IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES ROCHA,

Appellant,

vs.

STATE OF NEVADA, ex re; its DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF PUBLIC SERVICES, DIVISION OF PUBULIC AND BEHAVIORAL HEALTH,

Respondents.

Case No.: 82485

Dist. Ct. Case No.: A-19-804209-J

RESPONDENT'S ANSWERING BRIEF

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COMES NOW, the State of Nevada, Department of Health and Human Services ("DHHS") by and through its counsel, AARON D. FORD, Nevada Attorney General, through Deputy Attorney General SUSANNE M. SLIWA, and files this answering brief with this Honorable Court.

This brief has been filed pursuant to Nevada Revised Statute (NRS) 233B.133(2).

ISSUES PRESENTED FOR REVIEW

1. Was Appellant's appeal timely?
2. Did the District Court have jurisdiction to grant the Petition for Judicial Review?
3. Did the District Court err in remanding this matter so that the proper standard of review could be used?
4. Did DHHS waive the use of force argument?
5. Was the Decision on Remand arbitrary and capricious?
6. Should *O'Keefe* be overturned?

I. JURISDICTIONAL STATEMENT

This Honorable Court does not have jurisdiction in this matter as the Appellant's Notice of Appeal was not filed in a timely manner. Appellant is correct that the Notice of Appeal was filed on February 11, 2021. (APP Vol. II at 350). The District Court Order granting Respondent's Petition for Judicial Review and remanding the case to the Hearing Officer (hereinafter DC Order) was entered on July 20, 2020. (APP Vol. II at 321-322). Pursuant to Nevada Rule of Appellate Procedure 4(1), a Notice of Appeal must be filed no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served. The DC Order (APP Vol.

II at 324-325) was appealable pursuant to NRAP 4(a)(1). The Notice of Appeal was filed far beyond the allowed 30 days.

Appellant is incorrect in his assertion that the Hearing Officer's Findings of Fact, Conclusions of Law and Decision Following Remand from District Court (APP Vol. II at 332-340) (hereinafter Decision on Remand) is an appealable order and that the DC Order is not. Pursuant to Nevada Revised Statute 233B.130, the proper mechanism to contest the final decision of in a contested case is a Petition for Judicial Review. That Decision was filed on January 12, 2021. (APP Vol. II at 332-340). Appellant did file a Petition for Judicial Review on February 9, 2021.

The inclusion of the term "remand" in an order does not change the substantive finality with regard to the issue actually presented to the District Court. *Bally's Grand Hotel & Casino v. Reeves,* 112 Nev. 1487, 929 P.2d 936 (1996). In this case, the District Court's Order remanded the matter to the administrative Hearing Officer so that the proper standard of review (client abuse as opposed to use of force) could be applied. That standard of review is what Appellant is specifically appealing.

II. ROUTING STATEMENT

Pursuant to NRAP 17(B)(9), administrative agency appeals that do not involve tax, water or public utilities commission determinations are presumptively assigned to the Court of Appeals. As this appeal involves the decision of an administrative agency not involved with tax, water or public utilities, it is presumptively assigned to the Court of Appeals.

Appellant's arguments that this appeal involves issues of first impression are without merit and will be refuted in the brief below. All of the issues raised in this appeal can and should be resolved by the Court of Appeals.

III. STATEMENT OF THE CASE

Appellant Charles Rocha was terminated from State service effective March 22, 2019, by Respondent DHHS. The Employee was terminated for actions that amounted to client abuse. (APP Vol. I at 180-185). The matter went to hearing on August 23, 2019. The Hearing Officer's Decision and Order filed September 18, 2019 (hereinafter Decision) overturned the termination. (APP Vol. I at 132-149). Respondent filed a Motion for Stay of the Decision (APP Vol. I at 7A-17A) which was granted. Respondent also filed a Petition for Judicial Review (APP Vol. I at 004-006) which was granted by the District Court. An Order remanding the case back to the Hearing Officer to use the proper standard of review was entered on July 20, 2020. (APP Vol. II at 321-322).

The Hearing Officer's Decision on Remand reversed his previous Decision. The Decision on Remand utilized the proper standard of review (client abuse) and affirmed Appellant's termination. (APP Vol. II at 332-340). Appellant filed a Petition for Judicial Review on February 9, 2021. Appellant also filed a Notice of Appeal (APP Vol. II at 355). This Petition for Judicial Review is the proper way to appeal the Hearing Officer's Decision on Remand. The Notice of Appeal of the District Court Order is untimely.

IV. STATEMENT OF RELEVANT FACTS

Respondent DHHS terminated Appellant Charles Rocha from State service effective March 22, 2019. The Employee was terminated for twice punching a client (patient) who was subdued on the floor by other staff. On October 13, 2018, Appellant was involved in an altercation with a client. Appellant was attacked by that client. However, the two punches to the client's face occurred after the client was on the floor and had been subdued by at least two other staff. (APP Vol. I at 35, 36, 55, 100).

At the time of his termination, Appellant was employed with DPBH as a Forensic Specialist (technician) IV and was working at Southern Nevada Adult Mental Health Services (SNAMHS). SNAMHS is a State Agency that provides both inpatient and outpatient services for persons with mental illness. The Employee was working in SNAMHS' forensic unit. While the forensic unit is commonly referred to as "Stein Hospital," it is a part of SNAMHS. It is not a separately licensed facility. SNAMHS' mission is to provide treatment. All staff working at SNAMHS, including those working in the forensic unit, must comply with hospital requirements for the provision of treatment and care. Appellant received this training. (APP Vol. I at 32).

The mission of the forensic unit at SNAMHS is to provide treatment to competency for criminal defendants. (APP Vol. I at 41, 51,130). Forensic Specialists are Category III Peace Officers pursuant to NRS 289.240. However, Forensic Specialists are, first and foremost, Mental Health Technicians (MHTs). (APP Vol. I at 119). MHTs are an integral part of the treatment teams at SNAMHS. Forensic Specialists are required to be certified MHTs.

Appellant appealed his dismissal to the Department of Administration Personnel Commission pursuant to NRS 284.390. A hearing was held on August 23, 2019, before Hearing Officer Robert Zentz, Esq. On September 18, 2019, the Hearing Officer entered his Decision which reversed Appellant's dismissal and restored him to his prior position as a Forensic Specialist IV with full back pay. (APP Vol. I at 132-149).

Respondent, DHHS, filed a Petition for Reconsideration on October 4, 2019. That Petition also contained a request to reopen the record due to the fact that the Hearing Officer applied a use of force standard rather than a client abuse standard and that further evidence on that issue was justified. The Hearing Officer did grant

the Petition but did not change his ruling. He denied the request to reopen the record. (APP Vol. I at 113-117).

Respondent filed a Petition for Judicial Review (PJR) on October 23, 2019, and a Motion for Stay on October 24, 2019. The Motion for Stay was granted at a hearing on December 3, 2019. A hearing on the Petition for Judicial Review was held on May 26, 2020. The District Court granted the Petition in part and Denied it in part. (APP Vol. II at 319-320). The District Court found that the Hearing Officer committed clear error by applying a use of force standard to Appellant's actions when the he had actually been charged with client abuse. (APP Vol. II at 320). The case was remanded back to the Hearing Officer to make a determination based upon the proper standard and the actual charges against the Employee. That DC Order was entered on July 20, 2020. (APP Vol. II at 321-325).

The Hearing Officer submitted his Decision on Remand from District Court on January 12, 2021. The Hearing Officer applied the proper standard as ordered by the District Court and upheld the Employee's termination. (APP Vol. II at 332-339).

Appellant filed a Motion to Reconsider the Hearing Officer's decision on January 19, 2021. The Hearing Officer denied that Motion in a Decision and Order dated February 3, 2021. (APP Vol. II at 351-353).

Appellant filed a Notice of Appeal and a Case Appeal Statement with the Nevada Supreme Court on February 11, 2021. (APP Vol. II at 354-362). Appellant also filed a Petition for Judicial Review with the District Court on February 9, 2021.

V. SUMMARY OF ARGUMENT

This appeal is untimely. The District Court Order (DC Order) being appealed was served on July 20, 2020. Appellant did not file a Notice of Appeal until February 11, 2021. Pursuant to NRAP 4(a)(1), a Notice of Appeal must be filed within 30 days after the written notice of that order.

Appellant claims that he is appealing the Decision on Remand. Even if this were true, an appeal is not the proper way to contest an administrative hearing decision. A Petition for Judicial Review is the proper method of challenge for the Decision on Remand. NRS 233B.020(1) and NRS 233B.130(6). Appellant has filed a Petition for Judicial Review and preserved his challenge to the Decision on Remand.

Appellant raises several issues for the first time in his Opening Brief. None of these issues were raised at either the Administrative Hearing level or the PJR level. Issues raised for the first time generally will not be considered by the Nevada Supreme Court. *State Board of Equalization v. Barta,* 124 Nev. 612, 188 P.3d 1092 (2008).

The District Court had jurisdiction to decide Respondent's Petition for Judicial Review. Appellant does not have standing to challenge the service of another party. Also, service is not a jurisdictional requirement, and it can be waived. *Spar Bus. Servs., Inc. v. Olson*, 135 Nev. 296, 299, 448 P.3d 539, 542 (2019).

The District Court's remand was proper as the Hearing Officer failed to use a deferential standard of review as is required by *O'Keefe v. Department of Motor Vehicles*, 134 Nev. 752; 431 P.3d 350 (2018). The Hearing Officer also used a use of force standard when use of force was not the grounds for termination charged in the NPD-41 Specificity of Charges.

Once the proper standard of review was applied, it was clear that Appellant's termination was reasonable and for the good of the public service based on the substantial evidence presented at the administrative hearing.

Throughout this litigation, Respondent has consistently and specifically argued that this is a client abuse case and not a self-defense or use of force case. Respondent never "acquiesced" to another standard of review as Appellant claims.

Appellant raises the issue of overturning *O'Keefe v. Department of Motor*

Vehicles, 134 Nev. 752; 431 P.3d 350 (2018) based on "industrial common law." This issue was not previously raised. Most importantly, Appellant specifically agreed to use the *O'Keefe* standard for the remand decision.

VI. ARGUMENT

A. Standard of Review

When considering an appeal from a District Court Order granting judicial review of a decision of a State agency, this Honorable Court stands in the same position as the District Court. *State Board of Equalization v. Barta,* 124 Nev. 612, 188 P.3d 1092 (2008). The function of this Honorable Court in reviewing an administrative decision is identical to the District Court's. *Riverboat Hotel Casino v. Harold's Club,*113 Nev. 1025, 944 P.2d 819 (1997).

The standard of review for this matter is set forth in NRS Chapter 233B.135. This statute states:

1. Judicial review of a final decision of an agency must be:

(a) Conducted by the court without a jury; and

(b) Confined to the record.

In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities.

2. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3.

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

(a) In violation of constitutional or statutory provisions;

(b) In excess of the statutory authority of the agency;

(c) Made upon unlawful procedure;

(d) Affected by other error of law;

(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

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

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

The Supreme Court does not give any deference to the District Court decision when reviewing an order regarding a petition for judicial review. "We review an administrative agency's factual findings 'for clear error or an arbitrary abuse of discretion' and will only overturn those findings if they are not supported by substantial evidence." *City of N. Las Vegas v. Warburton,* 262 P.3d 715, 718 (2011). Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion. This Court will not reweigh the evidence or revisit an appeals officer's credibility determination. Citing *Elizondo v. Hood Machine, Inc.* 129 Nev. 780, 784 (1993). *Riverboat Hotel Casino v. Harold's Club,*113 Nev. 1025, 944 P.2d 819 (1997).

B. This Appeal Is Untimely.

Appellant's Docketing Statement clearly states that the District Court order being appealed was served on July 20, 2020. Appellant did not file a Notice of Appeal until February 11, 2021. (APP Vol. II at 354-362). Pursuant to NRAP 4(a)(1), a Notice of Appeal must be filed within 30 days after the written notice of that order.

Nevada Rule of Appellate Procedure 3A(b)(1) designates a final judgment

entered in an action or proceeding commenced in the court in which the judgment or order was rendered. The DC Order in this case was a final judgment. There was no further action to be taken by the District Court. It was an appealable order pursuant to NRAP 3A(b)(1) and should have been appealed within the 30 days specified by NRAP 4(a)(1).

Appellant contends that the DC Order was not final because it remanded the matter back to the Hearing Officer. The inclusion of the term "remand" in an order does not change the substantive finality with regard to the issue actually presented to the District Court. *Bally's Grand Hotel & Casino v. Reeves,* 112 Nev. 1487, 929 P.2d 936 (1996). In this case, the District Court's order remanded the matter to the Hearing Officer so that the proper standard of review (client abuse as opposed to use of force) could be applied. That standard of review is what Appellant is specifically appealing and that is stated in the Docketing Statement.

Even if this Honorable Court finds that the DC Order is *not* final, Appellant's appeal of the Hearing Officer's Decision on Remand was improper. Appellant could have and did file a Motion to Reconsider pursuant to Eighth Judicial District Court Rule 2.24. (APP Vol. II at 341-346). That section states that a party seeking reconsideration of a ruling of the court, other than any order that may be addressed by motion pursuant to NRCP 50(b), 52(b), 59 or 60, must file a motion for such relief within 14 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order. Appellant's Motion to Reconsider was denied. (APP Vol. II at 351-353). Appellant could have also filed a Motion for Relief from Order pursuant to NRCP 60.

In his Opening Brief, Appellant states that this Honorable Court has jurisdiction in this matter pursuant to NRS 233B.150 which states that an "aggrieved party may obtain a review of any final judgment of the district court by appeal to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme

Court pursuant to Section 4 of Article 6 of the Nevada Constitution. The appeal shall be taken as in other civil cases." The authority cited by Appellant to establish jurisdiction in this case clearly states that the DC Order should have been appealed.

NRS Chapter 233B, also known as the Administrative Procedure Act (APA), establishes minimum procedural requirements for the regulation-making and adjudication procedures of Nevada governmental agencies and the provisions of this chapter are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies. See NRS 233B.020(1) and NRS 233B.130(6). In line with its purpose, the APA provides that a party aggrieved by a final agency decision in a contested case who is identified as a party of record by an agency in an administrative proceeding is entitled to review of that decision by filing a *petition for judicial review* in the appropriate court. Moreover, the APA states that its provisions "are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which [NRS Chapter 233B] applies. *Déjà Vu Showgirls of Las Vegas, LLC v. State, Dep't of Taxation*, 130 Nev. 711, 715-16, 334 P.3d 387, 390 (2014). In that case, this Honorable Court also stated:

> It is undisputed that appellants are parties of record aggrieved by a final agency decision in a contested case, and that "[a] decision of the Nevada Tax Commission is a final decision for the purposes of judicial review." NRS 360.245(5). Furthermore, we have construed NRS 360.245(5) and NRS 233B.130(6) as meaning "that all final decisions by the Commission be subject to the provisions of NRS Chapter 233B." *S. Cal. Edison v. First Judicial Dist. Court,* 127 Nev. ——, ——, 255 P.3d 231, 235–36 (2011) (holding that a petition for judicial review is the sole remedy after a final decision by the Commission). Accordingly, absent explicit legislative direction to the contrary, the APA's procedures, including the requirement to file a petition for judicial review, apply to all

final Commission decisions, including those addressing refund requests under NLET. *See id.;* NRS 233B.020; NRS 233B.130(6).

This decision clearly establishes that a Petition for Judicial Review is the required method of challenge for an administrative decision. Appellant did file a Petition for Judicial Review of the Hearing Officer's Decision on Remand on February 9, 2021.

C. Arguments Not Raised Below Should Not Be Considered.

Appellant raises many issues in his Opening Brief that were not raised at either the administrative hearing level or during the PJR process. This Honorable Court will generally not consider arguments that a party raises for the first time on appeal. *State Board of Equalization v. Barta,* 124 Nev. 612, 188 P.3d 1092 (2008).

In *Palmieri v. Clark County,* 131 Nev. 1028, 1047 n.14, 367 P.3d 442, 455 n.14 (2015), the Respondent did not argue an issue at the lower level (in that case, the District Court) and it did not raise the issue in the Opening or Reply Briefs. This Honorable Court held that, as a general rule, issues not raised before the district court or in the appellant's opening brief on appeal are deemed waived. *Palmieri* is directly analogous to the instant case.

Prior to this appeal Appellant never challenged the *O'Keefe* deferential standard of review, the concept of substantial evidence, service of Respondent's PJR on other parties and whether the pre and post termination hearings comport with Due Process. All of these issues will be addressed individually. However, it is important to emphasize than none of them were argued by Appellant prior to this appeal and should not be considered by this Honorable Court pursuant to *Barta* and *Palmieri.*

D. The District Court Had Jurisdiction In This Matter.

Appellant filed a Statement of Intent to Participate in the judicial review process on November 11, 2019. (APP Vol. I at 008-009). At no time during the litigation of this matter did he raise the issue of service for any party.

Appellant relies on *Whitfield v. Nevada State Personnel Commission et al.,* 137 Nev. Adv. Op. 34 (July 29, 2021) to support his argument that the District Court was without jurisdiction in this matter due to some parties of record not being served with the Petition for Judicial Review. Appellant's reliance on *Whitfield* is misplaced. The 45 day period for service of a timely filed Petition for Judicial Review of an administrative decision is not a jurisdictional requirement. *Spar Bus. Servs., Inc. v. Olson*, 135 Nev. 296, 299, 448 P.3d 539, 542 (2019). Since service is not a jurisdictional requirement it can be waived. The service argument was not raised at the judicial review level and indeed was not raised until this appeal.

Even if that issue had not been waived, Appellant did not have standing to argue lack of service on behalf of another party. Standing is a question of law to be reviewed de novo. A party generally has standing to assert only its own rights and cannot raise the claims of a third party. *Logan v. Abe Pacific Heights Properties, LLC,* 131 Nev. 260, 263, 350 P.3d 1139, 1141 (2015).

The United States Supreme Court has established that the "irreducible constitutional minimum" of standing requires that a plaintiff have suffered an "injury in fact" that is not merely conjectural or hypothetical, that there be a causal connection between the injury and the conduct complained of, and that it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). The improper service of another party does not directly give injury of fact to Appellant.

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E. The District Court's Remand Was Not In Error.

Respondent has always argued that this is a client abuse case. The NPD-41 Specificity of Charges states it was substantiated that Appellant "engaged in patient mistreatment and/or abuse, patient endangerment and failed to follow policies and procedures." (APP Vol. I at 181). The client abuse argument has been consistent through Respondent's Employer's Prehearing Statement (APP Vol. I at 171-178), during the administrative hearing (APP Vol. I at 102), and throughout the subsequent judicial review process. (APP Vol. II at 282-292, 311-318).

The District Court found that the Hearing Officer committed clear error by ultimately applying a use of force standard to make the determination that the Appellant's actions were justified when he had actually been charged with client abuse. (APP Vol. II at 320). While the term "excessive force" may have been used over the course of this litigation and in DHHS policy, Appellant was terminated for *abuse*. He was found to have violated several Department of Health and Human Services Prohibitions and Penalties (hereinafter P&Ps), many of which authorize termination for a first offense. (APP Vol. I at 222-225). One of these violated sections, D8, mandates termination for a first offense. (APP Vols. I and II at 65, 163, 225). The District Court recognized that the Hearing Officer applied the wrong standard in his decision and remanded the matter back for consideration under the proper standard. (APP Vol. I at 319-320).

The argument that the Hearing Officer decided this case based on a self-defense standard rather than a use of force standard is incorrect. While both of these terms were used in the Hearing Officer's Decision, (APP Vol. I at 143-145, 147), that Decision is clearly based on use of force and that force being used in self-defense. (APP Vol. I at 147). Nowhere in the Decision is a determination that Appellant committed client abuse. (APP Vol. I at 132-149).

Appellant's contention that the District Court must have reached its decision "without actually reviewing the record" is offensive and non-sensical. That Court obviously reviewed the Record on Appeal and the pleadings of the parties prior to the hearing on the Petition for Judicial Review. Additionally, the District Court heard and granted Respondent's Motion for Stay which was fully briefed by the parties. The District Court also heard lengthy testimony at the hearing itself prior to rendering its decision.

There was testimony at the administrative hearing that hitting a client constitutes abuse. (APP Vol. I at 54). Appellant admitted to hitting the client twice with a closed fist. (APP Vol. I at 35, 88). The Hearing Officer did not specifically address the question of client abuse in his decision, (APP Vol. I at 132-149) despite this testimony. The District Court's review of the record and pleadings and analysis of the hearing testimony was clearly correct. The District Court did not issue the DC Order in error.

F. Respondent Did Not Waive the Standard of Review Argument.

Respondent never pursued Appellant's termination under a use of force standard and did not waive the argument that said standard was inappropriate. Appellant's analysis of *Graham v. Conner,* 490 U.S. 386 (1989) is irrelevant. While that case was mentioned by Appellant's counsel in her closing argument at the administrative hearing (APP Vol. I at 108), it was not cited in her Pre-Hearing Statement. (APP Vol. I at 150-170). Appellant acknowledges that the Hearing Officer did not use *Graham v. Conner* in his analysis for his Decision.

Appellant attempts to convince this Honorable Court otherwise with out of context references to the terms "use of force," "excessive force" and "self-defense." This case is and always will be about client abuse. That is the charge in the NPD-41 Specificity of Charges (APP Vol. I at 180-185) and it has been Respondent's argument throughout this case.

The case of *Haynes v. Golub Corp.*, 166 Vt. 228, 240, 692 A.2d 377 (1997) that Appellant cites as authority for the waiver argument is not on point. Respondent has never "acquiesced" to this case being decided on use of force, excessive force or self-defense. Respondent has plainly and consistently argued that this is a client abuse case and not one of use of force or self-defense. In fact, counsel for Respondent specifically argued at the administrative hearing that this is not a use of force case. (APP Vol. I at 8, 9, 102, 110).

G. Appellant Was Not Acting in Self-Defense.

Appellant argues that he had a right to act in self-defense and that he should not have been terminated because he was exercising that right. Appellant's cited authorities to support this contention are criminal statutes. This is not a criminal matter.

At the time of his termination, Appellant had received both Peace Officer Standards Training (POST) and Conflict Prevention and Response Techniques (CPART) training. (APP Vol. I at 43, 72, 211-217). The CPART trainings taught Appellant techniques to de-escalate situations involving persons with mental health issues (APP Vol. I at 73) and were used in mental health settings. Appellant testified that both POST and CPART training involved de-escalation techniques. (APP Vol. I at 73).

Appellant's cited authorities for his contention that he cannot be terminated for a "legitimate exercise of the right of self-defense" are misplaced. All of the cases cited arose from situations in the private sector and involved at will employees. None of them arose from cases involving Peace Officers, Mental Health Technicians or other employees trained in de-escalation techniques for persons with mental illness.

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Appellant was a trained Forensic Specialist IV. He failed to utilize his training and admittedly punched a client twice. (APP Vol. I at 46). This amounted to abuse.

H. The Decision on Remand Was Neither Arbitrary nor Capricious.

As stated previously, Appellant cannot appeal the Hearing Officer's Decision on Remand because the proper method of challenge is a Petition for Judicial Review. Even if the Decision on Remand were properly challenged, it was not arbitrary and capricious.

Appellant argues that the Hearing Officer's use of the client abuse standard in the Decision on Remand (as was instructed by the District Court) was arbitrary and capricious. That argument reinforces the fact that it is the DC Order remanding the matter back to the Hearing Officer that Appellant is appealing.

Appellant mischaracterizes the Decision by stating that the Hearing Officer concluded that there had been no abuse because the Appellant had acted in self-defense. The Hearing Officer actually found that Appellant used force in self-defense and that he was justified in doing so. (APP Vol. I at 147). This clearly demonstrates that the Hearing Officer did not apply the correct standard, which should have been client abuse, in his Decision.

When the proper standard was used in the Decision on Remand, the Hearing Officer concluded that Appellant had not used the minimal force available as was required by the applicable agency policy. (APP Vol. II at 336-337). This amounted to client abuse and was a serious violation of law and regulation which gave Respondent the authority to impose termination. (APP Vol. II at 337).

If the agency's published regulations prescribe termination as an appropriate level of discipline for a first-time offense, then that violation is necessarily 'serious' as a matter of law. *O'Keefe v. Department of Motor Vehicles,* 134 Nev. 752, 431 P.3d 350 (2018). In this case, many of the P&Ps cited in the NPD-41 Specificity of Charges allow for termination on a first offense. Specifically, B7, B22, D1, D8 and

D9 all authorize termination on a first offense. (APP. Vol. II at 221-230). Violation of D8 mandates termination. (APP. Vol II at 225). Appellant's violations of the charged P&Ps were serious as a matter of law and warranted termination.

I. *O'Keefe* Should Not Be Overturned.

Appellant's argument that *O'Keefe v. State, Dep't of Motor Vehicles,* 134 Nev. Adv. Op. 92, 431 P.3d 350 (2018) should be overturned is not appropriate. Appellant did not raise this issue prior to this appeal, and it should not be considered pursuant to the decisions in *Barta* and *Palmieri*. Moreover, Appellant specifically agreed to the *O'Keefe* standard that was used in Decision on Remand. (APP. Vol. II at 332-333). At the direction of the Hearing Officer the parties conferred and formulated the standard to be used.

> *Counsel submitted that the decision on remand in this case is a determination of whether the termination was justified based upon the charge of client abuse stated on the NPD-41. The parties stipulated that the authority granted the Hearing Officer under NRS 284.390(6) is to determine whether the agency had just cause for the discipline "as provided in NRS 284.385 " A dismissal for just cause is one which is not for any arbitrary, capricious, or illegal reason and which is one based upon facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true."*
>
> *O'Keefe v. State, Dept of Motor Vehicles, 134 Nev. 752, 431 P.3d 350 (2018) instructs Hearing Officers to utilize a three-step process in deciding when reviewing disciplinary decisions:*
>
> *1) the Hearing Officer must review, de novo, whether the employee committed the alleged violation;*
>
> *2) whether the alleged violation is a serious violation of law or regulation that would make the most severe discipline appropriate for a first discipline; and*
>
> *3) a deferential standard of review is utilized with regards to whether a termination is in the "good of public service."*

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

Additionally, Appellant cited the *O'Keefe* standard in his responsive brief during the judicial review process. (APP. Vol. I at 303, 307, 308). Appellant cannot now argue that *O'Keefe* is erroneous.

In addition to the previous cited decisions, by Appellant's own logic and his cited case of *Haynes v. Golub Corp.,* 166 Vt. 228, 692 A.2d 377 (1997), he has waived any argument against the *O'Keefe* standard. Appellant also challenges the substantial evidence standard despite the fact that he cited it in his responsive brief during the PJR process (APP Vol. II at 302-308) and did not argue the issue earlier in the litigation.

Appellant submits a lengthy argument against *O'Keefe* discussing "industrial common law" and cases from other jurisdictions. None of this changes the fact that there no conflict exists between the *O'Keefe* standard of review and the just cause standard found in NRS 284.390(1).

Appellant argues that the terms "good of the public service" and "reasonabless" referred to in NRS Chapter 284 are the "just cause" standa that is required by NRS 284.390(7) and that a deferential standard of review presents a conflict. This Honorable Court specifically discussed this issue in *O'Keefe*. Deference to appointing authority's decision is not an automatic affirmation of the action of the agency. The reviewing entity must satisfy itself that the agency has articulated a rational connection between the facts found and the choice made. *O'Keefe* at 760. This constitutes the just cause analysis.

The rational connection mandated in the *O'Keefe* decision directly establishes both reasonableness and good of the public service. The deference required by *O'Keefe* does not obviate a Hearing Officer's authority to assess an agency's

decision and determine whether the necessary rational connections have been established.

The language of NRS 284.385(1)(a) authorizes dismissal so long as "the appointing authority considers that the good of the public service will be served thereby." This statute recognizes that "the good of the public service" is a subjective concept, and the relevant perspective is that of the appointing authority, who is in a better position than the hearing officer to evaluate what is best for the public service. *O'Keefe* at 758. See also *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 931-32, 314 P.3d 949, 951 (2013). The deferential standard does not negate the neutrality of a decision maker. As this Honorable Court found in *O'Keefe* and *Taylor,* an appointing authority has better perspective and understanding as to what is best for the public service in terms of its agency and employees than that of a neutral decision maker. The Hearing Officer analysis must also include determination of whether the alleged violation is serious enough to warrant the discipline. *O'Keefe* at 759.

"Good of the public service" pursuant to NRS 284.385(1)(a) is not what a Hearing Officer believes to be for the good of the public service, but whether it was reasonable for the agency to consider that the good of the public service would be served by termination under that statute. *O'Keefe* at 760. That inquiry affords deference to the agency's decision, it "does not automatically mandate adherence to [the agency's] decision" as "[d]eferential review is not no review, and deference need not be abject." *O'Keefe v. State, Dept of Motor Vehicles*, 134 Nev. 752, 431 P.3d 350 (2018) citing *McDonald v. Western-Southern Life Ins. Co.*, 347 F.3d 161, 172 (6th Cir. 2003) (internal quotation marks omitted). A deferential standard of review is not a rubber stamp of the action of the agency. A reviewing entity must satisfy itself that the agency has articulated a rational connection between the facts

found and the choice made. *Port of Jacksonville Mar. Ad Hoc Comm., Inc. v. U.S. Coast Guard*, 788 F.2d 705, 708 (11th Cir. 1986).

Appellant criticizes the holding in *Southwest Gas Corporation v. Vargas,* 111 Nev. 1064, 901 P.2d 693 (1995) and claims that the definition of "just cause" found in that decision is erroneous. In that case, this Honorable Court found that a discharge for "just" or "good" cause is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by substantial evidence, and (2) reasonably believed by the employer to be true. See *Vargas* at 1078.

The argument that *Vargas* has no application to the appeals of disciplinary action by Nevada State employees in classified service is not on point. The *Vargas* case did not supply the standard of review used by the Hearing Officer in the Decision on Remand. The *O'Keefe* case provided the standard used and it is directly on point. The *O'Keefe* case had very similar underlying facts to those of the instant case. Both cases involved a classified Nevada State employee who was terminated on a first offense. This appeal is also the first time Appellant has challenged *Vargas.*

Appellant cites caselaw from other jurisdictions to support his contentions and attempts to confuse the issue with an analysis of employment manuals vs. negotiated contracts and public employment vs. private employment. Nothing in these arguments is relevant to this case. None of these arguments were raised at either the administrative hearing or PJR levels and should not be considered by this Honorab Court.

O'Keefe does not mandate a lower standard of just cause than NRS Chapter 288. A Hearing Officer has always been an impartial party who makes impartial decisions. Nothing in the *O'Keefe* decision changes the meanings of "just cause" and "reasonableness." Appellant has not cited any authority detailing a different

standard of review under NRS Chapter 288 and did not raise this issue until this appeal.

Appellant's claim that he "only received an informal pre-termination hearing" is without merit. Appellant provides no description of what a formal or informal hearing may be. No authority is cited to support this claim and there is no citation to the record. Appellant's pre-termination hearing was conducted pursuant to NRS Chapter 284 which provides appropriate procedural safeguards. Appellant was afforded all of the applicable Due Process.

Even if the pre-termination hearing had been informal, the post termination hearing was a full evidentiary hearing and was conducted by a neutral third party. Once again, this is an issue that was not raised at either of the lower levels. Nothing in the *O'Keefe* decision renders Hearing Officers partial or non-neutral.

Appellant's claim that *O'Keefe* instructs Hearing Officers to "blindly defer to the decisions of agency heads" is blatantly false. As has been argued above, *O'Keefe* requires a rational connection between the action of the agency and the facts found by the Hearing Officer. As is also stated in the *O'Keefe* decision, the deferential standard does not mandate adherence to an agency decision.

Under *O'Keefe,* an appointing authority retains its burden of proof that a disciplinary action was proper. The violation of a rule or regulation must be proven as well as the seriousness of the offense in reference to the discipline imposed. In the instant case, Appellant was charged with client abuse and that was proven at the administrative hearing. Section D8 of the P&Ps mandates termination for a first offense. (APP Vol. II at 225). There was just cause for the termination. It was shown to be reasonable and for the good of the public service.

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VII. CONCLUSION

The substantial, reliable, and probative evidence presented at the hearing demonstrated that Respondent DHHS had just and legal cause to terminate Appellant Charles Rocha and that said termination was reasonable and for the good of the public service.

This appeal was not timely filed. The issues that were not raised at the earlier stages of this litigation should not be considered by this Honorable Court. The District Court's Order of Remand and the Hearing Officer's Decision on Remand should be affirmed and that the decision to terminate Appellant Charles Rocha be upheld.

VIII. AFFIRMATION PURSUANT TO NRS 239B.030

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

IX. ATTORNEY'S CERTIFICATE

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

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Office of the Attorney General and that on the 13th day of October, 2021, I served a copy of the foregoing PETITIONER'S OPENING BRIEF by placing a copy of said document in the Nevada State Department of General Services for mailing addressed to:

Adam Levine, Esq.
Daniel Marks, Esq.
610 South Ninth Street
Las Vegas, NV 89101

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