

IN THE SUPREME COURT OF THE STATE OF NEVADA

Docket No.: 83942

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Elizabeth A. Brown
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SHARI KASSEBAUM

Appellant,

vs.

THE STATE OF NEVADA DEPARTMENT
OF CORRECTIONS,

Respondents.

Eighth Judicial District Court
Case No.: A-20-810424-P

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

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 an order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Daniel Marks, Esq. and Adam Levine, Esq. of the Law Office of Daniel Marks. There are no parent corporations.
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TABLE OF CONTENTS

Contents

DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1	2
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	3
ROUTING STATEMENT	3
STATEMENT OF ISSUES FOR REVIEW	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	4
STANDARD OF REVIEW	5
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THE REQUIREMENTS OF NAC 284.6562(2)(b) ARE A NON-JURISDICTIONAL CLAIMS PROCESSING RULE.	7
A. An Administrative Agency May Not Limit Its Own Jurisdiction or Alter the Requirements of A Statute.....	8
B. The Provisions of NAC 284.6562 Are A Claims Processing Rule.	10
II. THE DISMISSAL OF PETITIONER'S APPEAL VIOLATES FEDERAL CONSTITUTIONAL DUE PROCESS.	13

A. The Failure To Provide Kassebaum With An Evidentiary Hearing In Connection With Depriving Her Of Her Property Interest In Her Pay Violated Well Established Due Process Requirements..... 13

B. The Contradictory Instructions Contained Within The Division Of Human Recourse Management Appeal Form Further Violates Due Process..... 15

CONCLUSION 18

CERTIFICATE OF COMPLIANCE WITH NRAP 28(e) 19

CERTIFICATE OF SERVICE BY ELECTRONIC MEANS..... 21

TABLE OF AUTHORITIES

Cases

<i>Arbaugh v. Y & H Corp.</i> , 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006).....	11, 12
<i>Arnett v. Kennedy</i> , 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974).....	15
<i>City of Reno v. Civil Service Commission of City of Reno</i> , 117 Nev. 855, 34 P.3d 120 (2001).....	9
<i>Cleveland Board of Education v. Loudermill</i> , 470 U.S. 532, 105 S.Ct. 1487 (1985)	3, 13, 14, 15
<i>Gilbert v. Homar</i> , 520 U.S. 924, 117 S. Ct. 1807 (1997).....	3, 13, 14, 15
<i>Kontrick v. Ryan</i> , 540 U.S. 443, 456, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004)	11, 12
<i>Public Agency Compensation Trust v. Blake</i> , 127 Nev. 863, 265 P.3d 694, 695 (2011).....	6
<i>Rust v. Clark County School Dist.</i> , 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987).....	17, 18
<i>Sheriff v. Luqman</i> , 101 Nev. 149, 153, 697 P.2d 107, 110 (1985)	9
<i>Steel Co. v. Citizens for Better Environment</i> , 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).....	11
<i>Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainman General Committee of Adjustments, Central Region</i> , 558 U.S. 67, 130 S. Ct. 584 (2009).....	10, 12
<i>United States v. Cotton</i> , 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002))	11

Washoe County v. Otto, 128 Nev. 424, 282 P.3d 719 (2012)..... 8

Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 102 S.Ct. 1127, 71
L.Ed.2d 234 (1982)..... 11

Statutes

29 CFR §301.5 11

NAC 2843, 5, 6, 7, 8, 10, 14, 15, 16, 17

NRAP 17 3

NRAP 26.1 2

NRS 233B.130 3

NRS 2843, 4, 6, 7, 9, 10, 13, 14, 15, 16

NRS Chapter 233B..... 8

Rules

Fed. Rule Bkrcty. Proc. 4004 12

Regulations

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e 12

Constitutional Provisions

14th Amendment's Due Process Clause 6, 13

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRS 233B.150. Petitioner, Shari Kassebaum, timely filed her Notice of Appeal from the judgment of the district court on December 10, 2021 (App Vol. II at 370-581).

ROUTING STATEMENT

Pursuant to NRAP 17(a)(11) this case should be heard and decided by the Supreme Court because it involves a question of first impression involving whether the Nevada Personnel Commission has authority to enact regulations of a jurisdictional nature, as opposed to claim processing rules, and whether the dismissal of a disciplinary appeal under NRS 284.390 for failure to attach a piece of paper which is already in the possession of the employer pursuant to such a regulation violates principles of due process of law as established by *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985) and *Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807 (1997).

STATEMENT OF ISSUES FOR REVIEW

1. Can an administrative agency adopt regulations enlarging or restricting its jurisdiction.
2. Are the requirements of NAC 284.6562(2)(b), requiring an appeal of discipline to a Hearing Officer to attach the final decision of the appointing authority, jurisdictional in nature, or a claims processing rule.

3. Does the denial of an evidentiary hearing in connection with a suspension, demotion or dismissal pursuant to NRS 284.390 for failure to attach the final written decision of the appointing authority violate the 14th Amendment's Due Process Clause.

STATEMENT OF THE CASE

Appellant Shari Kassebaum filed a timely appeal of a suspension pursuant to NRS 284.390. (JA Vol I at 235-247). The Hearing Officer dismissed the appeal on jurisdictional grounds. (JA Vol. I at 211-215). Kassebaum filed a timely Petition for Judicial Review with the district court. (JA Vol. I at 016-019). The district court denied judicial review. (JA Vol. II at 358-363). Kassabaum filed a timely Notice of Appeal. JA Vol. II at 370-381.¹

STATEMENT OF FACTS

Sgt. Shari Kassebaum was employed as a Corrections Officer with NDOC. She received a disciplinary suspension effective August 30, 2019. She timely filed an appeal pursuant to NRS 284.390 on the NPD-54 Form provided by the Nevada Department of Administration Division of Human Resource Management. (JA

¹ Kassebaum filed a Motion to Consolidate with Docket No. 84008 as both appeals raise identical legal issues. However, no ruling on this Motion has issued prior to the due date of this Opening Brief.

Vol. I at 235-247).² The case was assigned to State Hearing Officer Mark Gentile. (JA Vol. I at 227).

NDOC filed a Motion to Dismiss the Appeal arguing that the failure to attach the written notification from NDOC Deputy Director Harold Wickham as provided for under NAC 284.6562(2)(b) constituted an incurable jurisdictional defect. (JA Vol. I at 027-220). The hearing officer agreed and dismissed the appeal on jurisdictional grounds. (JA Vol. I at 016-019).

STANDARD OF REVIEW

This Court's standard of review is the same as the district court's. Pursuant to NRS 233B.135(3) the Court is to determine whether a decision of an administrative agency should be set aside in whole or in part because substantial rights of the petitioner have been prejudiced because the final decision of the agency is:

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;
- (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

² The majority of pages in the record are attachments to the Motion. The actual Motion is at ROA003-010.

(f) Arbitrary or capricious or characterized by abuse of discretion.

The Court reviews issues of law, including questions of statutory construction, de novo. *Public Agency Compensation Trust v. Blake*, 127 Nev. 863, 265 P.3d 694, 695 (2011).

SUMMARY OF ARGUMENT

The district court erred in denying judicial review. NAC 284.6562(2)(b) is not jurisdictional; it is a claims processing rule under which any minor procedural issues may be cured. This result is compelled by the fact that administrative agencies may not enact regulations which either expand or restrict their jurisdiction. The prerogative of enacting jurisdictional requirements belongs to the legislature.

Members of the classified service of the State of Nevada have a property interest in their employment within the meaning of the 14th Amendment's Due Process Clause. The United States Supreme Court has unambiguously held that where an employee with such a property interest is deprived of either their pay, or their job, due process requires a post deprivation hearing. The hearing provided by NRS 284.390 is that hearing, and dismissing the appeal of an employee because they did not attach the final decision of the appointing authority to the appeals form violates due process. This is particularly so when the appeals form utilized by the State itself is contradictory as to whether any materials need to be attached.

ARGUMENT

I. THE REQUIREMENTS OF NAC 284.6562(2)(b) ARE A NON-JURISDICTIONAL CLAIMS PROCESSING RULE.

Appeals of discipline within the classified service of the State of Nevada are governed by NRS 284.390 which states in pertinent part:

1. Within 10 working days after the effective date of an employee's dismissal, demotion or suspension pursuant to NRS 284.385, the employee who has been dismissed, demoted or suspended may request in writing a hearing before the hearing officer of the Commission to determine the reasonableness of the action. The request may be made by mail and shall be deemed timely if it is postmarked within 10 working days after the effective date of the employee's dismissal, demotion or suspension.

The only requirement under the statute is that the request be "in writing", and made within "10 working days after the effective date of an employee's dismissal, demotion or suspension".

The Nevada Personnel Commission is a State administrative agency created pursuant to NRS 284.030. Under NRS 284.065(d) the Commission may adopt regulations to carry out the provisions of NRS Chapter 284. Among the regulations adopted by the Commission is NAC 284.6562 which states:

2. Except as otherwise provided in subsection 3, such a request must be:

(a) Addressed and submitted as required pursuant to NAC 284.778; and

(b) Accompanied by the written notification of the appointing authority's decision regarding the proposed action provided to the employee pursuant to subsection 7 of NAC 284.6561.

3. If the appointing authority failed to provide the notification required pursuant to subsection 7 of NAC 284.6561 or the disciplinary action imposed was an immediate suspension or dismissal pursuant to the standards and procedures set forth in NAC 284.6563 the written notification of the appointing authority's decision regarding the proposed action need not accompany the request for a hearing.

NDOC's Motion to Dismiss Appeal for Lack of Jurisdiction argued that the requirement of having the written notification of the appointing authority's decision accompany the appeal form was "jurisdictional" citing *Washoe County v. Otto*, 128 Nev. 424, 282 P.3d 719 (2012). (ROA at 011). However *Otto* is not applicable as that case involved the Administrative Procedures Act, NRS Chapter 233B, wherein the *Legislature* provided that a Petition for Judicial Review must name as respondents "the agency and all parties of record to the administrative proceeding". See NRS 233B.130(2)(a).

A. An Administrative Agency May Not Limit Its Own Jurisdiction or Alter the Requirements of A Statute.

An agency's jurisdiction is set by the Legislature, not the agency itself. It is a fundamental principle of administrative law that "administrative agencies cannot enlarge their own jurisdiction" and "the scope of an agency's authority is limited to the matters the legislative body has expressly or implicitly delegated to the

agency.” *City of Reno v. Civil Service Commission of City of Reno*, 117 Nev. 855, 34 P.3d 120 (2001). As more recently explained by this Court in *McNeill v. State*:

[a]lthough the legislature may not delegate its power to legislate, it may delegate the power to determine the facts or state of things upon which the law makes its own operations depend.” *Luqman*, 101 Nev. at 153, 697 P.2d at 110.

Thus, the legislature can make the application or operation of a statute complete within itself dependent upon the existence of certain facts or conditions, the ascertainment of which is left to the administrative agency. *Telford v. Gainesville* [208 Ga. 56], 65 S.E.2d 246 (1951). In doing so the legislature vests the agency with mere fact finding authority and not the authority to legislate. *Ex rel. Ginocchio v. Shaughnessy*, [47 Nev. 129, 217 P. 581 (1923)]. The agency is only authorized to determine the facts which will make the statute effective. *Montoya v. O’Toole* [94 N.M. 303], 610 P.2d 190 (1980); *State v. King*, 257 N.W.2d 693 (Minn.1977); *People v. Uriel* [76 Mich.App. 102], 255 N.W.2d 788 (1977); *State v. Kellogg* [98 Idaho 541], 568 P.2d 514 (1977); see generally 1 Am.Jur.2d Administrative Law, § 123 (1962).

132 Nev. 551, 556, 375 P.3d 1022, 1025-1026 (2016) quoting *Sheriff v. Luqman*, 101 Nev. 149, 153, 697 P.2d 107, 110 (1985).

As set forth above, the only jurisdictional requirements imposed by the Legislature under NRS 284.390(1) are that the appeal be in writing, and within 10 days. The Personnel Commission is not authorized, and is constitutionally unable, to alter these jurisdictional requirements.

Likewise, a Hearing Officer is unable to rule upon the propriety of the Division of Human Resources Management Administrator receiving and processing appeals which do not attach the written notification. Hearing officers

are required “to conduct hearings and render decisions as provided in NRS 284.376 and NRS 284.390.” See NRS 284.091. A Hearing Officer’s jurisdiction is also limited only to “determin[ing] the reasonableness” of a suspension, demotion, or dismissal. NRS 284.390.

B. The Provisions of NAC 284.6562 Are A Claims Processing Rule.

The Personnel Commission is authorized to adopt regulations “to carry out the provisions” of NRS Chapter 284. See NRS 284.065(d). However, such regulations are not “jurisdictional” and NDOC Motion to Dismiss filed with the Hearing Officer cites no authority for its claim that such regulations are “jurisdictional”. Appeals to this Court from the district courts need only be filed in a timely manner in order to establish jurisdiction. Other deficiencies in connection with submission such as may be addressed and remedied after the fact. See NRAP 3(a)(2) and (3).

The claim that regulations of administrative agencies are “jurisdictional” has become so prevalent that the United States Supreme Court has been forced to repeatedly address the issue. In *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainman General Committee of Adjustments, Central Region*, 558 U.S. 67, 130 S. Ct. 584 (2009) the High Court held that the failure to comply with 29 CFR §301.5 governing submission of disputes to the National

Railroad Adjustment Board (“NRAB”) was not jurisdictional but rather a claims processing rule. A unanimous Supreme Court emphasized:

Congress authorized the Board to prescribe rules for presenting and processing claims, [45 U.S.C.] §153, but Congress alone controls the Board’s jurisdiction. By refusing to adjudicate the instant cases on the false premise that it lacked “jurisdiction” to hear them, the NRAB panel failed “to conform, or confine itself, to matters [Congress placed] within the scope of [NRAB] jurisdiction,” §153.

558 U.S. at 69, 130 S. Ct. at 590. That unanimous Opinion further gave multiple examples of similar prior rulings:

Recognizing that the word “jurisdiction” has been used by courts, including ther Court, to convey “many, too many, meanings,” *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (internal quotation marks omitted), we have cautioned, in recent decisions, against profligate use of the term. Not all mandatory “prescriptions, however emphatic, are ... properly typed jurisdictional,” we explained in *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (internal quotation marks omitted). Subject-matter jurisdiction properly comprehended, we emphasized, refers to a tribunal’s “power to hear a case,” a matter that “can never be forfeited or waived.” *Id.*, at 514, 126 S.Ct. 1235 (quoting *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)). In contrast, a “claim-processing rule, . . . even if unalterable on a party’s application,” does not reduce the adjudicatory domain of a tribunal and is ordinarily “forfeited if the party asserting the rule waits too long to raise the point.” *Kontrick v. Ryan*, 540 U.S. 443, 456, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004).

For example, we have held non-jurisdictional and forfeitable the provision in *Title VII of the Civil Rights Act of 1964*, 42 U.S.C. § 2000e et seq., requiring complainants to file a timely charge of discrimination with the Equal Employment Opportunity Commission (EEOC) before proceeding to court. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). We

have also held non-jurisdictional and forfeitable the *Title VII* provision exempting employers who engage fewer than 15 employees. *Arbaugh*, 546 U.S., at 503, 515–516, 126 S.Ct. 1235. And we have determined that a Chapter 7 trustee’s (or creditor’s) limited time to object to the debtor’s discharge, see Fed. Rule Bkrtcy. Proc. 4004, is a claim-processing, not a jurisdictional, matter. *Kontrick*, 540 U.S., at 446–447, 460, 124 S.Ct. 906.

558 U.S. at 81-82, 130 S. Ct. at 596-597.

Thus, the Supreme Court concluded that the regulations not complied with was a “claims processing rule”, *notwithstanding the regulation stating* “No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the [RLA]”, because “Congress gave the Board no authority to adopt rules of jurisdictional dimension.” *Id.* at 83-84, 597. The Court further observed “we see no reason why the panel could not adjourn the proceeding pending cure of any lapse”. *Id.*

As noted by the Supreme Court in *Union Pacific Railroad Co.*, violation of claims processing rules are waived/forfeited if not promptly asserted. If the Hearing Officer or NDOC felt that the absence of the Deputy Director's actual disciplinary decision somehow impeded the ability of the Hearing Officer to hold

the appeal hearing, there was no reason the Hearing Officer could not adjourn/stay any proceedings and direct Officer Kassebaum to provide the document³.

II. THE DISMISSAL OF PETITIONER'S APPEAL VIOLATES FEDERAL CONSTITUTIONAL DUE PROCESS.

A. The Failure To Provide Kassebaum With An Evidentiary Hearing In Connection With Depriving Her Of Her Property Interest In Her Pay Violated Well Established Due Process Requirements.

Members of the classified service may only be suspended, demoted or dismissed for "just cause". See NRS 284.390(7). The "just cause" requirement creates a property interest in classified service employment within the meaning of the Due Process Clause of the 14th Amendment to the United States Constitution. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985).

In *Loudermill*, the United States Supreme Court held that the minimum requirements of federal due process require an informal pre-termination hearing followed by a more extensive post-termination evidentiary hearing. 470 U.S. at 546-547, 105 S.Ct. at 1495-1496. In *Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807 (1997) the High Court likewise held that the right to a hearing conferred by due process applies to suspensions.

³ In fact, NDOC already had the document as it was the appointing authority which authored and issued the document, and as evidence by the fact that the document was attached is Exhibit "B" to NDOC's Motion to Dismiss. (JA Vol I at 193).

The State provided Officer Kassebaum with an opportunity for an informal pre-disciplinary review hearing pursuant to NAC 284.6561. Subsection (5) of the regulation states:

The process is an informal proceeding between the two parties, the appointing authority and her or her designated representative and the employee, who meet together to discuss the proposed action. The employee will be given an opportunity to rebut the allegations against the employee and provide mitigating information. Witnesses are not allowed to attend, but each party may be accompanied by a person of her or her choice.

Thus the pre-disciplinary review constitutes the type of informal pre-deprivation hearing contemplated by *Loudermill*.⁴

However, the Supreme Court in *Loudermill* and *Gilbert* make clear that any such an informal pre-termination hearing must be followed by a "more comprehensive" post-deprivation hearing. *Gilbert*, 520 U.S. at 929, 117 S. Ct. at 1811. That is the hearing provided for under NRS 284.390. Officer Kassebaum did not receive her more comprehensive evidentiary hearing because the Hearing Officer dismissed the appeal for failure to attach a piece of paper which the Respondent already had in its possession. (JA Vol I at 193).

Loudermill makes clear that state law cannot supersede or impair that which federal constitutional due process requires:

⁴ Kassebaum elected not to attend the pre-disciplinary hearing which is permissible under the regulation.

In light of these holdings, it is settled that the “bitter with the sweet” approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. “Property” cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process “is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.”

470 U.S. at 541, 105 S. Ct. at 1493 citing *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974).

Simply put, the dismissal of Officer Kassebaum's timely filed appeal violates her right to due process of law. The district court should have granted Judicial Review and remanded the matter for the hearing required by *Loudermill/Gilbert*.

B. The Contradictory Instructions Contained Within The Division Of Human Recourse Management Appeal Form Further Violates Due Process.

Amongst the regulations adopted the Commission is NAC 284.778(1) addressing the request for a hearing under NRS 284.390 and which states:

A request for a hearing must be addressed to the Administrator **and submitted on the form provided by the Division of Human Resource Management.**

(Emphasis added). The form provided by the Division of Human Resource Management (hereafter "DHRM") is the NPD-54 entitled "Dismissal, suspension, demotion or Involuntary Transfer. (JA Vol. I at 235-236).

The NPD-54 provided by DHRM comes with a section entitled "Appeal Instructions". (JA Vol I. at 236). Those "Appeal Instructions" did not require that Officer Kassebaum submit the notice of suspension, much less informed her that such submission of the notice was jurisdictional. Rather, the "Appeal Instructions" stated the following:

Appeal Instructions:

Permanent, classified State employees are eligible to file an appeal. **Attachments to the form *may* be provided** however, **evidence and back-up documents need not be provided at this time**; prior to the hearing, **the clerk will send a request for any supporting material**. If you have received a Specificity of Charges or written notice of involuntary transfer, ***you must*** attach it to the appeal. Notification of a hearing will be sent to you or your designated representative by regular mail.

The appeal procedures and statements made on the form do not include all of the rights **available** to an appellant. It is advisable to review NRS 284 and NAC 284 prior to requesting a hearing. Appeal hearings are open to the public and decisions by a hearing officer are public information.

When to File an Appeal: The appeal will be deemed timely filed if it is either postmarked or received by the Administrator of the Division of Human Resource Management during the period beginning on the first

working day after the effective date of the action that is being appealed and ending on the 10th working day after the effective date. **Appeals received before or after the period may be dismissed as untimely.**

(Id. **emphasis added in parts**).

Nothing within the Appeals Instructions informed Officer Kassebaum that Acting Director Wickham's letter of August 26, 2019 was necessary to attach, much less upon penalty of dismissal. The Appeals Instructions state that if the employee has received a "Specificity of Charges" it must be attached. A Specificity of Charges is a different document than the final disciplinary decision. The Specificity is the notice of the charges and the "recommendation" for disciplinary action which is the HR-41 form. The Appeal Instructions only states that an appeal may be dismissed if the filing is untimely. (JA Vol. I at 236)

The Appeal Form from DHRM states on the first page, This appeal form must be accompanied by the written notification of the appointing authority's decision regarding the proposed action provided to the employee pursuant to (7) of NAC 284.6561". However, this is in a section entitled "*Note*" as opposed to the "Appeal Instructions". (JA Vol. I at 235). It does not advise that failure to do so will result in dismissal, or that such a failure must be cured within ten (10) days.

The failure to place this information in the "Appeal Instructions", coupled with the contrary instructions informing an employee that documents may be provided at a later date, violates due process. In *Rust v. Clark County School Dist.*,

103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987) this Court held that in order to comply with due process, jurisdictional rules must be "clear and absolute" in order to give all fair notice of what is required. The information provided on the NPD-54 is anything but "clear and absolute".

CONCLUSION

For all of the reasons set forth above, the district court abused its discretion when it denied judicial review. Accordingly, this Court should reverse the dismissal of Shari Kassebaum's appeal and remand the matter back to the Hearing Officer with instructions to conduct such a hearing on the merits.

DATED this 21st day of April 2022.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28(E)
AND NRAP 32(a)(8)

I hereby certify that I have read 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 Appellant's Opening Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e), which requires every assertion in the regarding any material issue which may have been overlooked to be supported by a reference to the page of the transcript or appendix where the matter overlooked is to be found.

I further certify that this Appellant's Opening Brief is formatted in compliance with NRAP 32(a)(4-6) as it has one (1) inch margins and uses New Times Roman - font size 14 has 25 pages, double-spaced, and contains 4527 words. I understand that I may be subject to sanction in the event that the

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accompanying Appellant's Opening Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 21st day of April 2022.

LAW OFFICE OF DANIEL MARKS



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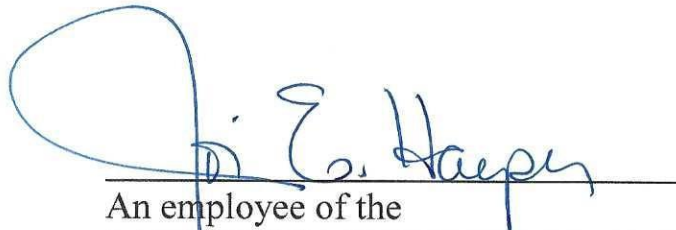
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CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 21st day of April 2022, I did serve the above and foregoing APPELLANT'S OPENING BRIEF by the court mandated E-Flex filing service, to the following addresses on file for:

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