NO. 83322

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, EMPLOYMENT SECURITY DIVISION; LYNDA PARVEN, IN HER CAPACITY AS ADMINISTRATOR OF THE EMPLOYMENT SECURITY DIVISION; AND J. THOMAS SUSICH, in his capacity as Chairperson of the EMPLOYMENT SECURITY DIVISION BOARD OF REVIEW,

Appellant,

vs.

KELLY EPPINGER,

Respondents.

On Appeal from an Order Granting a Petition for Judicial Review
of the Eighth Judicial District Court of
the State of Nevada, in and for Clark County
District Court Case No. A-20-826310-P

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider this appeal based on NRAP 3(a)(1) and NRS 612.530(6), which parallels NRS 233B.150.

The Notice of Entry of Order was entered July 6, 2021. (AA198). The Notice of Appeal was filed on July 30, 2021. (AA207). Therefore the appeal is timely.

ROUTING STATEMENT

Pursuant to NRAP 17(b)(9) the matter is assigned to the Court of Appeals because it is an administrative agency's case.

STATEMENT OF THE ISSUES

1. Whether substantial evidence existed in the record to support the administrative decision of ESD.

2. Whether, the District Court erred as a matter of law in failing to provide deference to the administrative agency, make contradictory factual findings it cannot make and overrule a credibility determination.

STATEMENT OF THE CASE

Kelly Eppinger (claimant) was employed by Linden & Associates PC (employer) as a psychiatric technician. (AA033). Claimant worked for employer from May 15, 2019 to January 1, 2020. (AA033). She filed a claim for unemployment insurance benefits (benefits) with ESD with an effective date of

March 29, 2020. (AA033). ESD denied claimant's claim for benefits in a Determination issued by the ESD Administrator's adjudicator on June 30, 2020, which was mailed out to claimant on July 1, 2020. (AA092-AA093). Claimant appealed this Determination to the Administrative Tribunal (referee). (AA033).

The evidentiary hearing was held on October 14, 2020. (AA039-AA074). The referee issued a decision on October 15, 2020, affirming the ESD Administrator adjudicator's Determination, concluding that claimant quit her employment without good cause. (AA033-AA035).

On October 20, 2020, claimant appealed the referee's decision to the Board of Review (Board). (AA031).

On December 3, 2020, the Board issued a decision affirming the referee's decision, adopting the referee's findings and reasoning. (AA022). The Board notified claimant that any appeal to the District Court had to be filed by December 28, 2020. (AA022). Claimant filed her Petition for Judicial Review. (AA010). The District Court granted the Petition for Judicial Review (AA192). This appeal followed.

STATEMENT OF FACTS

The Board of Review is the final fact-finder under NRS 612.530. The Board affirmed the referee's decision and adopted the referee's findings and reasoning. Accordingly, the Board found as follows:

Claimant appealed the Determination denying her benefits pursuant to NRS 612.380, voluntary quit. (AA033). Claimant filed a claim with ESD for unemployment insurance benefits (benefits) effective March 29, 2020. ESD issued a Determination denying benefits on July 1, 2020. Claimant timely appealed. (AA033). Employer Linden and Associates, P.C. (employer) did not respond to the Notice of Claim Filed – Separation Base Period Employer form, requesting information concerning claimant's employment and reasons for separation. (AA033).

Claimant was employed by employer from May 15, 2019 through January 1, 2020. Claimant worked her last completed shift on January 1, 2020, as a psychiatric technician. (AA033). Claimant reported to ESD's local office her separation was a mutual agreement, and she agreed to mutually separate opposed to continue working since she was offered another position that paid higher wages. (AA033). Claimant reported to ESD's Adjudication Division she was switched to a "1099" employee (i.e. independent contractor), without being asked. She put out her resume and was hired. She asked the physician (Doc) if he would honor his verbal agreement of giving her a raise. The physician said he could not afford. He added that if she had a better opportunity, she should take it. (AA033).

Claimant spoke with the physician sometime in November 2019, at the time of giving notice of resignation about the pay raise. (AA033-AA034). Claimant also

reported to ESD's Adjudication Division she was employed with the new employer, Summit Community Services, as a "1099" employee from December 15, 2019 through March 16, 2020. Claimant reported she was hired and/or signed her employment contract with "Summit" on November 26, 2019; however, she did not receive her first client until sometime in December of 2019. Claimant did not have a copy of the employment contract and/or any supporting documentation showing that she secured other employment prior to quitting. (AA034).

Claimant did not recall the exact date she gave employer her notice of resignation. Claimant held a conversation with the physician (Dr. Linden) sometime in November of 2019, at which time she gave him her verbal notice of resignation. Claimant advised the physician she was leaving for a higher paying job. (AA034). The "catalyst" – the final incident – that led to claimant's decision to quit and look for other employment was that her full-time position was changed to a "1099" employee. (AA034). Claimant was hired by employer as a full-time employee. Claimant's employment classification was changed to a "1099" sometime in November of 2019. (AA034).

On October 17, 2019, claimant had a conversation with the office manager (Jennifer) via text regarding coming into the office to sign the "1099" documents. Claimant questioned why she was being changed from full-time to a "1099" after five months of employment. (AA034). The office manager responded by telling

claimant that she seemed okay with "it" when they talked, and specifically instructed claimant to speak with the physician, Dr. Linden, about her inquiry regarding the change. (AA034). Claimant never went into the office to sign the "1099" documents. Prior to quitting, claimant never spoke with the physician regarding any problem she had with being changed to a "1099" and/or being "treated unfairly" relative to being changed to a "1099" employee. Also prior to quitting, claimant never filed a formal complaint with employer (employer's human resources, office manager, and/or the physician) or a state government agency regarding any issue related to being changed to a "1099" employee. (AA034).

Claimant provided supporting documentation, showing payroll received as a full-time employee through October 26, 2019, and as a "1099" employee. Claimant received her first check as a "1099" employee on November 13, 2019. (AA034). Claimant continued working for employer until January 1, 2020. Claimant did not provide employer with an effective last day of work when giving notice, because she did not know when her employment would end due to her agreeing to complete a project and assist with the training of her replacement. Claimant received her last check dated January 3, 2020, on January 7, 2020. (AA034). NRS 612.385 provides that a person is ineligible for benefits if she has been discharged from her last or next-to-last employment for misconduct connected with the work. (AA034). When there is doubt whether a separation should be considered a quit or a discharge, it is

commonly reasoned that if the employer set in motion the chain of events leading to the separation, the separation was a discharge. If, on the other hand, claimant sets the chain of events in motion then the separation was a voluntary quit or leaving. (AA034-AA035).

Here, the evidence substantiates that claimant was the moving party. Therefore, the voluntary quit provisions of the law apply (NRS 612.380). (AA035). NRS 612.380 provides that a person is ineligible for benefits if she left her last or next-to-last employment without good cause or to seek other employment. That ineligibility continues until she earns remuneration in covered employment equal to or exceeding her weekly benefit amount in each of ten weeks or until she secures other employment. (AA035).

Sworn testimony need not be "assumed" to be correct simply because it is sworn testimony. To be the basis for supportable findings, the testimony must not only be sworn testimony, it must be in accord with logic and reason and meet the test of credibility. (AA035).

Claimant contends she quit after being changed from a full-time employee to an independent contractor, without her knowledge and/or signing of any documentation. Claimant testified that she received her first check as a "1099" employee on November 13, 2019. She contended that she secured other employment effective November 26, 2019. She further testified that she continued working for

employer until January 1, 2020, to finish a project and help train her replacement. (AA035).

Evidence substantiates there was some type of conversation between claimant and employer in October of 2019, regarding the "1099" change. Claimant did not attempt to speak to the physician about her inquiries concerning the classification change, as she was instructed to do so by the office manager. This was prior to her quitting. (AA035).

It is not within logic or reason that claimant would continue working for employer, and receive compensation from employer for months, in a position or classification she was not in agreement with – whether such disagreement was expressed verbally or in writing. Additionally, claimant's actions of remaining employed as a "1099" employee, even after securing other employment, lacks logic and reason since claimant maintained that the classification change was the "catalyst" which led to her decision to quit and was the fundamental basis for seeking other employment. (AA035).

Claimant provided no supporting evidence substantiating that she secured other employment prior to quitting. (AA035). Based on the evidence in the record, claimant quit the employer due to personal and non-compelling reasons, and she quit prior to exhausting all reasonable alternative available to her. Good cause for quitting was not established. (AA035).

NRS 612.457 provides:

Upon receipt of the notice of filing a claim, the employing unit shall within 11 days after the date of mailing of the notice, submit to the Division [ESD] all relevant facts which may affect a claimant's rights to benefits. (AA035).

NRS 612.551 provides that the experience rating record of an employer from whom the claimant earned 75% or more of her wages shall not be charged if the employer provides evidence within ten working days of the Notice of Claim Filing that the claimant left without good cause or was discharged for misconduct. (AA036).

Since employer was not present during the hearing to provide testimony, the issue pursuant to NRS 612.457 (whether employer provided ESD with a response) and the issue pursuant to NRS 612.552 (whether employer's account was subject to charge) were not addressed. (AA036).

The appealed Determination issued under NRS 612.380 (voluntary quit without good cause) is affirmed. Claimant is ineligible for benefits from December 8, 2019 onward, until claimant works in covered employment and earns an amount equal to or greater than the weekly benefit amount in each of ten weeks. (AA036).

An evidentiary hearing was held in the matter as noted above and following facts through testimony was adduced:

The hearing occurred on October 14, 2020. (AA039). Claimant and her counsel were present telephonically. (AA040). Apparently, no witnesses were subpoenaed because, besides the claimant, no witnesses were present. (AA040). The referee explained, "This is your only evidentiary hearing required by law … which means it's your last opportunity to submit new evidence." (AA043).

Claimant was hired by employer around May 15, 2019. Claimant was not sure exactly what date was her last day working for employer, but her last paycheck was received by her on January 7, 2020. (AA047). Claimant explained, "I'm not exactly sure what my last day was, because I had taken another job and I was finishing up a project for Linden [employer]. They knew that I was -- you know, had took another job." (AA047). According to Exhibit 13, which claimant said should be accurate, claimant worked for employer from May 15, 2019 to her last day of work – January 1, 2020. Her separation date was January 1, 2020. (AA048).

Claimant's position with employer was "psychiatric technician." (AA048). Claimant worked for employer Monday through Friday, 8:30 a.m. to 4:00 p.m. with a 30-minute lunch break. Two days a week claimant worked at a nursing home. (AA049). Before going to the nursing home, she was off on Saturday and Sunday. (AA049).

The referee asked, "Did you resign or quit your position as psychiatric technician?" (AA049). Claimant's short answer for the record was "Yeah."

(AA049). Claimant explained: "I took another job. I discussed with Dr. Linden that I had found another job that paid more." (AA049). Claimant provided notice of her resignation to employer, but she could not recall the exact date. (AA049- to AA050). Claimant explained, "I don't know the exact date that I met with Dr. Linden, but I continued to work and complete projects … for … over a month after that conversation that I was going to take another job." (AA050). Claimant's resignation notice was verbal, but she gave no effective last day. (AA050). Claimant added, "I didn't know how long it would take me to finish the project that I had been working on, that I had agreed to finish. And I also had agreed to … train the girl who was going to take over doing what I was doing at the nursing home." (AA050). Claimant's verbal resignation notice was given to Dr. Linden. (AA050). Being changed to a "1099" worker was not the reason given to Dr. Linden for quitting. (AA050-AA051). The reason claimant gave to Dr. Linden for quitting was that she had secured a higher paying job with Summit Mental Health (Summit). (AA051). Claimant was hired by Summit on November 26, 2019. (AA051). At that time, she worked for employer and Summit. (AA052).

Claimant testified that she only sought other employment because of the "1099" issue and she received her first check from employer as a "1099" on November 13, 2019. (AA052). She learned of this classification when there was no direct deposit and the check noted payment for "contracted services." (AA052-

AA053). Claimant said she was shocked and started looking for a new job. (AA053). However, claimant and office manager Jennifer Williams communicated about the "1099" change on October 16, 2019. (AA053). Claimant never spoke with Dr. Linden about the "1099" classification. (AA055-AA056). Claimant spoke with Dr. Linden in November of 2019, when he told her she should take this other job that paid more. (AA056). This conversation between claimant and Dr. Linden occurred before she contacted or signed any papers with Summit. Claimant signed with Summit on November 26, 2019. (AA056).

Claimant was asked, "If you believe you were being treated unfairly, why did you continue working until January, completing the project and assisting with the training of your replacement?" (AA056). Claimant responded, "Integrity. I had started the project, you know. I was - - I did feel I was being treated unfairly. Once I did secure another job, then, you know, I didn't really want to - - I don't know. Basically, integrity." (AA056-AA057).

Claimant was asked, "When you filed the unemployment benefit claim … you reported [to ESD] your separation in accordance with Exhibits 12 through 14 as a mutual agreement. Why did you report that if you quit?" (AA056-AA057). Claimant responded, "Because, at the time, I didn't really realize that I was quitting. It was -- I looked at it as a mutual separation or a mutual agreement to separate. And that's just the way I had looked at it. But, per, you know, unemployment, I realized

that, oh, yeah, yes, she did quit. So, you know, I looked at it as a mutual, you know, agreement to separate." (AA057).

Claimant took no steps to address the 1099 classification. The only effort taken by claimant to resolve the "1099" classification issue was "waiting to talk to Dr. Linden." (AA057). Employer had human resources, including Jennifer Williams. Claimant did not file a formal complaint with employer before quitting regarding the "1099" contract service change. (AA058). Claimant did not file a complaint with a state government agency regarding being changed to a "1099" service contract employee, before quitting. (AA060).

The referee addressed the documentation submitted by claimant on October 10, 2020, for this hearing. These were marked Exhibits 21-28. (AA060). Exhibit 22 are text exchanges between claimant and employer's Jennifer Williams regarding the "1099" reclassification. (AA066). There was testimony about claimant's position with Summit to show good cause to quit – higher pay requiring higher level of skill. (AA066). When claimant told Dr. Linden that Summit offered her a higher paying job, Dr. Linden told her to take it. (AA068). Claimant indicated that she was still an employee (not an independent contractor). (AA068). Despite the "mutual agreement" and/or claimant quitting to pursue a higher paying job, at the hearing claimant said her "ultimate" reason for quitting was the "1099" reclassification. (AA068).

The referee went over Exhibit 22 with claimant. (AA068). Claimant has no supporting documentation showing that she secured other employment before quitting. (AA070). Claimant testified about her work with Summit as a "1099" contracted services worker. (AA071). Claimant's first paycheck from Summit was in December of 2019. (AA073).

STANDARD OF REVIEW

If supported by evidence and in the absence of fraud, the decision of the Board of Review (Board) and referee is conclusive. NRS 612.530(4); *State Employment Sec. Dept. v. Weber*, 100 Nev. 121, 676 P.2d 1318 (1984). In reviewing the Board's decision, this Court is limited to determining whether the Board acted arbitrarily or capriciously. *State Emp. Sec. Dept. v. Taylor*, 100 Nev. 318, 683 P.2d 1 (1984); *McCracken v. Fancy*, 98 Nev. 30, 31, 639 P.2d 552 (1982); *Bryant v. Private Investigator's Lic. Bd.*, 92 Nev. 278, 549 P.2d 327 (1976); *Lellis v. Archie*, 89 Nev. 550, 516 P.2d 469 (1973).

In performing its review function, this Court may not substitute its judgment for that of the Board, *Weber*, *supra*; *McCracken*, *supra*, nor may this Court pass upon the credibility of witnesses or weigh the evidence, but must limit review to a determination that the Board's decision is based upon substantial evidence. NRS 233B.135(3).

Substantial evidence has been defined as that which "a reasonable mind might accept as adequate to support a conclusion." *Desert Valley Const. v. Hurley*, 120 Nev. 499, 502, 96 P.3d 739, 741 (2004). Stated another way, it has been held that "substantial evidence" means only competent evidence which, if believed, would have a probative force on the issues. *State ex rel. Util. Consumers Council v. P.S.C.*, 562 S.W.2d 688, 692 (Mo. App. 1978). Evidence sufficient to support an administrative decision is not equated with a preponderance of the evidence, as there may be cases wherein two conflicting views may each be supported by substantial evidence. *Robinson Transp. Co. v. Public Service Comm'n*, 159 N.W.2d 636, 638 (Wis. 1968).

The burden to be met by ESD is to show that the Board's decision is one which could have been reached under the facts of this case. This Court is confined to a review of the record presented below, *Lellis, supra*, at 553-554, and the Board's action is not an abuse of discretion if it is supported by substantial evidence in the record. *State, Dept. of Commerce v. Soeller*, 98 Nev. 579 at 586, 656 P.2d 224 (1982); *Lellis, supra*; *North Las Vegas v. Pub. Serv. Comm'n*, 83 Nev. 278, 426 P.2d 66 (1967); *Randono v. Nev. Real Estate Comm'n*, 79 Nev. 132, 379 P.2d 537 (1963).

In 1986, the Nevada Supreme Court held:

> Pursuant to NRS 612.515(3), the Board of Review is authorized to affirm, modify or reverse a decision of the appeals referee. The Board may act solely on the basis of

> evidence previously submitted, or upon the basis of such additional evidence as it may direct to be taken.
>
> The district court's power to review a decision of the Board, however, is more limited. Where review is sought the factual findings of the Board, if supported by evidence ... shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. NRS 612.530 (4). Our decisional law is to the same effect. ...
>
> In short, **while the Board of Review is empowered to conduct a de novo review of the decisions of the appeals referee, the district court has no similar authority with respect to the decisions of the Board**.

Kraft v. Nev. Emp. Sec. Dept., 102 Nev. 191, 193, 717 P.2d 583, 584-85 (1986) (Emphasis added).

In the case of *Clark County School District v. Bundley,* 122 Nev. 1440, at 1444-45, 148 P.3d 750, at 754 (2006), our Nevada Supreme Court stated as follows:

> When reviewing an administrative unemployment compensation decision, this court, like the district court, examines the evidence in the administrative record to ascertain whether the Board acted arbitrarily or capriciously, thereby abusing its discretion. With regard to the Board's factual determinations, we note that the Board conducts de novo review of appeals referee decisions. Therefore, when considering the administrative record, the Board acts as 'an independent trier of fact,' and the Board's factual findings, when supported by substantial evidence, are conclusive.
>
> Accordingly, we generally review the Board's decision to determine whether it is supported by substantial evidence, which is evidence that a reasonable mind could find adequately upholds a conclusion. In no case may we

> substitute our judgment for that of the Board as to the weight of the evidence. Thus, even though we review de novo any questions purely of law, **the Board's fact-based legal conclusions with regard to whether a person is entitled to unemployment compensation are entitled to deference**. (Emphasis added).

The hearing before the referee was the only evidentiary hearing and the burden was on the claimant to show she was eligible for unemployment benefits. While an appealing party may have the burdening oar before ESD's administrative tribunal, this Court may only determine whether the record contained substantial evidence from which a reasonable factfinder could conclude the case was proved. As for the mixed question of fact and law, deference to the Board must be given. *Bundley, supra,* 122 Nev. at 1444-45, 148 P.3d at 754, *and see Kolnik v. Nevada Emp't Sec. Dep't*, 112 Nev. 11, 908 P.2d 726 (1996) ("Although the court may decide pure questions of law without giving deference to an agency's determination, an agency's conclusions of law which are closely related to an agency's view of the facts are entitled to deference and should not be disturbed if the court determines that they are supported by substantial evidence").

ESD's burden is to show this Court that the Board's decision is one which could have been reached under the evidence in the record; not that it is the "only" decision or even the "best" decision which may be suggested by the evidence contained within the record.

SUMMARY OF ARGUMENT

Substantial evidence existed in the record to support the administrative decision of ESD. The District Court failed to follow the appropriate standard of review and erred as a matter of law in failing to provide deference to the administrative agency, make contradictory factual findings it cannot make and overrule a credibility determination.

LAW AND ARGUMENT

I. Applicable Law

NRS 612.380, in pertinent part, states:

> 1. Except as otherwise provided in subsection 2, a person is ineligible for benefits for the week in which the person has voluntarily left his or her last or next to last employment:
>
> (a) Without **good cause**, if so found by the Administrator, and until the person earns remuneration in covered employment equal to or exceeding his or her weekly benefit amount in each of 10 weeks.

(Emphasis added.) Under NRS 612.380, a person is ineligible for unemployment benefits if he voluntarily leaves his job without good cause.

The term "good cause" in the context of NRS 612.380 is not specifically defined in Nevada's statutory or case law. The Board of Review has generally applied the standard that for good cause to exist, the claimant must prove by a preponderance of the evidence that he had no reasonable alternative but to quit. The

conditions giving rise to the reason to quit must be so compelling that a reasonably prudent person would voluntarily give up gainful employment and join the ranks of the unemployed. Similarly, the State of Utah defines "good cause" in the context of unemployment insurance as follows:

> Good cause as used in unemployment insurance is cause which would justify an employee's voluntarily leaving work and becoming unemployed.

Child v. Board of Review, 657 P.2d 1375, 1376 (Utah 1983).

In the case of *Calvert v. Alaska Department of Labor*, 251 P.3d 990 (Alaska, 2011), the Alaska Supreme Court defined good cause relating to unemployment insurance benefits as follows:

> To show good cause, a worker must demonstrate that the underlying reason for leaving work was compelling, and that the worker exhausted all reasonable alternatives before leaving the work. The burden of demonstrating both elements of good cause is on the worker.

In *MaGee v. Director, Arkansas Employment Security Department,* 55 S.W.3d 321 (Ark. App. 2001), the Arkansas court held that to qualify for unemployment benefits the claimant must prove that he acted in good faith showing a genuine desire to retain his employment and that he took all reasonable steps necessary to avoid the loss of his employment. *See also*, *Teel v. Daniels,* 606 S.W.2d 151 (Ark. App. 1980)

II. There Was No Error of Law Committed By ESD and Substantial Evidence in the Record Supports ESD's Administrative Decision

This Court can neither weigh the evidence nor may it determine the credibility of the witnesses. *Lellis, supra*, 89 Nev. at 554, and see *Weber, supra* and *McCracken, supra*. This is in conformity with NRS 233B.135(3), which states: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on a question of fact." Factual findings of the Board, if supported by evidence in the record are conclusive. NRS 612.530(4). This Court cannot reverse such a finding if the finder-of-fact applies the facts to the law, as occurred in this case. *Fremont Hotel v. Esposito*, 104 Nev. 394, 397, 760 P.2d 122, 124 (1988). The District Court did both in that it did not give deference to the Administrative findings and substituted its own judgment for that of the agency.

A case that applies here is *Dolores v. State , Employment Security Division,* 134 Nev. 258, 416 P.3d 259 (2018), which held "that where the record shows that the appellant's decision to resign was freely given and stemming from his own choice, such a resignation is voluntary pursuant to NRS 612.380." *Dolores, supra*, 134 Nev. at 258-259, 416 P.3d at 259. *Dolores* involved a resign or be fired ultimatum. Claimant, in the matter before the Court, testified about fellow workers who she claimed were fired for challenging the "1099" classification and, despite

quitting for a higher paying job, claimant feared she might be fired if she addressed her "1099" reclassification. In the vein, the *Dolores* court explained:

> Nevada has not yet defined "voluntary" for purposes of unemployment benefits; however, other jurisdictions have defined it as "a decision to quit that is freely given and proceeding from one's own choice or full consent." 76 Am. Jur. 2d *Unemployment Compensation* § 104 (2016) (citing *Thompson v. Kentucky Unemployment Ins. Comm'n,* 85 S.W.3d 621 (Ky. Ct. App. 2002), and *Ward v. Acoustiseal, Inc.,* 129 S.W.3d 392 (Mo. Ct. App. 2004)). Applying that definition to Dolores's case, the question here is whether Dolores's decision to resign was freely given despite the fact that he was given a resign-or-be-fired ultimatum.
> …
> The Minnesota Court of Appeals, however, has held that **"[w]hen an employee, in the face of allegations of misconduct, chooses to leave his employment rather than exercise his right to have the allegations determined, such action supports a finding that the employee voluntarily left his job without good cause."** *Ramirez v. Metro Waste Control Comm'n,* 340 N.W.2d 355, 357–58 (Minn. Ct. App. 1983). Specifically, in *Seacrist v. City of Cottage Grove*, the Minnesota Court of Appeals **held that an employee who resigned in order to protect his work record did so voluntarily when told to resign or else disciplinary action resulting in termination would result**. 344 N.W.2d 889, 891–92 (Minn. Ct. App. 1984). The *Seacrist* court determined that the claimant's letter of resignation was unequivocal and that "[w]hen an employee says he is quitting, an employer has a right to rely on the employee's word." *Id.* at 892; *see also Fallstrom v. Dep't of Workforce Servs.,* 367 P.3d 1034, 1035 (Utah Ct. App. 2016) ("**A termination of employment is considered a **262 voluntary quit when**

the employee is the moving party in ending the employment relationship.").

Like the claimants in the aforementioned cases, Dolores resigned when presented a resign-or-be-fired option. While the Minnesota cases involved employees who almost certainly would have been *261 terminated for misconduct had they not resigned, and thus are not entirely factually analogous, we conclude that the legal analysis from the Minnesota Court of Appeals is most applicable and adopt it here. **Accordingly, we hold that an employee presented with a decision to either resign or face termination voluntarily resigns under NRS 612.380 when the employee submits a resignation rather than exercising the right to have the allegations resolved through other available means**.

Dolores submitted his unequivocal resignation letter when he faced termination for failing to obtain the SIDA badge required for his job. Although the TSA's application of its policy may have been incorrect, **Dolores consciously chose to resign rather than wait and resolve the issue** through the union or explore other options. *Edwards v. Indep. Servs*., 140 Idaho 912, 104 P.3d 954, 957 (2004) ("**When an employee has viable options available, voluntary separation without exploring those options does not constitute good cause for obtaining unemployment benefits.** …[B]ecause the record shows that Dolores considered multiple factors, and that the decision to resign was freely given and proceeding from his own choice, we conclude that Dolores voluntarily resigned pursuant to NRS 612.380.

Dolores lacked good cause to resign

…

As we have noted above, Dolores **considered many**

> **factors when deciding to resign rather than face termination, and he elected to not pursue other options that could have allowed him to maintain his employment**. We therefore conclude that **substantial evidence supports *262 the appeals referee's determination that Dolores lacked good cause to resign, which rendered him ineligible for unemployment benefits**. NRS 612.380; *Edwards v. Indep. Servs.,* 140 Idaho 912, 104 P.3d 954, 957 (2004) ("**When an employee has viable options available, voluntary separation without exploring those options does not constitute good cause for obtaining unemployment benefits**."); *see also Elizondo v. Hood Mach., Inc.,* 129 Nev. 780, 784, 312 P.3d 479, 482 (2013) (setting forth the standard of review).

Dolores, supra, 134 Nev. 260-262, 416 P.3d 261-262 (Emphasis added).

Claimant made no showing that pursuing available steps regarding her "1099" classification by employer would be futile. No steps were taken in this regard because the"1099" classification did not really bother claimant. (AA099). Claimant testified that the reason for quitting was the higher paying job at Summit. (AA059). Promptly thereafter, claimant changed her story. She testified that the ultimate reason – the catalyst – for quitting was employer's "1099" reclassification. (AA052-AA060). Not only did claimant take no steps to address such reclassification (AA057-0060), the Summit position she left employer for was a "1099" position (AA071-AA072). Neither the "1099" classification (that was never challenged) or securing a higher paying job, entitled claimant to benefits.

The record lays out the following. Claimant's last paycheck from employer was received by claimant on January 7, 2020. (AA047). Claimant explained, "I'm not exactly sure what my last day was, because I had taken another job and I was finishing up a project for Linden [employer]. They knew that I was - - you know, had took another job." (AA047). Claimant testified that she quit her position with employer. (AA049). She explained: "I took another job. I discussed with Dr. Linden that I had found another job that paid more." (AA049). Claimant stated, "I don't know the exact date that I met with Dr. Linden, but I continued to work and complete projects … for … over a month after that conversation -- that I was going to take another job." (AA050). Claimant's resignation notice was verbal, but she gave no effective last day because, as she said, "I didn't know how long it would take me to finish the project that I had been working on, that I had agreed to finish. And I also had agreed to … train the girl who was going to take over doing what I was doing at the nursing home." (AA050). Claimant's "1099" classification by employer was not the reason given to Dr. Linden for quitting. (AA051). The reason claimant gave to Dr. Linden for quitting was that she had secured a higher paying job with Summit. (AA051). Claimant was hired by Summit on November 26, 2019. (AA051). At that time, she worked for employer and Summit. (AA052).

Claimant and office manager Jennifer Williams communicated about the "1099" change on October 16, 2019. (AA053-AA055). Claimant never spoke with

Dr. Linden about the "1099" classification. (AA055-AA056). Claimant spoke with Dr. Linden in November of 2019, when he told her she should take this other job that paid more. (AA056). This conversation between claimant and Dr. Linden occurred before she contacted or signed any papers with Summit. Claimant signed with Summit on November 26, 2019. (AA056).

Claimant was asked, "When you filed the unemployment benefit claim … you reported [to ESD] your separation in accordance with Exhibits 12 through 14 as a mutual agreement. Why did you report that if you quit?" (AA057). Claimant responded, "Because, at the time, I didn't really realize that I was quitting. It was -- I looked at it as a mutual separation or a mutual agreement to separate. And that's just the way I had looked at it. But, per, you know, unemployment, I realized that, oh, yeah, yes, she did quit. So, you know, I looked at it as a mutual, you know, agreement to separate." (AA057). Claimant made no effort to resolve the "1099" classification issue. (AA057). She did not file a formal complaint with employer and did not file a complaint with a state government agency regarding being changed to a "1099" service contract employee, before quitting. (AA058 and AA060).

When claimant told Dr. Linden that Summit offered her a higher paying job, Dr. Linden told her to take it. (AA068). The referee went over Exhibit 22 with claimant. (AA069-AA070). Claimant has no supporting documentation showing that she secured other employment before quitting. (AA070-AA071). Claimant

testified about her work with Summit as a "1099" contracted services worker. (AA071-AA072). Claimant's first paycheck from Summit was in December of 2019. (AA073).

On March 30, 2020, claimant informed that she discussed her separation with Dr. Linden and that, had she and employer not agreed to a mutual separation, she could have continued working for employer. (AA088). The mutual agreement to separate was due to being offered another position that paid higher wages. (AA089). Claimant was asked, "Was there an incident that occurred that led to the mutual agreement to separate?" Her response to this question was, "No." (AA090).

Accordingly, this matter was not arbitrarily or capriciously decided. Claimant voluntarily quit without good cause and, therefore, she was not eligible to receive benefits. *See* NRS 612.380.

III. The District Court failed to follow the standard of review and unlawfully substituted its own judgment for that of the administrative tribunal

The District Court ignored the administrative finding, substituted its own judgement. Despite the evidence to support the tribunal's finding that the claimant was incredible as laid out above and the numerous changes in story proffered by the claimant during the administrative process, the District Court then overruled the

credibility determination of the administrative appeals tribunal and substituted its own judgement for that of the tribunal.

Indeed, the appeals tribunal rightfully found

> It is not within logic or reason that claimant would continue working for employer, and receive compensation from employer for months, in a position or classification she was not in agreement with – whether such disagreement was expressed verbally or in writing. Additionally, claimant's actions of remaining employed as a "1099" employee, even after securing other employment, lacks logic and reason since claimant maintained that the classification change was the "catalyst" which led to her decision to quit and was the fundamental basis for seeking other employment. (AA035).

Based on the evidence presented to the administrative tribunal, which as noted above included claimant switching her story then claiming she quit based on the reclassification, but yet did not quit when reclassified and continued to work for the employer after obtaining new employment. In addition, claimant took no steps to address such reclassification with the employer (AA057-0060), and the Summit position she left employer for was a "1099" position (AA071-AA072). Neither the "1099" classification (that was never challenged) or securing a higher paying job, entitled claimant to benefits.

Based on the above, there is substantial evidence in the record that as the tribunal found that it defied logic that her stated reason for quitting and the

"catalyst" for the quit was the reclassification. On that basis the tribunal found no good cause for quitting and found claimant incredible.

The District Court failed to give that finding deference and overruled the credibility determination. The District Court then failed to stop there by making factual findings contrary to that of the tribunal. Therefore, the District Court erred in substituting its own judgment for that of the administrative tribunal and this Court should reverse the District Court.

CONCLUSION

The decision of the administrative tribunal is supported by substantial evidence in the Administrative Record and is consistent with Nevada statutory and case law. It was neither arbitrary nor capricious. The District Court substituted its own judgment for that of the administrative tribunal and failed to follow the correct legal standard as noted above. The District Court should be reversed.

DATED this 1st day of November, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This Answering Brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this Answering Brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is:

[X] Proportionately spaced, has a typeface of 14 points or more and is 7,203 words

3. Finally, I hereby certify that I have read this Answering 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, including NRAP 28(e)(1), which every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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.

DATED this 1st day of November, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d)(1)(B), I hereby certify that I am an employee of the State of Nevada, over the age of 18 years; and that on the date hereinbelow set forth, I served a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF**, by electronically serving through Eflex and/or mailing to the address below and placing the same within an envelope which was thereafter sealed and deposited for postage and mailing with the State of Nevada Mail at Carson City, Nevada, addressed for delivery as follows:

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