LUKE A. BUSBY, ESQ.
Nevada State Bar No. 10319
316 California Ave.
Reno, NV 89509
775-453-0112
luke@lukeandrewbusbyltd.com

Electronically Filed
Apr 11 2022 11:48 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

WASHOE COUNTY SCHOOL DISTRICT,
A political subdivision of the State of Nevada,

Appellant, No. 83713

Vs.

CAIDYN EDLUND,

Respondent.
_____/

RESPONDENT CAIDYN EDLUND'S ANSWERING BRIEF

COMES NOW the Respondent, CAIDYN EDLUND, an individual (hereinafter " Mr. Edlund") by and through the undersigned counsel, and hereby files the following Respondent's Answering Brief pursuant to Nevada Rule of Appellate Procedure ("NRAP") 28, seeking that the Court affirm the District Court's October 6, 2021 Order Modifying Arbitrator's Award.

Docket 83713 Document 2022-11303

NRAP 26.1 DISCLOSURE

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

Caidyn Edlund, an individual.

Washoe County School District, a political subdivision of the state of Nevada.

Attorney of record for Caidyn Edlund

Respectfully submitted this: Apr 11, 2022

By: /s/ Luke Busby, Esq.
LUKE A. BUSBY, ESQ.
Nevada State Bar No. 10319
316 California Ave.
Reno, NV 89509
775-453-0112
luke@lukeandrewbusbyltd.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CASES

COURT RULES

I. JURISDICTIONAL STATEMENT

The Supreme Court of the State of Nevada has jurisdiction over this matter pursuant to Article 6, Section 4 of the Nevada Constitution and Nevada Revised Statutes ("NRS") 2.090. The October 6, 2022 Order Modifying Arbitrator's Award (Vol. 3 at 0608-0615) is a final order subject to appeal under NRAP 3A(b)(1) and NRS 38.247(1)(d).

II. ROUTING STATEMENT

Edlund disagrees with WCSD that this matter should be presumptively retained by the Supreme Court under NRAP 17. This case does not present as a principal issue a question of statewide public importance under NRAP 17(a)(12), nor any other category listed in NRAP 17(a). Rather, as described below, this case presents a straightforward issue as to whether Judge Sigurdson had the authority under the common law to modify an arbitrator's award given the facts specific to this case. WCSD's argument that this case, if not heard by the Supreme Court "will erode the strong public policy favoring arbitration in the State of Nevada" is hyperbole, and presumes that the Court will accept WCSD's argument that Judge Sigurdson's order was not lawful. This case should be assigned to the Court of Appeals under NRAP 17(b).

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issue in this appeal is whether the District Court had the authority under the law to modify the arbitrator's award where it found that the arbitrator: (1) made findings that were arbitrary and capricious that have the effect of destroying Mr. Edlund's professional reputation, and (2) manifestly disregarded the law as to what the required remedy is when a teacher is fired without "just cause."

IV. STATEMENT OF THE CASE

WCSD has as failed to prevail in two separate arbitration proceedings in its nearly four year quest to fire Mr. Edlund without just cause, destroy his reputation, and to deny him back pay to which he is unequivocally entitled to under the law. Under the negotiated agreement, WCSD was required to have "just cause" to fire Edlund, and two arbitrators have found that WCSD fired Edlund without just cause. At the second arbitration proceeding, an arbitrator found that Mr. Edlund had been "reckless," despite the fact that she also concluded that Edlund acted unintentionally, and that Edlund was not entitled to back pay as the first arbitrator concluded, for reasons completely unrelated to the law. The District Court then modified the arbitrator's award to make it consistent with the law and the arbitrator's primary finding that WCSD lacked just cause to fire Edlund, to correct a glaring error of logic in the award, and to

provide that Mr. Edlund receive back pay that he is entitled to receive under the law where WCSD filed him despite lacking just cause to do so.

V. STATEMENT OF FACTS

Mr. Edlund is a Special Education teacher who started with the WCSD in 2014, after teaching for the Clark County School District for five years. Since the 2015-16 school year, Mr. Edlund had been teaching in the Comprehensive Life Skills (CLS) classroom at Galena High School (GHS). Mr. Edlund's overall teaching performance has always been “effective;” i.e., satisfactory, over the course of his District employment. Former GHS Principal Thomas Brown, GHS Assistant Principal Teresa Burrows and GHS Assistant Principal Marcus Culpepper have all evaluated and rated Mr. Edlund’s job performance as "effective" over the years. See performance reviews at Vol. 1 0017-0032.

WCSD’s crusade against Mr. Edlund is based solely upon Mr. Edlund accidentally leaving a gym bag containing a pistol in the locked cab of his pickup truck parked in the GHS faculty parking lot on May 10, 2018. Vol. 1 0044-0047. The circumstances surrounding Edlund’s arrest are described in the arrest report at Vol. 1 0044-0047. Mr. Edlund legally purchased the pistol and possesses a valid Nevada Concealed Firearm Permit. Vol. 1 00138. Mr. Edlund

is transgendered and carries a firearm for personal protection as transgendered persons are frequent victims of violent crime. Vol. 3 at 0519. District Police Officers searched Mr. Edlund's truck after a K-9 "hit" on Mr. Edlund's truck, and discovered white pills, which the officers believed were methamphetamines, and Mr. Edlund's pistol. Vol. 1 0044-0047.

Mr. Edlund told the officers on scene that the capsules were "Beano." *Id.* The officers arrested Mr. Edlund and charged him with possession of a controlled substance (a felony) and possessing a dangerous weapon on school property (a gross misdemeanor). *Id.* Although the officers found that the white capsules found in Mr. Edlund's truck field-tested "presumptive positive" for methamphetamines, the Washoe County Sheriff's Office Forensic Lab subsequently confirmed that the capsules contained no controlled substances. See Vol 1 at 0049. In light of the negative lab report, the controlled substance charge was dismissed. Vol. 1 at 0139.

On September 28, 2018, the District conducted an Investigatory/Due Process ("IDP") meeting regarding the incident on May 10, 2018. Vol. 1 at 00051. Mr. Edlund confirmed that he possesses a valid Nevada Concealed Firearm Permit and explained that he inadvertently left the pistol in his gym bag

the night before and left the gym bag in his locked truck in the GHS staff parking lot. By a letter dated October 23, 2018, former GHS Principal Brown notified Mr. Edlund that he was recommending Mr. Edlund's dismissal based solely upon the incident on May 10, 2018, and Mr. Edlund's alleged violations of NRS 202.265 and District Regulation 4675. Vol 1 at 0051. WCSD cut off Mr. Edlund's pay on October 25th of 2018, effectively terminating his employment. Vol 1 at 0052.

On August 7, 2019, Mr. Edlund entered a plea deal to possessing a dangerous weapon on school property violation. Vol. 1 at 0054. The plea deal provided in part that if Mr. Edlund obeyed all laws for a six month period, the state would not oppose his withdrawing his plea and would dismiss the charge against him. *Id.*

Mr. Edlund met the requirements of the plea deal and the charges against him were dismissed on March 2, 2020. Vol 1 at 0060. On July 2, 2020 District Court Judge Hardy , satisfied that Mr. Edlund is not a threat to the community, issued an Order (Vol 1 at 0062) which sealed the records from Mr. Edlund's criminal case and further ordered that all proceedings recounted in the sealed records are deemed never to have occurred and that Mr. Edlund may properly answer accordingly to any inquiry concerning the sealed arrest, conviction,

acquittal, or dismissal. Id.

After Mr. Edlund received notice of termination, through counsel provided by the Washoe Education Association ("Association"), he filed a grievance in accordance with Article 12 (grievance procedure) and 32 (due process) of the 2015-2019 Collective Bargaining Agreement ("CBA") between the Association and WCSD challenging the dismissal recommendation. Vol 1 at 0066. Article 32.1 of the CBA states that no teacher will be discharged without "just cause." Vol. 1 at 105. Article 12.5.4.9 of the CBA states that, "The arbitrator's decisions shall be binding except as provided In Section 12.5.4.6 ***and shall be consistent with the law*** and with the terms of this Agreement." [emphasis added] Vol. 1 at 74.

The matter was submitted to Arbitrator Paul Crost, Esq. Arbitrator Crost conducted an arbitration on August 20, 2019, in Washoe County. On or about October 1, 2019, Arbitrator Crost issued his Award. Vol 1 at 0127. Arbitrator Crost determined that the District did not establish the burden of proof that any misconduct by Mr. Edlund supports dismissal. *Id.* at 0131. Arbitrator Crost further concluded:

> 1. The District did not have just cause to dismiss [Mr. Edlund]. The District may issue a reprimand for bringing

> the gun on any District properties.
> 2. The District is ordered to reinstate [Mr. Edlund] to his former position without loss of seniority or accrued benefits. The District shall make [Mr. Edlund] whole for all lost earnings, interest, and benefits.

Id.

On November 8, 2019, WCSD filed a Motion to Vacate Arbitrator's Crost's Award, arguing that the award was arbitrary and capricious because the arbitrator ignored the facts and the law and refused to apply the "reckless" standard to evaluate Mr. Edlund's conduct provided in NRS 391.750(4). Vol. 1 0141. The District Court issued an Order Vacating the Arbitrator's Award and Remanding for a new Hearing. Vol. 2 at 460. The District Court found that Arbitrator Crost disregarded Mr. Edlund's guilty plea, and that such a plea could constitute just cause for his dismissal, and for this reason the award was arbitrary and capricious. *Id.* at 466.

Following the District Court's first Order, the parties selected a new arbitrator, Catherine Harris, and conducted a second proceeding on August 20, 2020. On or about November 5, 2020, Arbitrator Harris issued her Opinion and Award. Vol 1 at 0133. Arbitrator Harris determined, as did Arbitrator Crost, that WCSD lacked just cause to terminate Mr. Edlund under the Negotiated

Agreement and that Mr. Edlund should be conditionally reinstated. Vol. 1 at 0153. However, Arbitrator Harris's also determined that: (1) Mr. Edlund acted "recklessly" in leaving the pistol in his vehicle (Vol. 1 at 0147); (2) Mr. Edlund is not entitled to an award of back pay because "did not provide any assurances to the arbitrator that he can be counted upon to store his weapon somewhere other than his vehicle when he is scheduled to perform duties as a teacher for the District" (Vol. 1 at 0152); and (3) Mr. Edlund's reinstatement is conditioned upon written consent to random searches of his 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. Vol. 1 at 153 and 153.

On December 2, 2021 Edlund Filed a Motion to Vacate, or In the Alternative, Modify Arbitrator's Opinion and Award dated November 5, 2020. Vol. 1 at 1. On December 16, 2020, WCSD filed an Opposition to Edlund's Motion, and on December 21, 2020, Edlund Filed a Reply. Vol. 1 at 0154. On April 13, 2021, the Court held a hearing on the Motion. Vol. 3 at 537-593. On September 8, 2021, Edlund filed an addendum to make the Court aware that in August of 2021 Edlund was hired by the Storey County School District as a

Resource and Early Childhood Special Education Teacher for the 2021-2022 school year. Vol. 3 at 596. Mr. Edlund is employed at the Storey County School District and is sure to not leave any enzyme-based dietary supplements or firearms in his vehicle. As such, a determination from the District Court on the issue of whether Edlund should be subjected to unconstitutional random searches as a condition for reinstatement was moot, and the Court ruled as much at the September 28, 2021 hearing. Vol. 3 at 603. Also at the September 28, 2021 hearing, the Court ruled that it would find in Mr. Edlund's favor on the issues of whether Edlund's conduct was "reckless" and whether he was entitled to back pay, and modify the arbitration award accordingly. Vol. 3 at JA0604-JA0605.

On October 6, 2021, the District Court issued its Order Modifying Arbitrator's Award. Vol 3. at 0608-615, which WCSD challenges in this appeal. WCSD has failed to show in two separate arbitration proceedings that it had sufficient grounds under the "just cause" standard to fire Mr. Edlund nearly four years ago - this case now only involves the question of whether, having fired an employee without just cause, WCSD should be required to provide back pay.

VI. SUMMARY OF THE ARGUMENT

The District Court did not exceed its authority under the common law when it modified Arbitrator Harris' award. As shown below, the District Court had both statutory and equitable common law grounds to modify the award. Although a showing of exceptional circumstances are required for a court to modify an arbitrator's award, Arbitrator Harris' rulings in this case are based on personal whims and a demonstrable disregard for the law. Judge Sigurdson was justified in exercising her inherent equitable powers to prevent a miscarriage of justice against Mr. Edlund.

VII. STANDARDS OF REVIEW

The District Court's order granting Edlund's Motion is reviewed *de novo*. *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 85, 127 P.3d 1057, 1059 (2006).

Under NRS 38.241(2)(c), an arbitrator's 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. However, there are also two common-law grounds recognized in Nevada under which this Court may review arbitration awards: (1) whether the award is arbitrary, capricious, or unsupported by the agreement; and (2) whether the arbitrator manifestly disregarded the law. *Washoe Cty. Sch. Dist. v. White*, 133 Nev. 301, 306, 396 P.3d 834, 840 (2017). Under the arbitrary and capricious standard, "[R]eview is limited to whether the

arbitrator's findings are supported by substantial evidence in the record." *Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist*., 122 Nev. 337, 344, 131 P.3d 5, 9 (2006). An arbitrator "manifestly disregards" the law when she recognizes that the law requires a result and nonetheless refuses to apply the law correctly. *Bohlmann v. Printz*, 120 Nev. 543, 545, 96 P.3d 1155, 1156 (2004) overruled on other grounds by *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006).

VII. ARGUMENT

a. Arbitrator Harris' determination that Edlund acted recklessly was arbitrary and capricious

Arbitrator Harris found that WCSD acknowledges that there was no evidence that Mr. Edlund had brought the pistol in question to the school intentionally. Vol. 1 at 0143. However, Arbitrator Harris determined that, "The charged conduct, while not intentional, was reckless." Id. at 0147. Arbitrator Harris further determined that, "inadvertence is not a defense to reckless conduct." Id. at 149. These findings by Arbitrator Harris are contradictory given what the word "reckless" means. Arbitrator Harris' finding that Mr. Edlund was "reckless" was simply unsupported by any evidence on the record, much less substantial evidence presented at the hearing. Based on the contradictory nature of Arbitrator Harris' finding that Mr. Edlund was "reckless,'' Arbitrator

Harris' finding is not "minimally plausible." *News-Emedia Capital Grp. Ltd. Liab. Co. v. Las Vegas Sun, Inc*., 495 P.3d 108, 119 (Nev. 2021)

The term "reckless" is not defined in NRS Chapter 391. Nor is the term described or reasonably defined anywhere in the Opinion and Award. However, the term in significant because under NRS 391.750(4), "gross misconduct" is defined as "…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(1) provides grounds where "A teacher may be suspended, dismissed or not reemployed and an administrator may be demoted, suspended, dismissed or not reemployed." Thus, the consequences to Mr. Edlund's professional standing as a result of this finding by Arbitrator Harris are significant.

"Reckless" is generally defined as: "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." Black's Law Dictionary, 7th Ed. According to Miriam-Websters, recklessness "may be the basis for civil and often criminal liability. Unlike negligence it requires conscious disregard of risk to others."

> 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a

> failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.'

Delaney v. Baker (1999) 20 Cal.4th 23, 31-32 [82 Cal.Rptr.2d 610, 971 P.2d 986], internal citations omitted.)

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Restatement Second of Torts, section 500.

A statute should be given a plain and ordinary meaning unless the meaning violates the spirit of the act. *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). It cannot follow from Arbitrator Harris' finding of fact that Mr. Edlund did not intentionally bring his pistol to campus that Mr. Edlund's conduct was "reckless," because the word "reckless" means that a one has, or should have, knowledge of the risks associated with their conduct but they choose to engage in that conduct anyway, i.e. a "conscious disregard" for the risks being created. Clearly, the provisions of NRS 391.750(4) are intended to define "gross misconduct" as more than an inadvertent mistake, which is all the record showed that Mr. Edlund committed. Even if the Court were to evaluate Mr. Edlund's conduct as to whether he "willfully" brought the

pistol to the school, according to the facts found by the arbitrator, not even "willful" general intent can be found. General intent is defined as:

> The state of mind required for the commission of certain common-law crimes not requiring specific intent of not imposing strict liability. General intent usually takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk)….

Black's Law Dictionary, 7th Ed.

There is no evidence on the record that Mr. Edlund had "purpose or willingness" or "actual awareness" of bringing the pistol to the school. See *Childers v. State*, 100 Nev. 280, 283 n.2, 680 P.2d 598, 599 (1984). To the contrary, Arbitrator Harris made the express finding that, "No evidence has been presented at any stage of this dispute that supports the conclusion that [Mr. Edlund] made a considered decision to bring a handgun to work with him on the day in question." Vol. 1 at 149. Despite these findings and the meaning of the word, Arbitrator Harris found that Mr. Edlund was reckless. In the Opinion and Award Arbitrator Harris never actually applies any standard to her determination that Mr. Edlund's conduct was "reckless." When a person makes an inadvertent and unintentional error, their conduct may rise to the level of negligence, but not recklessness. "Recklessness" requires a showing of a conscious disregard for the probable consequences of a person's actions that are simply absent from the facts in this case. The substantial evidence, and Arbitrator Harris' own

findings of fact, do not support, and cannot logically support, the conclusion that she reached in her Opinion and Award that Mr. Edlund was "reckless."

WCSD argues that Arbitrator Harris' finding that Mr. Edlund acted recklessly was supported by substantial evidence in the record, and as such, it was not arbitrary and capricious. Oppo. at 7:2. Here, WCSD misses the point of the argument in the Motion by failing to acknowledge what the word "reckless" means. Under the arbitrary and capricious standard, "[R]eview is limited to whether the arbitrator's findings are supported by substantial evidence in the record." *Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist.*, 122 Nev. 337, 344, 131 P.3d 5, 9 (2006). Here, Arbitrator Harris found that Mr. Edlund's act of leaving his pistol in his pickup truck was not intentional. Vol. 1 at 0147.

Because the word "reckless" means that one is has knowledge of the risk but takes the risk anyway, absent an express finding in the Arbitrator's award that Mr. Edlund intentionally left the pistol in his pickup, there is no evidence in the record, much less "substantial evidence," to support the finding that Mr. Edlund was reckless. Substantial evidence is evidence that a reasonable person would deem adequate to support a decision. *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 899, 59 P.3d 1212, 1219 (2002).

To reach the conclusion that an inadvertent and unintentional act was reckless is unreasonable based on the meaning of the word "reckless." Thus, the

decision that Mr. Edlund was reckless lacks any substantial evidentiary support. To the contrary, Arbitrator Harris' express findings of fact support the opposite conclusion, i.e. that Mr. Edlund was not reckless because he did not intentionally leave the pistol in his truck. As such, "…the decision is unsustainable as being arbitrary or capricious." *Id.* at 899.

b. Arbitrator Harris' determination that Edlund is not entitled to back pay was arbitrary and capricious, manifestly disregarded the law, and exceeded her powers

Although Arbitrator Harris concluded that WCSD lacked just cause to terminate Mr. Edlund, she concluded that Mr. Edlund was not entitled to back pay because, "the Grievant did not provide any assurances to the arbitrator that he can be counted upon to store his weapon somewhere other than his vehicle when he is scheduled to perform duties as a teacher for the District." Id. at 20:9. NRS 391.760(3) unequivocally provides that, "If sufficient grounds for dismissal are not found to exist at the conclusion of the proceedings conducted pursuant to subsection 1 or 2, the employee must be reinstated with full compensation, plus interest." Again, both Arbitrator Crost and Arbitrator Harris determined that WCSD lacked just cause to terminate Mr. Edlund. Subsection 2 of NRS 391.760 describes the power of WCSD to terminate or suspend a teacher accused of a felony or crime involving moral turpitude or immorality. The October 23, 2018

"Notice of Recommended Dismissal" states that Edlund was being dismissed due to violation of NRS 202.265, which prohibits possession of dangerous weapons on property of a school. Vol. 1 at 0051.

According to the plain meaning of the terms of NRS 391.760, Mr. Edlund was and is entitled to "full compensation, plus interest," having prevailed before two separate arbitrators on the issue of whether WCSD had just cause to terminate his employment. Arbitrator Harris manifestly disregarded this law by refusing to apply the provisions of NRS 391.760, and instead arbitrarily and capriciously substituted her judgment and invented a non-existent rule for that expressed in the statute. Arbitrator Harris is not empowered to invent public policy in the State of Nevada as to the rule that should apply when back pay is at issue. Arbitrator Harris was clearly aware of the provisions of NRS 391.760 but simply chose to disregard the law in rendering her decision to deny Mr. Edlund back pay on a whim.

An arbitrator manifestly disregards a known law when the law is clear on an issue but the law is simply ignored. *Bohlmann v. Printz*, 120 Nev. 543, 545, 96 P.3d 1155, 1156 (2004) overruled on other grounds by *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006). Here, Arbitrator Harris ruled that Mr. Edlund is not entitled to back pay because of her impression that Mr. Edlund had not developed a plan for keeping his gun secured to avoid future infractions. See

Vol. 1 at 0152. Arbitrator Harris states that her decision is based on, "Nevada Law and District policy." Sections 2, 3, and 8 of NRS 391.760, all provide that where a party is subject to loss of pay, back pay must be awarded if the person was terminated without just cause, and/or where a charge against a teacher has been dismissed by a court of law. Here, the conditions for back pay under NRS 391.760 are undeniably met. Two separate arbitrators have found that WCSD lacked just cause to terminate Mr. Edlund, and the charges against Mr. Edlund for which he was fired had been dismissed and sealed. WCSD also argues that because the parties agreed that the issue at arbitration was stipulated to be what the appropriate remedy should be, that this gave Arbitrator Harris essentially unlimited discretion to provide whatever remedy she saw fit. The conclusion that WCSD hopes the Court will reach can only follow if the Court ignores express provisions in Nevada law under NRS 391.760 that protects teachers from bearing the financial brunt of being fired without just cause in violation of the law and/or collective bargaining agreements. Arbitrator Harris manifestly disregarded the provisions of NRS 391.760 by failing to provide back pay to Mr. Edlund, and her decision was entirely arbitrary and capricious.

The record of this case is peppered with references to NRS Chapter 391, and includes the Petitioner's Motion to Modify or Correct Award, which specifically directed Arbitrator Harris' attention to the provisions of NRS 391.760

requiring back pay. Arbitrator Harris' award also specifically states that the Crost award was, "received into evidence by this arbitrator" (Vol. 1 at 0008), and the Crost award provided that, "The District shall make Grievant whole for all lost earnings, interest, and benefits." Vol. 1 at 0131. See also Vol. 2 at 495, which is Edlund's Motion to Modify or Correct the Award, which specifically brought to Arbitrator Harris' attention the requirement for back pay. In a December 16, 2020 email, Arbitrator Harris, in response to Edlund's Motion to Modify, stated: "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)." Vol. 2 at 490.

That Mr. Edlund was entitled to back pay was a decision that was required to me made by operation of law once Arbitrator Harris determined that WCSD lacked just cause to terminate Mr. Edlund under the CBA. Under Article 12.5.4.9 of the CBA, Edlund was entitled to a decision from Arbitrator Harris that is, "consistent with the law and with the terms of [the CBA]." Vol. 1 at 74. While an arbitrator has broad discretion to interpret the facts and to reach a conclusion that they believe the law supports, an arbitrator's discretion is not unlimited or unhinged from the law. An arbitrator may not simply make off the cuff decisions and establish public policy without regard to any law, which is what Arbitrator Harris did in this case by denying Edlund back pay, not based on any standard

under the law, but based on her perception that Edlund lacked remorse for what happened or that he failed to present an adequate plan to prevent it from happening again. An arbitrator exceeds their powers when an arbitrator "effectively dispense[s] his own brand of industrial justice" *United Steelworkers of Am. v. Enter. Wheel & Car Corp*., 363 U.S. 593, 597, 80 S. Ct. 1358, 1361 (1960). "The task of an arbitrator is to interpret and enforce a contract, not to make public policy." *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 662, 130 S. Ct. 1758, 1764 (2010).

c. The Court had authority to modify Arbitrator Harris' award under NRS 38.242 and its inherent powers under the Common Law

After finding that Arbitrator Harris' award was arbitrary and capricious and manifestly disregarded the law, the District Court had to determine the appropriate remedy - either to vacate the award under NRS 38.241, or modify the award under NRS 38.242. Under NRS 38.242(1)(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. Mr. Edlund clearly prevailed on the merits of the matter, and by operation of law he is to receive back pay. Thus, the District Court had authority to modify the award by awarding back pay and not otherwise disturb the merits finding under NRS 38.242(1)(c), in addition to common law remedies. Edlund expressly argued

before the District Court that common law provided the power to modify an award (See Vol. 3 at 503) and the District Court's Order on appeal expressly cites the common law as the basis for modification of the award. See Vol. 3 at 611. In fact, the District Court's Order does not mention or cite NRS 38.242.

At the time the District Court issued its decision, Mr. Edlund had been waiting in limbo for over three years for a final determination as to whether he would get his job at WCSD back. He had already prevailed in the first arbitration proceeding before Arbitrator Crost, but WCSD moved to vacate or modify that decision, which the District Court granted. WCSD argues that pursuant to NRS 38.242, a court can only modify or correct an arbitrator's award in very limited circumstances. This is the case if the modification to the award sought is only sought under the provisions of NRS 38.242. However, as argued below, the District Court had an alternative under the common law to simply vacating Arbitrator Harris' award under NRS 38.241 and sending the parties back to arbitration for an exasperating third time.

Further, Edlund requested that the Court review and modify Arbitrator Harris' decision according to the provisions of the common law, which the Nevada Supreme Court has expressly adopted in reviewing arbitration awards. *Clark County Education Association and Isabell Stuart v. Clark County School District*, 122 Nev. 337, 341, 131 P.3d 5, 8 (2006). "Nevada recognizes both

common-law grounds and statutory grounds for examining an arbitration award." *Health Plan of Nev., Inc. v. Rainbow Med., LLC*., 120 Nev. 689, 691, 100 P.3d 172, 174 (2004).

Recently, this Court held that where an arbitrator manifestly disregards the law, "those errors support ***vacatur or modification*** under the narrow statutory or common-law ground[s]. [***emphasis added***] *News-Emedia Capital Grp. Ltd. Liab. Co. v. Las Vegas Sun, Inc.*, 495 P.3d 108, 119 (Nev. 2021). Although the Court has expressly stated that a court may vacate an arbitration award under the common law if it is arbitrary and capricious, unsupported by the agreement, or when an arbitrator has manifestly disregarded the law, a court may also modify an arbitrator's award under its inherent powers under the common law, and WCSD has cited no authority that the Court's powers under the common law that state otherwise. Rather, WCSD dodges the issue, and claims that modification can ***only*** occur under the provisions of NRS 38.242. Nothing in NRS 38.242 provides that it is an exclusive remedy, but just provides that a court shall modify an award if the three conditions in NRS 38.242(1)(a-c) are present - it does not state that modification can occur "if and only if'' one of these conditions are satisfied. If the Legislature intended that modifications to arbitration awards be available "if and only if" the conditions in NRS 38.242(1)(a-c) are present, it should have made that intention clear. While

WCSD cites the decision in *Manor Health Care Ctr., Inc. v. Monsour*, 126 Nev. 735, 367 P.3d 796 (2010) in support of the argument that if "the merits'' of the decision are challenged, they must be challenged under NRS 38.242 (See OB at 26). However, this again ignores the question of whether the common law permits the Court to modify an arbitration award where a finding is made that an award is arbitrary or capricious or manifestly disregards the law.

Under NRS 1.030, the common law provides the rules of decision in Nevada Courts. District Courts have inherent equitable powers. *Jones v. Eighth Judicial Dist. Court of the State*, 130 Nev. 493, 498, 330 P.3d 475, 479 (2014) quoting *Jordan v. State ex rel. DMV & Pub. Safety*, 121 Nev. 44, 59, 110 P.3d 30, 41 (2005). Recently, this Court held that there is a presumption that the Legislature legislates with common law principles in mind. *Fausto v. Sanchez-Flores,* 482 P.3d 677, 681 (Nev. 2021).

While the Uniform Arbitration Act provides narrow grounds to modify arbitration awards that are technically incorrect under NRS 38.242, a Court's common law and equitable powers should be available to it where an arbitrator acts so completely without justification, or acts irrationally, or outside of the scope of the law such that the Court can modify an award to prevent manifest injustice. "The Uniform Act, as adopted, did not, explicitly, either preserve or exclude common law arbitration; it was simply silent on the subject. In this

context, we follow our general rule that existing common law remedies are not to be abrogated unless such intention is clearly expressed." *Anderson v. Federated Mut. Ins. Co*., 481 N.W.2d 48, 49 (Minn. 1992). In examining the Federal Arbitration Act ("FAA), the US Supreme Court has also held that statutory remedies under the FAA are "not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590, 128 S. Ct. 1396, 1406 (2008).

Mr. Edlund, or any other litigant, is not entitled to a specific result from arbitration proceedings, but he is entitled to a decision that is at a minimum rational, and is based on some interpretation of the law. In extreme cases such as the one presented in this case, Nevada courts should preserve common law guardrails of a district court to modify an arbitrator's award where an arbitrator's decision "effectively dispenses his own brand of industrial justice" by manifestly ignoring the law and rendering a decision that is "'baseless' or 'despotic' and 'a sudden turn of mind without apparent motive; a freak, whim, mere fancy.'" *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

///

///

VIII. CONCLUSION

WHEREFORE, Mr. Edlund asks that the Court affirm the District Court's Order and find that the District Court acted within its authority to modify Arbitrator Harris' Award. If the Court finds that the District Court lacked the authority to modify the Award, Mr. Edlund requests that this Court remand this matter back to the District Court to determine whether Arbitrator Harris' Award should be vacated under *Health Plan of Nevada, Inc. v. Rainbow Med., LLC*, 120 Nev. 689, 697, 100 P.3d 172, 177 (2004).

Respectfully submitted this: Apr 11, 2022

By: /s/ Luke Busby, Esq.
LUKE A. BUSBY, ESQ.
Nevada State Bar No. 10319
316 California Ave.
Reno, Nevada 89509
775-453-0112
luke@lukeandrewbusbyltd.com

NRAP 28.2 ATTORNEY'S CERTIFICATE

I, Luke Busby, counsel to Caidyn Edlund, do hereby certify that:

(1) I have read the foregoing document;

(2) To the best of my knowledge, information and belief, the foregoing document is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) To the best of my knowledge, information and belief, the foregoing document complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion regarding matters in the record be supported by a reference to the page and volume number, if any and if available, of the appendix where the matter relied on is to be found as applicable;

(4) The foregoing document complies with the formatting requirements of Rule 32(a)(4)-(6), and either the page- or type-volume limitations stated in Rule 32(a)(7) as applicable as the document contains 6108 words in Helvetica 13 pt. font.

Respectfully submitted:

By: __/s/ Luke Busby, Esq._____
Luke Busby, Esq.

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I certify that on the date indicated below, I caused service to be completed by:

_____ personally delivering;

_____ delivery via Reno/Carson Messenger Service;

_____ sending via Federal Express (or other overnight delivery service);

_____ depositing for mailing in the U.S. mail, with sufficient postage affixed thereto; or,

___x___ delivery via electronic means (fax, eflex, NEF, etc.)

a true and correct copy of the foregoing pleading addressed to:

CHRISTOPHER B. REICH, ESQ.
Nevada Bar No. 10198
Deputy Chief General Counsel
NEIL A. ROMBARDO, ESQ.
Nevada Bar No. 6800
Chief General Counsel
SARA K. MONTALVO, ESQ.
Nevada Bar No. 11899
General Counsel
ANDREA L. SCHULEWITCH, ESQ.
Nevada Bar No. 15321
Associate General Counsel
Washoe County School District
P.O. Box 30425
Reno, NV 89520-3425

Attorneys for Appellant

By: _/s/ Luke Busby, Esq.___ Dated: Apr 11, 2022
Luke Busby