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Elizabeth A. Brown  
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## **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.

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### **PETITION FOR EN BANC RECONSIDERATION**

Respondent, CAIDYN EDLUND, petitions this Court, pursuant to Nevada Rule of Appellate Procedure (“NRAP”) 40A, to reconsider en banc its August 11, 2022 Order Affirming in Part and Reversing in Part (“Order”).

This petition is based on the following argument: The panel’s decision to affirm the District Court’s order held that the District Court vacated the arbitrator’s decision on an issue in the case. However, the

District Court's Order did not vacate the arbitrator's decision - it modified the arbitrator's decision. Where vacatur of a core decision in an arbitrator's award occurs, the entire award should be vacated and the matter should be remanded to a new arbitration hearing before a new arbitrator.

### **Background**

Over the course of the last four years Appellant Washoe County School District ("WCSD") has failed to prevail in two separate arbitration proceedings in its quest to fire Mr. Edlund without just cause, destroy his reputation, and to deny him back pay. At the second arbitration proceeding, an arbitrator found that Mr. Edlund had been "reckless," despite the fact the same arbitrator also concluded that Edlund acted unintentionally, and that Edlund was not entitled to back pay. Vol. 1 at 0176-0196. The issue of whether Mr. Edlund was "reckless" is a core decision of the arbitrator because 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 consequence to Mr. Edlund’s professional standing as a result of the finding that Edlund was “reckless” in the second arbitration is significant.

On October 6, 2021, the District Court issued its “Order Modifying Arbitrator’s Award.” Vol 3. at 0608-615. The ordering paragraph of Judge Sigurdson’s order states:

IT IS FURTHER ORDERED that the 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.

WCSD appealed the District Court’s decision to this Court. In its Opening Brief, WCSD argued that an issue on appeal was whether Judge Sigurdson had the authority to modify, as opposed to vacate, the arbitrator’s decision. See Opening Brief at 14 and 25. WCSD argued that:

[T]he 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).

See Opening Brief at 27.

In Edlund's Answering Brief, a similar argument was made, that is, if the District Court lacked the authority to modify the arbitrator's decision, the matter should be sent back to the District Court to consider whether vacatur of the arbitrator's award should occur:

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).

See Answering Brief at 25.

In its Order, the panel made the two following rulings: (1) it affirmed the District Court's reversal of the arbitrator's decision that Edlund acted recklessly, where there was no substantial evidence to support this conclusion; and (2) it reversed the District Court's ruling modifying the arbitrator's decision awarding Edlund backpay finding no manifest disregard of the law.

The panel's Order contains the following final sentence:

Based upon the foregoing, we affirm the district court's order insofar as it vacates the arbitrator's finding of recklessness and reverse that part of the order awarding Edlund back pay.

The panel's decision results in a mostly pyrrhic victory for Mr. Edlund where after two arbitrations and years of legal wrangling, Edlund is vindicated only in principle. Two arbitrators found WCSD lacked just cause and should not have fired Mr. Edlund, but he is still forced to bear the cost of years of lost work.

### **Standard of Review**

Under NRAP 40A(a), en banc reconsideration is warranted where reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or the proceeding involves substantial precedential, constitutional or public policy issues. This case meets the first standard because securing uniformity in this Court's decisions is necessary as to what the proper remedy is in cases where an arbitrator's decision is vacated under a court's common law powers.

As described below, because the panel's decision vacates a core decision of the arbitrator, it is contrary to prior, published opinions of the Nevada Supreme Court stating that vacatur of the award is the remedy if an arbitrator's decision is overturned on common-law grounds. In order to maintain uniformity in how this Court disposes of decisions reviewing

arbitrators' awards when an award is reversed, the panel's decision should be reconsidered *en banc*.

### **Argument**

The panel's decision states that when reviewing an arbitration award, the district court may either confirm the award under NRS 38.239, vacate the award under NRS 38.241, or modify the award in limited circumstances under NRS 38.242, and that Nevada recognizes common-law grounds for vacating an arbitration award. See *Health Plan of Nev., Inc. v. Rainbow Med., LLC*, 120 Nev. 689, 695, 100 P.3d 172, 176 (2004).

When the standard of review for arbitrator's awards under its common-law powers is described by this Court, the remedy appears to be categorical - vacatur of the award - not just vacatur of an issue decided by the arbitrator. In *Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist.*, 122 Nev. 337, 131 P.3d 5 (2006), this Court held that an arbitrator's award may be vacated under the common-law where an arbitrator's findings are not supported by substantial evidence or there is manifest disregard of the law. More recently, in *News-Emedia Capital Grp. Ltd. Liab. Co. v. Las Vegas Sun, Inc.*, 495 P.3d 108, 117 (Nev. 2021) this Court noted the

significant overlap between common-law grounds for vacatur under the “unsupported by the agreement” standard and the statutory grounds provided by NRS 38.241(1)(d), and described the remedy under the common-law to be vacatur of an “award,” not of an issue. NRS 38.241(1)(d) “dictates that a court shall vacate an arbitration award if the arbitrator exceeded his powers.” *Washoe Cty. Sch. Dist. v. White*, 133 Nev. 301, 301, 396 P.3d 834, 836 (2017). Similarly, NRS 38.241 as a whole refers to vacatur of an “award,” not an issue. The panel’s decision is contrary to these prior, published opinions of the Supreme Court because where a court finds that vacatur should occur, the remedy should be to order new arbitration proceedings, not to carve out an issue from the arbitrator’s decision for reversal by vacatur while leaving the remainder of the arbitrator’s award, a disembodied phantom, in effect.

When this Court’s jurisprudence surrounding common-law review of arbitrator’s decisions was being developed in the 1990s, in at least one instance, in *Wichinsky v. Mosa*, 109 Nev. 84, 847 P.2d 727 (1993), this Court did expressly vacate particular findings of an arbitrator as to damages without reversing the underlying ruling, but in that case it still remanded the matter for further proceedings. In *Wichinsky v. Mosa*, this

Court vacated various damage awards resulting from an arbitration proceeding because it held that the arbitrator abused her discretion and manifestly disregarded the law, but then remanded the matter for assignment to a new arbitrator to determine the amount of damages at issue. *Id.* at 90.

However, *Wichinsky v. Mosa* does not expressly discuss the common-law, despite clarifying the two non-statutory grounds on which a court may review an arbitrator's award - which are now expressly recognized as common-law grounds. *Id.* *Wichinsky v. Mosa* was issued in 1993, before this Court expressly clarified and explained at length that common-law grounds are a basis to review and potentially vacate an arbitrator's award in *Graber v. Comstock Bank*, 111 Nev. 1421, 1426, 905 P.2d 1112, 1115 (1995). In *Graber v. Comstock Bank* the Court again repeatedly refers to vacatur of "an arbitration award," not an isolated issue or decision. *Id.*

However, unlike in *Wichinsky v. Mosa*, the panel's decision in this case is ambiguous as to whether this matter should be remanded by the District Court to a new arbitrator, or whether the decision of the panel



disposes of the case entirely. The same should happen in Mr. Edlund's case.

WHEREFORE, Mr. Edlund prays that this Court grant this Petition and reconsider its decision in this matter and requests that the case be expressly remanded for a new hearing before a new arbitrator, consistent with the panel's underlying decision vacating the core finding of the second arbitrator.

Respectfully submitted:

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## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this petition for rehearing 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 brief has been prepared in a proportionally spaced typeface using Google Docs in Helvetica 14 point font.

2. I further certify that this petition for rehearing complies with the page or type-volume limitations of NRAP 40 or 40A because it does not exceed 4,667 words. This Petition contains 1,858 words.

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## CERTIFICATE OF SERVICE

I hereby certify that I have on this day served the foregoing document upon the following parties by U.S. Mail and/or Electronic Service and/or hand delivery to:

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