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 ANSWER TO RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION

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I. BACKGROUND

For the sake of judicial economy, Appellant Washoe County School District (District or WCSD) will not restate all the facts and background of the matters herein and directs the Court to the Briefs and documents filed in this appeal for further background as needed. The District will cite to salient points of the record on appeal in the argument below.

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.)

Judge Sigurdson Ordered:

> 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.

(JA0626, vol. 3) (Emphasis added.)

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II. STANDARD FOR RECONSIDERATION

"En banc reconsideration of a decision of a panel of the Supreme Court is not favored and ordinarily will not be ordered except when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue." NRAP 40A(a).

The Petition for En Banc Reconsideration argues that "[t]his 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." Petition at page 5. The District concurs with Respondent Caidyn Edlund (Mr. Edlund) on this point.

However, this case also meets the first standard for en banc reconsideration because securing uniformity in this Court's decisions is necessary to determine the proper standard of review for courts reviewing an arbitrator's definitions of terms under the arbitrary and capricious standard. In this matter, the lower court and the Panel appear to have comingled and bastardized the 'arbitrary and capricious' standard with the 'manifestly disregarded the law' standard by determining that there is only one legal definition under the law for 'reckless' and that the arbitrator knew that definition and the arbitrator used a different definition, and so, the

arbitrator was arbitrary and capricious because the substantial evidence only supports the arbitrator's definition.

The second reason for en banc reconsideration naturally flows from the above. Nevada's strong public policy favoring arbitrations will be eviscerated if parties know that arbitrators' authority to look at the totality of circumstances and form opinions and issue awards on such matters will or could be continually vacated based on a court's differing opinion on what a particular word means.

III. ARGUMENT

The District has consistently argued the proper remedy for the lower court in this case was to either 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 and reverse the Harris Award. The lower court order and the Panel order erroneously and improperly modified the Harris Award. Only the limited statutory reasons contained in NRS 38.242 allow a reviewing court to modify an arbitration award. The limited statutory reasons allowing modification of an award contained in NRS 38.242 are not present in this case.

For this purpose of this en banc reconsideration, the central part of the lower court's decision is modifying the Harris Award and "reversing" Arbitrator Harris' finding that Mr. Edlund was reckless. (JA0626, vol. 3). The lower court

and, respectfully, the Panel made the same significant error by developing their own definition of what the word reckless means, which they believe must contain an intentional act element, and apply their desired definition to the findings of facts and analysis articulated by Arbitrator Harris in order to determine that there is not substantial evidence of intentional conduct, and therefore, the Harris Award is arbitrary and capricious.

At no time during the arbitration proceedings did Mr. Edlund ever present evidence or argue to Arbitrator Harris that there is a specific legal definition of 'reckless' that she needed to consider and apply in this matter. (JA001 through JA0498, vols. 1-2) At most, counsel for Mr. Edlund mentioned in passing during his closing argument that "The District has no evidence that this was an intentional act, . . ." (JA0302, vol. 2)

Arbitrator Harris, based on the substantial evidence presented in the arbitration, applied a definition for reckless she saw as appropriate. Mr. Edlund did not meet his burden to prove by clear and convincing evidence that there is not substantial evidence to support arbitrator Harris' finding that he was reckless. "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., 120 Nev. at 695, 100 P.3d at 176. "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 definition of reckless in the Harris Award, the lower court and the Panel appear to adopt a new definition/law regarding the word 'reckless' and go on to find that Arbitrator Harris disregarded their definition in order to reverse Arbitrator Harris' finding that Mr. Edlund was reckless. The lower court randomly provides a Black's Law Dictionary definition, 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)

On appeal, the Panel then chooses to use Restatement (Second) of Torts § 500 cmt. g (1965):

> The record contains no evidence that Edlund intentionally or knowingly brought a weapon onto school property or any evidence "which a reasonable mind might accept as adequate to support [the] conclusion" that he had acted recklessly. Nev. Pub. Emps. Ret. Bd. u. Smith, 129 Nev. 618, 624, 310 P.3d 560, 564 (2013) (internal citation omitted); cf. Restatement (Second) of Torts § 500 cmt. g (1965) ("[R]eckless misconduct requires a conscious choice of a course of action, either with know ledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man."). Indeed, the arbitrator found that Edlund's conduct was unintentional and inadvertent; thus WCSD lacked just cause to terminate him under NRS 391.750(l)(u), (4).

However, if reviewing courts can adopt whatever definition that they believe an arbitrator must utilize in similar circumstances, then a different court with the same fact pattern could look to a Dictionary.com type definition, which has no intentional act element, to wit:

> *adjective*
> utterly unconcerned about the consequences of some action; without caution; careless (usually followed by *of*):*to be reckless of danger.*
> characterized by or proceeding from such carelessness: *reckless extravagance.*

https://www.dictionary.com/browse/reckless

Or, perhaps the definition from Bing.com, citing to, the Oxford English Dictionary:

> ADJECTIVE
> ***reckless*** *(adjective)*
> 1. (of a person or their actions) without thinking or caring about the consequences of an action:
> "reckless driving"
> *synonyms:*
> rash · careless · thoughtless · incautious · heedless · unheeding · inattentive · hasty · overhasty · precipitate · precipitous · impetuous · impulsive · daredevil · devil-may-care · hotheaded · irresponsible · wild · foolhardy · headlong · overadventurous · over-venturesome · audacious · death-or-glory · ill-advised · injudicious · misguided · harebrained · madcap · imprudent · unwise · ill-considered · unconsidered · ill-conceived · unthinking · indiscreet · mindless · negligent · tearaway · temerarious
> *antonyms:*
> careful · cautious · prudent

https://www.bing.com/search?q=Definition+for+Reckless&form=ANNH01&refig=dcca33ee2391450f8a923fafc7aa96e5

Or, merriam-webster.com:

> **Definition of *reckless***
> **1:** marked by lack of proper caution **:** careless of consequences
> **2:** IRRESPONSIBLE
> *reckless* charges

https://www.merriam-webster.com/dictionary/reckless

Suffice to say, there are a myriad of definitions for reckless and Arbitrator Harris had the authority and substantial evidence for finding Mr. Edlund reckless, as shown below.

Both the lower court and the Panel went far beyond the limited review of an arbitration award by finding that they disagreed with Arbitrator Harris's finding that Mr. Edlund was 'reckless' within the definition of gross misconduct contained in NRS 391.750(4) by substituting their own definition and opinion on what reckless means.

Arbitrator Harris used 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 articulates the following facts and evidence to find just cause that Mr. Edlund should receive some discipline:

> There can be no question that the Grievant committed the alleged misconduct in violation of state law and District policy. Here, it is undisputed that he brought a weapon onto the campus; that he is not a law enforcement officer; and that he did not have the permission of the Superintendent to bring his weapon onto school property. The Grievant also admits that he was aware of AR 4675 which precludes bringing a weapon onto District property, *including* District parking lots. Neither AR 4675 nor NRS 202.265 requires that the District demonstrate that the Grievant made a deliberate or considered decision to bring his gun to school on the day in question. NRS 202.265 broadly defines the prohibited conduct as *carrying or possessing a firearm while on school property* and AR 4675 refers to the act of *bringing a weapon onto District property.* Under the circumstances presented here, the Union essentially claims that the Grievant should be excused from this requirement for three reasons: 1) he forgot that the gun was in his gym bag; 2) an administrator was not terminated for engaging in the same conduct; and 3) he was not on notice that a violation of AR 4675 would lead to summary termination, especially where he brought his weapon to school

> inadvertently. The arbitrator urns now to a discussion of these defenses.

(JA0189-JA0190, vol. 1)

Arbitrator Harris then lays out the evidence she relies on to determine that '[t]he charged conduct, while not intentional, was reckless." (JA0190, vol. 1)

> 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). (Emphasis added.)

"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 v. Mosa, 109 Nev. 84, 90, 847 P.2d 727 731 (1993).

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).

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.

Arbitrator Harris found that given the undisputed facts and in the totality of circumstances, Mr. Edlund's behavior of bringing a loaded handgun on to a school

campus was reckless. 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).

Moreover, this Court holds that in either an arbitrary and capricious or manifest disregard standard, a court cannot second guess an arbitrator's interpretation of law.

> 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" **9 and because "the arbitrator demonstrated a manifest disregard of the law." 10 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 Cnty. Educ. Ass'n v. Clark Cnty. Sch. Dist., 122 Nev. 337, 342, 131 P.3d 5, 8–9 (2006) (Emphasis added.)

In the event the Court somehow finds that a lower court or a Panel can justifiably modify or overrule an arbitrator on such definitional matters, there will be no appetite for parties to agree to arbitration for such matters, as the courts will

in fact have a broad de novo review of arbitrator awards, rather than the current very limited review. Such will be the death knell for Nevada's strong public policy favoring arbitrations causing an overwhelming increase of litigation in the courts.

Therefore, the Court should find that the Harris Award is not arbitrary and capricious because Arbitrator Harris had broad authority from the parties to determine the definition of 'reckless' and her finding Mr. Edlund was 'reckless' is supported by substantial evidence in the record and the lower court and Panel exceeded their very limited review by substituting their own definition of 'reckless'.

IV. CONCLUSION

The Court should find and order:

1. The Harris Award is not arbitrary and capricious;

2. The lower court and the Panel exceeded their 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 and the Panel 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

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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 11th day of October, 2022.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

I hereby certify that this Appellant's Answer to Petition for En Banc Reconsideration 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 Answer to Petition for En Banc Reconsideration complies with the page limitations of NRAP 40A because it has typeface of 14 points or more and contains less than 4,667 words.

DATED this 11th day of October, 2022.

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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 11th day of October, 2022.

Breanne Read