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

APPELLANT'S REPLY BRIEF

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

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

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

Attorneys of Record for Appellant Charles Rocha

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I. ERROR IN DHHS' STATEMENT OF FACTS

In the Statement of Facts in support of its Answering Brief, Respondent Department of Health and Human Services (hereafter "DHHS") states that Rocha's two (2) punches to the inmate's ("client") face occurred "after the client was on the floor and had been subdued by at least two other staff." (Answering Br. at p. 7). DHHS' recitation of the facts incorrectly suggests that the inmate being on the grounds meant that he was in a position of vulnerability/disadvantage compared to Rocha.

The reason the inmate was on the floor was because after informing Rocha "I'm going to kill you", and striking Rocha several times in the face, the inmate wrapped his leg around Rocha's leg causing both to fall to the floor – with Rocha landing on his injured hip. (APP Volume I at 083-084, 087-096, 100).

Second, the inmate was not "subdued". To "subdue" means "to bring under control" *Merriam-Webster Dictionary* (Online Ed.). The inmate was not "subdued" as he continued to keep Rocha trapped such that he could not break free – all the while spitting and continuing to articulate threats. (APP Vol. I at 47-48, 090-091, 095-096).

II. ROCHA'S APPEAL IS NOT UNTIMELY.

DHHS argues that Rocha's appeal is untimely because notice of entry of the district court order granting judicial review was filed on July 20, 2020 and that the

Notice of Appeal was not filed until February 11, 2021. (Answering Br. at p. 12). DHHS' Answering Brief cites the 30 days to file an appeal pursuant to NRAP 3A(b)(1).

However, the district court's order granting judicial review filed July 1, 2020, and served July 20, 2020, was not a final judgment. This is because the district court's decision to reverse remanded the matter back to the Hearing Officer for further proceedings.

It is well-established that where a district court grants judicial review and remands the matter back to an administrative agency/tribunal for further proceedings, such an order does not constitute a final judgment within the meaning of NRAP 3A(b)(1). *Bally's Grand Hotel & Casino v. Reeves*, 112 Nev. 1487, 292 P.2d 936 (1996); *Clark County Liquor and Gaming Licensing Board v. Clark*, 102 Nev. 654, 730 P.2d 443 (1986).

In *Bally's Grand Hotel*, the Supreme Court recognized that the inclusion of the term "remand" in an order is not automatically outcome determinative for purposes of whether such an order is a final judgment within the meaning of NRAP 3A(b)(1). Rather, the Court takes "a functional view of finality, which seeks to further the rule's main objective: promoting judicial economy by avoiding the specter of piecemeal appellate review." 112 Nev. at 1489, 292 P.2d at 937.

Thus, in *Bally's Grand Hotel*, the order granting judicial review was deemed final because the sole issue before the district court on judicial review was whether the employee was entitled to workers compensation benefits, and the district court concluded that she was. Id. The "remand" was limited solely to calculation of the appropriate amount of benefits due.

In contrast, in *Clark County Liquor*, the remand was "for further substantive action". 112 Nev. at 1488, 292 P.2d at 937. Where substantive action is required, an order granting judicial review with remand is not a final judgment.

The district court's Findings of Fact, Conclusions of Law, Decision and Order on Petition for Judicial Review filed July 1, 2020 was not a final judgment within the meaning of NRAP 3A(b)(1). It was not an Order determining with finality whether Charles Rocha's discharge was reasonable and/or supported by just cause under NRS 284. 390(1) and (7), or whether the dismissal should be upheld. Rather, the district court's order remanded the matter back to the hearing officer to reconsider the case on the merits under a different standard of review. (APP. Volume II at 320). This constitutes "substantive action".

Because the July 1, 2020 Order was not a final judgment, it did not become final until after the hearing officer issued his decision following remand on January 12, 2021. Because the Notice of Appeal was filed on February 11, 2021 the appeal is timely.

III. THE REQUIREMENT TO SERVE THE ATTORNEY GENERAL AND THE HEAD OF THE AGENCY NAMED IN THE PETITION IS JURISTICTIONAL BECAUSE IT IS REQUIRED UNDER NRS 233B.130(2)(c).

DHHS does not dispute that it did not serve either of the Department of Administration or the Personnel Commission with its Petition for Judicial Reveal prior to having the District Court first stay, and subsequently reverse, the Hearing Officer's decision to reinstate Charles Rocha with full pay. Instead, DHHS argues that service of a Petition for Judicial Review is not jurisdictional citing *Spar Business Services v. Olson*, 135 Nev. ___, 448 P.3d 539 (2019).

DHHS misapplies the holding in *Spar Bus. Services* which holds that the 45 days to effectuate service under NRS 233B.130(5) is not jurisdictional. That conclusion was based upon the plain language of subsection (5) which permits an extension beyond 45 days "upon a showing of good cause" 448 P.3d at 542.

However, Rocha's jurisdictional challenge is not based upon the 45 day requirement under NRS 233B.130(5); it is based upon the failure to effectuate any service at all as required by NRS 233B.130(2). That statute states:

> Petitions for judicial review **must**:
>
> (a) Name as respondents the agency and all parties of record to the administrative proceeding;
>
> (b) Be instituted by filing a petition in the district court in and for Carson City, in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred;
>
> **(c) Be served upon:**

(1) The Attorney General, or a person designated by the Attorney General, at the Office of the Attorney General in Carson City; and

(2) The person serving in the office of administrative head of the named agency; and

(d) Be filed within 30 days after service of the final decision of the agency.

(Emphasis added).

The requirement of service upon the Attorney General and the "person serving in the office of administrative head of the named agency" falls under NRS 233B.130(2) – the same subsection of the statute which requires "all parties of record for the administrative proceeding" to be named. The word "must" in subsection (2) of NRS 233B.130 applies to subsection (2)(c) (requiring service on the AG and agency head) as much as it does subsection (2)(a) (requiring all parties to be named). As noted in *Spar Bus. Services* "Because NRS 233B.130(2) is silent on the court's authority to excuse noncompliance with those requirements, we have determined that the statute's plain language requires strict compliance and have held the requirements in NRS 233B.130(2) to be jurisdictional." 448 P.3d at 542 citing *Heat. & Frost Insulators & Allied Workers Local 16 v. Labor Commissioner of Nevada*, 134 Nev.1, 4, 408 P.3d at 156,159-60 (2018).

Simply put, because the requirement of service upon (1) the Attorney General and (2) the person serving in the office of administrative head of the named agency falls under NRS 233B.130(2), that service requirement is

jurisdictional. While the time limit of 45 days under subsection (5) is not jurisdictional, such service must eventually be effectuated for the district court to obtain subject matter jurisdiction to review the decision of an administrative agency or tribunal. Because it is undisputed that the Attorney General was not served, and that the head of the Personnel Commission and Department of Administration was not served, the district court lacked subject matter jurisdiction to grant judicial review or remand the matter back to the Hearing Officer after the Hearing Officer reversed the dismissal of Charles Rocha and ordered him reinstated with full pay pursuant to NRS 284.390(7).

Alternatively, DHHS Answering Brief argues that Rocha did not raise this jurisdictional defect before the district court below. However, it is well-established that jurisdictional issues may be raised on appeal for the first time. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 623 P.2d 98 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal"); *Garmong v. Lyon County Bd. of Commissioners*, 439 P.3d 962 (2019) ("issue of jurisdiction may be considered for the first time on appeal"); *Wallace v. Smith*, 2018 WL 142-6396 (Nev. 2018) ("questions of jurisdiction can never be waived or stipulated away by the parties"

and "may be raised at any time, even *sua sponte* by the court for the first time on appeal").[1]

IV. THE DISTRICT COURT ERRED IN REMANDING THE MATTER BACK TO THE HEARING OFFICER TO DECIDE THE DISMISSAL OF CHARLES ROCHA UNDER A DIFFERENT STANDARD OF REVIEW THAN UTILIZED IN THE HEARING OFFICER'S INITIAL DECISION.

A. The Proper Standard For The Hearing Officer To Utilize Was "The Reasonableness" Of The Dismissal Pursuant To NRS 284.390(1).

As set forth in Rocha's Opening Brief the Hearing Officer overturned Rocha's dismissal finding that he reasonably acted in self-defense. (APP Vol. I at 132-149). The district court reversed the Decision finding 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." (ROA Volume II at 320).

Under NRS 284.390(1) a hearing officer is to determine "the reasonableness" of a suspension, demotion or dismissal. Under NRS 284.390(7) if

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[1] DHHS further argues that Rocha lacks standing to raise the issue of the failure to serve the other indispensable parties. However, because the failure goes to the court's jurisdiction Rocha does have standing. Moreover, Rocha has suffered an injury by the failure to properly serve the Department of Administration. It was that Department which was responsible for filing the full Record on Appeal. As evidenced by the Court's order filed August 27, 2021 reflecting that the Department of Administration never filed the video of the incident with the district court, had the Department of Administration been properly served and brought into the case, this issue could have been raised with the Department.

the hearing officer determines that such suspension, demotion or dismissal "was without just cause" (i.e. "not reasonable") the employee is to be reinstated with "full pay".

The district court erred in setting aside the decision of the Hearing Officer by claiming that it was "clear error" to applying a use of force standard when Charles Rocha was charged with "patient abuse". The "reasonableness" of the discipline does not turn upon how it is characterized by the employer or the labels utilized (i.e. "abuse" versus "use of force" or "self-defense"). Rather, "reasonableness" is an objective standard which must be decided upon the totality of the circumstances. See e.g. *Graham v. Connor*, 490 U.S. 386, 396 (1989) ("the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application" and "its proper application requires careful attention to the facts and circumstances of each particular case").

Simply put, Charles Rocha's punches, directed toward the inmate who was attempting to kill him, was a use of force. If that use of force was legitimately in "self-defense", by definition it was "reasonable" within the meaning of NRS 284.390(1) and cannot constitute "client abuse". Allowing the district court to circumvent the word "reasonable" in NRS 284.390(1) by requiring the Hearing Officer to limit his analysis only to the employer's definition of a rule (i.e. "client abuse") renders the word "reasonable" under statute to be nothing other than mere

tautology. See e.g. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) ("The categories of substantive and procedure (due process) are distinct. Were the rule otherwise, the [Due Process] Clause would be reduced to a mere tautology").

This is clearly illustrated by the testimony of DHHS' own witnesses. When asked to explain why Rocha's actions were asserted to "violate agency policy", DHHS investigator Linda Edwards responded "Because it's *excessive use of force*". (APP Volume I at 055). This characterization of Rocha's conduct as being "excessive force" was repeated by Edwards under cross examination based upon her (erroneous) belief that the inmate was not resisting. (APP Volume I at 060).

The Hearing Officer, in both of his decisions prior to being reversed, determined that the inmate was continuing to resist and presented a threat to Rocha, and therefore his actions were justified in self-defense. (APP Volume I at 114-115, 146-147). If Rocha's actions to defend himself were reasonable and justied, by definition his dismissal could not be reasonable and therefore would be in violation of NRS 284.390(1).

B. DHHS Arguing Excessive Force Constituted A Waiver Of Any Claim of Error.

As detailed in Rocha's Opening Brief, at the appeals hearing, after DHHS's witnesses claimed Rocha's actions constituted excessive force, both parties

utilized the "excessive force" standard in their closing arguments. (APP Volume I at 103-105, 108-110).

DHHS' Answering Brief does not dispute that it argued "excessive force" and encouraged the Hearing Officer to review *Graham v. Connor*, supra and related case law during closing arguments. Instead, it seeks to have this Court disregard its closing argument substituting the argument that "This case is and always will be about client abuse" because that was the charge in the NPD-41 Specificity of Charges. (Answering Brief at p. 18).

Again, this is simply a resort to mere tautology. DHHS did not seek to draw any such distinction at the hearing or in its closing arguments before the Hearing Officer, instead arguing that Rocha's actions constituted excessive force. (APP Vol. I at 055-056, 60, 110). Because no such distinction was raised before the hearing officer, DHHS should not have been permitted to attempt to create such a distinction upon judicial review.

C. The Hearing Officer's Made A Factual Finding That Charles Rocha Was Acting In Justifiable Self Defense.

As set forth in Rocha's Of Brief, the district court was incorrect when it claimed that the Hearing Officer decided the case under a "use of force" analysis. A use of force analysis involves evaluation of three criteria: "the severity of the

crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor,* 490 U.S. at 396. While the use of force by Rocha was justified under these criteria, the Hearing Officer actually decided the case based upon the right of self-defense.

As set forth in Rocha's Opening Brief the right of self-defense has been recognized in Nevada and in other states. DHHS's Answering Brief dismisses the authorities cited by Rocha claiming they are either criminal statutes, or arose "from situations in the private sector and involved at will employees". (Answering Brief at p. 19). However, no explanation is provided by DHHS as to why an at-will employee should have a right of self-defense, and a post-probationary member of the classified service with a property interest in their employment should not.

Alternatively, DHHS argues that Rocha was not acting in self -defense because he had received CPART training in de-escalation techniques. (Answering Brief at p. 19). However, the undisputed testimony at the hearing was that the situation which Rocha found himself and was past the point where de-escalation was an option, and that Rocha had never been instructed that he could not use the

self-defense techniques that he was taught in his Academy in connection with his job. (APP Volume I at 43, 73, 75-76).[2]

At the hearing DHHS' witnesses never presented any evidence as to what DHHS contended that Rocha should have done when attacked and trapped. Rather, DHHS' witness testimony and argument was that Rocha's strikes were improper because they were motivated by an intent to "punish and retaliate". (APP Volume I at 57-58, 102).

However, the Hearing Officer made specific factual findings to support his conclusion that Rocha's punches were in self-defense to break free from his attacker. (APP Volume I at 143-147). "When the factual findings of the administrative agency are supported by substantial evidence, they are conclusive, and the district court is limited to a determination of whether the agency acted arbitrarily or capriciously." *Nevada Public Employee Retirement Sys. v. Smith, 129 Nev. 618, 623-624, 310 P.3d 560, 564 (2013)*; *Mishler v. Nev. Bd. of Med. Exam'rs*, 109 Nev. 287, 292, 849 P.2d 291, 294 (1993).

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[2] Linda Edwards who investigated the matter for DHHS, and who was called to testify, admitted that she was not familiar with Rocha's training. (APP Vol. I at 58).

V. O'KEEFE WAS IMPROPERLY DECIDED AND SHOULD BE OVERTURNED.

Rocha argues in his Opening Brief that *O'Keefe v. Department of Motor Vehicles*, 134 Nev. 752, 431 P.3d 350) 2018) (hereafter "*O'Keefe*") should be overruled for multiple reasons including the fact that it improperly utilizes the standard of "just cause" from *Southwest Gas Corporation v. Vargas*, 111 Nev. 1064, 901 P.2d 693 (1995) (hereafter "*Vargas*") which was a case which addressed only implied contracts of continuing employment.

DHHS argues that Rocha failed to properly preserve the issue below by acknowledging O'Keefe's applicability following remand from the district court. (Answering Brief at pp. 21-22). However, this argument ignores the fact that the arguments submitted in favor of overturning *O'Keefe* and include constitutional challenges to the requirement that a Hearing Officer defer to the employer, and the use of the substantial evidence standard. (Opening Brief at pp. 42-45). Constitutional issues may be raised for the first time on appeal. *Tam v. Eighth Judicial District Court*, 131 Nev. 792, 358 P.3d 234 (2015). See also *Jones v. State*, 101 Nev. 573, 707 P.2d 1128 (1985) (where "fundamental rights are implicated, it is appropriate to hear a constitutional question for first time on appeal").

Moreover, appellate courts do have discretion to consider pure questions of law not affected by the factual record on appeal, even if not raised below. See e.g.

Allen v. State Board of Elections, 393 U.S. 544, 535-537 (1962); *Telco Leasing v. Transwestern Title Co.*, 630 F.2d 691, 6930694 (9th Cir. 1980). As pointed out by Justice Pickering in her *O'Keefe* concurring opinion, the decision to overrule *Knapp v. State*, 111 Nev. 420, 769 P.2d 56 (1995) was made in *O'Keefe* despite the fact that it was an issue not presented by that appeal. 111 Nev. at 763, 431 P.3d at 358. If an erroneous decision may arise from a case where the issue was not developed before the administrative tribunal or district court below, correction of such an erroneous decision should likewise be permitted.

DHHS' Answering Brief does not dispute that the definition of just cause from *Vargas*, which was incorporated into *O'Keefe*, was limited to implied contracts of continuing employment in what would otherwise be an at-will relationship, based upon the fact that the employer had not contracted away its fact-finding prerogatives. DHHS' Brief has no answer for those authorities rejecting the *Vargas* definition of just cause in other contexts. DHHS' Brief has no response to the fact that the employees exercising their rights to challenge discipline under the arbitration mechanisms of the newly enacted collective bargaining agreements will receive the benefit of the just cause standard as adopted by the common law as opposed to the more employer deferential *O'Keefe* standard. DHHS' Brief cannot dispute that the use of the "substantial evidence" standard fails to meet constitutional muster where the State has the burden of

proving that the employee should be deprived of their property interest in their employment. These failures/non-responses should be deemed a confession of error.

VI. CONCLUSION/REMEDY REQUESTED

For all of the reasons set forth above, the decision of the district court granting judicial review and remanding Charles Roca's case back to the hearing officer with instructions to decide the case under a standard different than initially utilized should be *Reversed*. The matter should be remanded back to the district court with instructions to deny DHHS' Petition for Judicial Review thereby reinstating the Hearing Officer's original decision.

DATED this 1st day of December 2021.

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

I hereby certify that I have read this Appellant's Opening Brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose.

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

I further certify that this Appellant's Opening Brief is formatted in compliance with NRAP 32(a)(4-6) as it has one (1) inch margins and uses New Times Roman - font size 14 has 23 pages, double-spaced, and contains 4134 words. I understand that I may be subject to sanction in the event that the

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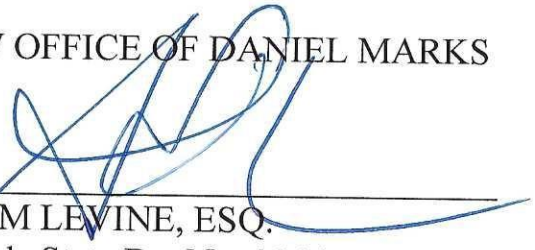
accompanying Appellant's Reply Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 1st day of December 2021.

LAW OFFICE OF DANIEL MARKS



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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 1st day of December 2021, I did serve the above and forgoing APPELLANT'S REPLY BRIEF, by way of Notice of Electronic Filing provided by the court mandated E-Flex filing service, at the following:

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