 Legislative session.

cause" as that term was understood under the industrial common law to include a full de novo review without any deference to the employer. Thus, *O'Keefe*'s revision of this standard, in a case where that issue was not squarely before the Court, and under circumstances where the issue was not adequately briefed before the Court of Appeals or Supreme Court, was unwarranted.

As set forth above, in 2019 the Nevada Legislature, the extended collective bargaining to the employees of the Executive Department of the State of Nevada. In doing so it enacted NRS 288.505(3) which states:

> An employee in a bargaining unit who has been dismissed, demoted or suspended may pursue a grievance related to that dismissal, demotion or suspension through:
>
> (a) The procedure provided in the agreement pursuant to paragraph (a) of subsection 1; or
>
> (b) The procedure prescribed by NRS 284.390,

The "procedure provided" pursuant to paragraph (1)(a) is a grievance process which "culminates in final and binding arbitration".

Thus, any employee who elects to grieve a matter to arbitration will have their cases decided under the standard of "just cause" as that term is understood under the industrial common law developed by arbitrators since the beginning of the labor movement in the 1930s. It makes no sense to maintain a lesser standard under *O'Keefe* for those employees who exercise their statutory right not to join a union as the outcome of a case should not depend upon the forum chosen.

C. The *O'Keefe* Court Never Considered The Constitutional Implications Of Its Decision.

Unlike the private sector out of which *Vargas* was decided, public sector employment is fundamentally different. Where, as here, members of the classified service of the State of Nevada may only be dismissed for "just cause", this creates a property interest in their employment subject to the 14th Amendment's Due Process Clause. *Cleveland Court Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985).

Because Rocha's only received an informal pre-termination hearing, his right to a post-termination evidentiary hearing was not dependent upon NRS 284.390; it was required by constitutional due process. As explained by the Court in *Loudermill*:

> The right to due process is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.

470 U.S. at 541, 105 S. Ct. at 1493. Where only an informal pre-termination hearing takes place, due process requires "a full post-termination hearing." 470 U.S. at 546, 105 S. Ct. at 1495. Due process further requires that this full evidentiary hearing be before a neutral third party. *Levine v. City of Alameda*, 595 F.3d 903, 906 (9th Cir. 2008).

In no other case where the State seeks to deprive a person of their liberty or property interests is a neutral decision maker instructed that they must defer to one party to a dispute. Except in cases where there are express statutory presumptions, judges and juries are not instructed to defer to one party to a case, and administrative law judges are not instructed to defer to one party or another in Worker's Compensation, Social Security cases, or any of the other innumerable disputes handled through the administrative law process.

In a hearing under NRS 284.390 the State, as represented by the appointing authority, is seeking to deprive an employee such as Charles Rocha of his property interest in his employment. The employee is seeking to preserve that property interest. By instructing Hearing Officers that they must defer to the appointing authority with regard to either the severity of the offense, or the appropriateness of the sanction, *O'Keefe* renders Hearing Officers less than fully neutral regard to an issue of deprivation of property. See *Smith v. Board of Horse Racing,* 288 Mont. 249, 956 P.2d 752 (1998) (due process violated where Horse Racing Board deferred to a steward's decision regarding disqualification); *Fusco v. Motto*, 649 F. Supp. 1486 (D. Conn. 1986) ("A court may not ignore dictates of due process and blindly defer to the decisions of agency heads").

O'Keefe further impermissibly alters the burden of proof. Every jurisdiction which has considered the issue has held that where the State seeks to deprive an employee of their property interest in their job, it is the State which bears the

burden of proof. *Brown v. City of Los Angeles*, 102 Cal.App 4th 155, 175, 125 Cal. Rptr. 2nd 474, 488 (2003); See also *In re: Grievance of Brown*, 177 Vt. 365, 865 A.2d 402, 406 (2004) ("The burden of proof to establish just cause existed is on the employer."); *Dallas County Civil Service Com'n v. Warren*, 988 S.W.2d 864, 871-872 (Tex. App. 1999) (Civil Service Commission violated due process rights by imposing burden of proof on the fired employee); *City of Albuquerque v. Chavez*, 125, N.M. 809, 965 P.2d 928, 931-932 (1998) (Due process violated by placing the burden of proof on employee at initial post-termination hearing); *Pierce v. Douglas County Civil Service Commission*, 275 Neb. 722, 748 N.W.2d 660 (2008); *Thompson v. New Orleans Police Department*, 844 So.2d 940 (La. App. 2003); *California Correctional Peace Officers Association v. State Personnel Board*, 10 Cal.4th 1133, 899 P.2d 79 (1995); *Department of Institutions v. Binchen*, 886 P.2d 700 (Colo. 1994).

The State's burden is more than simply demonstrating whether an employee violated a rule or regulation. The burden further encompasses a demonstration as to the seriousness of the offense and that the level of discipline given was warranted. By instructing Hearing Officers to defer to the appointing authority on these matters, *O'Keefe* impermissibly relieves the State of its burden.

DHHS has "Prohibitions and Penalties" which are approved by the Personnel Commission pursuant to NAC 284.742. (APP Vol. II at 221-230). Under these Prohibitions and Penalties there is a range of discipline for most

offenses. By way of example, "Any act or omission which causes mental or physical injury to a client or which places a client at risk of injury" for a first offense ranges from a written reprimand all the way to dismissal. (APP Vol. II at 225). It is not the employee who bears the burden of establishing that it should be a written reprimand; it is the State which bears the burden of establishing that the facts support dismissal (or whatever other level of discipline is imposed).

Finally, by incorporating the *Vargas* definition of just cause *O'Keefe* impermissibly lowers the standard of proof below that which due process requires. *Vargas* utilizes a *substantial evidence* standard. As explained by the United States Supreme Court in *Addington v. Texas*:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."

141 U.S. 418, 423, 99 S. Ct. 1804, 1808 (1979).

As recognized in *Nassiri v. Chiropractic Physicians' Board of Nevada*, 130 Nev. 245, 327 P.3d 487 (2014) is no standard lower than a preponderance of the evidence standard. There is no reason that an employee could be deprived of their property interest in their employment based upon a substantial evidence standard. As astutely recognized in footnote 3 to *Nassiri*, to allow a substantial evidence standard to be utilized would mean that a person may lose their property interest

in their employment "even after reasoning that the conclusion is more likely to be incorrect than it is to be correct".

CONCLUSION

For all of the reasons set forth above, the judgment of the district court granting judicial review and remanding the matter back to the Hearing Officer reevaluate the case under a standard different than that utilized in his initial Decision of September 18, 2019 must be *reversed.*

If the reversal is based upon a lack of subject matter jurisdiction by the district court due to the failure to serve the agency and other parties, the matter should be remanded back to the district court with instructions to *dismiss* DHHS' Petition for Judicial Review.

If the reversal is based upon any of the other assignments of error set forth in this Brief, the matter should be remanded back to the district court with instructions to *deny* DHHS' Petition for Judicial Review.

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Under either scenario Charles Roca should be ordered reinstated with full back pay as provided for under NRS 284.390(7).

DATED this 16th day of August 2021.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28(e) AND NRAP 32(a)(8)

I hereby certify that I have read this Appellant's Opening 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 Appellant's Opening Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e), which requires every assertion in the regarding any material issue which may have been overlooked to be supported by a reference to the page of the transcript or appendix where the matter overlooked is to be found.

I further certify that this Appellant's Opening Brief is formatted in compliance with NRAP 32(a)(4-6) as it has one (1) inch margins and uses New Times Roman - font size 14 has 57 pages, double-spaced, and contains 12,867 words. I understand that I may be subject to sanction in the event that the accompanying Appellant's Opening Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of August 2021.

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