

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES ROCHA

Appellant,

v.

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

Respondent.

Case No.: 82485

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

Electronically Filed  
Aug 17 2021 08:59 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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**JOINT APPENDIX**

**VOLUME II of II**

**Part 1 of 3**

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Appeal from the Eighth Judicial District Court  
Case. No. A-19-804209-J

DANIEL MARKS, ESQ.  
Nevada State Bar No. 002003  
ADAM LEVINE, ESQ.  
Nevada State Bar No. 004673  
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OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT  
OF HEALTH AND HUMAN SERVICES  
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*Attorneys for Respondent*

///

	<u>Description</u>	<u>Vol(s)</u>	<u>Pg(s)</u>
1.	Register of Actions	I	ROCHA000001- ROCHA000002
2.	Petition for Judicial Review 10/23/2019	I	ROCHA000004- ROCHA000007
2A.	Petitioner's Motion to Stay	I	ROCHA000007A- ROCHA00007K
3.	Statement of Intent to Participate 11/11/2019	I	ROCHA000008- ROCHA000009
4.	Transmittal of Record on Appeal 02/04/2020	I-II	ROCHA000010- ROCHA000219
5.	Petitioner's Opening Brief 03/09/2020	II	ROCHA000228- ROCHA000292
6.	Respondent's Reply Memorandum of Points and Authorities 04/13/20	II	ROCHA000293- ROCHA000310
7.	Petitioner's Reply Brief 05/07/2020	II	ROCHA000311- ROCHA000318
8.	Findings of Facts, Conclusions of law, Decision and Order on Petition for Judicial Review 07/01/2020	II	ROCHA000319- ROCHA000320
9.	/Notice of Entry of Order 07/20/2020 /	II	ROCHA000321- ROCHA000325
10.	Substitution of Attorney 02/11/2021	II	ROCHA000326- ROCHA000328

	<u>Description</u>	<u>Vol(s)</u>	<u>Pg(s)</u>
11.	Respondent Charles Rocha's Supplement to the Record Following Remand from District Court 02/11/2021	II	ROCHA000329-ROCHA000354
12.	Notice of Appeal 02/11/2021	II	ROCHA000355-ROCH000362

**CERTIFICATE OF SERVICE BY ELECTRONIC MEANS**

I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 17<sup>th</sup> day of August 2021, I did serve the above and forgoing JOINT 7APPENDIX Volume II of II (Part 1 of 3) by way of Notice of Electronic Filing provided by the court mandated E-Flex filing service, upon the Respondents at the following:

AARON D. FORD, ESQ., Attorney General  
SUSANNE M. SLIWA, ESQ., Deputy Attorney General  
Nevada State Bar No. 4753  
OFFICE OF THE ATTORNEY GENERAL DEPARTMENT  
OF HEALTH AND HUMAN SERVICES  
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*Attorneys for Respondent*

/s/Joi E. Harper  
\_\_\_\_\_  
An employee of the  
LAW OFFICE OF DANIEL MARKS

# EXHIBIT 4

Employee EXHIBIT 4

## DEPARTMENT OF HUMAN RESOURCES

### INCOMPATIBLE ACTIVITIES, PROHIBITIONS, AND PENALTIES

The following is a guide for employees of the Department of Human Resources identifying those activities which will be considered inconsistent, incompatible, or in conflict with their duties as employees and will be cause for disciplinary action. In compliance with the Nevada Administrative Code 284.742, it is meant as a supplement and does not attempt to cover all possible violations of the existing rules nor does it preclude other prohibitions and penalties as contained in the Nevada Administrative Code. It is to be used to assist the supervisor in taking appropriate corrective disciplinary action. The extent of progressive discipline will be at the discretion of the appointing authority and should be in proportion to the seriousness of the offense.

#### CODE DESCRIPTION

1. Warning - may be oral or written.
2. Reprimand - written, use Form NPD-52.
3. Suspension - may be for a period of from one (1) working day to thirty (30) calendar days.  
NPD-41
4. Demotion - reduction in the class level the employee currently occupies. NPD-41
5. Dismissal - termination. NPD-41

If a supervisor recommends disciplinary action of a permanent classified employee to codes 3, 4 or 5 above, the pre-disciplinary hearing guidelines must be followed.

#### A. FRAUD IN SECURING APPOINTMENT

	1st <u>OFFENSE</u>	2nd <u>OFFENSE</u>	3rd <u>OFFENSE</u>
1. Willful falsification of application for employment or other personal records with respect to a material point, which would have adversely affected selection for appointment.	5 .....	.....	.....
2. Permitting another person to take a portion of a State Civil Service examination for him/her, except when approved due to disability such as blindness.	5 .....	.....	.....

B. PERFORMANCE ON THE JOB

	<u>1st OFFENSE</u>	<u>2nd OFFENSE</u>	<u>3rd OFFENSE</u>
1. Failure of an employee, who is designated as a supervisor to fulfill their supervisory responsibilities, including but not limited to taking corrective disciplinary action where such action is needed, preparing timely reports of performance and accounting for employees time.	1,2....	2, 3....	4, 5....
2. Misconduct of supervisor because of prejudice, anger or other unjustifiable reason.	1, 2, 3, 4	2, 3, 4, 5	4, 5....
3. Failure of employee to maintain performance standards after reasonable period of instruction.	1, 2, 3..	2, 3....	4, 5....
4. Failure to maintain prescribed records.	1, 2, 3..	2, 3, 4, 5	5.....
5. Willfully withholding or concealing information regarding their job from official records or from supervisors or other persons having necessity for said information.	2, 3, 4, 5	3, 4, 5..	5.....
6. Negligent failure to disclose information related to job duties from official records or from supervisors or other persons having necessity for said information.	1, 2, 3..	3, 4, 5..	5.....
7. Endangering self, fellow employees, clients or public through careless or willful violation of agency policy as contained in performance standards, procedures and various federal and state laws, regulations and guidelines.	2, 3, 4, 5	3, 4, 5..	5.....
8. Failure to cooperate with other employees and/or supervisors.	1, 2, 3..	2, 3, 4, 5	5.....
9. Failure to properly account for state or federal funds where it is a known requirement of the position.	2, 3, 4, 5	3, 4, 5..	5.....
10. Negligent waste or loss of material, property or equipment.	1, 2, 3..	2, 3, 4, 5	4, 5....

		<u>1st OFFENSE</u>	<u>2nd OFFENSE</u>	<u>3rd OFFENSE</u>
11.	Willful destruction of or damage to state property.	2, 3, 4, 5	3, 4, 5 ..	5 .....
12.	Negligent destruction of or damage to state property.	1, 2, 3 ..	3, 4, 5 ..	5 .....
13.	Negligent destruction of state records.	1, 2, 3, 4	3, 4, 5 ..	5 .....
14.	Willful and unauthorized destruction of state records.	2, 3, 4, 5	3, 4, 5 ..	5 .....
15.	Soliciting or accepting a bribe for activities related to the employee's state employment.	5 .....	.....	.....
16.	Embezzlement or misappropriation of state funds or of other funds for personal gain which come into the employee's possession by reason of his/her official position.	5 .....	.....	.....
17. /	Willful falsification of any public record, including time sheets, travel vouchers and/or information in client or agency files.	2, 3, 4, 5	5 .....	.....
18. /	Negligent falsification of any public record, including time sheets, travel vouchers and/or information in client or agency files.	1, 2, 3, 4	3, 4, 5 ..	5 .....
19.	Willful falsification of any public record that involves misuse of state or federal funds.	2, 3, 4, 5	5 .....	.....
20.	Unauthorized taking or using property belonging to the state/federal government or other employees.	2, 3, 4, 5	5 .....	.....
21.	Making personal profit from state transactions.	2, 3, 4, 5	5 .....	.....
22.	Deliberate failure to enforce or comply with laws and/or agency policies and regulations that directly relate to the employee's work activities.	2, 3, 4, 5	5 .....	.....

C. NEGLECT OF, OR INEXCUSABLE ABSENCE FROM THE JOB

	<u>1st OFFENSE</u>	<u>2nd OFFENSE</u>	<u>3rd OFFENSE</u>
1. Negligence in performing official duties including failure to follow instructions or regulations.	1, 2, 3 ..	2, 3, 4, 5	3, 4, 5 ..
2. "Loafing" on the job; wasting time; failure to put in a full days work.	1, 2, 3 ..	2, 3, 4, 5	3, 4, 5 ..
3. Failure to notify supervisor promptly when unable to report for work.	1, 2, 3 ..	2, 3, 4, 5	3, 4, 5 ..
4. Failure to report to work at specified times and in the prescribed manner.	1, 2, 3 ..	2, 3, 4, 5	3, 4, 5 ..
5. Carrying on personal business during working hours.	1, 2, 3 ..	2, 3, 4, 5	3, 4, 5 ..
6. Continual or frequent tardiness.	1, 2, 3 ..	2, 3, 4, 5	3, 4, 5 ..
7. Absence from duty without permission or without adequate justification.	1, 2, 3 ..	3, 4, 5 ..	5 .....
8. Willful absence from duty without permission after having been denied permission to take such leave.	3, 4, 5 ..	5 .....	.....
9. Use of sick leave for a reason not authorized by NAC 284.554.	2, 3, 4 ..	5 .....	.....
10. Failure to call in or report to work for three			
11. or more consecutive workdays without permission and without justification.	5 .....	.....	.....

D. RELATIONS WITH CLIENTS

	<u>1st OFFENSE</u>	<u>2nd OFFENSE</u>	<u>3rd OFFENSE</u>
1. Willfully abridging or denying the rights of a client as specified in NRS or agency policy.	2, 3, 4, 5	3, 4, 5 ..	5 .....
2. Negligently abridging or denying the rights of a client as specified in NRS or agency policy.	1, 2, 3, 4	3, 4, 5 ..	5 .....

		<u>1st OFFENSE</u>	<u>2nd OFFENSE</u>	<u>3rd OFFENSE</u>
3.	Borrowing items from a client, selling to or trading items with a client or entering into a transaction with a client involving the transfer of a client's property for personal use or gain.	2, 3, 4, 5	3, 4, 5 ..	5 .....
4.	Entering into a romantic or sexual relationship with any client of the employee's agency, facility or program when said employee is involved in the care, treatment or delivery of service to the client.	2, 3, 4, 5	3, 4, 5 ..	.....
5.	Using insulting, intimidating or abusive language to clients, neglecting clients, threatening or causing bodily harm to clients.	3, 4, 5 ..	5 .....	.....
6.	Having personal or business relationships with program participants, grantees or licensees for the purpose of, or which results in, any departmental program advantages, considerations or benefits to either party which exceeds normal entitlement.	2, 3, 4, 5	3, 4, 5 ..	5 .....
7.	Soliciting clients and/or agency contacts for the establishment or maintenance of a private professional practice similar to their work activities.	2, 3, 4, 5	3, 4, 5 ..	5 .....
8.	Any willful or reckless act of aggression directed towards a client, including, but not limited to, sexual exploitation of a client; grabbing, pushing, tripping, hitting or striking a client in any manner; or willful misuse of physical or chemical restraints not in accordance with an approved treatment plan or in violation of state or federal law.	5 .....		
9.	Any act or omission to act which causes mental or physical injury to a client or which places the client at risk of injury, including but not limited to the failure to: establish or carry out an appropriate plan of treatment for the client; provide the client required health care; provide a safe environment.	3,4,5 ..	5 .....	

		<u>1st OFFENSE</u>	<u>2nd OFFENSE</u>	<u>3rd OFFENSE</u>
10.	Failure to report suspected denial of client rights, client abuse or neglect.	2, 3, 4, 5	5 .....	
11.	Failure of an employee as mandated by law in their professional or occupational capacity to report child or elder abuse.	3, 4, 5 ..	5 .....	

E. RELATIONS WITH SUPERVISORS, FELLOW EMPLOYEES OR THE PUBLIC

		<u>1st OFFENSE</u>	<u>2nd OFFENSE</u>	<u>3rd OFFENSE</u>
1.	Refusal to comply with a reasonable and proper order or instruction from a supervisor.	2, 3, 4, 5	3, 4, 5 ..	5 .....
2.	Threatening, stalking, intimidating, attempting, or doing bodily harm to supervisor, public or fellow employee; or using insulting, intimidating or abusive language or conduct to supervisor, public or fellow employee.	2, 3, 4, 5	3, 4, 5 ..	5 .....
3.	Discourteous treatment of the public or a fellow employee.	1, 2, 3, 4, 5	2, 3, 4, 5	3, 4, 5 ..

F. USE OF ALCOHOLIC BEVERAGES, NARCOTICS OR HABIT FORMING DRUGS

		<u>1st OFFENSE</u>	<u>2nd OFFENSE</u>	<u>3rd OFFENSE</u>
1.	While on duty, consuming or being under the influence of alcohol, narcotics, drugs or other controlled substances unless prescribed by a physician.	3, 4, 5 ..	4, 5 ....	5 .....

		<u>1st OFFENSE</u>	<u>2nd OFFENSE</u>	<u>3rd OFFENSE</u>
2.	Convicted of driving under the influence as enumerated in NRS 484.379 or an offense where driving under the influence is an element, while driving a state vehicle at anytime or a privately owned vehicle on state business.	3, 4, 5 ..	5 .....	.....
3.	Drinking alcohol or taking any controlled substance during working hours unless in accordance with a prescription issued by a physician, podiatrist or dentist.	2, 3, 4, 5	3, 4, 5 ..	5 .....
4.	Bringing alcohol or controlled substances onto any agency grounds or any buildings occupied by clients (except employee's locked vehicle parked in a parking lot).	3, 4, 5 ..	5 .....	.....
5.	Selling, giving or otherwise providing clients or staff with intoxicating beverages, drugs or any controlled substances during working hours unless specifically authorized to do so.	3, 4, 5 ..	5 .....	.....
6.	Refusal to submit to a screening test for alcohol or drugs when the appointing authority has a reasonable belief, based on objective facts, the employee is under the influence of alcohol and/or a controlled substance while on duty.	5 .....		

G. MISUSE OF STATE PROPERTY

		<u>1st OFFENSE</u>	<u>2nd OFFENSE</u>	<u>3rd OFFENSE</u>
1.	Unauthorized use of state-owned or leased equipment.	1, 2, 3, 4, 5	3, 4, 5 ..	5 .....
2.	Operating state vehicle in negligent manner resulting in damage to the state equipment or other property.	1, 2, 3, 4, 5	2, 3, 4, 5	5 .....

	<u>1st OFFENSE</u>	<u>2nd OFFENSE</u>	<u>3rd OFFENSE</u>
3. Failure to have state equipment which is used as part of the employee's activities properly serviced, resulting in damage to the equipment.	1, 2, 3 ..	2, 3, 4, 5	5 .....
4. Operating state equipment without proper authorization or credentials.	2, 3, 4, 5	5 .....	.....
5. Negligently leaving state equipment or machinery which results in damage to the equipment or other property.	1, 2, 3, 4, 5	3, 4, 5 ..	5 .....

#### H. MISUSE OF INFORMATION TECHNOLOGY

	<u>1st OFFENSE</u>	<u>2nd OFFENSE</u>	<u>3rd OFFENSE</u>
1. Accessing or communicating data not pertaining to official job duties without authorization.	1, 2, 3, 4	2, 3, 4, 5	5 .....
2. Revealing passwords or using another person's user identification and/or password to allow access to confidential information for unauthorized purposes.	2, 3, 4 ..	3, 4 ....	5 .....
3. Installing or using personal or unauthorized software on state information technology resources without proper authorization and approval.	2, 3, 4 ..	3, 4 ....	5 .....
4. Making unauthorized copies such as books, manuals and computer software in violation of copyright laws or vendor licensing agreement.	2, 3, 4, 5	3, 4, 5 ..	5 .....
5. Using state information technology resources, including but not limited to computing and communications equipment, services or facilities for soliciting business, selling products or otherwise engaging in commercial activities.	2, 3, 4, 5	3, 4, 5 ..	5 .....

		<u>1st OFFENSE</u>	<u>2nd OFFENSE</u>	<u>3rd OFFENSE</u>
6.	Using state information technology resources to gain access and/or download from the Internet information not pertaining to official job duties without authorization, including, but not limited to, games, pornography or unauthorized software.	1, 2, 3, 4	2, 3, 4, 5	5 .....
7.	Knowing and willful sabotage of information technology resources, including but not limited to the introduction of computer viruses, system monitoring devices or devices that can cause damage or limit access to the equipment, operating systems, software or data.	5 .....	.....	.....
8.	Negligent use of information technology that results in the introduction of computer viruses, system monitoring devices or devices that can cause damage or limit access to the equipment, operating systems, software or data.	1, 2, 3 ..	3, 4, 5 ..	5 .....

L OTHER ACTS OF MISCONDUCT OR INCOMPATIBILITY

		<u>1st OFFENSE</u>	<u>2nd OFFENSE</u>	<u>3rd OFFENSE</u>
1.	Unauthorized bringing to agency grounds or buildings a firearm or other implement generally construed to be a weapon; unauthorized carrying a gun or weapon at any time while performing state duties.	2, 3, 4, 5	3, 4, 5 ..	.....
2.	Failure to report an accident involving state equipment assigned to an employee.	2, 3, 4, 5	3, 4, 5 ..	5 .....
3.	Improper disclosure of confidential information or theft of confidential written matter.	2, 3, 4, 5	3, 4, 5 ..	5 .....

		<u>1st OFFENSE</u>	<u>2nd OFFENSE</u>	<u>3rd OFFENSE</u>
4.	Conviction of any criminal act related to their work activity or conviction of any criminal act involving moral turpitude when it is related to the employee's work activity.	5 . . . . .	. . . . .	. . . . .
5.	Accepting gifts from any individual, firm or organization connected with department business when the employee is responsible for decisions or making recommendations for decisions affecting the activities of the individual, firm or organization. Exceptions would be, e.g., advertising samples, normal lunches, etc., which do not exceed \$10 in value.	2, 3, 4, 5	3, 4, 5 . .	. . . . .
6.	Releasing a paycheck before the appropriate time.	2 . . . . .	3 . . . . .	5 . . . . .
7.	Requesting, receiving and cashing a paycheck before the state's designated payday.	2 . . . . .	3 . . . . .	5 . . . . .
8.	Rendering of services or goods to recipients that is not in accordance with departmental or divisional policies.	2, 3, 4, 5	3, 4, 5 . .	5 . . . . .
9.	Refusal to undergo a criminal background check when it is required by law, regulation or agency policy.	5 . . . . .		
10.	Failure to disclose a criminal conviction when disclosure is required by law, regulation or agency policy.	2, 3, 4, 5	3, 4, 5 . .	5 . . . . .
11.	Failure to maintain a current occupational license or certification when possession of the occupational license or certification is a requirement of the job.	2, 3, 4, 5	3, 4, 5 . .	5 . . . . .
12.	Failure to maintain a valid driver's license when possession of a valid driver's license is a requirement of the job.	2, 3, 4, 5	3, 4, 5 . .	5 . . . . .
13.	Driving a state vehicle with an expired or revoked driver's license.	3, 4, 5 . .	5 . . . . .	



1 BEFORE THE NEVADA STATE PERSONNEL COMMISSION

2 HEARING OFFICER

3 CHARLES ROCHA,

4 Petitioner-Employee,

5 vs.

6 DEPARTMENT OF HEALTH AND HUMAN  
7 SERVICES,

8 Respondent-Employer.

Appeal No: 1914774-RZ

FILED

JUL 9 2019

APPEALS OFFICE

9 NOTICE OF RESETTING

10  
11 The hearing in the above entitled action originally scheduled to begin on July 10, 2019,  
12 has been rescheduled to August 23, 2019 at 9:00 a.m. at the following location:

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

16 On or before August 13, 2019, Pre-Hearing Statements must be served and filed setting  
17 forth the following matters in the following order:

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

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

6 If either party needs additional assistance of the Hearing Officer to resolve any  
7 disputes regarding this matter, please contact the Hearing Officer's designated assistant to  
8 schedule a conference call.

9 DATED this 9th day of July, 2019.

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13 ROBERT ZENITZ, ESQ.  
14 HEARING OFFICER  
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CHARLES ROCHA  
3710 JULIUS COURT  
LAS VEGAS NV 89129


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

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

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

Dated this 9th day of July, 2019.

Dated this 9th day of July, 2019.



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

BEFORE THE STATE OF NEVADA DEPARTMENT OF ADMINISTRATION

HEARING OFFICER

CHARLES ROCHA,

Petitioner,

vs.

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

Respondent.

Case No. 1914774-RZ

FILED

JUL 9 2019

APPEALS OFFICE

**STIPULATED CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER**

In consideration of the covenants and conditions contained herein, Petitioner-Employee, CHARLES ROCHA (hereinafter Employee), and Respondent-Employer, STATE OF NEVADA, ex rel, its DEPARTMENT OF HEALTH AND HUMAN SERVICES; DIVISION OF PUBLIC AND BEHAVIORAL HEALTH (hereinafter Employer) and hereby agree and stipulate as follows:

1. The Employer and the Employee enter into this Stipulated Confidentiality Agreement and Protective Order to establish procedures for the handling of documents and tangible things, specifically video of an incident of October, 13, 2018, involving a client of Southern Nevada Adult Mental Health Services' Stein Hospital.
2. The Employer shall produce a copy of the incident video to counsel for the Employee
3. The Employee and counsel agree that the video shall only be used for purposes of this personnel appeal (Case No. 1914774-RZ) and shall only be distributed or shown to:
  - a) counsel of record for Employer;
  - b) counsel of record for Employee;
  - c) the non-technical and clerical staff employed by counsel of record;
  - d) interpreters and copying services employed by counsel of record's employerto the extent reasonably necessary to render professional services in this case;

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- 1 e) any private court reporter retained by counsel for depositions in this case;  
2 f) persons retained by counsel to serve as expert witnesses or consultants in this  
3 case (upon execution of the Acknowledgment governing this Protective Order); and  
4 g) personnel of the Court and Hearing Office.

5 Dated this 25<sup>th</sup> day of June, 2019.

6 Dated: Angela J. Lizada 6/12/2019  
7 ANGELA J. LIZADA, Esq.  
8 Lizada Law Firm  
9 711 S. Ninth Street  
10 Las Vegas, NV 89101  
11 Attorney for Employee

12 Dated: Susanne M. Sliva  
13 SUSANNE M. SLIWA  
14 Senior Deputy Attorney General  
15 555 East Washington Ave., Ste. 3900  
16 Las Vegas, NV 89101  
17 Attorney for Employer

18 ORDER

19 IT IS SO ORDERED.

20 Dated this 9<sup>th</sup> day of July, 2019.

21   
22 ROBERT ZENTZ, Esq.  
23 HEARING OFFICER  
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SUSANNE M SLIWA ESQ  
SENIOR DEPUTY ATTORNEY GENERAL  
OFFICE OF THE ATTORNEY GENERAL  
555 E WASHINGTON AVE STE 3900  
LAS VEGAS NV 89101

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

1 BEFORE THE NEVADA STATE PERSONNEL COMMISSION

2 HEARING OFFICER

FILED

JUN - 3 2019

3 CHARLES ROCHA,

4 Petitioner-Employee,

5 vs.

6 DEPARTMENT OF HEALTH AND HUMAN  
7 SERVICES,

8 Respondent-Employer.

Appeal No: 1914774-RZ

APPEALS OFFICE

9  
10 NOTICE OF HEARING

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15 Las Vegas, Nevada 89102

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17 forth the following matters in the following order:

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

DOL011

00227

ROCHA000238

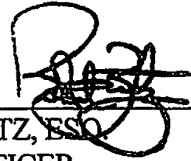
1 A hard copy of the Pre-Hearing Statement and any Exhibits must be filed with the State of  
2 Nevada Department of Administration at 2200 South Rancho Drive, Suite 220, Las Vegas,  
3 Nevada, 89102. Pre-Hearing Statements and Exhibits must be served upon the opposing party.  
4 In addition, an electronic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

6 If either party needs the Hearing Officer to issue Subpoenas, the Subpoenas must be  
7 presented for issuance to the Hearing Officer's designated assistant no later than June 26, 2019.  
8

9 Motions must be filed no later than June 10, 2019.

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

13 DATED this 3rd day of June, 2019.

14  
15   
16 \_\_\_\_\_  
17 ROBERT ZENTZ, ESQ.  
18 HEARING OFFICER  
19  
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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 NOTICE OF HEARING was duly mailed, postage prepaid, OR transmitted via  
interoffice mail to the following:

5 CHARLES ROCHA  
6 3710 JULIUS COURT  
LAS VEGAS NV 89129

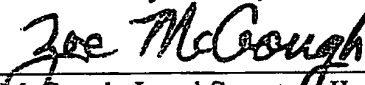
7 ANGELA LIZADA ESQ  
8 LIZADA LAW FIRM LTD  
9 501 S 7TH ST  
LAS VEGAS NV 89101

10 DEPARTMENT OF HEALTH AND HUMAN SERVICES  
11 RICHARD WHITLEY, DIRECTOR  
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  
16 1321 JONES BLVD  
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 3rd day of June, 2019.

21   
22 Zoe McGough, Legal Secretary II  
23 Employee of the State of Nevada  
24  
25  
26  
27  
28

1 BEFORE THE NEVADA STATE PERSONNEL COMMISSION

2 HEARING OFFICER

**FILED**

3 APR 22 2019

4 CHARLES ROCHA,

5 Petitioner-Employee,

6 vs.

7 DEPARTMENT OF HEALTH AND HUMAN  
SERVICES,

8 Respondent-Employer.

Appeal No: 1914774-RZ

APPEALS OFFICE

9 NOTICE OF EARLY CASE CONFERENCE

10 A telephonic Early Case Conference has been scheduled for May 7, 2019, at 10:30 a.m.

11 Please use the following conference call information to participate:

12 **DIAL IN NUMBER 702-800-3190**

13  
14 I request that counsel be prepared to discuss scheduling, discovery issues and any other  
15 matters either side wants to discuss.  
16

17 **Dated** this 22nd day of April, 2019.

18  
19  
20   
21 ROBERT ZENTZ, ESQ.  
22 HEARINGS OFFICER  
23  
24  
25  
26  
27  
28

DOC 012


1 CERTIFICATE OF SERVICE

2 I hereby certify that service of the foregoing NOTICE OF EARLY CASE  
3 CONFERENCE, was made via e-mail only as follows:

4 JEANINE LAKE  
5 AFSCME LOCAL 4041  
6 601 S RANCHO DR #C-24  
7 LAS VEGAS NV 89106  
8 [jeanine@afscme.org](mailto:jeanine@afscme.org)

9 SUSANNE M SLIWA ESQ  
10 DEPUTY ATTORNEY GENERAL  
11 555 E WASHINGTON AVE STE 3900  
12 LAS VEGAS NV 89101  
13 [ssliwa@ag.nv.gov](mailto:ssliwa@ag.nv.gov)

14 Dated this 22<sup>nd</sup> day of April, 2019.

15   
16 Zoe McGough, Legal Secretary  
17 Employee of the State of Nevada  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Steve Sisolak  
Governor



Deonne E. Contin  
Director

Michelle Morgando, Esc  
Senior Appeals Office

Northern Nevada:  
Hearing Office  
1050 E. Williams St. Ste. 400  
Carson City, Nevada 89701  
(775) 687-8440 | Fax (775) 687-8441

Appeals Office  
1050 E. Williams St. Ste. 450  
Carson City, Nevada 89701  
(775) 687-8420 | Fax (775) 687-8421

STATE OF NEVADA  
DEPARTMENT OF ADMINISTRATION

*Hearings Division*

<http://hearings.nv.gov/>

Southern Nevada:  
Hearing Office  
2200 S. Rancho Drive, Ste. 21  
Las Vegas, Nevada 8910  
(702) 486-2525 | Fax (702) 486-287

Appeals Office  
2200 S. Rancho Drive, Ste. 22  
Las Vegas, Nevada 8910  
(702) 486-2527 | Fax (702) 486-255

April 16, 2019

Jeanine Lake  
Afsome Local 4041  
601 S Rancho Dr #C-24  
Las Vegas, NV 89106

Susanne Sliwa, Senior Deputy Attorney General  
Office of the Attorney General  
555 East Washington Ave., Suite 3900  
Las Vegas, NV 89101

RE: Charles Rocha vs Department Of Health And Human Services 1914774-RZ

Dear Mses. Lake and Sliwa:

The State of Nevada Hearings Division has assigned this matter to Robert Zentz, to serve as the Hearing Officer in this matter.

We will schedule an Early Case Conference to discuss the case and to arrange a mutually convenient time for the hearing. Services for preparation of audio recording of the hearing will be provided. However, court reporters may be used in such proceedings, upon the request of either party and at the party or parties' own expense.

I am the assistant assigned to this file. If you have any questions or concerns, please contact me at 702-486-2532 or [zmcgough@admin.nv.gov](mailto:zmcgough@admin.nv.gov).

Sincerely,

A handwritten signature in black ink that reads "Zoe McGough".

Zoe McGough  
Judicial Assistant

cc: Charles Rocha: [crocha68@yahoo.com](mailto:crocha68@yahoo.com)  
Richard Whitley: [rwhitley@health.nv.gov](mailto:rwhitley@health.nv.gov)  
Jackie Arellano, Personnel Officer II: [jarellano@health.nv.gov](mailto:jarellano@health.nv.gov)

DOC013

00232

ROCHA000243

Steve Sisolak  
Governor



Deonne E. Contreras  
Director

Michelle Morgando, Esq.  
Senior Appeals Officer

Northern Nevada:  
Hearing Office  
1050 E. Williams St. Ste. 400  
Carson City, Nevada 89701  
(775) 687-8440 | Fax (775) 687-8441

Appeals Office  
1050 E. Williams St. Ste. 450  
Carson City, Nevada 89701  
(775) 687-8420 | Fax (775) 687-8421

STATE OF NEVADA  
DEPARTMENT OF ADMINISTRATION  
*Hearings Division*  
<http://hearings.nv.gov/>

Southern Nevada:  
Hearing Office  
2200 S. Rancho Drive, Ste. 21  
Las Vegas, Nevada 89102  
(702) 486-2525 | Fax (702) 486-287

Appeals Office  
2200 S. Rancho Drive, Ste. 22  
Las Vegas, Nevada 89102  
(702) 486-2527 | Fax (702) 486-255

April 5, 2019

Charles Rocha  
3710 Julius Court  
Las Vegas, NV 89129

Richard Whitley, Director  
Department Of Health And Human Services  
4150 Technology Way  
Carson City, NV 89706

RE: Charles Rocha vs Department Of Health And Human Services

Dear Messrs. Rocha and Whitley:

Please be advised that in response to Charles Rocha's request for a hearing received by our office on April 3, 2019, we are providing you a list of potential Hearing Officers, pursuant to NAC 284 and the Personnel Commission's *Hearing Officer Rules of Procedure*.

You may each strike one name from the list of potential Hearing Officers provided below. ***We suggest the appellant consult with his representative and the employer consult with the Office of the Attorney General prior to making a strike selection.*** Please indicate your strike by drawing a line through the person's name. Once you have made your choice please sign and date the strike list below.

Please return this strike list within 7 working days from receipt of this letter by either email to [zmccgough@admin.nv.gov](mailto:zmccgough@admin.nv.gov) or by faxing to our office at (702) 486-2555. If you do not choose to strike a name, the Hearing Officer will be selected based on our procedures.

DOC014

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ROCHA000244

**Strike one name:**

Cara Brown, Esq.

Mark Gentile, Esq.

Robert Zentz, Esq.

**Please complete the following:**

\_\_\_\_\_  
Sign

\_\_\_\_\_  
Date

\_\_\_\_\_  
Print Name

☐ Appellant ☐ Representative ☐ Employer ☐ DAG

\_\_\_\_\_  
Address

\_\_\_\_\_  
Address

\_\_\_\_\_  
Phone Number

\_\_\_\_\_  
Email Address

Thank you,



Zoe McGough  
Judicial Assistant

cc: Jeanine Lake: [jeanine@afscme.org](mailto:jeanine@afscme.org)

Jackie Arellano, Personnel Officer II: [jarellano@health.nv.gov](mailto:jarellano@health.nv.gov)

Linda C. Anderson, Chief Deputy Attorney General: [landerson@ag.nv.gov](mailto:landerson@ag.nv.gov)

Date Received:

**APPEAL OF  
DISMISSAL, SUSPENSION, DEMOTION,  
OR INVOLUNTARY TRANSFER**

**FILED**

**APR - 5 2019**

**APPEALS OFFICE**

This form is required for an employee or former employee to request a hearing to determine the reasonableness of his or her dismissal, suspension, demotion, or involuntary transfer.

**Appellant Information (required section)**

Name: Charles Rocha

Mailing Address:

3710 Julius Court

Las Vegas, Nevada 89129

Contact Phone: 708-248-0663

Email: crocha68@yahoo.com

Employee I.D. #: 48299

Department/Agency at time of Action: DHHS/Stein Forensic Hospital

**RECEIVED**

MAR 28 2019

NEVADA DIV. OF HR MANAGEMENT  
GRIEVANCES APPEALS  
CARSON CITY, NEVADA

**Appeal Information (required section)**

I am appealing the action of: ☒ Dismissal ☐ Suspension ☐ Demotion ☐ Involuntary Transfer

The effective date of the action was: 03/22/19

*Note: The appeal will be deemed timely if it is postmarked or received by the Administrator of the Division of Human Resource Management within the first 10 working days after the effective date of the action. This appeal form must be accompanied by the written notification of the appointing authority's decision regarding the proposed action provided to the employee pursuant to subsection 7 of NAC 284.6561.*

Immediately prior to the action, were you a permanent, classified, State employee? ☒ Yes ☐ No

*Note: Employees who were probationary, unclassified, or not employed by the Executive Branch or the Nevada System of Higher Education are not eligible to appeal the action.*

The remedy I seek is:

☒ For the dismissal, suspension or demotion to be set aside; and to be reinstated with full pay and benefits for the period the action was in effect.

☐ For the involuntary transfer to be set aside; to be returned to my former position; and if entitled, receive a per diem allowance and travel expenses paid for the period the transfer was in effect.

☐ Other: \_\_\_\_\_

*Note: "Other" remedies may not be within the jurisdiction of the hearing officer to grant.*

Briefly explain why you believe the action taken against you was not reasonable; in the case of an involuntary transfer, please explain how the transfer was made to discipline and/or harass you. Please reference any statute, regulation, policy, or procedure you believe was violated. Attachments may be added.

I was dismissed from the Stein Forensic Hospital on 03/22/19 for "patient mistreatment and/or abuse, patient endangerment and failure to follow policies". I disagree with this action and believe the state has neglected to consider all of the extenuating circumstances which led to why I was dismissed over a physical altercation with a patient.

The incident with the patient in question involved a number of Forensic Specialists and occurred on 10/13/18. This patient is a very aggressive, assaultive one who has attacked staff previously and even after the October incident. It took a number of staff to restrain him and to calm him down. This was after this patient physically assaulted me on that date. He hit me numerous times in the face and on my body while threatening my life and pinning me down. As I said, it took a number of co-workers to assist with restraining this patient and helping me get free.

It should be noted that following my altercation with this patient, the treatment team for this individual found it necessary to have this patient in waist restraints whenever he is let out of his room. Prior to that, no restraints were used.

I believe that the agency decision to dismiss me was unfair and unnecessary. I believe that I have always been a dedicated employee who has worked very hard to become a supervisor and more importantly, the kind of employee the Division expects me to be. I believe that this disciplinary action is excessive and needs to be reversed.

**Appellant Representation (required section)**

You may represent yourself or be represented by an attorney or other person of your choosing. A representative may be designated at a later date. I choose to:

☐ Represent myself

☒ Designate the following representative to act on my behalf during the course of this appeal:

Name: Jeanine Lake-AFSCME Local 4041 Phone: 702-431-3113

Address: 601 S. Rancho, LV NV. 89106

Fax: 702-331-3066

**Signature (required section)**

By signing this form, you are requesting a hearing to determine the reasonableness of the action and affirming that the information you provided is true and correct.

Appellant Signature: Charles Rock Date: 3-28-19

**Appeal Instructions**

**General:** Permanent, classified State employees are eligible to file an appeal. Attachments to this form may be provided however, evidence and back-up documents need not be provided at this time; prior to the hearing, the clerk will send a request for any supporting material. If you have received a Specificity of Charges or written notice of involuntary transfer, *you must* attach it to this appeal. Notification of a hearing will be sent to you or your designated representative by regular mail.

The appeal procedures and statements made on this form do not include all of the rights available to an appellant. It is advisable to review NRS 284 and NAC 284 prior to requesting a hearing. Appeal hearings are open to the public and decisions by a hearing officer are public information.

**When to File an Appeal:** The appeal will be deemed timely filed if it is either postmarked or received by the Administrator of the Division of Human Resource Management during the period beginning on the first working day after the effective date of the action that is being appealed and ending on the 10<sup>th</sup> working day after the effective date. Appeals received before or after this period may be dismissed as untimely.

**Whistleblower Retaliation Appeal:** If you believe the action you are appealing was based on retaliation due to your disclosure of information concerning improper governmental action, please submit your appeal on the NPD-53 form, "Appeal of Whistleblower Retaliation Under the Provisions of NRS 281.641."

**Where to File an Appeal:** The appeal may be submitted by mail, email, fax or hand delivery. Please submit the appeal to:

Administrator, Division of Human Resource Management  
c/o Employee and Management Services  
100 N. Stewart St., Suite 200  
Carson City, Nevada 89701-4204  
Fax (775) 684-0118 Phone (775) 684-0135  
Email: HearingClerk@admin.nv.gov

SCHEDULED ON

APR 22 2019

HEARINGS DIVISION

1914770 - R 7

00237

ROCHA000248

STEVE SISOLAK  
Governor

RICHARD WHITLEY, MS  
Director, DHHS

STATE OF NEVADA



JULIE KOTCHEVAR  
Administrator, DPBH

HISAN AZZAM, M.D.  
Chief Medical Officer

DEPARTMENT OF HEALTH AND HUMAN SERVICES  
DIVISION OF PUBLIC AND BEHAVIORAL HEALTH

4150 Technology Way, Suite 300

Carson City, Nevada 89706

Telephone: (775) 684-4200 · Fax: (775) 684-4211

**CONFIDENTIAL**

*This is a confidential document. It is not intended that this document or the information within it be disseminated to other employees.*

March 19, 2019

Charles Rocha  
2412 Sage Point Circle  
Las Vegas, NV 89128

Dear Mr. Rocha:

In response to the Pre-Disciplinary Hearing held on Monday, March 18, 2019, I have discussed your case with the Southern Adult Mental Health Services (SNAMHS) Outpatient Administrator. After due consideration of the available facts and the information you presented during the hearing, I concur with the recommended disciplinary action as proposed in the Specificity of Charges (NPD-41) you received on March 7, 2019, as appropriate and shall remain with the effective date of March 22, 2019. This notice is being provided to you in accordance with Nevada Administrative Code (NAC) 284.656.

If you have any questions related to this matter or the disciplinary procedure, please contact SNAMHS Human Resource Officer, Jackie Arellano at (702) 486-0444 for assistance. You also have a right to appeal this decision with the Division of Human Resource Management in accordance with Nevada Revised Statute (NRS) 284.390.

Sincerely,

A handwritten signature in black ink, appearing to read "Julie Kotchevar".

Julie Kotchevar

Administrator, Division of Public and Behavioral Health

cc: Jackie L. Arellano, Personnel Officer II, DPBH, SNAMHS  
Susanne Sliwa, Deputy Attorney General

*Steven D. Grierson*

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](mailto: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 checked="" 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

*mke*

06/23/2020

ROCHA000250

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 29<sup>th</sup> of June, 2020.

20  
21         
22       KATHLEEN E. DELANEY  
23       DISTRICT COURT JUDGE

24       AARON D. FORD  
25       Attorney General

26       By: /s/ Susanne Sliwa  
27       Susanne M. Sliwa  
28       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)



SUPPL  
LAW OFFICE OF DANIEL MARKS  
DANIEL MARKS, ESQ.  
Nevada State Bar No. 002003  
office@danielmarks.net  
ADAM LEVINE, ESQ.  
Nevada State Bar No. 004673  
alevine@danielmarks.net  
610 South Ninth Street  
Las Vegas, Nevada 89101  
(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.

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 11<sup>th</sup> 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

12                                alevine@danielmarks.net

13                                610 South Ninth Street

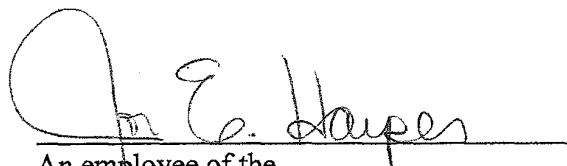
14                                Las Vegas, Nevada 89101

15                                Attorneys for Petitioner

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 11<sup>th</sup>  
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 RESPONDENT CHARLES ROCHA'S  
5 SUPPLEMENT TO THE RECORD FOLLOWING REMAND FROM DISTRICT COURT by way of  
6 Notice of Electronic Filing provided by the court mandated E-file & Serve system, to the e-mail  
7 address on file for:

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

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24  
  
An employee of the  
LAW OFFICE OF DANIEL MARKS

1 BEFORE THE NEVADA STATE PERSONNEL COMMISSION

2 HEARING OFFICER

3 FILED

4 JAN 12 2021

5 HEARINGS DIVISION

6 Charles Rocha,

7 Petitioner/Employee,

8 vs.

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

12 Respondent/Employer

) Case No.: 2106668-RZ

) FINDINGS OF FACT

) CONCLUSIONS OF LAW

) DECISION AND ORDER FOLLOWING

) REMAND FROM DISTRICT COURT

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

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

22 On December 9, 2020 a teleconference was conducted with Angela J. 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." *See 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  
17 the alleged violation;
- 18 2) whether the alleged violation is a serious violation of law or regulation that  
19 would make the most severe discipline appropriate for a first discipline; and
- 20 3) a deferential standard of review is utilized with regards to whether a  
21 termination is in the "good of public service."

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

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.<sup>1</sup>

2 Pursuant to *O'Keefe v. State*, a de novo review of the essential facts in this matter was  
3 conducted.<sup>2</sup> Patient abuse must be proven by a preponderance of the evidence that the  
4 act committed was both willful and unjustified.<sup>3</sup> 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-207  
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.<sup>4</sup>  
20  
21

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

25 <sup>2</sup> 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 <sup>3</sup> NRS 233B.121.9.

28 <sup>4</sup> 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.<sup>5</sup> 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

16           It is uncontroverted that the Employee while on the floor struggling with the Patient  
17 other employees arrived to assist and they were able to pull the Patient's right arm from  
18 the Employee's back. However, the Employee's right arm remained trapped between  
19 the Patient and the other employees. The Employee contends that the Patient was  
20 spitting in his face during this time, that the Employee was in fear for his life and that  
21 he hit the patient in an effort to break free, not to punish him.<sup>6</sup> The video clearly shows  
22 the Patient was moving his face toward the Employee's face and was in close to the  
23  
24

25           <sup>5</sup> 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  
had ample opportunity to do so.

27           <sup>6</sup> Spitting on another person is a battery as defined by NRS 200.481, see Hobbs v. State, 251 P.3d 177  
28 (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.<sup>7</sup>

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

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

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

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

27 <sup>8</sup> The Patient had to be restrained by employees for approximately 7 minutes and 5 employees were  
28 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  
24 **FINDINGS OF FACT**

- 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  
27 Revised Statutes, Nevada Administrative Code and Employer Regulations.  
28 2) The Employee willfully struck the Patient in the face twice on October 13, 2018.

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES ROCHA

Appellant,

v.

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

Respondent.

Case No.: 82485

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

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**JOINT APPENDIX**

**VOLUME II of II**

**Part 2 of 3**

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Appeal from the Eighth Judicial District Court  
Case. No. A-19-804209-J

DANIEL MARKS, ESQ.  
Nevada State Bar No. 002003  
ADAM LEVINE, ESQ.  
Nevada State Bar No. 004673  
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OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT  
OF HEALTH AND HUMAN SERVICES  
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*Attorneys for Respondent*

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	<b><u>Description</u></b>	<b><u>Vol(s)</u></b>	<b><u>Pg(s)</u></b>
1.	Register of Actions	I	ROCHA000001- ROCHA000002
2.	Petition for Judicial Review 10/23/2019	I	ROCHA000004- ROCHA000007
2A.	Petitioner's Motion to Stay	I	ROCHA000007A- ROCHA00007K
3.	Statement of Intent to Participate 11/11/2019	I	ROCHA000008- ROCHA000009
4.	Transmittal of Record on Appeal 02/04/2020	I-II	ROCHA000010- ROCHA000281
5.	Petitioner's Opening Brief 03/09/2020	II	ROCHA000282- ROCHA000292
6.	Respondent's Reply Memorandum of Points and Authorities 04/13/20	II	ROCHA000293- ROCHA000310
7.	Petitioner's Reply Brief 05/07/2020	II	ROCHA000311- ROCHA000318
8.	Findings of Facts, Conclusions of law, Decision and Order on Petition for Judicial Review 07/01/2020	II	ROCHA000319- ROCHA000320
9.	/Notice of Entry of Order 07/20/2020 /	II	ROCHA000321- ROCHA000325
10.	Substitution of Attorney 02/11/2021	II	ROCHA000326- ROCHA000328

	<b><u>Description</u></b>	<b><u>Vol(s)</u></b>	<b><u>Pg(s)</u></b>
11.	Respondent Charles Rocha's Supplement to the Record Following Remand from District Court 02/11/2021	II	ROCHA000329-ROCHA000354
12.	Notice of Appeal 02/11/2021	II	ROCHA000355-ROCH000362

**CERTIFICATE OF SERVICE BY ELECTRONIC MEANS**

I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 17<sup>th</sup> day of August 2021, I did serve the above and forgoing JOINT APPENDIX Volume II of II (Part 2 of 3) by way of Notice of Electronic Filing provided by the court mandated E-Flex filing service, upon the Respondents at the following:

AARON D. FORD, ESQ., Attorney General  
SUSANNE M. SLIWA, ESQ., Deputy Attorney General  
Nevada State Bar No. 4753  
OFFICE OF THE ATTORNEY GENERAL DEPARTMENT  
OF HEALTH AND HUMAN SERVICES  
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Las Vegas, Nevada 89101  
[ssliwa@ag.nv.gov](mailto:ssliwa@ag.nv.gov)  
*Attorneys for Respondent*

/s/Joi E. Harper  
\_\_\_\_\_  
An employee of the  
LAW OFFICE OF DANIEL MARKS

- 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

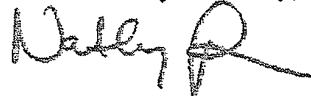
7 ANGELA LIZADA ESQ  
8 LIZADA LAW FIRM LTD  
9 711 S 9<sup>TH</sup> STREET  
LAS VEGAS NV 89101

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  
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16 1321 JONES BLVD  
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 12<sup>th</sup> day of January, 2020.

21 

22 Nataly Rann, Legal Secretary II  
23 Employee of the State of Nevada  
24  
25  
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27  
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ROCHA00009

ROCHA000263

1 ANGELA J. LIZADA, ESQ.  
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4 711 S. 9th Street  
5 Las Vegas, NV 89101  
6 (702) 979-4676  
7 Fax: (702) 979-4121  
8 Attorney for Employee

9  
10  
11  
12 **BEFORE THE NEVADA STATE PERSONNEL COMMISSION**  
13 **HEARING OFFICER**  
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19 CHARLES ROCHA,  
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21 Employee,  
22  
23 v.  
24

Case No.: 1914774-RZ

25 STATE OF NEVADA DEPARTMENT OF  
26 CORRECTIONS,  
27  
28 Employer.

**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.

19  
20  
21  
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**

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

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

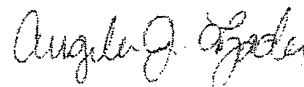
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13 NRS 289.055 required Employer to have written policies in place, but Employer did not  
14 have any such written policies in place. Further, NRS 289.060 and NRS 289.080 provide specific  
15 notice requirements and specify that those notice requirements are mandatory and must be  
16 followed to the letter. The Notice of Investigation was deficient pursuant to NRS 289 in this case,  
17 as it failed to: 1) provide an adequate summary of alleged misconduct to provide Employee with  
18 an opportunity to prepare for his interview; 2) inform Employee of his right to have two  
19 representatives of his choosing during an interview relating to the investigation; 3) state the name  
20 and rank of the officer in charge of the investigation and the officers who will conduct any  
21 interrogation or hearing; 4) provide the name of any other person who will be present at the  
22 interrogation or hearing; and 5) include a statement setting forth the provisions of subsection 1 of  
23 NRS 289.080 regarding the rights of the Employee to have two representatives of his choosing  
24 present during any phase of an interrogation.  
25  
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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."  
9

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*.  
12

13 DATED this 19th day of January, 2021.

14 LIZADA LAW FIRM, LTD.

15 

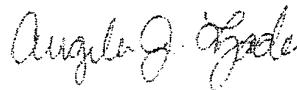
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17 ANGELA J. LIZADA, ESQ.  
18 Nevada Bar No. 11637  
19 711 S. 9th Street  
20 Las Vegas, NV 89101  
21 [angela@lizardalaw.com](mailto:angela@lizardalaw.com)  
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CERTIFICATE OF SERVICE

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  
nrann@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.

27 ///

28 ///

1 II. LEGAL ARGUMENT

2 A. Standard for Reconsideration

3 Petitions for reconsideration of administrative decisions are permitted pursuant to NRS  
4 233B.130(4). The Nevada Personnel Commission's Hearing Officer Rule of Procedure 11.7 allows a  
5 petition for reconsideration to be filed with the Hearing Officer within 15 calendar days after the date of  
6 service of the decision. A Hearing Officer is required to grant or deny such a petition at least five days  
7 before the expiration of the time for filing a petition for judicial review.

8 Reconsideration is appropriate where the Hearing Officer is presented with: (1) newly discovered  
9 evidence; (2) committed clear error; or (3) if there is an intervening change in controlling law. *See*  
10 *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999). In this case, the Employer submits that the  
11 Hearing Officer's Decision on Remand upholding the termination of the Employee does not meet any of  
12 the criteria for reconsideration.

13 B. The Hearing Officer Did Not Commit Clear Error.

14 The Hearing Officer was fully aware of and considered all the relevant facts in his Decision on  
15 Remand. The findings of fact were not changed as the Employee claims. The proper standard of review  
16 used in the Decision on Remand allows and mandates a different finding and decision when reviewing  
17 the same facts. The client abuse standard is a very different standard of review than the use of force  
18 standard that was used in the first Decision. The differences in the two standards merit different  
19 conclusions of law. There was no clear error or abuse of discretion.

20 C. The Peace Officer Bill of Rights Issue Has Been Waived.

21 The Employee has waived any arguments not raised at the hearing level. The Petition for  
22 Reconsideration is the first and only time that the Employee has raised the issue regarding the Peace  
23 Officer Bill of Rights. The Employee has had no less than *four* opportunities to raise that issue. It could  
24 have been raised at the administrative hearing level, in response to the Employer's Petition for  
25 Reconsideration, to the District Court during the Petition for Judicial Review process and prior to the  
26 Hearing Officer's Decision on Remand (after the District Court's decision). The issue was never raised.

27 ///

28 ///

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 25<sup>th</sup> day of January, 2021.

13  
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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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General and that on the 25<sup>th</sup> day of January, 2021, I served a copy of the foregoing **RESPONDENT-EMPLOYER'S RESPONSE TO EMPLOYEE'S PETITION FOR RECONSIDERATION** by email, and by also placing a copy of said document in the Nevada State Department of General Services for mailing addressed to:

Angela Lizada, Esq.  
LIZADA LAW FIRM, LTD.  
711 S. 9<sup>th</sup> Street  
Las Vegas, NV 89101  
[angela@lizadalaw.com](mailto:angela@lizadalaw.com)

Robert Zentz, Esq.  
Hearing Officer  
2200 S. Rancho Dr. Suite 220  
Las Vegas, NV 89102  
[nrann@admin.nv.gov](mailto:nrann@admin.nv.gov)

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

1 BEFORE THE NEVADA STATE PERSONNEL COMMISSION

2 HEARING OFFICER

3  
4 Charles Rocha, )

5 )  
6 Petitioner/Employee, ) Case No.: 2106668-RZ

7 vs. )

7 ) DECISION AND ORDER

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

10 )  
11 Respondent/Employer )

12 On January 19, 2021 Angela J. Lizada, Esq., Lizada Law Firm, Ltd for the  
13 Employee filed a Petition for Reconsideration of the undersigned's Decision and Order  
14 following remand the remand of the matter from the District Court. On January 26,  
15 2021 Susanne M. Sliwa, Esq., Senior Deputy Attorney General filed an Opposition to  
16 this Petition on behalf of the Employer.<sup>1</sup>

17  
18 The District Court Order found clear error in this Hearing Officer's application of  
19 the use of force standard for law enforcement as opposed to the proper standard for use  
20 of force policy by mental health employees amounting to patient abuse as alleged in  
21 this matter.

22  
23 Counsel for the Parties stipulated that the Hearing Officer's decision following the  
24 remand was limited to determining whether the termination was justified using the  
25 standard for patient abuse as charged on the NPD-41, not on the standard for the  
26

27  
28 <sup>1</sup> For this Petition and the Response, the Parties used Case No.: 1914774-RZ. Following remand from  
District Court a new case number was assigned. This decision and order are filed with Case No.:  
2106668-RZ

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.<sup>2</sup> 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 <sup>2</sup> 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.

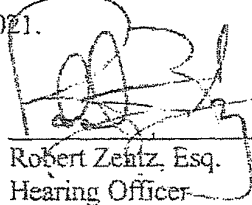
3  
4 **DECISION and ORDER**

5 Based upon foregoing and good cause appearing therefore,

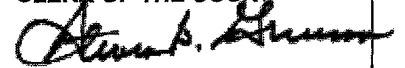
6 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

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

8 DATED this 3rd day of February 2021.

9  
10   
11 Robert Zehitz, 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.



1 **NOTC**

2 AARON D. FORD  
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13 Attorneys for State of Nevada,  
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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,

Petitioner,

22 vs.

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

27 Respondents.

Case No.: A-19-804209-J

Dept. No.: 25

28 **NOTICE OF ENTRY OF ORDER**

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

Respectfully submitted this 20<sup>th</sup> day of July, 2020

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

**CERTIFICATE OF SERVICE**

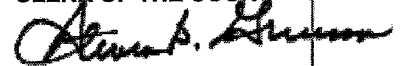
I hereby certify that I am an employee of the Office of the Attorney General and that on the 20<sup>th</sup> day of July, 2020, I served a copy of the foregoing NOTICE OF ENTRY OF ORDER by using the electronic filing system.

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

**EXHIBIT 1**

**EXHIBIT 1**

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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

ROCHA000280

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 29<sup>th</sup> of June, 2020.

  
KATHLEEN E. DELANEY  
DISTRICT COURT JUDGE

JG

AARON D. FORD  
Attorney General

24  
25 By: /s/ Susanne Sliwa  
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10  
11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

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

Case No.: A-19-804209-J

Dept. No.: 25

16 Petitioner,

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

20 Respondents.

21  
22 **PETITIONER'S OPENING BRIEF**

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ATTORNEY FOR PETITIONER

ATTORNEY FOR RESPONDENT

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**APPELLANT’S OPENING BRIEF**

COMES NOW Petitioner, STATE OF NEVADA ex rel. its DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF PUBLIC AND BEHAVIORAL HEALTH (hereinafter DPBH) by and through counsel, AARON D. FORD, Attorney General for the State of Nevada, and SUSANNE M. SLIWA, Deputy Attorney General, hereby submits Appellant’s Opening Brief, in support of its Petition for Judicial Review of the final decision of the Nevada State Personnel Commission Hearing Officer dated October 8, 2019.

**JURISDICTIONAL STATEMENT**

This Honorable Court has jurisdiction pursuant to NRS 233B.130(2)(b). This brief has been filed pursuant to Nevada Revised Statute (NRS) 233B.133(1). A Petition for Judicial Review was timely filed on October 23, 2019. The Petition was filed within 30 days of the Hearing Officer’s final determination dated October 4, 2019. The Record on Appeal in this matter was filed on February 4, 2020.

**ISSUES PRESENTED FOR REVIEW**

1. Did the Hearing Officer abuse his discretion or err as a matter of law ruling on a violation that was not charged in the NPD-41?
2. Did DPBH have just cause to terminate the Employee?
3. Did the Hearing Officer commit clear error by failing to apply a deferential standard to DPBH’s decision to terminate the Employee?

**I. STATEMENT OF THE CASE**

DPBH terminated the Respondent, Charles Rocha, from State service effective March 22, 2019. The Employee was terminated for actions that amounted to patient abuse. (ROA pp. 56, 169-174).

This matter went to hearing on August 23, 2019. The Hearing Officer’s Decision and Order filed September 18, 2019 overturned the termination. (ROA pp. 102-106). DPBH filed a Petition for Reconsideration. (ROA pp. 107-120) which was granted. However, the Hearing Officer did not change his decision. (ROA pp. 102-106).

///  
///

1 Pursuant to NRS 233B.130, the Hearing Officer's Decision on the Petition for Reconsideration is  
2 the final determination for the purposes of judicial review. DPBH filed a Petition for Judicial Review  
3 pursuant to NRS Chapter 233B on October 23, 2019.

4 On October 24, 2019 DPBH filed a Motion for Stay. That Motion was heard and granted on  
5 December 3, 2019. Petitioner DPBH now files this Opening Brief.

## 6 **II. STATEMENT OF FACTS**

7 At the time of his termination, the Employee was employed with DPBH as a Forensic Specialist  
8 (technician) IV and was working at Southern Nevada Adult Mental Health Services (SNAMHS).  
9 SNAMHS is a State Agency that provides both inpatient and outpatient services for persons with mental  
10 illness. The Employee was working in SNAMHS' forensic unit. While the forensic unit is commonly  
11 referred to as "Stein," it is a part of SNAMHS. It is not a separately licensed facility. SNAMHS' mission  
12 is to provide treatment for seriously mentally ill individuals. All staff working at SNAMHS, including  
13 those working in the forensic unit, must comply with hospital requirements for the provision of treatment.

14 The mission of the forensic unit at SNAMHS is to provide treatment to competency for criminal  
15 defendants. (ROA pp. 30, 40, 119) .Forensic Specialists are Category III Peace Officers pursuant to NRS  
16 289.240. However, Forensic Specialists are, first and foremost, Mental Health Technicians (MHTs).  
17 MHT's, including Forensic Technicians, must go through a vocational and educational certification  
18 program provided in conjunction with the Nevada System of Higher Education. NRS 433.279. MHT's  
19 carry out "procedures and techniques which involve cause and effect and which are used in the care,  
20 treatment and rehabilitation of persons with mental illness." NRS 433.279(4). As such, MHTs are an  
21 integral part of the treatment teams at SNAMHS, including the treatment teams in the forensic unit. This  
22 was stressed by Dr. Elizabeth Neighbors, Statewide Forensic Services Director and prior Agency  
23 Manager of Lakes Crossing Center, in her Declaration in support of DPBH's Motion for Stay. (ROA p.  
24 119).

25 On October 13, 2018, the Employee was involved in an altercation with a patient. (ROA p. 33).  
26 The Employee was attacked by that patient. The Employee admitted to twice punching the patient in the  
27 face during that altercation (ROA p. 36). The punches occurred after the patient had been subdued by  
28 the Employee and other staff and was on the floor. (ROA pp. 36-37).

1 The Employee was presented with a Specificity of Charges (NPD-41) for his termination on  
2 March 7, 2019. (ROA pp. 169-174). A pre-disciplinary hearing was held on March 18, 2019. The  
3 Employer upheld the termination. The Employee was notified of this in a letter dated March 19, 2019.  
4 (ROA p. 238).

5 The Employee timely appealed his dismissal to the Department of Administration Personnel  
6 Commission pursuant to NRS 284.390. A hearing was held on August 23, 2019 before Hearing Officer  
7 Robert Zentz, Esq. On September 18, 2019, the hearing officer entered his Findings of Fact, Conclusions  
8 of Law Decision and Order (Decision) which reversed the Employee's dismissal and restored him to his  
9 prior position as a Forensic Specialist IV with full back pay. (ROA pp. 107-120).

10 The Employer filed a Petition for Reconsideration on October 4, 2019. (ROA pp. 121-138). That  
11 Petition also contained a request to reopen the record due to the fact that the Hearing Officer applied a  
12 use of force standard rather than a patient abuse standard and that further evidence on that issue was  
13 justified. On October 8, 2019 the Hearing Officer granted the Petition for Reconsideration but did not  
14 change his ruling. He also denied the request to reopen the record. (ROA pp. 102-106).

15 Pursuant to NRS 233B.130, the Hearing Officer's Decision on the Petition for Reconsideration is  
16 the final determination for the purposes of judicial review. Any Petition for Judicial Review must be  
17 filed within 30 days after service of that October 8, 2019 decision. Petitioner DPBH timely filed a  
18 Petition for Judicial Review on October 23, 2019.

### 19 **III. ARGUMENT**

#### 20 **A. Standard of Review**

21 This Honorable Court's standard of review for this matter is set forth in NRS Chapter  
22 233B.135(3). This statutory section states:

23 The court shall not substitute its judgment for that of the agency as to the weight of  
24 evidence on a question of fact. The court may remand or affirm the final decision or set it  
25 aside in whole or in part if substantial rights of the petitioner have been prejudiced because  
the final decision of the agency is:

- 26 (a) In violation of constitutional or statutory provisions;
- 27 (b) In excess of the statutory authority of the agency;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;
- 28 (e) Clearly erroneous in view of the reliable, probative and substantial evidence on  
the whole record; or

1 (f) Arbitrary or capricious or characterized by abuse of discretion.

2 As used in this section, "substantial evidence" means evidence which a reasonable mind might  
3 accept as adequate to support a conclusion.

4 In *Nevada Industrial Commission et. al. v. Reese*, 93 Nev. 115, 560 P.2d 1352 (1977), it was held  
5 that, like the District Court, the Nevada Supreme Court reviews an appeals officer's decision for clear  
6 error or arbitrary abuse of discretion. The appeals officer's fact-based conclusions of law are entitled to  
7 deference, and they will not be disturbed if supported by substantial evidence. Further, the Court may  
8 not substitute its judgment for that of the appeals officer as to the weight of the evidence on a question  
9 of fact, and review is limited to the record before the appeals officer. Nonetheless, the Court  
10 independently reviews the appeals officer's purely legal determinations, including those of statutory  
11 construction.

12  
13 **B. The Hearing Officer Committed Clear Error By Ruling On a Violation that  
Was Not Charged**

14 In considering a Petition for Judicial Review, the Court shall not substitute its judgment for that  
15 of the agency regarding weight of evidence on a question of fact. NRS 233B.135(3). A final decision  
16 may be remanded, affirmed or set aside in whole or in part if substantial rights of the petitioner have been  
17 prejudiced due to several factors. Those factors include clear error in view of the reliable, probative and  
18 substantial evidence on the whole record. NRS 233B135(3)(e). In this case, the Hearing Officer applied  
19 a use of force analysis in what is clearly a patient abuse case. (ROA pp. 132-134, 136 ).

20 In the NPD-41, the Employee was charged with patient abuse. (ROA pp. 169-173). There was  
21 no charge of improper use of force. (ROA pp. 169-174). The Hearing Officer considered and ruled on  
22 a violation that was not charged. (ROA pp. 132-134, 136 ). This is clear error.

23 **C. DPBH Had Just Cause to Terminate the Employee**

24 The authority granted the Hearing Officer under NRS 284.390(6) is to determine whether the  
25 agency had just cause for the discipline "as provided in NRS 284.385." A dismissal for "just cause is one  
26 which is not for any arbitrary, capricious, or illegal reason and which is one based upon facts (1) supported  
27 by substantial evidence and (2) reasonably believed by the employer to be true." *Sw. Gas Corp. v. Vargas*,

1 111 Nev. 1064, 1077, 901 P.2d 693, 701 (1995). The testimony, video and documentary evidence  
2 presented at the hearing clearly demonstrated that DPBH had just cause to terminate the Employee.

3 The timing of the Employee's punching of the patient is crucial in this matter. The Employee  
4 struck the patient *after* the patient was on the floor and was being subdued by other staff members.  
5 The Employee, Investigator Linda Edwards and Personnel Officer II Jackie Arellano all testified to that  
6 fact. (ROA pp. 36-37, 45-49, 53-54). This can be clearly seen on the incident video. (ROA p. 220).<sup>1</sup>

7 Both Edwards and Arellano testified that the Employee's actions constituted patient abuse and  
8 violated DPBH Division Policy CCR-1.2 Prohibition of Abuse or Neglect of Consumers and Reporting  
9 Requirements. (ROA pp. 46-49, 55-57). That policy defines physical abuse as, among other things,  
10 hitting, and slapping. Abuse of patients is also prohibited by NRS 433.554(5).

11 Edwards testified that the Employee's punching of the patient constituted abuse and violated the  
12 policy. (ROA p. 48). She stated that the Employee had "no need" to punch the patient who had already  
13 been restrained. (ROA pp. 47, 49). She also stated that the punches constituted patient abuse and violated  
14 Policy CCR-1.2. (ROA p. 46). Arellano testified that she viewed the video several times and concluded  
15 that the Employee's punching of the patient violated DPBH Policy CCR-1.2 (ROA pp. 55-57).

16 Although he DPBH and SNAMHS have a use of force policy, the Employee was not charged  
17 with any violation of that policy in the NPD-41. (ROA pp. 169-174). The investigators did review the  
18 use of force policy, but found that the Employee had abused the patient in violation of Policy CCR-1.2  
19 Prohibition of Abuse or Neglect of Consumers and Reporting Requirements. (ROA p. 208).<sup>2</sup> Despite  
20 the substantial evidence in the record, the Hearing Officer found that the Employee's punching the patient  
21 was an acceptable *use of force* and that the Employee was justified in his actions. (ROA p. 138). This  
22 decision was clearly erroneous in view of the reliable, probative and substantial evidence on the whole  
23 record.

24 **D. The Hearing Officer Committed Clear Error by Failing to Apply a**  
25 **Deferential Standard to DPBH's Decision to Terminate the Employee**

26 A hearing officer reviews de novo whether a classified employee committed the alleged violation,  
27 but the Hearing Officer applies a deferential standard of review to the agency's decision to terminate.

28 <sup>1</sup> A CD containing the video has been provided to chambers for review.

<sup>2</sup> The investigation report has been provided to chambers for review.

1 *O'Keefe v. State, Dep't of Motor Vehicles*, 134 Nev. Adv. Op. 92, 431 P.3d 350 (2018). A deferential  
2 standard was not applied in this case.

3 As is stated previously, both Edwards and Arellano testified that the Employee's actions  
4 constituted patient abuse and violated Policy CCR-1.2. (ROA pp. 46-49, 55-57). Arellano also testified  
5 that the substantiated violations charged in the NPD-41 warranted termination on a first offense. (ROA  
6 p. 56-57). In fact, the Department of Health and Human Services Prohibitions and Penalties *mandate*  
7 termination for a first offense in cases of patient abuse. (ROA p. 216). Based on these factors, DPBH  
8 made the decision to terminate the Employee. (ROA pp. 58-59).

9 Despite all of above mentioned evidence that was presented at the hearing, the Hearing Officer  
10 failed to apply a deferential standard of review the termination decision. In *O'Keefe*, the Nevada  
11 Supreme Court held that the Hearing Officer acted arbitrarily and capriciously in holding that conduct  
12 of classified employee, who violated multiple regulations and four Department of Motor Vehicle  
13 (DMV) prohibitions and penalties, did not constitute a serious violation of law or regulation, so as to  
14 warrant immediate termination without imposing progressive discipline. In that case, the DMV  
15 expressly delineated one of the prohibitions involving misuse of information technology as an offense  
16 that warranted termination for a first violation, and Hearing Officer "second-guessed" DMV's  
17 assessment as to the seriousness of the violation of its own regulations. See *O'Keefe* at 354.

18 The *O'Keefe* case is directly on point. The Hearing Officer in this case improperly second guessed  
19 DPBH's assessment as to the seriousness of the Employee's violations of the Employer's own policies.

20 Even though the Employer has a use of force policy and Forensic Specialists are Category III  
21 Peace Officers pursuant to statute, SNAMHS is not a prison. SNAMHS is a facility operated by DPBH  
22 for the care, treatment and training of patients. See NRS 433.094 & 433.233. The people that they serve  
23 are patients, not inmates. Patients are sent to SNAMHS for psychiatric treatment. That is why the  
24 Employer charged the Employee with patient abuse and not improper use of force. The punches  
25 thrown by the Employee were clearly patient abuse.

#### 26 **IV. CONCLUSION**

27 Based upon the foregoing, DPBH has shown that the Hearing Officer committed clear error  
28 overturning the termination of the Employee. Accordingly, DPBH respectfully requests that its Petition

1 for Judicial Review be granted, that the Hearing Officer's decision be overturned and that the Employee's  
2 termination be upheld.

3 **V. ATTORNEY'S CERTIFICATE**

4 I hereby certify that I have read this appellate brief, and to the best of my knowledge, information,  
5 and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief  
6 complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P.28(e), which  
7 requires every assertion in the brief regarding matters in the record to be supported by a reference to the  
8 page of the transcript or appendix where the matter relied on is to be found. I understand that I may be  
9 subject to sanctions in the event that the accompanying brief is not in conformity with the requirements  
10 of the Nevada Rules of Appellate Procedure.

11 **VI. AFFIRMATION PURSUANT TO NRS 239B.030**

12 The undersigned does hereby affirm that the preceding document DOES NOT contain the  
13 personal information of any person.

14 Respectfully submitted this 9<sup>th</sup> day of March, 2020.

15 AARON D. FORD  
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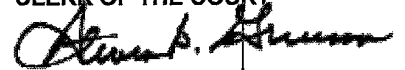
**CERTIFICATE OF MAILING**

I, CATHY L. MACKERL, being first duly sworn on oath, depose and say that:

On the 9<sup>th</sup> day of February, 2020, I personally placed envelopes, POSTAGE PREPAID, A copy of the **PETITIONER'S OPENING BRIEF**, addressed to the individual(s) set forth below and delivered to the State of Nevada Department of General Services for mailing at Las Vegas, Nevada.

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DISTRICT COURT  
CLARK COUNTY, NEVADA

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

Petitioner,

14 v.

15 CHARLES ROCHA,

16 Respondent.

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

**RESPONDENT'S REPLY**  
**MEMORANDUM OF POINTS AND**  
**AUTHORITIES**

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1 Decision and Order overturning the termination. Employer filed a Motion for Reconsideration.  
2 The Hearing Officer agreed to reconsider the issues as requested, but still found that the  
3 termination was not appropriate. Employer then filed this Petition for Judicial Review. Employer  
4 also filed a Motion to Stay, although Employer is fully aware that this matter is frivolous, as  
5 Employer violated Nevada law regarding Mr. Rocha's rights as a peace officer, and should this  
6 matter be remanded, it will be dismissed on the procedural violations. This Court granted  
7 Employer's Motion to Stay "out of an abundance of caution", leaving Mr. Rocha unemployed  
8 for over a year now.  
9

## 10 II. STATEMENT OF FACTS

11 Respondent, Charles Rocha (hereinafter "Mr. Rocha") was employed at Stein Forensic  
12 Hospital, a facility operated by Employer, as a Forensic Specialist IV. ROA Page 30:9-13. Mr.  
13 Rocha was a model employee and never issued any type of discipline in his years of employment  
14 with Employer. ROA Page 89:13-19. Stein Hospital is a facility that houses the criminally  
15 insane. The patients are there because they are awaiting trial for dangerous crimes and their  
16 mental competency is at issue or because they have already been convicted of a serious crime  
17 and their mental instability poses a danger at the correctional facility. ROA Pages 30:19-22,  
18 33:10-14, 64:1-21. Because of the nature of the services provided at Stein and the criminal  
19 nature surrounding the patients, the employees at Stein are not solely mental health professionals,  
20 as at Employer's other facilities. Instead, at Stein, the employees are designated as a Peace  
21 Officer 3, which is the same as the correctional officers at the correctional facilities. Mr. Rocha's  
22 job duties was to maintain safety and order in the facility (the same duties of a correctional  
23 officer). ROA 31:1-2. Prior to working for Employer, Mr. Rocha was a correctional officer for  
24 the Nevada Department of Corrections for four (4) years. ROA Pages 32:1-5; 60:8-18.  
25  
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1 Employer has not made any policies or procedures that would acknowledge the  
2 difference between patients at Stein and those at the other facilities. ROA Page 57:19-24. The  
3 Forensic Specialists receive training both as peace officers and mental health workers, but  
4 Employer provides zero procedures or guidance for the employees to indicate which procedures  
5 should be used in different situations. ROA Pages 61:19-65:1. The training for Mental Health  
6 Technicians is CPART, which deals only with de-escalating and appropriate "holds". However,  
7 the Forensic Specialists receive the Peace Officer III training (POST training), which has de-  
8 escalation as the first step, but recognizes that additional measures are needed to deal with  
9 criminal/dangerous individuals. The training for the forensic specialists involves training more  
10 in line with law enforcement and involves open handed techniques *prior to aggression* and other  
11 combative techniques with includes, but is not limited to strikes, kicks, and use of batons. ROA  
12 Pages 62:4-64:21.

15 The subject patient in this case had a history of violence towards staff members, attacking  
16 multiple employees leading up to the subject incidence. ROA Page 69:13-20. It was known to  
17 Mr. Rocha and the other staff members that this patient was at Stein because he was found not  
18 to be mentally competent to stand trial for attempted murder with a deadly weapon and battery  
19 with a deadly weapon. On October 13, 2018, because of the extreme danger this patient exhibited  
20 towards others, especially employees, and because he was especially on edge and jumpy that  
21 day, the patient was given extra medication and supposed to be on a "one to one", whereby an  
22 assigned employee was to stay within arms reach of the patient at all times, however, the  
23 employee assigned to do so was not diligent and allowed the patient out of his reach. ROA Pages  
24 70:3-9; 71:1-22, 77:9-20.

1 At this time, Mr. Rocha was in the common area. Completely unprovoked, the subject  
2 patient began yelling at Mr. Rocha that he was going "to fucking kill" him. ROA Pages 72:23-  
3 72:16. The dangerous patient rushed at Mr. Rocha in a wild fury of fists. The patient struck Mr.  
4 Rocha multiple times and knocked Mr. Rocha to the ground before other employees intervened.  
5 ROA Pages 76:20-77:2. Mr. Rocha was required to be examined by a doctor and underwent X-  
6 rays resulting from the severity of the strikes by the patient to Mr. Rocha's head prior to the other  
7 employees intervening. ROA Page 76:20-77:2.  
8

9 When the other employees were able to intervene, the subject patient continued to  
10 violently resist the just out of the camera's view, still swinging and wrapping both of the patient's  
11 legs around Mr. Rocha's right leg. ROA 77:1-13. When the subject patient was finally atken to  
12 the floor, the patient was still holding Mr. Rocha's right leg with both of his legs. ROA Page  
13 78:14-17. When Mr. Rocha was on the side of the subject patient, the subject patient had an arm  
14 around Mr. Rocha's upper body/shoulders, pulling Mr. Rocha down towards him, in addition to  
15 having Mr. Rocha's right leg secured by both of the patient's legs and pulling the leg outward  
16 (causing excruciating pain to Mr. Rocha's left hip that was to be replaced in the coming weeks).  
17 ROA Pages 66:21-67:21, 68:8-11; 78:14-17, 79:8-12, 82:12-13, 83:3-15. The subject patient  
18 continued resisting the whole time and continued to verbally threaten to kill Mr. Rocha and spit  
19 in Mr. Rocha's face. ROA Page 78:22-24, 79:8-12. 79:20-80:3; 83:3-15. At this point, as the  
20 patient still had his arm and both legs wrapped around Mr. Rocha, and was still spitting in Mr.  
21 Rocha's face and threatening to kill Mr. Rocha, Mr. Rocha still felt a risk of harm. ROA Page  
22 83:16-84:17. As an experienced correctional officer, Mr. Rocha applied reasonable force to  
23 remove the ongoing threat to himself. ROA 84:18-85:13. Mr. Rocha first had to struggle in order  
24 to even get an arm free. ROA 84:18-85:13. After he freed his arm, Mr. Rocha struck the patient  
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1 once, but the patient continued to fight and threaten Mr. Rocha, and Mr. Rocha still was not able  
2 to remove himself from the situation. ROA Page 21:12-15; 89:23-90:2. Mr. Rocha then applied  
3 a second strike which finally allowed him enough space to remove himself from the subject  
4 patient's grasp and he stood up and immediately moved away from the patient. ROA Page 36:13-  
5 16, 85:14-15; 89:23-90:2. The entire situation from the first strike by the patient on Mr. Rocha,  
6 until Mr. Rocha freed himself, was less than a minute. ROA 86:4-8. The short length of time  
7 with the patient violently attacking Mr. Rocha for the entire period, did not allow a time for  
8 reflection and retaliation. Mr. Rocha was responding based on his training and experience, not  
9 out of retaliation. ROA Pages 86:13-87:7. This was not the first time that Mr. Rocha had been  
10 attacked by an inmate, in his experience as a correctional officer, so he did not take it personally,  
11 he just acted as was reasonable under the circumstances due to the patient's continued resistance  
12 and threat of violence. ROA Pages 86:13-87:7.  
13

14  
15 The other employees that were attempting to control the subject patient during the attack  
16 on Mr. Rocha also used similar techniques. Mr. Rocha was eventually terminated approximately  
17 five months after the subject incident, on March 19, 2019. Mr. Rocha was not served with his  
18 rights as a peace officer as required by Nevada Statute.  
19

20 Mr. Rocha was terminated for "abuse of patient" without any consideration given to his  
21 duties, rights, and responsibilities as a peace officer III. Employer's factual conclusion was that  
22 Mr. Rocha "lost his temper and struck the patient in retaliation, which would amount to patient  
23 abuse.  
24

25 At the appeal hearing, Employer called three witnesses other than Mr. Rocha. None of  
26 the witnesses had any experience working at Stein (or any other forensic facility) nor did any  
27 witness have any knowledge or experience as a peace officer III or correctional officer. ROA  
28

1 27:17-19. The evidence presented made it clear that no consideration was given to the fact that  
2 these employees were required to be trained as peace officer III's nor was any directions provided  
3 to the employees that would indicate when those rights and responsibilities should or should not  
4 be used.

5 The first witness by Employer, had never even been on the unit that Mr. Rocha was  
6 working on. ROA Page 17:8-9. The second witness works at Rawson Neal, which only deals  
7 with civil cases, never serious criminal patients for competency issues. ROA Pages 40:4-6,  
8 40:19-22; 48:7-14. She has never worked at Stein. ROA 41:20-22. Ms. Edwards testified that the  
9 acts constituted "excessive use of force", however, she has no training or knowledge about peace  
10 officer III training and what would be appropriate force or excessive force. ROA Pages 44:21-  
11 22; 47:10-13; 48:15-21, 50:17-19. Ms. Edwards instead drew a conclusion that Mr. Rocha's  
12 actions were retaliatory because the client attacked and struck Mr. Rocha first. ROA Page 46:18-  
13 19.

14 Employer's final witness, Jackie Arrellano states that patient abuse is strictly prohibited.  
15 Patient abuse is considered to be the willful or unjustified infliction of pain, injury or mental  
16 infliction. ROA Page 53:23-25.

17 Employer submits information, a statement by Dr. Elizabeth Neighbors, that was not  
18 submitted as evidence at the appeal hearing. The Court is not entitled to consider new evidence  
19 that was not presented at the appeal hearing, so that statement/affidavit should be stricken and  
20 not considered by the Court.

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### **III. LEGAL ANALYSIS**

#### **A. STANDARD OF REVIEW**

A judicial review of an administrative decision is confined to the record. NRS 233B.135(1)(b). The decision of the Hearing Officer is deemed to be reasonable and lawful unless the decision is set aside by the Court. NRS 233B.135(2). The burden of proof is on the Petitioner (the “attacking party”) to prove the decision is “invalid”. *Id.* Under NRS 233B.135(3), a decision is invalid if the 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 substantive evidence on the whole record; or
- (f) Arbitrary or capricious or characterized by abuse of discretion.

“The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact.” NRS 233B.135(3). The Hearing Officer is the finder of fact in the administrative hearing. The Hearing Officer’s fact-based conclusions of law are entitled to deference, and they will not be disturbed if they are supported by substantive evidence. *Nevada Industrial Commission et. Al. v. Reese*, 93 Nev. 115, 560 P.2d 1352 (Nev. 1977).

#### **B. THE HEARING OFFICER’S DECISION WAS BASED ON SUBSTANTIAL EVIDENCE PRESENTED AT THE APPEAL HEARING**

In the underlying administrative case, Petitioner terminated Mr. Rocha. An appointing authority may terminate an employee “when the good of the public service will be served thereby.” NRS 284.385(1)(a). A terminated employee has the ability to challenge the reasonableness of his termination. NRS 284.390(1). If the Hearing Officer determines that the termination was not for “just cause” then he must render the decision in writing. NRS 284.390(6).

1 A Hearing Officer is required to issue findings of facts that are based exclusively on a  
2 preponderance of the evidence, which is evidence which enables the Hearing Officer to  
3 determine that a contested fact is more probable than the nonexistence of a contested fact. NRS  
4 233B.121(9), NRS 233B.0375.

5 Under the *Ludwick* and *O'Keefe* decisions, when an employee is terminated for the first  
6 offense, the Hearing Officer is to review the case as a three-step process: 1) the Hearing Officer  
7 must review, de novo, whether the employee committed the alleged violation; 2) whether the  
8 alleged violation is a serious violation of law or regulation that would make the most severe  
9 discipline appropriate for a first discipline; and 3) a deferential standard of review is utilized  
10 with regards to whether a termination is in the "good of public service." *NDOC v. Ludwick*, 135  
11 Nev. Adv. Op. 12 (citing NRS 284.385, NRS 284.390, and NRS 284.798); *O'Keefe v. DMV*,  
12 431 P. 350 (2018); ROA Page 122.

13 For the first step, based on the prevailing law on this matter, the Hearing Officer is to  
14 first review the facts de novo, to determine whether the employee committed the allegation. The  
15 "de novo" standard is a nondeferential standard of review, which means the Hearing Officer does  
16 not defer to the Employer, but instead reviews the information as presented at the appeal hearing  
17 and makes a determination based on the substantive evidence presented.

18 If the Hearing Officer finds that no violation was committed, the analysis is complete, if  
19 however, the Hearing Officer finds the employee committed the alleged violation, then the  
20 Hearing Officer should determine whether the alleged violation is a serious violation, and then  
21 when determining whether the action was in the good of the public service, the Hearing Officer  
22 should review it in a deferential standard of review.

23 ///

1                   1. The Hearing Officer's Decision Was Not Clearly Erroneous

2           In this case, Employer only terminated Mr. Rocha for "patient abuse" under NRS  
3 433.554. Abuse is defined within the statute as any willful AND unjustified infliction of pain,  
4 injury, or mental anguish. NRS 433.554(5).

5           As such, the Hearing Officer was first tasked to review the evidence presented at the trial  
6 to determine whether Mr. Rocha willfully and unjustifiably inflicted pain, injury or mental  
7 anguish on the subject patient. As such, the facts must show that hitting the patient was willful  
8 and not justified. In this case, there was no argument that the strike was not willful, but the  
9 reliable, probative, and substantial evidence presented showed that the strikes were justified.  
10

11           Employer's arguments center around the fact that the Hearing Officer considered Nevada  
12 law that was not cited by Employer. This is not a valid or appropriate argument. The fact that  
13 the Employer did not consider Mr. Rocha's rights and obligations under Nevada law, does not  
14 mean that those rights do not exist or that the Hearing Officer improperly considered them.  
15

16           The evidence presented at the hearing established that Mr. Rocha was required to be, and  
17 in fact was, POST certified and had experience as a correctional officer. The evidence presented  
18 showed that Mr. Rocha was unprovokingly attacked by a patient, known by Mr. Rocha to be  
19 violent and unstable, and who had a history of violently attacking staff members. The evidence  
20 showed that the subject patient was verbally threatening to kill Mr. Rocha during the entire  
21 exchange, and that the subject patient continued to attack Mr. Rocha physically by spitting in  
22 Mr. Rocha's face, wrapping both legs around Mr. Rocha's right leg, and wrapping an arm around  
23 Mr. Rocha's torso. These actions were causing Mr. Rocha great bodily harm and prevented Mr.  
24 Rocha from being able to remove himself from the risk of physical harm by the patient. Even  
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1 with five or more employees on the patient, the patient did not voluntarily release Mr. Rocha or  
2 comply in any manner.

3 The Hearing Officer considered the alleged violation that Employer accused Mr. Rocha  
4 of, which was abuse. The Hearing Officer looked at the actual legal requirement of what  
5 constitutes abuse, which is that the pain or injury inflicted it is willful and unjustified. ROA Page  
6 125, 132-133. The Hearing Officer recognized that the "infliction of bodily injury can be justified  
7 if, in good faith, the person believes that it's absolutely necessary to use force to ... prevent great  
8 bodily harm." Id. Further, the Hearing Officer also recognized that the use of force can be used  
9 by a peace officer, but that a peace officer is justified only using the minimum amount of force  
10 necessary to control the situation and protect themselves or others. ROA Page 133.  
11

12 As the evidence presented showed that the subject patient continued to resist and not  
13 cooperate, and even continued his attack on Mr. Rocha, even with numerous employees assisting  
14 to control the patient. In fact, the Patient was still no volatile that it took five employees to place  
15 the patient in a restraint chair after Mr. Rocha was able to free himself. ROA Page 133. The  
16 Hearing Officer considered the specific situation that Mr. Rocha was in at the time of the strikes.  
17 He acknowledges that Mr. Rocha was still entangled by the subject patient on the floor with his  
18 right arm pinned between the patient and another employee, so Mr. Rocha used his left hand to  
19 strike the patient. ROA Page 133-134. "The amount of force in those punches was minimal."  
20 ROA Page 134. The Hearing Officer considered the testimony that Mr. Rocha stated that he was  
21 in fear for his life, he was pinned and unable to break free while be threatened and spit on. ROA  
22 Page 133. The Hearing Officer outlines the fact that Employer submitted no contradicting  
23 evidence. Id.  
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1 It is clear that the reliable, probative, and substantial evidence presented showed that the  
2 actions by Mr. Rocha were justified, and thus by Nevada Statute, IS NOT ABUSE.

3 Employer argues that the Hearing Officer made "clear error" while considering the use  
4 of force. Employer argues that it is error because Mr. Rocha was not charged with improper use  
5 of force, only with patient abuse. This is a flawed argument. The Hearing Officer considered the  
6 abuse charge, however, in order to properly consider whether Mr. Rocha abused a patient, the  
7 Hearing Officer was required to analyze *what constitutes abuse*. Because patient abuse requires  
8 that the infliction be both willful and justified, both must be considered. Very tellingly,  
9 Employer's brief does not even acknowledge the definition of abuse, instead it contains only  
10 conclusions that Mr. Rocha's actions are abuse because Employer and its agents have made that  
11 conclusion. Employer does not even argue that the act was not justified.  
12  
13

14 In order to determine whether the infliction was justified, the full circumstances must be  
15 considered, including that the subject patient was known to be dangerous and attack employees,  
16 that Mr. Rocha is a peace officer (and thus offered the protections of such under Nevada statutes),  
17 that the patient was still actively threatening, resisting and attacking Mr. Rocha at the time of the  
18 use of force/infliction of pain. Therefore, the Hearing Officer's decision was based on substantial  
19 evidence and thus was not made in clear error.  
20

## 21 2. Employer Did Not Have Just Cause to Terminate the Employee

22 Employer recognizes that the Hearing Officer is granted the authority to determine  
23 whether the agency had "just cause" for the discipline. NRS 284.385. Just cause must be  
24 supported by substantial evidence. In this case, the "evidence" presented by Employer was only  
25 the opinion that Employer believed that Mr. Rocha's acts were in retaliation. Even in Employer's  
26 brief to discuss the just cause, Employer still does not address Nevada law which states that  
27  
28

1 abuse is the willful and unjustified infliction of pain, injury, or mental anguish. Employer uses  
2 broad conclusory statements, and the policies based on the statute, without addressing the actual  
3 statute. There is not even a cursory attempt to address whether the action was justified, as  
4 required by the statute. Employer argues that because Mr. Rocha was not charged with a violation  
5 of use of force, that it should not be considered, but that is absurd. The fact that Mr. Rocha was  
6 not charged with the use of force strengthens how unjust the discipline was, not vice versa. As  
7 such, the Hearing Officer's decision that Employer did not have just cause was based on the  
8 substantial evidence.  
9

10 3. The Hearing Officer Did Not Commit Error by Not Applying a Deferential Standard When  
11 the Substantial Evidence Showed that the Employee Did Not Commit the Violation

12 Employer acknowledges that the Hearing Officer is to review the facts DE NOVO to  
13 determine whether the Employee committed the alleged violation. In this case, the Hearing  
14 Officer did so, and found that the EMPLOYEE DID NOT COMMIT THE ALLEGATION. As  
15 such, the analysis does not even reach whether or not the decision to terminate was reasonable,  
16 because if the employee did not even commit the alleged violation, then the discipline is not  
17 reasonable.  
18

19 Employer continues to make conclusory statements to support its opinion. The personal  
20 conclusory opinions of Employer's agents that this constitutes abuse, without providing facts to  
21 support the legal requirements of such a charge, is not appropriate. In *O'Keefe*, the hearing  
22 officer found that the employee DID commit the violation, but then found that it was not a serious  
23 violation. In the *O'Keefe v. State of Nevada, Department of Motor Vehicles*, there was no factual  
24 dispute, it was agreed by both the Employee and the Employer that Ms. O'Keefe violated  
25 multiple NAC regulations and at least four prohibitions and penalties, instead the Hearing Officer  
26 found that even though the facts provided substantial evidence that Ms. O'Keefe committed the  
27  
28

1 alleged violations, the Hearing Officer then made the conclusion that the violations were not  
2 severe. *O'Keefe v. State of Nevada, Department of Motor Vehicles*, 134 Nev. Adv. Op. 92 (2018).  
3 Under O'Keefe, *after* a Hearing Officer finds that the evidence supports that the employee did  
4 in fact commit the alleged violation, deference is to be given to the appointing authority as to  
5 whether the discipline is in the good of the public service. This case is completely distinguished,  
6 because the hearing officer in this case found the employee DID NOT commit the alleged  
7 violation. Because the Employer did not prove with a preponderance of the evidence that Mr.  
8 Rocha's acts were not justified, and thus constituted abuse, we do not reach the next step of the  
9 analysis.  
10

11 As such, the Hearing Officer rightfully did not defer to the agency's decision to  
12 terminated and defer to the Employer's opinion it was in the good of the public, when the Hearing  
13 Officer found that the substantial evidence was that Mr. Rocha did not commit the alleged  
14 violation.  
15

#### 16 IV. CONCLUSION

17 Based on the foregoing, the reliable, probative, and substantial evidence supports the  
18 Hearing Officer's findings of fact, conclusions of law, and decision that Mr. Rocha did not  
19 commit client abuse as the infliction of pain was justified under the circumstances, and thus the  
20 Hearing Officer rightfully did not defer to the Employer's decision to terminate Mr. Rocha.  
21

#### 22 V. ATTORNEY'S CERTIFICATE

23 I hereby certify that I have read this Respondent's Reply Brief, and to the best of my  
24 knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I  
25 further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure,  
26 in particular NRAP 28(e), which requires every assertion in the brief be support by a reference  
27  
28

1 to the page of the transcript or appendix where the matter relied on is to be found. I understand  
2 that I may be subject to sanctions in the event the accompanying brief is not in conformity with  
3 the requirements of Nevada Rules of Appellate Procedure.

4 **VI. AFFIRMATION PURSUANT TO NRS 239B.030**

5 The undersigned does hereby affirm that the preceding document DOES NOT contain  
6 the personal information of any person.  
7

8 DATED this 13<sup>th</sup> day of April, 2020.

9  
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An Employee of Lizada Law Firm, Ltd.

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES ROCHA

Appellant,

v.

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

Respondent.

Case No.: 82485

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

---

**JOINT APPENDIX**

**VOLUME II of II**

**Part 3 of 3**

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Appeal from the Eighth Judicial District Court  
Case. No. A-19-804209-J

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///

	<b><u>Description</u></b>	<b><u>Vol(s)</u></b>	<b><u>Pg(s)</u></b>
1.	Register of Actions	I	ROCHA000001- ROCHA000002
2.	Petition for Judicial Review 10/23/2019	I	ROCHA000004- ROCHA000007
2A.	Petitioner's Motion to Stay	I	ROCHA000007A- ROCHA00007K
3.	Statement of Intent to Participate 11/11/2019	I	ROCHA000008- ROCHA000009
4.	Transmittal of Record on Appeal 02/04/2020	I-II	ROCHA000010- ROCHA000281
5.	Petitioner's Opening Brief 03/09/2020	II	ROCHA000282- ROCHA000292
6.	Respondent's Reply Memorandum of Points and Authorities 04/13/20	II	ROCHA000293- ROCHA000310
7.	Petitioner's Reply Brief 05/07/2020	II	ROCHA000311- ROCHA000318
8.	Findings of Facts, Conclusions of law, Decision and Order on Petition for Judicial Review 07/01/2020	II	ROCHA000319- ROCHA000320
9.	/Notice of Entry of Order 07/20/2020 /	II	ROCHA000321- ROCHA000325
10.	Substitution of Attorney 02/11/2021	II	ROCHA000326- ROCHA000328

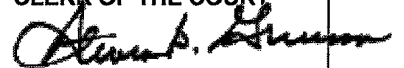
	<b><u>Description</u></b>	<b><u>Vol(s)</u></b>	<b><u>Pg(s)</u></b>
11.	Respondent Charles Rocha's Supplement to the Record Following Remand from District Court 02/11/2021	II	ROCHA000329-ROCHA000354
12.	Notice of Appeal 02/11/2021	II	ROCHA000355-ROCH000362

**CERTIFICATE OF SERVICE BY ELECTRONIC MEANS**

I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 17<sup>th</sup> day of August 2021, I did serve the above and forgoing JOINT APPENDIX Volume II of II (Part 3 of 3) by way of Notice of Electronic Filing provided by the court mandated E-Flex filing service, upon the Respondents at the following:

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9 DISTRICT COURT  
10 CLARK COUNTY, NEVADA

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

15 Petitioner, )

Case No. A-19-804209-J

16 vs. )

Dept. No. 25

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

21 Respondents. )

22 **PETITIONER'S REPLY BRIEF**

23 **ATTORNEY FOR PETITIONER**

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1 **PETITIONER'S REPLY BRIEF**

2 COMES NOW Petitioner, STATE OF NEVADA ex rel. its DEPARTMENT OF HEALTH AND  
3 HUMAN SERVICES, DIVISION OF PUBLIC AND BEHAVIORAL HEALTH (hereinafter DPBH) by  
4 and through counsel, AARON D. FORD, Attorney General for the State of Nevada, and SUSANNE M.  
5 SLIWA, Deputy Attorney General, hereby submits Petitioner's Reply Brief, in support of its Petition for  
6 Judicial Review of the final decision of the Nevada State Personnel Commission Hearing Officer dated  
7 October 8, 2019.

8 **JURISDICTIONAL STATEMENT**

9 This Honorable Court has jurisdiction pursuant to NRS 233B.130(2)(b). This brief has been filed  
10 pursuant to Nevada Revised Statute (NRS) 233B.133(1). A Petition for Judicial Review was timely filed  
11 on October 23, 2019. The Petition was filed within 30 days of the Hearing Officer's final determination  
12 dated October 4, 2019. The Record on Appeal in this matter was filed on February 4, 2020.

13 **I. ARGUMENT**

14 **A. The Hearing Officer's Decision Was Based on Clear Error**

15 The Employer submits that the Employee's Statement of Facts contains several inaccuracies and  
16 misconstrues the information found in the Record on Appeal. However, these factual inaccuracies do  
17 not change the actuality that the Employee's punching of the patient was both willful and unjustified.  
18 They do not change the reality that the Employer had just cause to terminate the Employee or that the  
19 Hearing Officer's Decision was based on clear error.

20 The Hearing Officer's Decision states that the Employee used an acceptable *use of force* (ROA  
21 p. 138) despite the fact that excessive use of force was never charged in the NPD-41. (ROA 169-174).  
22 The Hearing Officer clearly used the wrong standard to rule on this case.

23 Patients have the right to be free from abuse pursuant to NRS 433.484(1)(e)(2). The Hearing  
24 Officer's Decision references this section. (ROA p. 125.) However, the Hearing Officer incorrectly cites  
25 NRS 200.200, NRS 200.275 and NRS 200.481 as authority for his decision. (ROA p. 123). These are  
26 *criminal* statutes and are not at all applicable to this matter. The Hearing Officer's reliance on the  
27 criminal statutes demonstrates erroneous reasoning in his decision. Criminal statutes detailing killing in  
28 self defense, justifiable inflection or threat of bodily injury and the definition and penalties for battery

1 should never have been considered in a personnel appeal. For purposes of this case, it is irrelevant  
2 whether any of the Employee's actions would have been punishable under NRS 200. The fact that  
3 statutes from that chapter were considered shows that the Hearing Officer committed clear error when he  
4 applied an incorrect standard in making his determination as to whether the Employee's punching the  
5 patient was justified.

6 **B. The Hearing Officer's Decision Was Not Based Upon the Substantial Evidence**  
7 **Presented**

8 The substantial evidence presented at the hearing proved that the Employee's punching a patient  
9 twice constituted patient abuse. The incident was investigated by Nevada's Division of Public and  
10 Behavioral Health (DPBH). An investigation report was done and presented at the hearing. The  
11 Employee did not object to the admission of the investigation report. (ROA p. 7). That reports contains  
12 confidential information and the full report was not included in the ROA. (ROA p. 208). A copy of the  
13 full report has been provided to this Honorable Court for review.

14 The investigation report substantiated the allegation of patient abuse against the Employee. The  
15 investigators based this conclusion on their review of the incident video (also provided to this Honorable  
16 Court), their review of SNAMHS and DPBH policies and their interviews with involved staff members.  
17 The investigators had received training in incident investigation and report writing. Linda Edwards, the  
18 lead investigator, testified to this fact at the hearing and fully explained the investigative process. (ROA  
19 pp. 41-44). This thorough investigation concluded that the Employee's actions constituted patient abuse.  
20 That evidence was presented at the hearing.

21 **C. The Employer Had Just Cause to Terminate the Employee**

22 At the hearing, the Employer demonstrated that there was just cause to terminate the Employee  
23 pursuant to NRS 284.390(6) and *Sw. Gas Corp. v. Vargas*, 111 Nev. 1064, 1077, 901 P.2d 693, 701 (1995).  
24 The termination was supported by substantial documentary, testimony and video evidence. The  
25 investigation report and the testimony of investigator Linda Edwards and Personnel Officer II Jackie  
26 Arellano clearly showed that the Employee's actions constituted patient abuse and violated Policy CCR-  
27 1.2. (ROA pp. 46-49, 55-57). The Department of Health and Human Services Prohibitions and Penalties  
28

1 *mandate* termination for a first offense in cases of substantiated patient abuse. (ROA p. 216). Arellano  
2 testified to this fact at the hearing. (ROA pp. 56-57).

3 **D. The Hearing Officer Failed to Apply a Deferential Standard to DPBH's Decision to**  
4 **Terminate the Employee**

5 Both the Employer and the Employee cite *O'Keefe v. State, Dep't of Motor Vehicles*, 134 Nev.  
6 Adv. Op. 92, 431 P.3d 350 (2018) as authority for their respective positions. The Employer agrees that  
7 the *O'Keefe* three step review process is applicable to this case. When a classified employee requests a  
8 hearing to challenge an agency's decision to terminate an employee as a first-time disciplinary measure,  
9 the Hearing Officer determines the reasonableness of the agency's decision by conducting the following  
10 three-step review process: (1) the Hearing Officer reviews de novo whether the employee in fact  
11 committed the alleged violation; (2) the Hearing Officer determines whether that violation is a serious  
12 violation of law or regulations such that the severe measure of termination is available as a first-time  
13 disciplinary action and if the agency's published regulations prescribe termination as an appropriate level  
14 of discipline for a first-time offense, then that violation is necessarily "serious" as a matter of law; and  
15 (3) the Hearing Officer applies a deferential standard of review to the agency's determination that  
16 termination will serve the good of the public service. See *O'Keefe* at 354.

17 The Employer disagrees, however, that the *O'Keefe* review should have stopped after the first  
18 step. The Employee argues that the Hearing Officer was not obligated to apply a deferential standard to  
19 the termination decision because of his finding that the Employee had not committed the alleged  
20 violation. As is argued above, that determination was clearly erroneous. The Employer did establish that  
21 the Employee committed the charged violation of patient not abuse and the three step analysis should  
22 have continued.

23 The Employee does not contest the Employer's assertion that termination is an appropriate level  
24 of discipline for patient abuse. The Employer submits the patient abuse was clearly established through  
25 the documents and testimony presented at the hearing.

26 The Hearing Officer should have applied a deferential standard of review to the Employer's  
27 termination decision as is required by the *O'Keefe* decision. The Hearing Officer in this case improperly  
28

1 second guessed DPBH's assessment as to the seriousness of the Employee's violations of the Employer's  
2 own policies.

3 **II. CONCLUSION**

4 Based upon the foregoing, DPBH has shown that the Hearing Officer committed clear error  
5 overturning the termination of the Employee. The substantial evidence presented at the hearing showed  
6 that the Employee did commit patient abuse and that his termination was for just cause and the good of  
7 the public service. Accordingly, DPBH respectfully requests that its Petition for Judicial Review be  
8 granted, that the Hearing Officer's decision be overturned and that the Employee's termination be upheld.

9 **III. ATTORNEY'S CERTIFICATE**

10 I hereby certify that I have read this appellate brief, and to the best of my knowledge, information,  
11 and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief  
12 complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P.28(e), which  
13 requires every assertion in the brief regarding matters in the record to be supported by a reference to the  
14 page of the transcript or appendix where the matter relied on is to be found. I understand that I may be  
15 subject to sanctions in the event that the accompanying brief is not in conformity with the requirements  
16 of the Nevada Rules of Appellate Procedure.

17 **IV. AFFIRMATION PURSUANT TO NRS 239B.030**

18 The undersigned does hereby affirm that the preceding document DOES NOT contain the  
19 personal information of any person.

20 Respectfully submitted this 7<sup>th</sup> day of May, 2020.

21 AARON D. FORD  
Attorney General

22 By: /s/ Susanne M. Sliwa  
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**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of the Office of the Attorney General and that on the 7<sup>th</sup> day of May, 2020, I served a copy of the foregoing **PETITIONER'S REPLY BRIEF** by using the electronic filing system.

/s/ Cathy Mackerl  
Cathy L. Mackerl, an employee of  
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**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

*mke*

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 29<sup>th</sup> 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  
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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 1<sup>st</sup> 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 20<sup>th</sup> 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

*Steven D. Grierson*

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Susanne M. Sliwa  
Deputy Attorney General  
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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

*mkr*

06/23/2020

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

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

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

DATED this day 29<sup>th</sup> of June, 2020.

KATHLEEN E. DELANEY  
DISTRICT COURT JUDGE

AARON D. FORD  
Attorney General

By: /s/ Susanne Sliwa  
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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2 LAW OFFICE OF DANIEL MARKS  
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6 ADAM LEVINE, ESQ.  
7 Nevada State Bar No. 004673  
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12 *Attorneys for Petitioner*

8 DISTRICT COURT  
9 CLARK COUNTY, NEVADA

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

13 Petitioner,

14 vs.

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

**SUBSTITUTION OF ATTORNEY**

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

19 Respondents.

**SUBSTITUTION OF ATTORNEY**

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

22 DATED this 1/ day of February 2021.

23   
24 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 11<sup>th</sup> day of February 2021.

4 LAW OFFICE OF DANIEL MARKS

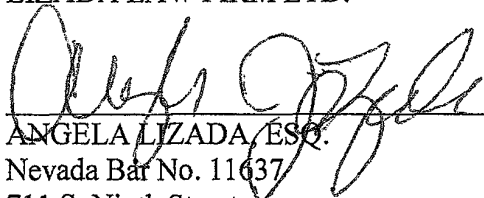
5 

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 11<sup>th</sup> day of February 2021.

14 LIZADA LAW FIRM LTD.

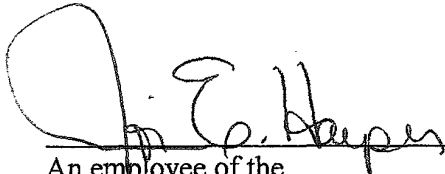
15 

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

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 11<sup>th</sup>  
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: sslwa@ag.nv.gov  
16                   Attorney for State of Nevada, Division  
17                   of Public and Behavioral Health

18  
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An employee of the  
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1 SUPPL  
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12 *Attorneys for Petitioner*

8 DISTRICT COURT  
9 CLARK COUNTY, NEVADA

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

13 Petitioner,

14 vs.

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

19 Respondents.

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

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

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

- 21 1. Findings of Fact Conclusions of Law Decision and Order Following Remand from
- 22 District Court, filed January 12, 2021 [ROCHA00001 – ROCHA00009];
- 23 2. Employee's Petition for Reconsideration [ROCHA00010 – ROCHA00017];
- 24

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

4. Decision and Order [ROCHA00020 – ROCHA00022].

DATED this 11<sup>th</sup> day of February 2021.

LAW OFFICE OF DANIEL MARKS

~~DANIEL MARKS, ESQ.~~

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Las Vegas, Nevada 89101

*Attorneys for Petitioner*

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Aaron D. Ford, Esq.  
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Susanne M. Sliwa, Esq.  
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*Attorney for State of Nevada, Division  
of Public and Behavioral Health*

  
An employee of the  
**LAW OFFICE OF DANIEL MARKS**

1 BEFORE THE NEVADA STATE PERSONNEL COMMISSION

2 HEARING OFFICER

FILED

JAN 12 2021

HEARINGS DIVISION

3 Charles Rocha,

4 Petitioner/Employee,

5 vs.

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

9 Respondent/Employer

) Case No.: 2106668-RZ

) FINDINGS OF FACT

) CONCLUSIONS OF LAW

) DECISION AND ORDER FOLLOWING

) REMAND FROM DISTRICT COURT

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 8<sup>th</sup> 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 J. 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.<sup>1</sup>

2 Pursuant to *O'Keefe v. State*, a de novo review of the essential facts in this matter was  
3 conducted.<sup>2</sup> Patient abuse must be proven by a preponderance of the evidence that the  
4 act committed was both willful and unjustified.<sup>3</sup> 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-207  
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.<sup>4</sup>  
20  
21

22 ...

23  
24 <sup>1</sup> Nevada Personnel Commission, Hearing Officer Rules of Procedure Rule 11.1.

25 <sup>2</sup> 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 <sup>3</sup> NRS 233B.121.9.

28 <sup>4</sup> 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.<sup>5</sup> 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  
16           It is uncontroverted that the Employee while on the floor struggling with the Patient  
17 other employees arrived to assist and they were able to pull the Patient's right arm from  
18 the Employee's back. However, the Employee's right arm remained trapped between  
19 the Patient and the other employees. The Employee contends that the Patient was  
20 spitting in his face during this time, that the Employee was in fear for his life and that  
21 he hit the patient in an effort to break free, not to punish him.<sup>6</sup> The video clearly shows  
22 the Patient was moving his face toward the Employee's face and was in close to the  
23  
24

25           <sup>5</sup> 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           <sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>

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 <sup>7</sup> 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 <sup>8</sup> 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.

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

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

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  
17 this termination imposed for the "good of public service?"

18 The decision to terminate the Employee was not made for an arbitrary, capricious, or  
19 illegal reason. The decision to terminate the Employee was established by a  
20 preponderance of substantial evidence and was reasonably believed by the employer to  
21 be true. Utilizing a deferential standard of review this termination was for the "good of  
22 public service."  
23

#### 24 FINDINGS OF FACT

- 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  
27 Revised Statutes, Nevada Administrative Code and Employer Regulations.  
28 2) The Employee willfully struck the Patient in the face twice on October 13, 2018.

- 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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**DECISION**

The Employer's decision to dismiss the Employee from employment with the State was for the good of the public service and is sustained.

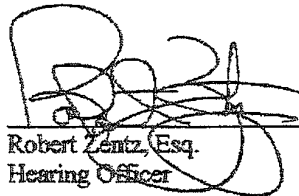
**ORDER**

Based upon foregoing findings of fact, and conclusions of law and good cause appearing therefore,

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

The Employer's decision to dismiss the Employee from public service is **AFFIRMED.**

**DATED** this 12th day of January 2021.

  
Robert Zentz, Esq.  
Hearing Officer

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

1 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

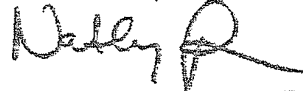
7 ANGELA LIZADA ESQ  
8 LIZADA LAW FIRM LTD  
9 711 S 9<sup>TH</sup> STREET  
LAS VEGAS NV 89101

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  
16 1321 JONES BLVD  
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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 12<sup>th</sup> day of January, 2020.

21 

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

ROCHA00009

ROCHA000340

1 ANGELA J. LIZADA, ESQ.  
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5 Attorney for Employee

6  
7 **BEFORE THE NEVADA STATE PERSONNEL COMMISSION**  
8 **HEARING OFFICER**  
9  
10

11  
12 CHARLES ROCHA,

Case No.: 1914774-RZ

13 Employee,

14 v.

15 STATE OF NEVADA DEPARTMENT OF  
16 CORRECTIONS,

17 Employer.  
18

19 **EMPLOYEE'S PETITION FOR RECONSIDERATION**

20 COMES NOW, CHARLES ROCHA, by and through his attorney, ANGELA J.  
21 LIZADA, ESQ. of LIZADA LAW FIRM, LTD., and submits his Petition for Reconsideration  
22 of the Hearing Officer's Decision filed and served on January 12, 2021 pursuant to NRS  
23 233B.130(4).  
24

25 ///

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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.

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

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

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

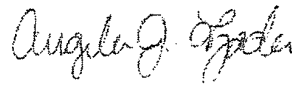
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13 NRS 289.055 required Employer to have written policies in place, but Employer did not  
14 have any such written policies in place. Further, NRS 289.060 and NRS 289.080 provide specific  
15 notice requirements and specify that those notice requirements are mandatory and must be  
16 followed to the letter. The Notice of Investigation was deficient pursuant to NRS 289 in this case,  
17 as it failed to: 1) provide an adequate summary of alleged misconduct to provide Employee with  
18 an opportunity to prepare for his interview; 2) inform Employee of his right to have two  
19 representatives of his choosing during an interview relating to the investigation; 3) state the name  
20 and rank of the officer in charge of the investigation and the officers who will conduct any  
21 interrogation or hearing; 4) provide the name of any other person who will be present at the  
22 interrogation or hearing; and 5) include a statement setting forth the provisions of subsection 1 of  
23 NRS 289.080 regarding the rights of the Employee to have two representatives of his choosing  
24 present during any phase of an interrogation.  
25  
26  
27  
28

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.”  
9

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*.  
12

13 DATED this 19th day of January, 2021.

14 LIZADA LAW FIRM, LTD.

15 

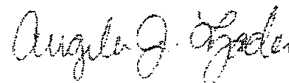
16  
17 ANGELA J. LIZADA, ESQ.  
18 Nevada Bar No. 11637  
19 711 S. 9th Street  
20 Las Vegas, NV 89101  
21 [angela@lizardalaw.com](mailto:angela@lizardalaw.com)  
22  
23  
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28

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](mailto:ssliwa@ag.nv.gov)

Robert Zentz, Esq.  
Hearing Officer  
[nrann@admin.nv.gov](mailto:nrann@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 25<sup>th</sup> day of January, 2021.

13  
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  
26  
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Angela Lizada, Esq.  
LIZADA LAW FIRM, LTD.  
711 S. 9<sup>th</sup> Street  
Las Vegas, NV 89101  
[angela@lizardalaw.com](mailto:angela@lizardalaw.com)

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

1 BEFORE THE NEVADA STATE PERSONNEL COMMISSION

2 HEARING OFFICER

3  
4 Charles Rocha,

5  
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

)  
)  
) DECISION AND ORDER

12 On January 19, 2021 Angela J. Lizada, Esq., Lizada Law Firm, Ltd for the  
13 Employee filed a Petition for Reconsideration of the undersigned's Decision and Order  
14 following remand the remand of the matter from the District Court. On January 26,  
15 2021 Susanne M. Sliwa, Esq., Senior Deputy Attorney General filed an Opposition to  
16 this Petition on behalf of the Employer.<sup>1</sup>

17  
18 The District Court Order found clear error in this Hearing Officer's application of  
19 the use of force standard for law enforcement as opposed to the proper standard for use  
20 of force policy by mental health employees amounting to patient abuse as alleged in  
21 this matter.

22  
23 Counsel for the Parties stipulated that the Hearing Officer's decision following the  
24 remand was limited to determining whether the termination was justified using the  
25 standard for patient abuse as charged on the NPD-41, not on the standard for the  
26

27  
28 <sup>1</sup> For this Petition and the Response, the Parties used Case No.: 1914774-RZ. Following remand from  
District Court a new case number was assigned. This decision and order are filed with Case No.:  
2106668-RZ

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.<sup>2</sup> 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 During the hearing the Petitioner made clear that he was a peace officer in  
17 accordance with NRS 289.240, however at no time were arguments alleging any  
18 procedural violations of the Peace Officer Bill of Rights presented or heard until this  
19 Petition.  
20

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

27  
28 <sup>2</sup> 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.

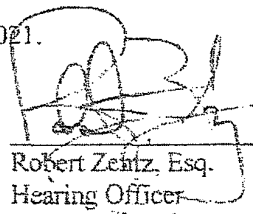
3 **DECISION and ORDER**

4 Based upon foregoing and good cause appearing therefore,


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

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

7 DATED this 3rd day of February 2021.

8   
9  
10 Robert Zehtz, Esq.  
11 Hearing Officer  
12

13 **NOTICE:** Pursuant to NRS 233B.134, 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.  
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1 NOAS  
2 LAW OFFICE OF DANIEL MARKS  
3 DANIEL MARKS, ESQ.  
4 Nevada State Bar No. 002003  
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6 ADAM LEVINE, ESQ.  
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9 610 South Ninth Street  
10 Las Vegas, Nevada 89101  
11 (702) 386-0536; FAX (702) 386-6812  
12 *Attorneys for Petitioner*

DISTRICT COURT  
CLARK COUNTY, NEVADA

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

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

16 Petitioner,

17 vs.

NOTICE OF APPEAL

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

22 Respondents.

NOTICE OF APPEAL

23 Notice is hereby given that Respondent Charles Rocha hereby appeals to the Supreme Court of  
24 Nevada from the District Court's Findings of Fact, Conclusions of Law, Decision and order on Petition

///

///

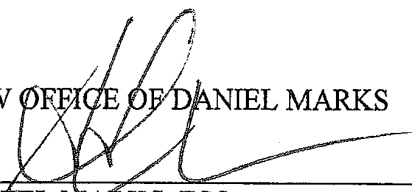
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1 for Judicial Review entered in this action on July 1, 2020, , the Notice of Entry of which was filed on  
2 July 20, 2020. (Exhibit "A" attached hereto), and which became final following proceedings on remand  
3 on or about February 3, 2021.

4 DATED this 11<sup>th</sup> 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

12 alevine@danielmarks.net

13 610 South Ninth Street

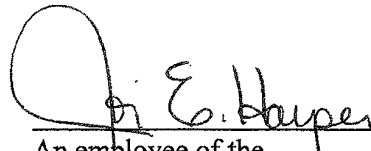
14 Las Vegas, Nevada 89101

15 *Attorneys for Petitioner*

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 11<sup>th</sup>  
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 NOTICE OF APPEAL by way of Notice  
5 of Electronic Filing provided by the court mandated E-file & Serve system, to the e-mail address on file  
6 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                   *Attorney for State of Nevada, Division*  
16                   *of Public and Behavioral Health*

17  
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24  
  
An employee of the  
LAW OFFICE OF DANIEL MARKS

# EXHIBIT A

# EXHIBIT A



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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12 Email: [ssliwa@ag.nv.gov](mailto:ssliwa@ag.nv.gov)

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 1<sup>st</sup> 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 20<sup>th</sup> 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

**EXHIBIT 1**

**EXHIBIT 1**

*Steven D. Grierson*

AARON D. FORD  
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Susanne M. Sliwa  
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(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

*mke*

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.

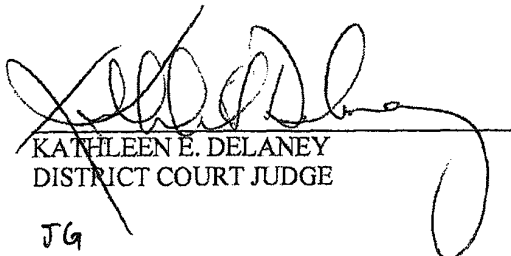
8       **THE COURT FURTHER FINDS** that, based upon this clear error, the Hearing Officer did not  
9 get to the issue of whether the Respondent's actions were justified.

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 29<sup>th</sup> of June, 2020.

20  
21         
KATHLEEN E. DELANEY  
DISTRICT COURT JUDGE

22  
23       AARON D. FORD  
Attorney General

JG

24  
25       By: /s/ Susanne Sliwa  
Susanne M. Sliwa  
26 Deputy Attorney General  
Nevada Bar No.:4753  
27 ssliwa@ag.nv.gov  
(702) 486-3375  
28 Attorneys for Petitioner,  
State of Nevada, Division of Public and  
Health (DPBH)