IN THE SUPREME COURT OF THE STATE OF NEVADA

WASHOE COUNTY SCHOOL DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA

Appellant,

vs.

CAIDYN EDLUND,

Respondent.

Supreme Court No. 83713
District Court Case No. CV19-02058

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

As Appellant Washoe County School District is a governmental entity [NRS 41.0305; NRS 386.010(2)], no NRAP 26.1 disclosure is required.

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I. JURISDICTIONAL STATEMENT

The Court has jurisdiction pursuant to NRS 38.247(1) "An appeal may be taken from: (c) An order confirming or denying confirmation of an award; (d) An order modifying or correcting an award; and, (e) An order vacating an award without directing a rehearing; . . . .", and pursuant to NRS 38.247(2), "An appeal under this section must be taken as from an order or a judgment in a civil action." NRS 38.247(1)(c)(d)(e) and (2). As such, the Order Modifying Arbitrator's Award of the District Court is an appealable final order.

The District Court Order Modifying Arbitrator's Award was filed on October 6, 2021. (JA0608-JA0615, vol. 3) Petitioner/Respondent Caidyn Edlund (Mr. Edlund) filed the Notice of Entry of Order on October 6, 2021. (JA0616-JA0627, vol. 3) The Notice of Appeal was filed on October 27, 2021, within the 30-days from written notice of entry of judgment as set forth in NRAP 4(a). (JA0628-JA0630, vol. 3)

II. ROUTING STATEMENT

Appellant Washoe County School District (District or WCSD) believes this matter is neither presumptively retained by the Supreme Court nor assigned to the Court of Appeals under NRAP 17. The Supreme Court does retain "[a]ppeals from orders denying motions to compel arbitration" pursuant to NRAP 17(a)(1); however, NRAP 17 does not specifically mention appeals from motions to modify

or vacate arbitration awards. However, the District believes this matter should be retained by the Supreme Court to uphold strong public policy favoring arbitration of disputes.

The District Court in this matter went beyond its very limited authority in reviewing the Arbitrator Harris's Opinion and Award (Harris Award). (JA0176-JA0196, vol. 1) The District Court reviewed the matter in a more plenary or de novo manner and simply substituted its opinion for that of the arbitrator. In addition, the District Court's Order Modifying Arbitrator's Award is not an award modification pursuant to the limitations of NRS 38.242, but actually goes to the merits of the award by overturning Arbitrator Harris' remedy. Moreover, Mr. Edlund failed to meet his high burden to prove his motion to modify or vacate the award by clear and convincing evidence. These errors by the District Court, if allowed to go uncorrected, will erode the strong public policy favoring arbitration in the State of Nevada. "Strong public policy favors arbitration because arbitration generally avoids the higher costs and longer time periods associated with traditional litigation." D.R. Horton, Inc. v. Green, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004).

"The scope of judicial review of an arbitration award is limited and is nothing like the scope of an appellate court's review of a trial court's decision. The party seeking to attack the validity of an arbitration award has the burden of proving,

by clear and convincing evidence, the statutory or common-law ground relied upon for challenging the award." Health Plan of Nevada, Inc. v. Rainbow Med., LLC., 120 Nev. 689, 695, 100 P.3d 172, 176 (2004).

If the order of the District Court order goes uncorrected, dissatisfied parties in future arbitrations will be encouraged to bring frivolous petitions to vacate arbitration awards because the high thresholds of limited review and proof by clear and convincing evidence will be eroded and the courts and litigants will not be able to avoid higher costs and longer time periods associated with traditional litigation.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. The lower court exceeded its authority in reviewing the issue of whether the Harris Award was arbitrary and capricious because the court substituted its own opinion of the word 'reckless' for that of Arbitrator Harris's opinion rather than conducting a very limited review of whether there was substantial evidence on the record for the Arbitrator's finding.

2. The Harris Award is not arbitrary and capricious because there is substantial evidence in the record to support Arbitrator Harris's finding Mr. Edlund was 'reckless' as it applies to the definition of "gross misconduct" contained in NRS 391.750(1)(u) and (4).

3. The lower court exceeded its extremely limited reviewing authority regarding the issue of whether Arbitrator Harris manifestly disregarded the law

because the lower court inserted the inapplicable provisions of NRS 391.760 on its own volition when neither party during two arbitration hearings ever mentioned, let alone argued, the applicability of the NRS 391.760 provisions.

4. Arbitrator Harris did not manifestly disregard the law, NRS 391.760.

5. The lower court erroneously and improperly modified the Harris Award pursuant to NRS 38.242 because the limited statutory reasons allowing modification of an award contained in NRS 38.242 are not present in this case.

I. STATEMENT OF THE CASE

This appeal is from the Second Judicial District Court, Judge Kathleen Sigurdson's Order Modifying Arbitrator's Award filed October 6, 2021 (Order). (JA0608-JA0615, vol. 3) The Order grants Mr. Edlund's December 2, 2020 Motion to Vacate, or in the Alternative To Modify, Arbitrator's Opinion and Award (MTV/M). (JA0001-JA0153, vol. 1) On December 16, 2020, the District filed its Opposition to the MTV/M (Opposition). (JA0154-JA0498, vols. 1-2) On December 21, 2020, Mr. Edlund filed his Reply to the District's Opposition (Reply). (JA0499-JA0507, vol. 3)

On April 13, 2021, Judge Sigurdson held a hearing on the MTV/M and heard argument from the parties. (JA0537-JA0593, vol. 3)

On April 23, 2021, the District Court issued an Order dismissing the Washoe Education Association (WEA) from the case based upon a stipulation of the parties. (JA0594-JA0595, vol. 3)

On September 8, 2021, five months after the original hearing on the matter, Mr. Edlund filed an addendum to his MTV/M informing the District Court that he had obtained employment with the Storey County School District in August of 2021. (JA0596-JA0599, vol. 3) Mr. Edlund requested a status conference with the District Court, which was held on September 28, 2021. (JA0600-JA0607, vol. 3) During the September 28, 2021 status conference, Judge Sigurdson stated:

> . . . I did review all the pleadings that were found on this matter. In order to speed things up, Mr. Busby, I'm going to ask you to draft an order for me with the three things that you outlined. **I am going to overrule the Arbitrator and grant back pay. I am also going to find that his actions were not reckless. They may have been negligent, but that's not the same as being reckless. He just made a mistake,** Mr. Edlund, and I think you well recognized that based on our conversation at the last hearing. I know you are being super cautious now at the new job and congratulations.

(JA0604-JA0605, vol. 3) (Emphasis added.)

On September 19, 2021, Mr. Busby emailed a proposed order to the Judicial Assistant for Judge Sigurdson. Judge Sigurdson made no change to the proposed order (JA0608-JA0615, vol. 3) and Ordered, "that the Arbitration Award awarded by Arbitrator Harris is hereby MODIFIED as follows: (1) Arbitrator Harris's determination that Mr. Edlund acted with "recklessness" is reversed; and (2) WCSD shall make Mr. Edlund whole for all applicable lost earnings, interest, and benefits according to the terms of NRS 391.760." (JA0614, vol. 3)

The District Court had jurisdiction to review the 'binding arbitration' Harris Award in accordance with NRS 38.206 to 38.248, also known as the Uniform Arbitration Act of 2000.

II. STATEMENT OF THE FACTS

A. General Background Facts.

All relevant times regarding this matter, the District and the WEA were Parties to the 2015-2019 Collective Bargaining Agreement (CBA) entered into

pursuant to Chapter 288 of Nevada Revised Statutes. (JA066-JA0125, vol. 1) The WEA is an employee organization within the meaning of NRS 288.040 and is the recognized bargaining agent for teachers working for the District. Mr. Edlund was a WEA member.

Mr. Edlund was hired by the District as a special education teacher in 2014. For the 2017-2018 school year, Mr. Edlund's work assignment was as a special education teacher at Galena High School. On May 10, 2018, Mr. Edlund was arrested by Washoe County School District Police Department (School Police) for possession of a dangerous weapon on school property, a violation of NRS 202.265, and possession of a controlled substance, a violation of NRS 453.331.[1] Mr. Edlund left a black Taurus PT111 G2 9mm pistol and 11 rounds of 9mm ammunition in his vehicle located on District property. (JA0034-JA047, vol. 1)

Mr. Edlund was placed on Administrative Leave with Pay in accordance with District procedure on May 10, 2018. (JA0386, vol. 2) It is important to note that the District Superintendent never placed Mr. Edlund on leave or suspension pursuant to NRS 391.760. (JA0386, vol. 2) On September 28, 2018, an Investigatory Due Process (IDP) meeting was held at Galena High School to discuss the alleged misconduct. (JA0388-JA0389, vol. 2) Mr. Edlund was represented by legal counsel

[1] The possession of a controlled substance charge was subsequently dropped by the Washoe County District Attorney's Office and was not referenced in the Grievant's Notice of Recommended Dismissal.

at the IDP meeting and was provided a Garrity warning, which he signed acknowledging that he was being directed to answer all questions regarding the May 10, 2018 incident. (JA0391, vol. 2) During the IDP meeting, Mr. Edlund stated that he accidentally brought the gun onto school property.

On October 23, 2018, a Notice of Recommended Dismissal was sent to Mr. Edlund via U.S. Certified Mail. (JA0393-JA0394, vol. 2) The notice stated that Mr. Edlund was being dismissed from the District due to his violations of NRS 391.750(1):[2] (c) Unprofessional conduct; (i) Inadequate performance; (k) Failure to comply with such reasonable requirements as a board may prescribe; (n) Any cause which constitutes grounds for the revocation of a teacher's license; (u) Gross misconduct; NRS 202.265; and District Administrative Regulation 4675 (Staff Responsibilities – Possession of a Weapon on School District Property Prohibited). The dismissal was effective November 19, 2018. (JA0388-JA0389, vol. 2) At the center of this case is the reason for dismissal under NRS 391.750(1)(u) Gross Misconduct, which, as defined ". . . includes any act or omission that is in wanton, willful, reckless or deliberate disregard of the interests of a school or school district or a pupil thereof." NRS 391.750(4). (JA0374, vol. 2)

[2] NRS 391.750 is the governing statute for suspension, demotion, dismissal or refusal to reemploy licensed personnel.

It is important to know for this Appeal that Mr. Edlund was **not** dismissed for "NRS 391.750(1)(h) Conviction of a felony or of a crime involving moral turpitude." It is also important to know that a violation of NRS 202.265 "Possession of dangerous weapon on property or in vehicle of school or child care facility; penalty; exceptions," is a gross misdemeanor penalty, **not** a felony. NRS 202.265(2).

Mr. Edlund, through the WEA, filed a timely grievance of the dismissal directly to Level IV – Arbitration as provided under Article 12.5.4 of the CBA. (JA0318-JA0319, vol. 2) The parties mutually selected Arbitrator Paul Crost utilizing the procedure spelled out in the CBA. At the request of the WEA's legal counsel, the arbitration was delayed until Mr. Edlund's arrest was resolved in court. On August 7, 2019, Mr. Edlund entered a plea of guilty with the Second Judicial District Court, State of Nevada, Case No. CR19-0020 to one count of possession of a dangerous weapon on school property. As part of this plea agreement, Mr. Edlund agreed to surrender the 9mm pistol and have the plea vacated and the charges dismissed so long as he obeys all laws for six months. (JA0054-JA0058, vol. 1) Mr. Edlund met the requirements of the plea deal and the charges against him were dismissed on March 2, 2020. On July 2, 2020 Judge Hardy of the Second Judicial District Court, State of Nevada issued an Order which sealed the records from Mr. Edlund's criminal case. (JA0062-JA0064, vol. 1)

B. First Dismissal Arbitration (Arbitrator Crost).

Mr. Edlund's initial dismissal arbitration hearing was held on August 20, 2019 before Arbitrator Paul Crost. Arbitrator Crost issued an Award on October 1, 2019 overturning the District's dismissal and ordering that Mr. Edlund be returned to work with full back pay, interest and benefits from the date of his dismissal (Crost Award). (JA0127-JA0131, vol. 1)

The District carefully reviewed the hastily written Crost Award, in which Arbitrator Crost omits certain key facts submitted in arbitration by the District and adds new facts that are not part of the arbitration record. Arbitrator Crost based his distorted analysis on the new additional facts that are not in the record and disregarded real facts of the matter. Comparing the Crost Award with the arbitration record, it was clear to the District that the Crost Award was arbitrary and capricious and that Arbitrator Crost manifestly disregarded the law. Arbitrator Crost did not apply the "reckless" standard for Gross Misconduct as stated in NRS 391.750(4), which was the District's basis for Mr. Edlund's dismissal.

On November 8, 2019, the District filed a motion to vacate Arbitrator Crost's Award pursuant to NRS 38.241 in the Second Judicial District Court, State of Nevada. The District based its motion to vacate the Crost Award because it was arbitrary and capricious, it was unsupported by the evidentiary record, Arbitrator Crost failed to consider evidence material to the controversy, and Arbitrator Crost

manifestly disregarded the law. The WEA and Mr. Edlund timely filed their opposition and the District timely filed its reply. The motion was heard in District Court on February 7, 2020 and on March 31, 2020, the District Court issued an Order Vacating Arbitrator's Award and Remanding for New Hearing before a new Arbitrator. (JA460-JC467, vol. 2)

C. <u>Second Dismissal Arbitration (Arbitrator Harris).</u>

On April 2, 2020, Mr. Edlund and the WEA formally requested a new list of arbitrators and requested the new arbitration hearing be scheduled in a timely manner. The parties selected Arbitrator Catherine Harris, Esq. and the new arbitration hearing was conducted on August 20, 2020 at the District Administration Building (Harris Arbitration). (JA198-JA281, vols. 1 & 2)

At the conclusion of the Harris Arbitration Hearing, the WEA elected not to file a written closing brief, and rather, give an oral closing argument. (JA0298-JA0307, vol. 2) The District elected to file a written closing brief. (JA0283-JA0296, vol. 2)

On November 5, 2020 the 21-page Harris Award was submitted to the District and the WEA. (JA0176-JA0196, vol. 1) In the Harris Award, Arbitrator Harris identifies the relevant provisions of the CBA – Article 32, Due Process; the relevant provisions of NRS – NRS 202.265, NRS 391.750(1)(c), (i), (k), (n) and (u); and District Administrative Regulation 4675. Importantly for this Appeal, and

similar to the Crost Arbitration, the WEA and Mr. Edlund did not bring NRS 391.760 to Arbitrator Harris's attention as a relevant provision for the Arbitrator to consider. (JA198-JA281, vols. 1 & 2) and (JA0298-JA0307, vol. 2)

The parties agreed to the following issues for Arbitrator Harris to decide:

> The parties agree that the following issues are properly before the arbitrator for **final and binding determination**:
>
> Issue number one, whether there was just cause for the termination; and
>
> Issue number two, if not, **what shall be the appropriate remedy**?
>
> The parties also jointly requested, in the event a remedy were to be ordered in this case, that the arbitrator retain jurisdiction over implementation of the award.

(JA0136, vol. 1) (Emphasis added.)

Arbitrator Harris then uses over nine pages to discuss the background facts of the matter, including the May 10, 2018 incident when the School Police found the loaded handgun in Mr. Edlund's vehicle. (JA0136-JA0145, vol. 1) Arbitrator Harris then dedicates over six pages to describe her opinion based on the testimony and document evidence presented to her in the arbitration, including: "There was just cause for disciplinary action . . ., The charged conduct, while not intentional, was reckless . . ., The charged conduct is also properly characterized as gross misconduct . . ., Under these circumstances, inadvertence is not a defense to reckless conduct . .

., The Grievant cannot successfully claim that he was not on notice that his conduct would result in serious discipline . . ., Conditional reinstatement without backpay is a more appropriate remedy . . ., and The Grievant is not entitled to an award of backpay." (JA0146-JA0152, vol. 1)

Arbitrator Harris awarded the following:

> There was no just cause for termination.
>
> A more appropriate remedy is conditional reinstatement without backpay.
>
> The Grievant is to be offered immediate reinstatement to his former position, or a comparable position, as a Special Education Teacher for the District.
>
> Reinstatement is conditioned upon written consent to random searches of the Grievant's vehicle when parked on District property for one year from the date of his reinstatement, as well as compliance with any other reasonable requirements applicable to hiring and retention of certificated teaching staff.
>
> The parties are directed to meet and confer within ten (10) business days concerning implementation of the award.
>
> The arbitrator retains jurisdiction over implementation of the award.

(JA0196, vol. 1)

On November 10, 2020, after receiving the Harris Award, the WEA legal counsel emailed Arbitrator Harris with the WEA's Motion to Modify or Correct Arbitrator's Award. (JA0490-JA0498, vol. 2) The WEA and Mr. Edlund's argument in the WEA Motion to Arbitrator Harris was made pursuant to NRS

38.237(1) and NRS 38.242(1)(a) and (c) and argued that Arbitrator Harris should modify her award to rescind her remedy of conditional reinstatement without backpay to a 20-day unpaid suspension because NRS 391.760(8) has such a 20-day limit per year for suspensions. What the WEA motion to Arbitrator Harris failed to state is that NRS 391.760(8) is specifically regarding limitations on a school district superintendent when issuing suspensions:

> **A superintendent may** discipline a licensed employee by suspending the employee with loss of pay at any time after a hearing has been held which affords the due process provided for in this chapter. The grounds for suspension are the same as the grounds contained in NRS 391.750. An employee may be suspended more than once during the employee's contract year, but the total number of days of suspension may not exceed 20 in 1 contract year. Unless circumstances require otherwise, the suspensions must be progressively longer.

NRS 391.760(8) (Emphasis added.)

NRS 391.760(8) is a limitation on Nevada school district superintendents regarding how many days of suspension without pay a licensed employee can receive each year. It does not pertain to or limit an independent third-party neutral arbitrator who is given broad authority by the parties to fashion remedies in arbitration. Before the District was able to file an opposition to the WEA motion, Arbitrator Harris responded to the parties:

> I have reviewed your motion which amounts to a request that I reconsider my final award.
>
> After carefully considering the evidence and arguments presented by both parties, I determined that conditional reinstatement without back

> pay was the appropriate remedy (as opposed to a suspension or termination).
>
> The arbitrator is now functus officio.

(JA0490, vol. 2)[3]

There is no evidence in the record that either party, at any time throughout the entire grievance process and two arbitrations, mentioned, let alone argued the provisions of NRS 391.760 were controlling and required an arbitrator to grant back pay and benefits if the arbitrator finds no just cause for the dismissal. The only near reference to NRS 391.760 is in the vacated Crost Award. Crost's *non sequitur* reference to "NRS 391.706(3) [sic]" at the end of his opinion is based on nothing but thin air. Neither party mentioned nor cited to that statute in either arbitration. The District Court found the Crost Award arbitrary and capricious and not supported by the record. (JA460-JC467, vol. 2)

III. SUMMARY OF THE ARGUMENT

A. The Harris Award is Not Arbitrary and Capricious because the Finding that Mr. Edlund was Reckless is Supported by Substantial Evidence and the Lower Court Exceeded its Very Limited Scope of Review.

The lower court goes beyond authority of a limited review of an arbitration award by finding that it simply disagrees with Arbitrator Harris's finding that Mr.

[3] After Mr. Edlund retained separate legal counsel, the WEA requested to be dismissed as a petitioner and, on March 15, 2021, the parties stipulated to dismiss the WEA. The District Court order dismissing the WEA was filed on April 23, 2021. (JA0594-JA0595, vol. 3)

Edlund was 'reckless' within the definition of gross misconduct contained in NRS 391.750(4). The lower court simply rejects Arbitrator Harris's analysis and interpretation of 'reckless' and substitutes its own opinion on what reckless means.

"The arbitrary-and-capricious standard does not permit a reviewing court to vacate an arbitrator's award based on a misinterpretation of the law. Rather, our review is limited to whether the arbitrator's findings are supported by substantial evidence in the record." Clark County Educ. Ass'n v. Clark County Sch. Dist., 122 Nev. 337, 343–44, 131 P.3d 5, 9–10 (2006).

B. Arbitrator Harris Did Not Manifestly Disregard NRS 391.760 and the Lower Court Exceeded its Very Limited Scope of Review.

The rule for a court to find that an arbitrator has manifestly disregarded the law is well articulated in Nevada. The Supreme Court of Nevada holds:

> In determining a question under an arbitration agreement, an arbitrator enjoys a broad discretion, but that discretion is not without limits." "He is confined to interpreting and applying the agreement, and his award need not be enforced if it is arbitrary, capricious, or unsupported by the agreement." But, "judicial inquiry under the manifest-disregard-of-the-law standard is extremely limited." "**A party seeking to vacate an arbitration award based on manifest disregard of the law may not merely object to the results of the arbitration." In such instance, "the issue is not whether the arbitrator correctly interpreted the law, but whether the arbitrator, knowing the law and recognizing that the law required a particular result, simply disregarded the law.** (Emphasis added.)

Clark County Educ. Ass'n v. Clark County Sch. Dist., 122 Nev. 337, 341, 131 P.3d 5, 8 (2006) citing, Exber, Inc., v. Sletten Constr. Co., 92 Nev. 721, 731, 558 P.2d

517, 523 (1976) and Bohlmann v. Printz, 120 Nev. 543, 547, 96 P.3d 1155, 1158 (2004).

> In *Wichinsky v. Mosa*, we vacated an arbitrator's award of compensatory and punitive damages because of the "lack of evidence to support the arbitrator's *findings*" and because "the arbitrator demonstrated a manifest disregard of the law." Thus, *Wichinsky* properly demonstrated that the arbitrary-and-capricious standard limits a reviewing court's consideration to whether the arbitrator's findings are supported by substantial evidence, while the manifest-disregard-of-the-law standard limits the reviewing court's concern to whether the arbitrator consciously ignored or missed the law. As a result, neither standard permits a reviewing court to consider the arbitrator's interpretation of the law.

Clark, at 8-9 (italics emphasis in original decision), citing, Wichinsky v. Mosa, 109 Nev. 84, 90, 847 P.2d 727, 731 (1993).

The lower court exceeded its standard of an extremely limited review in finding that Arbitrator Harris manifestly disregarded certain provisions of NRS 391.760.

There is absolutely no evidence in the arbitration record that the parties gave argument or citation of NRS 391.760 to Arbitrator Harris claiming it an applicable or significant legal principle in the matter and that she chose to consciously ignore it.

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C. The Lower Court Erroneously and Improperly Modified the Harris Award Pursuant to NRS 38.242 because the Limited Statutory Reasons Allowing Modification of an Award Contained in NRS 38.242 are not Present in this Case.

The lower court Order is devoid of any argument or legal authority for the Court to modify or correct the Harris Award pursuant to NRS 38.242. A court can only modify or correct an arbitrator's award in very limited circumstances and those circumstances were not present in this matter. Thus, the lower court could only vacate or confirm the Harris Award.

IV. ARGUMENT

A. Standard of Review.

The Court reviews a district court's decision to vacate or confirm an arbitration award *de novo*. Thomas v. City of N. Las Vegas, 122 Nev. 82, 97, 127 P.3d 1057, 1067 (2006). The scope of a district court's review of an arbitration award, however, is limited. Health Plan of Nevada, Inc., 120 Nev. at 695, 100 P.3d at 176. "The party seeking to attack the validity of an arbitration award has the burden of proving, by clear and convincing evidence, the statutory or common-law ground relied upon for challenging the award." Id. "Strong public policy favors arbitration because arbitration generally avoids the higher costs and longer time periods associated with traditional litigation." D.R. Horton, Inc., 120 Nev. at 553, 96 P.3d at 1162. *See also*, Washoe County Sch. Dist. v. White, 133 Nev. 301, 303, 396 P.3d 834, 838 (2017) "[A]n arbitrator may order such remedies as the arbitrator

considers just and appropriate under the circumstances of the arbitral proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under NRS 38.239 or for vacating an award under NRS 38.241." NRS 38.238.

As discussed below, Mr. Edlund failed to meet his high burden to prove his motion to vacate by clear and convincing evidence and the lower court judge reviewed the matter, not in a very limited manner, but in a plenary or de novo type manner.

B. The Harris Award is Not Arbitrary and Capricious because the finding that Mr. Edlund was Reckless is Supported by Substantial Evidence and the Lower Court Exceeded its Very Limited Scope of Review.

The lower court goes beyond its limited review of an arbitration award by finding that it simply disagrees with Arbitrator Harris's finding that Mr. Edlund was 'reckless' within the definition of gross misconduct contained in NRS 391.750(4). The lower court simply rejects Arbitrator Harris's analysis and interpretation of 'reckless' and substitutes its own opinion on what reckless means.

"The arbitrary-and-capricious standard does not permit a reviewing court to vacate an arbitrator's award based on a misinterpretation of the law. Rather, our review is limited to whether the arbitrator's findings are supported by substantial evidence in the record." Clark County Educ. Ass'n v. Clark County Sch. Dist., 122 Nev. 337, 343–44, 131 P.3d 5, 9–10 (2006).

Rather than reviewing the Harris Award and the arbitration record for substantial evidence and accept Arbitrator Harris's findings and definitions in the Harris Award, the lower court astonishingly comes up with its own definition of 'reckless' and substitutes it for Arbitrator Harris's, finding:

> "Reckless" is not statutorily defined, but Black's Law Dictionary provides the following definition: "Characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk." The record does not show that Edlund had a conscious disregard because he left the gun in his car inadvertently. No evidence in the record indicates that Edlund knew the gun was left in his car. Arbitrator Harris stated that she "credits [Edlund's] testimony that bringing the gun to school was a mistake that occurred when he threw his gym bag into his vehicle on the way to school and that he did not make a considered decision to bring his weapon onto school property." *See* Harris Award 15:8-10. Additionally, Harris found that "[n]o evidence has been presented at any stage of this dispute that supports the conclusion that [Edlund] made a considered decision to bring a handgun to work with him on the day in question." Harris Award 7:14. While negligent, there is no evidence that Mr. Edlund's conduct rises to the level of recklessness. Because Arbitrator Harris's finding of recklessness is not supported by substantial evidence in the record, the finding was arbitrary and capricious.

(JA0612, vol. 3)

Rather than reviewing the Harris Award and the arbitration record for substantial evidence and accept Arbitrator Harris's findings and definitions in the Award, the lower court astonishingly comes up with its own definition of 'reckless' despite the fact that Arbitrator Harris use three and a half pages of her 21-page Award to clearly articulate the facts and reasoning she applies to find Mr. Edlund

was reckless and that his actions amount to Gross Misconduct. (JA0189-JA0192, vol. 1) In sum, Arbitrator Harris found:

> Bringing a loaded gun to school, even if left in a locked vehicle in the school parking lot, is particularly egregious where, as here, the Grievant carried a concealed weapon routinely, i.e., even taking it to the gym with him. This act transcends a mere mistake or ordinary negligence because the Grievant, as a holder of a concealed weapons permit, knew, or should have known, that leaving a loaded handgun unattended on District property had the potential for inflicting serious harm on students, staff and visitors to the campus. This lack of concern for the safety and well-being of others, despite the known perils associated with unsecured handguns in school settings, brings the Grievant's conduct squarely within the definition of reckless behavior contrary to the District's interests.

(JA0191, vol. 1).

"The arbitrary-and-capricious standard does not permit a reviewing court to vacate an arbitrator's award based on a misinterpretation of the law. Rather, our review is limited to whether the arbitrator's findings are supported by substantial evidence in the record." Clark County Educ. Ass'n, 122 Nev. at 344, 131 P.3d at 9-10, citing to, Wichinsky, 109 Nev. at 90, 847 P.2d at 731. In the present matter, the lower court goes beyond its limited scope by finding that Arbitrator Harris misinterpreted the word 'reckless' as part of NRS 391.750(4).

The case at bar is similar to the facts in the Clark County Educ. Ass'n case where the Court found, "unlike our decision in *Wichinsky,* in which we noted that the appellate record was scant as to the arbitration proceedings, here the arbitrator's seventeen-page opinion and award specifically recounts the factual underpinning of

the award in favor of the District. Thus, we conclude that the arbitrator's decision is supported by substantial evidence and therefore is not arbitrary and capricious." Clark County Educ. Ass'n, 122 Nev. at 344, 131 P.3d at 10.

Without some concrete legal authority prohibiting Arbitrator Harris from using her definition of 'reckless' in relation to NRS 391.750(4), she was free to interpret 'reckless' as she saw fit based on the facts of the matter. "Thus, the Arbitrator's findings are supported by substantial evidence in the record." Underwood v. Palms Place, LLC, 2:09-CV-00700-RLH, 2011 WL 1790463, at *4 (D. Nev. May 10, 2011).

Therefore, the Court should find that the Harris Award is not arbitrary and capricious because Arbitrator Harris's definition of 'reckless' is supported by substantial evidence in the record and the lower court exceeded its very limited review by substituting its own definition of 'reckless'.

C. Arbitrator Harris Did Not Manifestly Disregard NRS 391.760 and the Lower Court Exceeded its Very Limited Scope of Review.

The rule for a court to find that an arbitrator has manifestly disregarded the law is well articulated in Nevada. The Supreme Court of Nevada holds:

> In determining a question under an arbitration agreement, an arbitrator enjoys a broad discretion, but that discretion is not without limits." "He is confined to interpreting and applying the agreement, and his award need not be enforced if it is arbitrary, capricious, or unsupported by the agreement." But, "judicial inquiry under the manifest-disregard-of-the-law standard is extremely limited." "**A party seeking to vacate an arbitration award based on manifest disregard of the law may not**

> **merely object to the results of the arbitration." In such instance, "the issue is not whether the arbitrator correctly interpreted the law, but whether the arbitrator, knowing the law and recognizing that the law required a particular result, simply disregarded the law.** (Emphasis added.)

Clark County Educ. Ass'n v. Clark County Sch. Dist., 122 Nev. 337, 341, 131 P.3d 5, 8 (2006) citing, Exber, Inc., v. Sletten Constr. Co., 92 Nev. 721, 731, 558 P.2d 517, 523 (1976) and Bohlmann v. Printz, 120 Nev. 543, 547, 96 P.3d 1155, 1158 (2004).

> In *Wichinsky v. Mosa*, we vacated an arbitrator's award of compensatory and punitive damages because of the "lack of evidence to support the arbitrator's *findings*" and because "the arbitrator demonstrated a manifest disregard of the law." Thus, *Wichinsky* properly demonstrated that the arbitrary-and-capricious standard limits a reviewing court's consideration to whether the arbitrator's findings are supported by substantial evidence, while the manifest-disregard-of-the-law standard limits the reviewing court's concern to whether the arbitrator consciously ignored or missed the law. As a result**,** neither standard permits a reviewing court to consider the arbitrator's interpretation of the law.

Clark, at 8-9 (italics emphasis in original decision), citing, Wichinsky v. Mosa, 109 Nev. 84, 90, 847 P.2d 727, 731 (1993).

The lower court exceeded its extremely limited review in finding that Arbitrator Harris manifestly disregarded certain provisions of NRS 391.760.

It is abundantly clear that Arbitrator Harris did not manifestly disregard NRS 391.760 in this matter because throughout the entire record of this employment matter between the District and Mr. Edlund, to wit: investigation, discipline,

grievance, first arbitration, first court petition to vacate, and second arbitration, the provisions of NRS 391.760 were never argued or mentioned by any party. NRS 391.760 was not the process followed by the District regarding Mr. Edlund's employment and it is not applicable to any facts of this matter. Mr. Edlund was dismissed from service from based upon the provisions of NRS 391.750. (JA051-JA052, vol. 1; JA0176-JA0196, vol. 1) At no time during the arbitrations did either party bring NRS 391.760 to the attention of either arbitrator and argue that it required a particular result.[4] "[W]hen searching for a manifest disregard for the law, a court should attempt to locate arbitrators who **appreciate the significance of clearly governing legal principles but decide to ignore or pay no attention to those principles**." Clark County Educ. Ass'n v. Clark County Sch. Dist., 122 Nev. 337, 344, 131 P.3d 5, 10 (2006). (Emphasis added.)

There is absolutely no evidence in the record that Arbitrator Harris was given any indication that NRS 391.760 was an applicable or significant legal principle in this matter and that she consciously ignored it.

The District Court over states the record to support the proposition that Arbitrator Harris manifestly disregarded NRS 391.760. The only item the District

[4] Only after Arbitrator Harris submitted her Award to the parties did the WEA and Mr. Edlund mention NRS 391.760(8) in their motion to pursuant to NRS 38.237(1) and NRS 38.242(1)(a) and (c). (JA0495-0498, vol. 2)

Court can point to is the vacated arbitrary and capricious Crost Award, which actually cites to "NRS 391.706(3)", not NRS 391.760. (JA0131, vol. 1)

> The record makes clear that Arbitrator Harris was aware of the requirement under Nevada law that a teacher be awarded back pay if fired without just cause – but simply disregarded the law. **Arbitrator Harris' award includes an extensive discussion** of Arbitrator Crost's prior award in this case, which Arbitrator Harris received into evidence, **and which contains a discussion of the statutory requirement for and an award of backpay in favor of Mr. Edlund**. Harris Award 8-9.

(JA0614, vol. 3) (Emphasis added.)

The District Court Order erroneously finds that the Harris Award extensively discusses the Crost Award and indicates that discussion includes some statutory requirement for back pay. The District Court seems to imply that the Crost Award has some authority that Arbitrator Harris needed to follow. However, contrary these findings, the Harris Award only briefly mentions the Crost Award (16 lines) as part of the procedural history of the matter. Arbitrator Harris states:

> The Crost award, dated October 1, 2019, was received into evidence by this arbitrator. The award does not recap what documents were received into evidence nor does it enumerate the witnesses who provided testimony. Nor was a transcript of the first arbitration provided to this arbitrator. In reaching his conclusion that there was no just cause for termination, Arbitrator Crost was persuaded by the Union's argument, i.e., that the District had presented no evidence that the Grievant's inadvertent conduct on May 10, 2018 warranted his summary dismissal. Arbitrator Crost further noted that the District's own regulation [AR 4765 (3)] does not require the Grievant' s dismissal, i.e., providing that an employee who violates the policy can be" ... disciplined up to and including suspension, and/or dismissal, in accordance with ... progressive discipline plans." Arbitrator Crost

> further determined that the District had failed to meet its burden of proving that there was unprofessional conduct, inadequate performance, failure to comply with District regulations, or gross misconduct. Arbitrator Crost rejected the District's contention that simply bringing a gun onto the campus (irrespective of the Grievant's intent) and/or not removing the gun from his vehicle before driving to school amounted to reckless disregard of student safety.

(JA0183-JA0184, vol. 1)

There is no discussion by Arbitrator Harris about Arbitrator Crost's last paragraph of his opinion where Arbitrator Crost cites to "NRS 391.706(3)" [sic]. (JA0127-JA0131, vol. 1) Crost opines:

> As I have determined that the District did not establish the burden of proof that Grievant's misconduct that supports dismissal, Grievant shall be reinstated to his previous position, and that back pay, benefits, and interest as required by NRS.391.706(3) [sic]. The District may issue a reprimand stating that Grievant erred by bringing a gun on any District properties.

(JA0131, vol. 1)

In fact, the careless Crost Award cites to NRS 391.706(3), which is a non-existent statute and is meaningless. The Harris Award never mentions, let alone discusses, anything regarding NRS 391.760 or a required statutory back pay because there were no mentioned or arguments by the parties in the Harris Arbitration that any section of NRS 391.760 was applicable or required a particular outcome. And so, there can be no finding that Arbitrator Harris manifestly disregarded the law.

Moreover, with absolutely no evidence in the arbitration record, the lower court only discusses NRS 391.760(2):

NRS 391.760 governs the suspension and reinstatement of licensed employees. Section 2 of the statute provides as follows:

> Notwithstanding the provisions of NRS 391.750, **a superintendent may suspend a licensed employee who has been officially charged but not yet convicted of a felony or a crime involving moral turpitude or immorality. If the charge is dismissed or if the employee is found not guilty, the employee must be reinstated with back pay, plus interest, and normal seniority.** The superintendent shall notify the employee in writing of the suspension. Within 10 days after the date on which the employee receives such notice, the superintendent shall provide the employee with the opportunity for an informal hearing to address the circumstances relating to the charges and any other circumstances relating to the suspension. The superintendent shall issue a written decision concerning the continuation of the suspension based on the information presented at the hearing. The employee is entitled to continue to receive his or her salary and other benefits after the suspension becomes effective until the date on which the superintendent issues the written decision. The superintendent may recommend that an employee who has been charged with a felony or a crime involving immorality be dismissed for another ground set forth in NRS 391.750.
>
> NRS 391.760(2)….
>
> The criminal charges against Edlund have been dismissed. Therefore, NRS 391.760(2) requires that he is entitled to back pay.

(JA0613, vol. 3) (Emphasis added.)

This is important because the lower court appears to be grabbing statutes out of thin air and contorting them to fit a tortured analysis to support the Order. First, NRS 391.760(2) is regarding the actions of a Nevada school district superintendent in suspending a school employee when the employee is officially charged but not

yet convicted of a felony or a crime involving moral turpitude or immorality, not the ability of an independent third-party arbitrator's ability to fashion a remedy. Second, Mr. Edlund was not officially charged with a felony or a crime involving moral turpitude or immorality. Mr. Edlund was officially charged with a violation of NRS 202.265, which is a gross misdemeanor pursuant to NRS 202.265(2). (JA0367, vol. 2) Moreover, NRS 391.750 provides the "Grounds for suspension, demotion, dismissal and refusal to reemploy teachers . . .". While a school district can dismiss an employee for 'Immorality' and 'Conviction of a felony or of a crime involving moral turpitude', NRS 391.750(1)(b) and (h) respectively, Mr. Edlund was not charged with these offenses and not dismissed for theses offenses. (JA0388-JA0389, vol. 2; JA0393-JA0394, vol. 2) The District never utilized the provisions of NRS 391.760 regarding Mr. Edlund's disciplinary matter.

> Even if an arbitrator made errors regarding facts or application of the law, they do not amount to manifest disregard of the law. *Health Plan of Nevada,* 120 Nev. at 699, 100 P.3d at 179. Manifest disregard of the law "encompasses a conscious disregard of applicable law." *Id.* The arbitrator must have known the law, recognized that the law required a certain result, and then disregarded it. *Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist.,* 122 Nev. 337, 342, 131 P.3d 5, 8 (2006). MHCC must provide evidence that not only did it communicate the correct law to the arbitrator, but the arbitrator "intentionally and knowingly chose to ignore that law despite the fact that it was correct." *ABCO Builders v. Progressive Plumbing,* 282 Ga. 308, 647 S.E.2d 574, 575 (Ga.2007). There must be concrete evidence of an intent to disregard known law in the findings of the arbitrator or in the transcript of the proceedings. *Id.* at 576.

Manor Health Care Ctr., Inc. v. Monsour, 126 Nev. 735, 367 P.3d 796 (2010).

Again, there is no clear and convincing evidence that Arbitrator Harris knew any provision of NRS 391.760 was applicable to this matter and required a particular result.

Therefore, the Court must find that Arbitrator Harris did not manifestly disregard NRS 391.760 and that the lower court exceeded its extremely limited authority in reviewing the matter.

D. The Lower Court Erroneously and Improperly Modified the Award Pursuant to NRS 38.242 because the Limited Statutory Reasons Allowing Modification of an Award Contained in NRS 38.242 are not Present in this Case.

The Order is devoid of any argument or legal authority for the Court to modify or correct the Harris Award pursuant to NRS 38.242. A court can only modify or correct an arbitrator's award in very limited circumstances.

> That statute provides for modification or correction of the award in the following three circumstances: (1) if the arbitrator made an "evident mathematical miscalculation or a mistake in the description of a person, thing or property in the award"; (2) if the "arbitrator has made an award on a claim not submitted to the arbitrator"; or (3) if the award "is imperfect in a matter of form" that does not affect the merits of the decision. NRS 38.242(1).

Manor Health Care Ctr., Inc. v. Monsour, 126 Nev. 735, 367 P.3d 796 (2010).

The only argument presented in Mr. Edlund's MTV/M is in his prayer for relief, to wit,

> WHEREFORE, for the reasons stated above, the Petitioner respectfully requests that the Court vacate Arbitrator Harris's Opinion and Award and remand this matter for rehearing before a different arbitrator**, or in**

> **the alternative, modify the Opinion and Award to provide the Petitioner with full back pay as required by NRS 391.750** and remove the requirement that Mr. Edlund consent to random searches of his vehicle.

(JA0013, vol. 1) (Emphasis added.)

The District argued in its Opposition that the provisions of NRS 38.242(1) are not applicable to the matter. (JA0154-JA0498, vols. 1-2) Mr. Edlund then argued in his Reply that the court has some inherent power to apply the provisions of NRS 38.242 to modify the Harris Award if the court chose not to vacate. However, Mr. Edlund cannot and did not cite to any case law to support his argument. (JA0499-JA0507, vol. 3) The crux of Mr. Edlund's legal argument that the provisions of NRS 38.242(1) apply is because his legal "counsel has found no authority for the proposition that a Court may not also modify an arbitrator's award under these same circumstances." Mr. Edlund argues further that "under NRS 38.242(2)(c), an award may be modified or corrected where the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted." (JA0504, vol. 3)

However, this Court does find that an arbitrator's remedy clearly goes to the merits of the decision. In Manor Health Care Ctr., Inc. v. Monsour, this Court found that a disagreement about whether appellant's estate can legally receive doubled damages "challenged the merits of the award rather than a clear mathematical error." Manor Health Care Ctr., Inc. v. Monsour, 126 Nev. 735, 367 P.3d 796 (2010). Similarly, in the current matter, Mr. Edlund cannot get the Harris Award vacated

and is trying to modify the Harris Award remedy of no back pay, which clearly goes to the merits of the Harris Award.

There is no evidence, argument or case law contained in the MTV/M to support the lower court modifying or correcting the Harris Award by changing the remedy. Moreover, Arbitrator Harris considered the WEA's Motion to Modify or Correct Arbitrator's Award to Arbitrator Harris on the basis of NRS 38.242(1)(a) and (c) through NRS 38.237. Arbitrator Harris found "[a]fter carefully considering the evidence and arguments presented by both parties, I determined that conditional reinstatement without back pay was the appropriate remedy (as opposed to a suspension or termination)." (JA490, vol. 2) Even considering the above, the lower court's Order is devoid of any analysis or discussion about its authority or the factual basis it uses to modify the Harris Award and perfunctorily finds:

> Accordingly, IT IS HEREBY ORDERED that the Motion is GRANTED.
>
> IT IS FURTHER ORDERED that the Arbitration Award awarded by Arbitrator Harris is hereby MODIFIED as follows: (1) Arbitrator Harris' determination that Mr. Edlund acted with "recklessness" is reversed; and (2) WCSD shall make Mr. Edlund whole for all applicable lost earnings, interest, and benefits according to the terms of NRS 391.760.

(JA0614, vol. 3)

The proper remedy for the lower court in this case was to vacate or confirm the Harris Award. *See*, Health Plan of Nevada, Inc. v. Rainbow Med., LLC, 120

Nev. 689, 697, 100 P.3d 172, 177 (2004). The lower court, with no articulated rationale, chose to exceed its authority and modify the Harris Award.

Therefore, the Court should find that the lower court erroneously and improperly modified the Harris Award pursuant to NRS 38.242 because the limited statutory reasons allowing modification of an award contained in NRS 38.242 are not present in this case.

V. CONCLUSION

The Court should find and order:

1. The Harris Award is not arbitrary and capricious;

2. The lower court exceeded its limited review of whether the Harris Award was arbitrary and capricious;

3. Arbitrator Harris did not manifestly disregard the provisions of NRS 391.760 in the Harris Award;

4. The lower court exceeded its extremely limited reviewing authority regarding the issue of whether Arbitrator Harris manifestly disregarded the law;

5. The lower court erroneously and improperly modified the Harris Award pursuant to NRS 38.242 because the limited statutory reasons allowing modification of an award contained in NRS 38.242 are not present in this case;

6. Mr. Edlund's Motion to Vacate, or in the Alternative to Modify, Arbitrator's Opinion and Award is denied in its entirety and the Harris Award is confirmed pursuant to NRS 38.241(4); and

7. The District is entitled to attorney's fees, costs and expenses pursuant to NRS 38.243.

AFFIRMATION PURSUANT TO NRS 239B.030: The undersigned does hereby affirm that the preceding document **DOES NOT** contain the social security number of any person.

DATED this 16th day of March, 2022.

WASHOE COUNTY SCHOOL DISTRICT
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ATTORNEY'S CERTIFICATE OF COMPLIANCE

I hereby certify that this Appellant's Opening 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and type style Times New Roman.

I further certify that this Appellant's Opening Brief complies with the page limitations of NRAP 32(a)(7)(A)(i).

I hereby certify that I have read this 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires 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.

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I understand that I may be subject to sanctions in the event that this Appellant's Opening Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of March, 2022.

WASHOE COUNTY SCHOOL DISTRICT
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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I certify that I am an employee of the WASHOE COUNTY SCHOOL DISTRICT OFFICE OF THE GENERAL COUNSEL and that on this date I served a true and correct copy of the preceding document upon:

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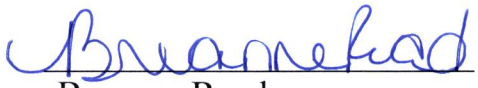
by electronically filing the foregoing document with the Clerk of the Court which served Mr. Busby electronically.

DATED this 16th day of March, 2022.



Breanne Read