

IN THE SUPREME COURT OF THE STATE OF NEVADA

Docket No. 83942

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SHARI KASSEBAUM

Appellant,

vs.

THE STATE OF NEVADA DEPARTMENT
OF CORRECTIONS,

Respondents.

Eighth Judicial District Court
Case No.: A-20-811982-J

**JOINT APPENDIX
VOLUME II Part 1 of 3**

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	<u>Description</u>	<u>Vol(s)</u>	<u>Pg(s)</u>
1.	Petition for Judicial Review 03/10/2020	I	JA 00001 - JA 00008
2.	Statement of Intent to Participate in Petition for Judicial Review	I	JA 00009 - JA 00011
3.	Transmittal of Record on Appeal 02/08/2021	I	JA 00012 – JA 00247
4.	Petitioner Shari Kassebaum’s Opening Brief 02/22/2021	II	JA 00248 – JA 00266
5.	Respondent’s Answering Brief 04/08/2021	II	JA 00267 – JA 00294
6.	Appendix to Respondent’s Answering Brief 04/08/2021	II	JA 00295 – JA 00323
7.	Respondent, Department of Corrections’ Request to Set Matter for Hearing 05/13/21	II	JA 00324 – JA 00326
8.	Petitioner Shari Kassebaum’s Reply Brief 05/25/2021	II	JA 00327 – JA 00341
9.	Minute Order 10/01/21	II	JA 00342
10.	Findings of Fact, Conclusions of Law and Order 11/19/2021	II	JA 00343 – JA 00354
11.	Notice of Entry of Findings of Facts, Conclusions of Law, and Order Denying Petition for Judicial Review 12/01/2021	II	JA 00355 – JA 00369
12.	Notice of Appeal 12/10/2021	II	JA 00370 – JA 00387

13.	Case Appeal Statement 12/10/2021	II	JA 00388 – JA00391
14.	Recorder's Transcript of Proceedings 02/24/2022	II	JA 00392 – JA 00405

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 forgoing JOINT APPENDIX Volume I Part 1 of 3, by way of Notice of Electronic Filing provided by the court mandated E-Flex filing service, at the following:

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

SHARI KASSEBAUM,

Plaintiff,

Case No.: A-20-811982-J
Dept. No.: 24

v.

STATE OF NEVADA,

Defendant.

**PETITIONER SHARI KASSEBAUM'S
OPENING BRIEF**

COMES NOW, SHARI KASSEBAUM, by and through ANGELA J. LIZADA, ESQ. of
LIZADA LAW FIRM, LTD., her attorney of record and hereby files her Opening Brief in this
Matter.

This Opening Brief is made and based on the pleadings and papers on file herein, the
Memorandum of Points and Authorities, and any oral arguments that may be allowed by the
Court at the time of hearing.

DATED this 22nd day of February, 2021.

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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. Angela J. Lizada, Esq. of the Lizada Law Firm, Ltd. There are no parent corporations.

Attorneys of Record for Petitioner Shari Kassebaum.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRS 233B.130(2)(b). Petitioner, Shari Kassebaum, timely filed her Petition for Judicial Review on April 3, 2020, within 30 days of the Nevada State Personnel Administrative Hearing Officer's final decision dated March 6, 2020. *See* NRS 233B.130(2)(d).

ROUTING STATEMENT

N/A

STATEMENT OF ISSUES FOR REVIEW

1. Did the Hearing Officer err and/or abuse his discretion in dismissing Petitioner's appeal of a suspension pursuant to NRS 284.390 on jurisdictional grounds.

STATEMENT OF THE CASE

Sgt. Shari Kassebaum was a member of the classified service of the State of Nevada who received a suspension pursuant to NRS 284.385. She timely filed an appeal requesting that the suspension be set aside. (ROA at 223-235). The State of Nevada Department of Corrections (hereafter "NDOC") filed a "Motion to Dismiss Appeal for Lack of Jurisdiction". (ROA at 014-208). The Hearing Officer granted the Motion. (ROA at 003-006). A timely Petition for Judicial Review was filed.

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

1 Human Resource Management. (ROA at 223-235).¹ The case was assigned to State Hearing
2 Officer Mark Gentile. (ROA at 215).

3 NDOC filed a Motion to Dismiss the Appeal arguing that the failure to attach the written
4 notification from NDOC Deputy Director Harold Wickham as provided for under NAC
5 284.6562(2)(b) constituted an incurable jurisdictional defect. (ROA at 014-208). The hearing
6 officer agreed and dismissed the appeal on jurisdictional grounds. (ROA at 003-006).

8 STANDARD OF REVIEW

9 The scope of judicial review is set forth under NRS 233B.135 (3) which permits a district
10 court to set aside “in whole or in part” a decision of an administrative agency if substantial rights
11 of the petitioner have been prejudiced because the final decision of the agency is:

- 12 (a) In violation of constitutional or statutory provisions;
- 13 (b) In excess of the statutory authority of the agency;
- 14 (c) Made upon unlawful procedure;
- 15 (d) Affected by other error of law;
- 16 (e) Clearly erroneous in view of the reliable, probative and substantial evidence on
17 the whole record; or
- 18 (f) Arbitrary or capricious or characterized by abuse of discretion.

19 The court reviews issues of law, including questions of statutory construction, de novo.
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21 *Public Agency Compensation Trust v. Blake*, 127 Nev. —, 265 P.3d 694, 695 (2011).
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28 ¹ The majority of pages in the record are attachments to the Motion. The actual Motion is at ROA003-010.

SUMMARY OF ARGUMENT

The Hearing Officer erred in determining that attachment of the letter stating the effective date that Kassebaum would be suspended was a jurisdictional requirement. The attachment requirements of NAC 284.6562(2)(b) are not jurisdictional; they are what the law recognizes as a "claims processing" rule which is non-jurisdictional. Regulations such as NAC 284.6562(2)(b) are promulgated by the Nevada Personnel Commission. As an administrative agency, the Personnel Commission does not have authority to limit its own jurisdiction; only the Legislature may determine jurisdictional requirements for administrative agencies.

The NPD-54 appeal form provided by the State of Nevada Department Administration under "Appeals Instructions" is fundamentally misleading as makes no mention of any attachment requirements of the appointing authority's actual disciplinary decision under NAC 284.6562 (2)(b).

Finally, dismissal of an appeal on jurisdictional grounds for failure to attach a piece of paper violates the 14th Amendment's Due Process Clause. Well-established federal constitutional law holds that in an employee with a property interest in their job must be provided a hearing in connection with any suspension or termination. The hearing which due process requires is the hearing provided by the appeal under NRS 284.390.

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.

1 The request may be made by mail and shall be deemed timely if it is postmarked
2 within 10 working days after the effective date of the employee's dismissal,
3 demotion or suspension.

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

6 The Nevada Personnel Commission is a State administrative agency created pursuant to
7 NRS 284.030. Under NRS 284.065(d) the Commission may adopt regulations to carry out the
8 provisions of NRS Chapter 284. Among the regulations adopted by the Commission is NAC
9 284.6562 which states:
10

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

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

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

16 3. If the appointing authority failed to provide the notification required pursuant
17 to subsection 7 of NAC 284.6561 or the disciplinary action imposed was an
18 immediate suspension or dismissal pursuant to the standards and procedures set
19 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.

20 NDOC's Motion to Dismiss Appeal for Lack of Jurisdiction argued that the requirement of having
21 the written notification of the appointing authority's decision accompany the appeal form was
22 "jurisdictional" citing *Washoe County v. Otto*, 128 Nev. 424, 282 P.3d 719 (2012). (ROA at 011).

23
24 1. **An Administrative Agency May Not Limit Its Own Jurisdiction Or Alter The
25 Requirements Of A Statute.**
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1 *Otto* is simply inapposite. That case involved the Administrative Procedures Act wherein
2 the Legislature provided that a Petition for Judicial Review must name as respondents "the agency
3 and all parties of record to the administrative proceeding". See NRS 233B.130(2)(a).

4 An agency's jurisdiction is set by the Legislature, not the agency itself. It is a fundamental
5 principle of administrative law that "administrative agencies cannot enlarge their own jurisdiction"
6 and "the scope of an agency's authority is limited to the matters the legislative body has expressly
7 or implicitly delegated to the agency." *City of Reno v. Civil Service Commission of City of Reno*,
8 117 Nev. 855, 34 P.3d 120 (2001). As more recently explained by the Nevada Supreme Court in
9 *McNeill v. State*:

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

14 Thus, the legislature can make the application or operation of a statute complete
15 within itself dependent upon the existence of certain facts or conditions, the
16 ascertainment of which is left to the administrative agency. *Telford v. Gainesville*
17 [208 Ga. 56], 65 S.E.2d 246 (1951). In doing so the legislature vests the agency
18 with mere fact finding authority and not the authority to legislate. *Ex rel. Ginocchio*
19 *v. Shaughnessy*, [47 Nev. 129, 217 P. 581 (1923)]. The agency is only authorized
20 to determine the facts which will make the statute effective. *Montoya v. O'Toole*
21 [94 N.M. 303], 610 P.2d 190 (1980); *State v. King*, 257 N.W.2d 693 (Minn.1977);
22 *People v. Uriel* [76 Mich.App. 102], 255 N.W.2d 788 (1977); *State v. Kellogg* [98
23 Idaho 541], 568 P.2d 514 (1977); see generally 1 Am.Jur.2d Administrative Law,
24 § 123 (1962).

25 132 Nev. 551, 556, 375 P.3d 1022, 1025-1026 (2016) quoting *Sheriff v. Lugman*, 101 Nev. 149,
26 153, 697 P.2d 107, 110 (1985).

27 As set forth above, the only jurisdictional requirements imposed by the Legislature under
28 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.

1 Likewise, a Hearing Officer is unable to rule upon the propriety of the Division of Human
2 Resources Management Administrator receiving and processing appeals which do not attach the
3 written notification. Hearing officers are required “to conduct hearings and render decisions as
4 provided in NRS 284.376 and NRS 284.390.” See NRS 284.091. A Hearing Officer’s jurisdiction
5 is also limited to “determin[ing] the reasonableness” of a suspension, demotion, or dismissal. NRS
6 284.390. The Personnel Commission is not authorized, and is constitutionally unable, to alter
7 these jurisdictional requirements set forth by the Legislature.
8

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

10 The Personnel Commission is authorized to adopt regulations “to carry out the provisions”
11 of NRS Chapter 284. See NRS 284.065(d). However, such regulations are not “jurisdictional” and
12 NDOC Motion to the Hearing Officer cites no authority for its claim that such regulations are
13 “jurisdictional”. By way of example, NDOC’s Motion cites *Rust v. Clark County School Dist.*, 103
14 Nev. 686, 688, 747 P.2d 1380, 1382 (1987) for the proposition that “the proper and timely filing
15 of a notice of appeal is jurisdictional”. (ROA at 016). However, appeals to the Nevada Supreme
16 Court from the district courts need only be filed in a timely manner in order to establish
17 jurisdiction; any other deficiencies in connection with submission such as may be addressed and
18 remedied after the fact. See NRAP 3(a)(2) and (3).
19

20 The abuse of the jurisdictional regulation fiction by litigants before administrative agencies
21 has become so prevalent that the United States Supreme Court has been forced to repeatedly
22 address the issue. In *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and*
23 *Trainman General Committee of Adjustments, Central Region*, 558 U.S. 67, 130 S. Ct. 584 (2009)
24 the High Court held that the failure to comply with 29 CFR §301.5 governing submission of
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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 this 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 Bkrcty. 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.

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

8 If the Hearing Officer or NDOC felt that the absence of the Deputy Director's actual
9 disciplinary decision somehow impeded the ability of the Hearing Officer to hold the appeal
10 hearing, there was no reason the Hearing Officer could not adjourn/stay any proceedings and direct
11 Officer Kassebaum to provide the document².

13 **C. The Purpose of NAC 284.6562's Attachment Requirements is to Assist the**
14 **Hearings Office to Know What Type of Hearing Needs to Occur.**

15 A simple review of the regulatory history for the Personnel Commission's adoption
16 establishes that the goal of requiring the appeal to include the termination letter is “to distinguish
17 the hearing that may be requested after disciplinary action has been taken from the hearing that
18 occurs prior to disciplinary action.” (See Personnel Commission Meeting Minutes, June 8, 2018,
19 Ms. Michelle Garton's testimony Appendix "A" attached hereto). As part of the changes, the
20 regulation was clarified to provide that the effective date of a suspension for purposes of filing an
21 appeal is the first day of the suspension, not the last date. Therefore, the purpose of the change was
22 further to assist the Division of Human Resources Management, which processes the appeals, to
23 determine whether an appeal submitted in writing pursuant to NRS 284.390 was within the "10
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27 ² In fact, NDOC already had the document as it was the appointing authority
28 which authored and issued the document, and as evidence by the fact that the
document was attached as Exhibit "C" to NDOC's Motion to Dismiss. (ROA at
181).

1 working days" provided for by the statute. The goal was not to deny a right to a hearing for an
2 employee. Similarly, the LCB's "Explanation of Proposed Change" does not categorize the
3 change as jurisdictional, only procedural in nature, in its memorandum noticing the public of a
4 hearing on May 4, 2018. (Appendix "B" attached hereto).

5 **II. THE DIVISION'S NOTICE OF PETITIONER'S APPEAL RIGHTS IN ITS**
6 **APPEAL FORM IS DEFECTIVE, MISLEADING, AND DEPRIVED**
7 **PETITIONER OF HER DUE PROCESS RIGHTS UNDER STATUTE.**

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

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

12 (Emphasis added). The form provided by the Division of Human Resource Management (hereafter
13 "DHRM") is the NPD-54 entitled "Dismissal, suspension, demotion or Involuntary Transfer. (ROA
14 at 069-070).
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16 The NPD-54 provided by DHRM comes with a section entitled "Appeal Instructions".
17 (ROA at 070). Those "Appeal Instructions" did not require that Officer Kassebaum submit the
18 notice of suspension, much less inform her that such submission of the notice was jurisdictional.
19 Rather, the "Appeal Instructions" stated the following:
20

21 **Appeal Instructions:**

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

28 The appeal procedures and statements made on this form do not include all of the
rights available to an appellant. It is advisable to review NRS 284 and NAC 284

1 prior to requesting a hearing. Appeal hearings are open to the public and decisions
2 by a hearing officer are public information.

3 When to File an Appeal: The appeal will be deemed timely filed if it is either
4 postmarked or received by the Administrator of the Division of Human Resource
5 Management during the period beginning on the first working day after the
6 effective date of the action that is being appealed and ending on the 10th working
7 day after the effective date. Appeals received before or after this period may be
8 dismissed as untimely.

9 (ROA at 224 **emphasis added in parts**).

10 Nothing within the "Appeals Instructions" informed Officer Kassebaum that Acting
11 Director Wickham's letter of July 3, 2019 was necessary to attach, much less upon penalty of
12 dismissal. Even if NAC 284.6562 had been jurisdictional, as opposed to a claims processing rule,
13 compliance would only be necessary if the instructions were clear and unambiguous. *See Rust v.*
14 *Clark Co. School Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987) ("Because jurisdictional
15 rules go to the very power of this [Court] to act. They must, accordingly, be *clear and absolute* in
16 order to give all fair notice of what is required to bring a matter properly before this court.").

17 **III. THE DISMISSAL OF PETITIONER'S APPEAL VIOLATES FEDERAL** 18 **CONSTITUTIONAL DUE PROCESS.**

19 Members of the classified service may only be suspended, demoted or dismissed for "just
20 cause". See NRS 284.390 (7). This "just cause" requirement creates a property interest in classified
21 service employment within the meaning of the Due Process Clause of the 14th Amendment to the
22 United States Constitution. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct.
23 1487 (1985).

24 In *Loudermill v. United States* Supreme Court held that the minimum requirements of
25 federal due process require an informal pre-termination hearing followed by a more extensive post-
26 termination evidentiary hearing. 470 U.S. at 546-547, 105 S.Ct. at 1495-1496. In *Gilbert v. Homar*,
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1 520 U.S. 924, 117 S. Ct. 1807 (1997) the High Court likewise held that the right to a hearing
2 conferred by due process applies to suspensions.

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

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

10 Thus this pre-disciplinary review constitutes the type of informal pre-deprivation hearing
11 contemplated by *Loudermill*.³

12 However, the Supreme Court in *Loudermill* and *Gilbert* make clear that any such an
13 informal pre-termination hearing must be followed by a "more comprehensive" post-deprivation
14 hearing. *Gilbert*, 520 U.S. at 929, 117 S. Ct. at 1811. Officer Kassebaum did not receive her more
15 comprehensive evidentiary hearing because the Hearing Officer dismissed the appeal for failure
16 to attach a piece of paper which the Respondent already had in its possession. (ROA at 42).

17
18 *Loudermill* makes clear that state law cannot supersede or impair that which federal
19 constitutional due process requires:

20
21 In light of these holdings, it is settled that the "bitter with the sweet" approach
22 misconceives the constitutional guarantee. If a clearer holding is needed, we
23 provide it today. The point is straightforward: the Due Process Clause provides that
24 certain substantive rights—life, liberty, and property—cannot be deprived except
25 pursuant to constitutionally adequate procedures. The categories of substance and
26 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

27
28 ³ Kassebaum elected not to attend the pre-disciplinary hearing which is permissible under the
regulation.

1 constitutionally authorize the deprivation of such an interest, once conferred,
2 without appropriate procedural safeguards.”

3 470 U.S. at 541, 105 S. Ct. at 1493 citing *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40
4 L.Ed.2d 15 (1974).

5 Simply put, the dismissal of Officer Kassebaum's timely filed appeal violates her right to
6 due process of law. This alone compels that judicial review be granted and the matter remanded
7 for a hearing on the merits.

8 **IV. ISSUE PRECLUSION REQUIRES THAT JUDICIAL REVIEW BE GRANTED**

9
10 This was not the only disciplinary appeal of Sergeant Kassebaum which was dismissed on
11 purported "jurisdictional" grounds for failure to attach the appointing authority's "final decision".
12 Sergeant Kassebaum appealed a 15 day suspension in Case No. 201623-CB which was assigned
13 to Hearing Officer Cara Brown. That appeal was likewise dismissed on the same Motion filed by
14 NDOC as in this case. (Exhibit "C").

15
16 Kassebaum filed a petition for Judicial review in Case No. A-20-810424-P which was
17 assigned to Department 31, the Honorable Joanna Kishner. Due to a fluke of scheduling, likely
18 COVID 19 related, the record in A-20-810424-P was filed with the District Court back in October
19 of 2020 even though the underlying discipline occurred later than the discipline involved in this
20 case. Kassebaum filed the same brief as this in A-20-810424-P, citing the exact same authorities.

21
22 At a hearing held on February 18, 2021 Judge Kishner *granted* Kassebaum's Petition for
23 Judicial Review on the grounds that Hearing Officer Brown's Decision did not explain how she
24 reached the conclusion that NAC 284.6562(2) was "jurisdictional" as opposed to a claims
25 processing rule, and directed that the matter be assigned to a new hearing officer to determine
26
27
28

whether it is jurisdictional or a claims processing rule, and to further address the 14th Amendment issues raised.⁴

While Kassebaum firmly believes that Judge Kishner should have determined that NAC 284.6562(2) is a non-jurisdictional claims processing rule, and Judge Kishner should have addressed the due process violation, as opposed to remanding the matter back for consideration by a hearing officer, the fact remains that the same outcome in this case is required by issue preclusion. See *Five Star Capital Corporation v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008). The Findings of Fact, Conclusions of Law, and Order Granting Judicial Review is being drafted for submission for signature to Judge Kishner. Rather than delay the filing of this Opening Brief awaiting the filing of that Order, Kassebaum will supplement this filing with the Order when received.

CONCLUSION

For all of the reasons set forth above, the Petition for Judicial Review must be GRANTED, the dismissal of the appeal REVERSED, in the matter remanded back to the Department of Administration for further proceedings.

DATED this 22nd day of February, 2021.

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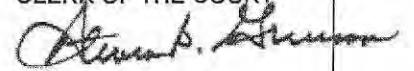
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⁴ The reason the matter was ordered assigned to a new hearing officer is that Cara Brown has stepped down from the position as a hearing officer.

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

SHARI KASSEBAUM,

Petitioner,

vs.

STATE OF NEVADA ex rel. its
DEPARTMENT OF CORRECTIONS;
STATE OF NEVADA ex rel., its
DEPARTMENT OF ADMINISTRATION,
PERSONNEL COMMISSION, HEARING
OFFICER,

Respondents.

Case No: A-20-811982-J
Dept. No: 8

RESPONDENT'S ANSWERING BRIEF

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **STATEMENT OF JURISDICTION**

4 This Court has jurisdiction pursuant to NRS 233B.130(2)(b). The State of Nevada Personnel
5 Commission Hearing Officer, Mark Gentile, entered his "Order re: Motion to Dismiss Appeal for Lack
6 of Jurisdiction"- on February 12, 2020 granting State of Nevada ex rel. Department of Corrections'
7 (NDOC) Motion to Dismiss. Petitioner, Shari Kassebaum (Kassebaum), filed a timely Petition for
8 Judicial Review on March 10, 2020. *See* NRS 233B.130(2)(d).

9 **II.**

10 **STATEMENT OF ISSUES**

- 11 1. Whether Kassebaum failed to preserve any issues for appeal/judicial review when she did not
12 oppose the legal arguments in NDOC's motion to dismiss.
- 13 2. Whether Kassebaum is judicially estopped from taking inconsistent positions.
- 14 3. Whether Kassebaum is barred from raising new legal theories for the first time on judicial review,
15 after conceding to the legal arguments in NDOC's motion to dismiss.
- 16 4. Whether the Hearing Officer properly granted NDOC's motion to dismiss for lack of jurisdiction
17 where Kassebaum failed to comply with the mandatory and jurisdictional filing requirements of
18 NAC 284.6562 and NRS 284.390.
- 19 5. Whether another District Court Judge's ruling precludes this Court from considering the
20 arguments made herein.

21 **III.**

22 **STATEMENT OF THE CASE**

23 This is an appeal of Hearing Officer Mark Gentile's decision to grant NDOC's motion to dismiss
24 appeal for a lack of jurisdiction when Kassebaum failed to attach the written notification of her final
25 discipline to her appeal form in accordance with NAC 284.6562 - a mandatory and jurisdictional
26 requirement to request a hearing on discipline.

27 Kassebaum was a correctional sergeant at NDOC and received a two-day suspension without pay
28 for various acts of misconduct pursuant to NRS 284.385, ROA 00021-00023; 00181. Kassebaum

1 appealed her suspension to the Department of Administration Personnel Commission Hearing Officer
2 pursuant to NRS 284.390. ROA 00223-00235. In filing her appeal, Kassebaum failed to comply with
3 the mandatory and jurisdictional requirements of NAC 284.6562. *Id.* NDOC filed a “Motion to Dismiss
4 Appeal for Lack of Jurisdiction.” ROA 00014-00208. Kassebaum filed a “Limited Opposition” in which
5 she did not oppose any of the legal issues raised by NDOC and only opposed the statement of facts. ROA
6 00011-00013. After the matter was fully briefed, the Hearing Officer granted NDOC’s motion to dismiss.
7 ROA 00003-00006. Kassebaum now seeks judicial review of the Order despite not opposing the
8 underlying motion to dismiss.

9 IV.

10 STATEMENT OF FACTS

11 A. NDOC served Kassebaum with discipline

12 Kassebaum was a correctional sergeant employed at NDOC and assigned to Southern Desert
13 Correctional Center. ROA 00071. On August 9, 2019, NDOC served Kassebaum with a Specificity of
14 Charges (SOC), which recommended a two-day (sixteen hours) suspension without pay as a result of her
15 continuous discourteous conduct towards her fellow employees and supervisors. ROA 00021-00179. On
16 August 23, 2019, NDOC Associate Warden, James Scally, conducted a pre-disciplinary review pursuant
17 to NAC 284.6561. ROA 00182. Kassebaum did not attend her scheduled pre-disciplinary review. *Id.*
18 After reviewing the evidence, Scally concurred with the recommended two-day suspension without pay.
19 *Id.* On August 28, 2019, NDOC served Kassebaum with the written notification of Acting Director
20 Harold Wickham’s final decision that Kassebaum would be suspended for two days without pay. ROA
21 00181. Kassebaum’s suspension was effective August 30, 2019. *Id.*

22 B. Administrative Appeal History

23 On or about September 12, 2019, Kassebaum filed an appeal of her discipline by submitting the
24 NPD-54 Form titled “Appeal of Dismissal, Suspension, Demotion, or Involuntary Transfer” (Appeal
25 Form). ROA 00223-00235. The Appeal Form specifically states, “*This appeal form must be
26 accompanied by the written notification of the appointing authority’s decision regarding the proposed
27 action provided to the employee pursuant to subsection 7 of NAC 284.6561.*” ROA 00223 (emphasis
28 added). Kassebaum attached a typed statement totaling nine pages to the Appeal Form explaining why

1 she believed the action taken was not reasonable and done in retaliation. ROA 00223-00235.
2 Kassebaum's Appeal Form was not accompanied by the written notification of Acting Director Wickham
3 as required by NAC 284.6562(2)(b). *Id.*

4 On or about January 14, 2020 NDOC filed its "Motion to Dismiss Appeal for Lack of
5 Jurisdiction." ROA 00014-00208. NDOC argued that the appeal was jurisdictionally defective because
6 Kassebaum failed to comply with the mandatory requirements of NAC 284.6562(2) and could not amend
7 since the 10-day appeal period under NRS 284.390(1) had expired. ROA 00014-18.

8 Kassebaum filed a "Limited Opposition to Motion to Dismiss Appeal" in which she **did not**
9 oppose any of the legal issues raised by NDOC and only opposed the statement of facts in the Motion.
10 ROA 00011-00013 (emphasis added). In her limited opposition, Kassebaum "concedes that under the
11 revised NAC 284.6562(2)(b) it is now required" for an Appeal to include the written notification of the
12 appointing authority. ROA 00011. Kassebaum further conceded "**procedurally, Employer will prevail**
13 **on its Motion to Dismiss...**" *Id.* (emphasis added). Kassebaum did not dispute that the requirements of
14 NAC 284.6562 and NRS 284.390 were mandatory and jurisdictional. ROA 00011-12. Kassebaum further
15 noted that "the language of NAC 284.6562 is clear...that employee must submit the written notification
16 of the appointing authority's decision." ROA 00012. Accordingly, Kassebaum wholly conceded that she
17 failed to comply with NAC 284.6562(2)(b) and that she failed to submit a complete and proper appeal
18 within the 10-day filing period under NRS 284.390(1). ROA 00011-12. In fact, Kassebaum essentially
19 consented to dismissal, choosing instead to "continue her pursuit of her federal lawsuit against NDOC..."
20 ROA 00011.

21 NDOC filed its Reply in Support of Motion to Dismiss, which noted Kassebaum's non-opposition
22 to the legal arguments for dismissal. ROA 00007-10. NDOC further noted that the facts presented in the
23 Motion were procedural in nature and identified documents and dates related to Kassebaum's disciplinary
24 process and did not discuss the underlying facts supporting the suspension. ROA 00008 at footnote 1.

25 Hearing Officer Gentile granted NDOC's Motion to Dismiss citing that the appeal was deficient
26 because it did not include the written notification of the appointing authority pursuant to NAC 284.6562.
27 ROA 0003-5. Hearing Officer Gentile further found that the Kassebaum conceded procedurally that her
28 appeal was deficient. ROA 0004. Hearing Officer Gentile further noted that there was nothing

1 extraordinary, unusual, or inappropriate about the facts or exhibits included in the Motion. *Id.*

2 Despite conceding to the Motion to Dismiss, Kassebaum has filed the instant petition for judicial
3 review and raised new arguments in her opening brief which were never set forth in her "limited
4 opposition."

5 **V.**

6 **SUMMARY OF ARGUMENT**

7 The District Court should deny Kassebaum's petition for judicial review and affirm the Hearing
8 Officer's final decision because the decision did not substantially violate the rights of Kassebaum. First,
9 Kassebaum did not oppose the motion to dismiss and conceded to the legal arguments. Thus, Kassebaum
10 did not preserve any issues for appeal and her failure to oppose is deemed an admission the motion to
11 dismiss was meritorious. Second, Kassebaum is judicially estopped from taking inconsistent positions in
12 her administrative appeal where she did not oppose that NAC 284.6562 was mandatory and jurisdictional
13 to now her position in her petition for judicial review that NAC 284.6562 is not jurisdictional. Third,
14 Kassebaum is barred from raising new arguments in her petition for judicial review after conceding to
15 the legal merits of the motion to dismiss. Fourth, the Hearing Officer's interpretation of NAC 284.6562
16 and NRS 284.390 must be given deference. Fifth, the Hearing Officer properly granted NDOC's motion
17 to dismiss for lack of jurisdiction because Kassebaum failed to comply with the mandatory filing
18 requirements of NAC 284.6562 when she failed to attach the written notification of the appointing
19 authority and thus her appeal was not proper and timely under NRS 284.390. The 10-day time limit in
20 NRS 284.650 is jurisdiction and NAC 284.6562 codifies the requirements of NRS 284.390 including the
21 requirements for a complete, proper and timely appeal. NAC 284.6562 is not a claims processing rule it
22 is jurisdictional and either way Kassebaum's failure to comply still requires dismissal. The regulatory
23 history of NAC 284.6562 is irrelevant because the language of the regulation is clear but if reviewed,
24 history does not support Kassebaum's position. The Appeal Form is not unconstitutionally vague and
25 clearly stated the requirements pursuant to NAC 284.6562. Kassebaum was afforded due process because
26 she had the opportunity to appeal her suspension pursuant to NRS 284.390 but failed to file a timely and
27 proper appeal. Sixth, issue preclusion is not applicable in this case. Based on the foregoing, the petition
28 for judicial review must be denied.

1 VI.

2 LEGAL ARGUMENT

3 A. Standard of Review

4 The standard of review for evaluating a hearing officer's decision is governed by the Administrative
5 Procedure Act, as set forth in NRS 233B.010, et seq. *See Dredge v. State, ex rel., Dep't of Prisons*, 105
6 Nev. 39, 43, 769 P.2d 56, 58 (1989). Pursuant to NRS 233B.135(3), a reviewing court may remand or affirm
7 a final decision of a hearing officer, or set it aside in whole or in part, if the substantial rights of the petitioner
8 have been prejudiced because the final decision of an agency is:

- 9 (a) In violation of constitutional or statutory provisions;
10 (b) In excess of the statutory authority of the agency;
11 (c) Made upon unlawful procedure;
12 (d) Affected by other error of law;
13 (e) Clearly erroneous in view of the reliable, probative and substantial evidence
14 on the whole record; or
15 (f) Arbitrary or capricious or characterized by abuse of discretion.

16 NRS 233B.135 (3).

17 The District Court "defer[s] to an agency's interpretation of its governing statutes or regulations
18 if the interpretation is within the language of the statute." *Taylor v. Dep't. of Health & Human Servs.*,
19 129 Nev. 928, 930, 314 P.3d 949, 951 (2013) (quoting *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of*
20 *Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008)). The District Court reviews other questions
21 of law de novo. *See Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 334, 302 P.3d 1108, 1112
22 (2013). The District Court will uphold findings of fact when supported by substantial evidence, which is
23 defined as "evidence that a reasonable person would accept as adequate to support [the] conclusion." *Id.*

24 B. Kassebaum did not preserve any issues for appeal and her consent to the legal issues in the
25 motion waives any judicial review

26 Kassebaum filed a "limited opposition" to NDOC's Motion to Dismiss which was more akin to a
27 non-opposition as Kassebaum did not oppose any legal arguments and only opposed the statement of
28 facts and exhibits. ROA 00011. A party who utterly fails to oppose a motion is deemed to have
affirmatively consented to it and cannot later complain about it being granted. *See Bower v. Harrah's*
Laughlin, Inc., 125 Nev. 470, 479, 215 P.3d 709, 717 (2009) (by failing to promptly object to district
court action, party "did not preserve the issue for appeal" and "his consent" waives any appeal); *see also*

1 *Walls v. Brewster*, 112 Nev. 175, 178, 912 P.2d 261, 263 (1996) (district court properly construed
2 plaintiffs failure to respond to a motion to dismiss as an admission that the motion was meritorious).

3 Here, in her “limited opposition” Kassebaum “concede[d] that procedurally, [NDOC] will prevail
4 on its motion to dismiss.” ROA 00011. Kassebaum essentially did not oppose NDOC’s Motion to
5 Dismiss because she did not oppose any legal arguments contained therein, conceding to the merits of
6 NDOC’s legal arguments. As such, Kassebaum affirmatively consented to the Motion to Dismiss and
7 cannot now come to the district court to complain about NDOC’s motion being granted. By failing to
8 oppose the legal arguments, Kassebaum did not preserve any issues for judicial review and Kassebaum’s
9 consent to the Motion to Dismiss waives judicial review. Thus, this petition for judicial review must be
10 denied.

11 **C. Kassebaum is barred by the doctrine of judicial estoppel from taking inconsistent positions**

12 Kassebaum filed a “limited opposition” to NDOC’s Motion to Dismiss admitting she failed to
13 comply with the requirements of NAC 284.6562 by failing to attach the written verification of the
14 appointing authority. ROA 00011. Kassebaum’s limited opposition only opposed NDOC’s presentation
15 of the facts. ROA 00011-12. Kassebaum **did not** oppose any of the legal arguments made by NDOC
16 thereby conceding to the merits of the Motion to Dismiss. ROA 00011. Now, Kassebaum takes an
17 inconsistent position in her petition for judicial review arguing it was legal error for the hearing officer
18 to grant the Motion despite her failure to oppose the legal arguments that compliance with NAC 284.6562
19 was mandatory and jurisdictional.

20 The primary purpose of judicial estoppel is to protect the judiciary's integrity, and a court may
21 invoke the doctrine at its discretion. *See NOLM, LLC v. Cty. of Clark*, 120 Nev. 736, 743, 100 P.3d 658,
22 663 (2004). Courts must consider a five-factor test when determining whether judicial estoppel applies:
23 whether “(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-
24 judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the
25 tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5)
26 the first position was not taken as a result of ignorance, fraud, or mistake.” *Kaur v. Singh*, 136 Nev. Adv.
27 Op. 77, 477 P.3d 358, 362–63 (2020) citing *In re Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. 50,
28 56, 390 P.3d 646, 652 (2017).

1 Here, the five factors of judicial estoppel are met. First, Kassebaum has taken two different
2 positions. Kassebaum did not oppose that the requirements of NAC 284.6562 were mandatory and that
3 initiating a proper and timely appeal was jurisdictional before the hearing officer. ROA 00011-12. Now,
4 before the District Court, Kassebaum has changed her position arguing that NAC 284.6562 is not
5 jurisdictional and her due process rights were violated. Second, Kassebaum's first position was taken in
6 a quasi-judicial administrative proceeding pursuant to NRS 284.390 before the hearing officer and her
7 second position is taken in a judicial proceeding before the District Court seeking judicial review. Third,
8 Kassebaum was successful in asserting that she did not oppose the legal arguments. In fact, the hearing
9 officer accepted Kassebaum's position and incorporated those admissions and concessions in his
10 Decision. *See* ROA 0004. Fourth, the two positions are totally inconsistent because Kassebaum first did
11 not oppose the legal arguments (including that compliance with NAC 284.6562 was mandatory and a
12 proper and timely appeal was jurisdictional) and now argues NAC 284.6562 is a claims processing rule
13 and the hearing officer violated her rights. Fifth, there is no evidence that the first position was taken as
14 a result of ignorance, fraud, or mistake. Kassebaum was represented attorney, Angela Lizada, Esq., the
15 **same** attorney representing Kassebaum in this petition for judicial review, who stated, "[t]he language of
16 NAC 284.6562 is clear and neither the Hearing Officer nor opposing counsel need a non-controlling
17 authority to be submitted to explain what it means when the NAC states that employee must submit the
18 written notification of the appointing authority's decision." ROA 00012. Thus, Kassebaum's counsel clearly
19 understood that the requirements of NAC 284.6562 were mandatory in order to properly initiate a timely
20 appeal under NRS 284.390. Accordingly, judicial estoppel applies and Kassebaum is barred from taking an
21 inconsistent position on judicial review.

22 **D. Kassebaum is barred from raising new issues on appeal**

23 Kassebaum's legal arguments raised on judicial review are new and were never raised before
24 Hearing Officer Gentile. In her opening brief, Kassebaum now argues that NAC 284.6562(2)(b) is not
25 jurisdictional and is instead a "claims processing rule."¹ *See* Opening Brief at 8-17. Kassebaum further
26 argues that dismissal of her appeal for her failure to comply with NAC 284.6562 is a violation of her due
27 process. *Id.* Opening Brief at 8-17. Yet, Kassebaum never made these arguments before the hearing
28

¹ NDOC will oppose these new legal theories -the claims processing rule and due process violations in section F.

1 officer in her “limited opposition.” Instead, Kassebaum conceded that procedurally NDOC would prevail
2 on its motion to dismiss. Furthermore, Kassebaum did not dispute that compliance with NAC 284.6562
3 and NRS 284.390 were mandatory and jurisdictional.

4 “A point not urged in the trial court, unless it goes to the jurisdiction of the court, is deemed to
5 have been waived and will not be considered on appeal.” *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52,
6 623 P.2d 981, 983 (1981). “[P]arties may not raise a new theory for the first time on appeal, which is
7 inconsistent with or different from the one raised below.” *Schuck v. Signature Flight Support of Nevada,*
8 *Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 544 (2010) (internal quotation marks and citation
9 omitted). *See Ford v. Warden*, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995) (on appeal an
10 appellant cannot change his theory underlining an assignment of error). This rule “is not meant to be
11 harsh, overly formalistic, or to punish careless litigators. Rather, the requirement that parties may raise
12 on appeal only issues which have been presented to the district court maintains the efficiency, fairness,
13 and integrity of the judicial system for all parties.” *Schuck*, 126 Nev. at 437 (quoting *Boyers v. Texaco*
14 *Refining and Marketing, Inc.*, 848 F.2d 809, 812 (7th Cir. 1988)).

15 Here, Kassebaum did not make any legal arguments in her limited opposition. Instead, Kassebaum
16 conceded to the legal merits of NDOC’s Motion to Dismiss. Kassebaum cannot now argue that NAC
17 284.6562 is a “claims processing rule” or that granting the motion to dismiss violated her due process
18 rights when she conceded to the merits of the Motion and never raised these issues before the hearing
19 officer. Kassebaum is attempting to raise new theories for the first time on judicial review despite not
20 opposing the motion and bringing these theories before the hearing officer. Since Kassebaum did not
21 preserve any issues for judicial review, she cannot raise new issues on appeal or in judicial review. Thus,
22 Kassebaum’s new arguments in her petition for judicial review should not be considered as they were not
23 made before the hearing officer and her petition for judicial review must be denied.

24 **E. The Hearing Officer’s interpretation of NRS 284.390 and NAC 284.6562 are owed deference**
25 **on judicial review.**

26 Although statutory construction is generally a question of law reviewed *de novo*, courts must “defer
27 to an agency’s interpretation of its governing statutes or regulations if the interpretation is within the language
28 of the statute.” *Taylor v. Dep’t of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013).

1 Accordingly, as long as a hearing officer's interpretation of NRS Chapter 284 and its associated regulations
2 is "within the language of the statute," a court must defer to that interpretation. Here, the hearing officer's
3 interpretation of NAC 284.6562 was within the language of the statute.

4 When determining statutory meaning, we look first to the plain language of the statute. *Clay v.*
5 *Eight Jud. Dist. Ct.*, 129 Nev. 445, 451, 305 P.3d 898, 902 (2013). When the statute's language is plain
6 and the meaning is clear, the courts will apply the plain language. *Leven v. Frey*, 123 Nev. 399, 403, 168
7 P.3d 712, 715 (2007).

8 NAC 284.6562 states:

9 1. A permanent employee who has been dismissed, demoted or
10 suspended may request a hearing before the hearing officer of the
11 Commission pursuant to NRS 284.390, within 10 working days after the
12 effective date of his or her dismissal, demotion or suspension.

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

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

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

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

26 The Supreme Court has repeatedly affirmed that the word "must," as used in NAC 284.6562(2),
27 imposes a mandatory requirement. *See Washoe Cty. v. Otto*, 128 Nev. 424, 432, 282 P.3d 719, 725 (2012).

28 Here, Hearing Officer Gentile interpreted NAC 284.6562 as setting forth the mandatory
requirements for initiating an administrative appeal pursuant to NRS 284.390, which is clearly within the
language of the regulation. ROA 00004. The hearing officer found that Kassebaum received the written
notification of the appointing authority on August 28, 2019; thus, Kassebaum was in possession of the
written notification at the time she filed her appeal on September 12, 2019 and subsection (3) would not
apply. ROA 00003. The Hearing Officer further found that Kassebaum's Appeal Form did not include

1 the written notification and was thus deficient. ROA 00004. Kassebaum did not dispute that she failed to
2 include the mandatory document with her appeal. *Id.* The Hearing Officer concluded that NAC 284.6562
3 sets forth the mandatory manner in which an appeal must be initiated and that “the proper and timely
4 filing of a notice of appeal is jurisdictional. *Rust v. Clark Co. School Dist.*, 103 Nev. 686, 688, 747 P.2d
5 1380, 1382 (1987).” *Id.* Therefore, the Hearing Officer interpreted NAC 284.6562 and its use of the word
6 “must” to create mandatory requirements for initiating an appeal pursuant to NRS 284.390. The hearing
7 officer found Kassebaum’s deficient appeal was not proper and timely and that a defect of appellant
8 jurisdiction is never waived. ROA 00004. As the interpretation is within the language of the statute, this
9 Court must defer to the Hearing Officer’s interpretation and deny the petition for judicial review because
10 the Hearing Officer did not abuse his discretion or act in excess of his statutory authority in interpretation
11 NAC 284.6562.

12 **F. The Hearing Officer properly dismissed Kassebaum’s appeal because Kassebaum failed to**
13 **file an appeal in compliance with NAC 284.6562 within the 10-day filing period under NRS 284.390**

14 For all intents and purposes, Kassebaum did not oppose the Motion to Dismiss before the hearing
15 officer and only opposed the facts. Despite her failure to oppose the motion, Kassebaum seeks judicial
16 review. Based on Kassebaum’s failure to preserve any issues for judicial review, the applicability of the
17 doctrine of judicial estoppel, and Kassebaum’s attempt to raise new arguments on appeal, the District
18 Court should deny the petition for judicial review on those issues alone. Should the Court reach the new
19 arguments raised by Kassebaum, it should deny the petition for judicial review because the hearing officer
20 properly dismissed Kassebaum’s appeal for her failure to file a complete appeal pursuant to NAC
21 284.6562 within the 10 day filing period pursuant to NRS 284.390(1).

22 The Personnel Commission, pursuant to the authority granted to it by NRS 284.065(2)(d), has
23 adopted regulations to carry out the provisions of NRS Chapter 284. In order to successfully invoke a
24 hearing officer’s jurisdiction to consider the reasonableness of disciplinary action, a petitioning employee
25 must submit a timely notice of appeal. *See* NRS 284.390(1). NAC 284.6562(1) codifies the timing
26 requirement for filing a notice of appeal, while NAC 284.6562(2) sets forth the manner requirements for
27 filing a complete and proper appeal. NAC 284.6562(2)(b) specifically mandates that an appeal “must”
28 be “accompanied by the written notification of the appointing authority’s decision regarding the proposed

1 action . . .” Similarly, the NPD-54 appeal form provided by DHRM expressly instructs that “[f]his appeal
2 form must be accompanied by the written notification of the appointing authority’s decision regarding
3 the proposed action provided to the employee pursuant to subsection 7 of NAC 284.6561.” See ROA
4 00223.

5 Regulations adopted by the Personnel Commission, such as NAC 284.6562, have the full force
6 and effect of law. See *Turk v. Nev. State Prison*, 94 Nev. 101, 104, 575 P.3d 599, 601 (1978). Moreover,
7 the powers of an administrative agency are strictly limited to only those powers specifically set forth by
8 statute and regulation. See *Clark Cty. Sch. Dist. V. Clark Cty. Classroom Teachers Ass’n*, 115 Nev. 98,
9 102 977 P.2d 1008, 1010 (1999). Indeed, an administrative agency cannot act outside its legal authority
10 without committing an abuse of discretion. See *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560,
11 563 (1993) (“[W]here a trial court exercises its discretion in clear disregard of the guiding legal principles,
12 this action may constitute an abuse of discretion.”) As such, it would be outside a hearing officer’s limited
13 authority and an abuse of discretion to disregard non-compliance with the mandatory provisions of NAC
14 284.6562. Furthermore, NRS 284.390 and NAC 284.6562 are the provisions which authorize State
15 employees to administratively appeal discipline. Accordingly, the proper and timely filing of a notice of
16 appeal (in accordance with NRS 284.390 and NAC 284.6562) is jurisdictional. See *Rust v. Clark Co.*
17 *School Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987) (“[t]he proper and timely filing of a notice
18 of appeal is jurisdictional.”)

19 Also, strict compliance applies to the requirements of NAC 284.6562 because this rule states a
20 specific “time and manner” for filing an appeal. See *Markowitz v. Saxon Special Servicing*, 129 Nev. 660,
21 664, 310 P.3d 569, 572 (2013). Specifically, NAC 284.6562(1) is the timing requirement, while NAC
22 284.6562(2) is the manner requirement for filing an appeal. Moreover, NAC 284.6562(2) also uses the
23 mandatory “must” when describing the manner requirements for filing a proper appeal. See *Wishengrad*
24 *v. JP Morgan Chase Bank Nat’l Ass’n*, No. 67045, 2016 WL 6089390, at *2 (Nev. App. Oct. 6, 2016)
25 (Finding that a time and manner rule, which uses the mandatory word “shall,” is a mandatory rule that
26 requires strict compliance). As such, strict compliance applies to NAC 284.6562 and substantial
27 compliance cannot suffice as a matter of law.

28 ///

Moreover, the intent of the Personnel Commission in adopting NAC 284.6562(2) was plain and the only exception to these mandatory provisions is enumerated in NAC 284.6562(3), which excuses the requirements of NAC 284.6562(2)(b) *only if* the appointing authority failed to provide the notification required or the disciplinary action was immediate. These enumerated exceptions to NAC 284.6562(2), neither of which apply here, are further proof that this provision was intended as a mandatory rule that requires strict compliance. *See Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009) (“the mention of one thing implies the exclusion of another.”) Interpreting NAC 284.6562(2) as anything other than mandatory would effectively nullify NAC 284.6562(3). *See Nevada Dept. of Motor Vehicles v. Turner*, 89 Nev. 514, 517, 515 P.2d 1265 (1973) (it is established law in Nevada that all parts of an act are to be construed harmoniously).

Furthermore, the legislative history of NAC 284.6562 does not suggest that substantial compliance is the applicable standard, and regardless, the language of NAC 284.6562 is unambiguous, and it would be clear legal error to even resort to legislative history in interpreting NAC 284.6562. *See State v. Beemer*, 51 Nev. 192, 199, 272 P.2d 656, 657 (1928) (“[w]here the language of a statute is plain, the intention of the legislature must be deduced from such language, and the court has no authority to look beyond it, or behind it, or to the proceedings of the legislative body to ascertain its meaning.”)

Here, Kassebaum’s appeal was incomplete and omitted the written notification required pursuant to NAC 284.6562(2). *See* ROA, at 00223-235. Kassebaum failed to timely cure her incomplete and defective appeal within the 10-day appeal period under NAC 284.6562(1) and NRS 284.390(1). As a result, Kassebaum failed to file a proper, complete, and timely appeal that vested jurisdiction in the hearing officer before the expiration of the 10-day filing deadline.

None of these legal arguments or facts were disputed by Kassebaum before Hearing Officer Gentile. ROA 00011-13. Accordingly, Hearing Officer Gentile agreed that Kassebaum had failed to file a complete and proper notice of appeal within the filing deadline and, as such, had failed to meet mandatory jurisdictional requirements for bringing an administrative appeal. ROA 00003-6. Not only were Hearing Officer Gentile’s conclusions correct, but his interpretation of NAC 284.6562 is entitled to deference as a matter of law. *See supra*.

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1 In response to the foregoing, Kassebaum's Opening Brief raises several arguments for the first
2 time on judicial review.

3 **1. The 10-day time limit to file an appeal is jurisdictional and the Legislature delegated**
4 **authority to the Personnel Commission to carry out the provisions of NRS Chapter**
5 **284, including provisions that govern filing an appeal.**

6 Kassebaum begins by distinguishing *Washoe County v. Otto*, and then arguing that the Personnel
7 Commission may not limit its own jurisdiction but is restricted to merely regulating matters that the Nevada
8 Legislature has expressly or implicitly delegated to the agency. *See* Opening Brief, at 10-11.

9 However, the holding in *Otto* confirms (1) a party seeking to invoke special statutory jurisdiction
10 (such as the jurisdiction of an administrative hearing officer) must strictly comply with the procedures
11 prescribed by statute; (2) when a petition is statutorily defective a court does not obtain jurisdiction over it;
12 and (3) that a defective appeal cannot be cured outside of the statutory filing deadline. *Otto*, 128 Nev. at 432.
13 As in *Otto*, not every agency decision is reviewable under NRS 284.390 and NAC 284.6562, but only the
14 decisions that fall within those provisions and are challenged in accordance with the mandatory requirements
15 set forth therein. Otherwise, a hearing officer would be improperly exercising authority outside the powers
16 set forth by statute/regulation, which is an abuse of discretion. *See Clark Cty. Classroom Teachers Ass'n*,
17 115 Nev. at 102; *see also Bergmann*, 109 Nev. 674. As such, *Otto* is analogous to this case and confirms
18 that the mandatory requirements for filing an appeal under NRS 284.390 and NAC 284.6562 are
19 jurisdictional.

20 Additionally, as to whether the Personnel Commission is limited to regulating matters the Nevada
21 Legislature has expressly or implicitly delegated to the agency, the Nevada Legislature enacted NRS 284.390
22 (which places a 10-day time limit on filing a notice of appeal) and then tasked the Personnel Commission
23 (under NRS 284.065(2)(d)) with adopting "regulations to carry out the provisions of this chapter." In turn,
24 the Personnel Commission then adopted NAC 284.6562 to carry out the jurisdictional 10-day time limit for
25 filing appeals. It is notable that the Nevada Legislature did not merely task the Personnel Commission with
26 adopting *procedural* rules, but *all* rules to carry out the provisions of NRS Chapter 284. This is contrary to
27 other statutes, such as NRS 281.641, in which the Nevada Legislature merely tasked the Personnel
28 Commission with adopting procedural (i.e. non-jurisdictional) rules. *See NDOT v. Bronder*, 136 Nev.

1 Advance Op. 76 (Dec. 3, 2020) (holding that the Personnel Commission could not adopt jurisdictional rules
2 under NRS 281.641, because it was only authorized by the Legislature to promulgate “procedural rules.”)
3 In other words, the 10-day time limit under NRS 284.390 is clearly a jurisdictional bar on filing an appeal
4 and NAC 284.6562 was validly promulgated by the Personnel Division to carry out this jurisdictional bar,
5 which was within the authority granted by NRS 284.065(2)(d). Therefore, the Personnel Commission has
6 not limited its own jurisdiction, but has merely provided rules for carrying out the provisions of NRS 284.390
7 as expressly delegated by the Nevada Legislature.

8 **2. NAC 284.6562(2)(b) is not a “claims processing rule” and if it were it still requires**
9 **dismissal of Kassebaum’s appeal**

10 Kassebaum cites several inapplicable and non-controlling federal cases to urge that NAC 284.6562
11 is a non-jurisdictional “claims processing rule.” *See* Opening Brief, at 11-13. However, Kassebaum does not
12 cite a single Nevada case in which NRS 284.390 or NAC 284.6562 were deemed claims processing rules.
13 *Id.* In fact, nowhere does Kassebaum even define what constitutes a “claims processing rule” or explain why
14 NRS 284.390 and NAC 284.6562 are non-jurisdictional claims processing rules. Instead, Kassebaum begins
15 by arguing that claims processing rules are non-jurisdictional. *Id.* By doing so, Kassebaum not only concedes
16 that her legal arguments are wholly unsupported, but Kassebaum also concedes that she has failed to carry
17 her burden on judicial review under NRS 233B.135(2).

18 Furthermore, NRS 284.390 and NAC 284.6562 are not claims processing rules, because rules
19 governing the filing of a notice of appeal are jurisdictional even under analogous federal law. In *Bowles v.*
20 *Russell*, 551 U.S. 205, 127 S. Ct. 2360 (2007), the Supreme Court held that a time limit governing the filing
21 of a notice of appeal from a district court to a circuit court was jurisdictional. *Id.* at 209–15, 127 S. Ct. 2360.
22 The Supreme Court emphasized that its own repeated interpretation of appeal deadlines as jurisdictional over
23 the course of more than a century was determinative. *Id.* Likewise, the Nevada Supreme Court has expressly
24 found that “[t]he proper and timely filing of a notice of appeal is jurisdictional.” *Rust*, 103 Nev. at 688.
25 Accordingly, the 10-day filing limit for appealing an agency decision to a hearing officer under NRS 284.390
26 is jurisdictional and not merely a claims processing rule. Similarly, the provisions of NAC 284.6562, which
27 regulate the manner of filing a complete and proper appeal under NRS 284.390, are also not claims
28

1 processing rules.²

2 Additionally, Kassebaum's argument that NRS 284.390 and NAC 284.6562 are claims processing
3 rules is simply misplaced because the violation of a mandatory claims processing rule still requires
4 dismissal. Under federal law, the classic example of a claims processing rule is Title VII's mandatory
5 administrative-exhaustion requirement, which the Supreme Court has deemed a mandatory claims
6 processing rule. *See Fort Bend County v. Davis*, — U.S. —, 139 S. Ct. 1843, 204 L.Ed.2d 116 (2019).
7 But even if the failure to exhaust administrative remedies under Title VII is not jurisdictional, a plaintiff's
8 failure to exhaust is still fatal to his/her claim and subject to dismissal under FRCP 12(b)(6). *See L.G. by &*
9 *through G.G. v. Bd. of Educ. of Fayette Cty., Kentucky*, 775 F. App'x 227, 231, fn. 3 (6th Cir. 2019).
10 Therefore, it makes no difference whether NRS 284.390 and NAC 284.6562 are claims processing rules or
11 jurisdictional rules, because the result (i.e. dismissal) is the same. As such, whether jurisdictional or not,
12 Hearing Officer Gentile correctly dismissed this appeal, because Kassebaum irrefutably failed to comply
13 with the mandatory requirements for submitting a complete, proper, and timely appeal under NRS 284.390
14 and NAC 284.6562

15 **3. The regulatory history is not needed where the statutory language is clear, and it**
16 **does not support Kassebaum's interpretation of NAC 284.6562**

17 The regulatory history of the regulation is not needed as the plain language of the regulation is
18 clear and the hearing officer's interpretation was within the language of the regulation. In her Opening
19 Brief, Kassebaum refers to the Personnel Commission Meeting Minutes and the Legislative Counsel
20 Bureau (LCB) to support her position that the regulation only intended to assist the hearing officer to
21 know what type of hearing needs to occur.³ *See* Opening Brief at 13-14.

22 The Personnel Commission Meeting minutes clearly show that the intent in adopting NAC
23 284.6562 was "to move the **procedures** for an employee who is dismissed, demoted, or suspended to

24
25 ² As a brief aside, the Opening Brief cites NRAP 3(a)(2) and (3) to argue that even appeals to the Nevada
26 Supreme Court need only be filed in a timely manner and that other deficiencies can be remedied after the fact.
27 *See* Opening Brief, at 11. However, Kassebaum's argument overlooks the fact that such a provision does not exist
in NRS Chapter 284 or NAC Chapter 284, and that the authority of hearing officers is strictly limited. *See*
Bergmann, 109 Nev. at 674.

28 ³ Kassebaum states that the minutes and explanation of proposed change are attached however, there was
no appendix so the documents will be included in NDOC's Appendix.

1 **request a hearing by a hearing officer** into a separate regulation. This will serve to distinguish the
2 hearing that may be requested after disciplinary action has been taken from the hearing that occurs prior
3 to disciplinary action, now referred to as a pre-disciplinary review.” *See* Appendix A, Personnel
4 Commission Meeting Minutes, June 8, 2018 (emphasis added). NAC 284.6562 sets forth the required
5 procedures for a post-disciplinary hearing as opposed to a pre-disciplinary review found in NAC
6 284.6561. This was to make the procedures clear to the employee-not to assist DHRM in processing.

7 Further, the LCB’s “Explanation of Proposed Change” very clearly explained that NAC 284.6562
8 “will place **procedures and requirements related to requesting a hearing** ...into a separate regulation.
9 Removing this language from NAC 284.6561 **will ensure that it is clear that these procedures are to**
10 **be used specifically when requesting a hearing pursuant to NRS 284.390.**” Appendix B, LCB
11 Explanation of Proposed Change (emphasis added). The explanation further adds, “This amendment also
12 adds a requirement that the written notification of an appointing authority’s decision regarding proposed
13 disciplinary action **must** accompany such a request.” *Id.*

14 As previously stated, the Appeal Form specifies in bold print on the first page that the written
15 notification of the appointing authority must be attached to the Appeal Form. Kassebaum ignores this
16 clear language and instead notes that the instructions located on the second page do not specify the need
17 for the form. It is clear that DHRM’s use of bold and italicized font made it clear that DHRM was
18 notifying the employees of the required form pursuant to NAC 284.6562 and cited to the language of
19 regulation verbatim. Even if this Court were to conclude that the form failed to provide clear instructions,
20 the controlling authority is found in NAC 284.6562-not the Appeal Form. The Appeal Form does not
21 have the force and effect of law, but governing regulations, such as NAC 284.6562, do. *See Turk v. Nev.*
22 *State Prison*, 94 Nev. 101, 104, 575 P.2d 599, 601 (1978) (regulations adopted by the Personnel
23 Commission have the full force and effect of law).

24 **4. Neither NAC 284.6562 nor the NPD-54 form (Appeal Form) are unconstitutionally**
25 **vague.**

26 Kassebaum complains that the section on the NPD-54 form titled “Appeal Instructions” omits the
27 requirements of NAC 284.6562(2), which (according to Kassebaum) renders the entire NPD-54 form
28 unconstitutional. *See* Opening Brief, at 13-14. However, overlooked by Kassebaum is that the **very first**

1 page of the NPD-54 form includes the language of NAC 284.6562(2)(b) in bold and italicized letters: “*This*
2 *appeal form must be accompanied by the written notification of the appointing authority’s decision*
3 *regarding the proposed action provided to the employee pursuant to subsection 7 of NAC 284.6561.*” See
4 ROA, at 00223. This warning is taken *verbatim* from NAC 284.6562(2)(b), which mandates that an appeal
5 “must” be “[a]ccompanied by the written notification of the appointing authority’s decision regarding the
6 proposed action provided to the employee pursuant to subsection 7 of NAC 284.6561.” As such, the NPD-
7 54 form clearly states the mandatory requirements of NAC 284.6562(2)(b). Therefore, no serious argument
8 can be made that the NPD-54 is so vague as to amount to a violation of Kassebaum’s due process rights.
9 Furthermore, even if the NPD-54 did not exactly quote NAC 284.6562(2)(b) *verbatim*, Kassebaum is not
10 relieved from complying with Nevada law, which is also clear and unambiguous.

11 **5. Kassebaum was afforded the opportunity to submit a complete, proper, and timely**
12 **appeal of her 2-day suspension, but failed to do so; therefore, Kassebaum’s due process**
13 **rights were satisfied.**

14 Lastly, Kassebaum argues that she was constitutionally entitled to a post-deprivation hearing and
15 that Hearing Officer Gentile violated Kassebaum’s due process rights by dismissing her appeal. See Opening
16 Brief, at 15-17 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985)). However,
17 Kassebaum’s argument misstates the holding in *Loudermill*. The law is well-established that the *opportunity*
18 for a post-deprivation hearing before a neutral decisionmaker is needed in order to satisfy due process
19 requirements. As long as the procedural requirements are reasonable and give the employee notice and an
20 opportunity to participate meaningfully, they are constitutionally adequate. See *Hennigh v. City of Shawnee*,
21 155 F.3d 1249, 1256 (10th Cir. 1998). As succinctly stated by the Seventh Circuit, the “availability of
22 recourse to a constitutionally sufficient administrative procedure satisfies due process requirements if the
23 complainant merely declines or fails to take advantage of the administrative procedure.” *Dusanek v. Hannon*,
24 677 F.2d 538, 542–43 (7th Cir.) (1982) (citations omitted), *cert. denied sub nom Dusanek v. O'Donnell*, 459
25 U.S. 1017, 103 S. Ct. 379, 74 L.Ed.2d 512 (1982). Consequently, where the employee refuses to participate
26 or chooses not to participate in the post-termination proceedings, then the employee has waived her
27 procedural due process claim. See *Krentz v. Robertson Fire Prot. Dist.*, 228 F.3d 897, 904 (8th Cir. 2000)
28 (citations omitted).

Here, it is irrefutable that Kassebaum (like every other classified State employee who is subject to workplace discipline) had an adequate remedy to appeal her suspension under NRS 284.390 and NAC 284.6562. However, Kassebaum failed to file a complete and proper appeal in accordance with the mandatory terms of NAC 284.6562, which Kassebaum failed to cure within the 10-day appeal period. Kassebaum had notice of the requirements of NAC 284.6562(2)(b), which was on the first page of the NPD-54, and had an opportunity to file a complete and proper appeal with the hearings division. Nevertheless, Kassebaum failed to do so in a timely manner. As such, due process was clearly satisfied because a constitutionally adequate post-deprivation remedy was available to Kassebaum, but Kassebaum simply failed to invoke the administrative appeals process.

G. Issue Preclusion does not apply in this case

In her Opening Brief, Kassebaum makes a conclusory statement that issue preclusion applies in this judicial review because she filed another petition for judicial review appealing the final decision on her 15-day suspension which was also dismissed for the same reasons.⁴ *See* Opening Brief at 17; *See also Kassebaum v. NDOC*, Case No. A-20-810424-P before the Honorable Joanna Kishner. Yet, Kassebaum fails to even analyze the elements of issue preclusion, likely because Kassebaum would not be able to satisfy all the elements for issue preclusion to apply. This Court is not precluded by Kassebaum's other case before Judge Kishner. Indeed, another District Court's ruling which is unpublished is not controlling legal authority and is not binding on this Court in any way.

Issue preclusion applies to conserve judicial resources, maintain consistency, and avoid harassment or oppression of the adverse party. *Berkson v. LePome*, 126 Nev. 492, 500, 245 P.3d 560, 566 (2010). For this doctrine to apply, the following four elements must be met:

(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; ... (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated.

Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008)

⁴ It is important to note that in the 15-day suspension case before Hearing Office Cara Brown (the subject of Case No. A-20-810424-P) Kassebaum filed the exact same "limited opposition" where she only opposed the facts, admitted her appeal was deficient, and conceded to the legal arguments.

1 Here, Kassebaum cannot meet elements two or four. While both cases stem from a hearing officer
2 granting a motion to dismiss due to Kassebaum's failure to attach the written notification of the
3 appointing authority, the issue has not been decided. In Case No. A-20-810424-P, Judge Kushner
4 remanded to the Hearing Officer to analyze or consider whether NAC 284.6562 is a claims processing
5 rule. *See* Appendix C, Findings of Fact, Conclusions of Law and Order Granting Petition for Judicial
6 Review attached hereto. However, with all do respect to Judge Kushner, the hearing officer in the
7 Kassebaum 15-day suspension case did not analyze whether the regulation was a claims processing rule
8 because Kassebaum **never made** that argument before the hearing officer. It is not necessary to have the
9 hearing officer analyze this issue because Kassebaum did not preserve any issues on appeal because she
10 did not oppose the legal arguments and she has improperly raised new issues on appeal. Further, Judge
11 Kushner did not rule on the merits of Kassebaum's petition for judicial review and did not make a final
12 decision on the issue. Judge Kushner remanded to the hearing officer for further analysis and
13 consideration of whether NAC 284.6562 is jurisdictional or a claims processing rule. Thus, element two
14 has not been met. Similarly, since Judge Kushner did not make any final rulings, the matter has not been
15 actually and necessarily litigated.

16 While not controlling authority, the issue of whether compliance with NAC 284.6562 is
17 mandatory and whether filing a proper and timely appeal is jurisdictional pursuant to NRS 284.390 is an
18 issue that has been decided before the Honorable Elizabeth Gonzalez in *Ray Allen v. NDOC*, Case No.
19 A-20-813237-J.⁵ *See* Appendix D, Order Denying Petition for Judicial Review attached hereto. In the
20 *Allen* case, Allen received a final written notification imposing a 15-day suspension. Allen appealed his
21 discipline, but like Kassebaum, Allen failed to attach the written notification to his Appeal Form. *Id.*
22 NDOC filed a motion to dismiss for failure to comply with NAC 284.6562 which was granted. *Id.* In the
23 *Allen* case, Allen did not file an opposition to the motion to dismiss. *Id.* The Hearing Officer granted the
24 motion on two grounds: 1. the motion was unopposed and 2. NAC 284.6562 sets forth the mandatory
25 manner in which an appeal must be initiated. *Id.* Allen subsequently retained new counsel and filed a
26 petition for judicial review making the same arguments as Kassebaum did here. *Id.* In *Allen*, Judge
27

28 ⁵ Counsel in the *Allen* case filed a Motion to Consolidate that case with both *Kassebaum* cases. The *Allen*
Court denied the motion for consolidation.

1 Gonzalez denied the petition for judicial review finding that the hearing officer correctly rule that Allen's
2 failure to oppose the motion was an admission that the motion was meritorious. *Id.* Judge Gonzalez
3 further found that the hearing officer's decision with respect to the jurisdictional defect was not legal
4 error or a misapplication of the existing regulations governing the review process. *Id.* at 5.

5 Here, similar to *Allen*, Kassebaum did not oppose the legal arguments of the motion to dismiss.
6 While Kassebaum filed a "limited opposition" it was only disputing the facts. Thus, Kassebaum in
7 essence did not oppose the motion and her failure to oppose should similarly be deemed an admission
8 the motion is meritorious. Further, this Court is required to give deference to the hearing officer's
9 interpretation of NAC 284.6562 and the hearing officer properly determined that the plain language of
10 the regulation imposed mandatory requirements for initiating an appeal under NRS 284.390. Thus, this
11 Court is not precluded from deciding the issues as result of the decision in the *Kassebaum* case before
12 Judge Kishner. Further, the Court's ruling in *Allen*, while not controlling, serves as persuasive authority
13 for this case.

14 VII.

15 CONCLUSION

16 Based on the foregoing, NDOC respectfully requests that the Court deny Kassebaum's Petition
17 for Judicial Review and affirm Hearing Officer Gentile's "Order re: Motion to Dismiss Appeal for Lack
18 of Jurisdiction"

19 DATED April 8, 2021.

20 AARON D. FORD
21 Attorney General

22 By: /s/ Michelle Di Silvestro Alanis
23 Michelle Di Silvestro Alanis (Bar No. 10024)
24 Supervising Senior Deputy Attorney General
25 *Attorneys for Petitioner*
26 *State of Nevada ex rel. Department of Corrections*
27
28

1 CERTIFICATE OF COMPLIANCE

2 1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4),
3 the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

4 ☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 12
5 pt. Times New Roman; or

6 ☐ This brief has been prepared in a monospaced typeface using [state name and version of
7 word-processing program] with [state number of characters per inch and name of type style].

8 2. I further certify that this brief complies with the page- or type-volume limitations of NRAP
9 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

10 ☐ Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

11 ☐ Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines
12 of text; or

13 ☒ Does not exceed 30 pages.

14 3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge,
15 information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that
16 this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP
17 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a
18 reference to the page and volume number, if any, of the transcript or appendix where the matter relied on
19 is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is
20 not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

21 DATED April 8, 2021.

22
23 AARON D. FORD
Attorney General

24 By: /s/ Michelle Di Silvestro Alanis
25 Michelle Di Silvestro Alanis (Bar No. 10024)
26 Supervising Senior Deputy Attorney General
27 Attorneys for Petitioner
28 State of Nevada ex rel. Department of Corrections

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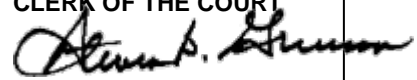
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

SHARI KASSEBAUM,

Petitioner,

v.

STATE OF NEVADA ex rel, its
DEPARTMENT OF CORRECTIONS, and
STATE OF NEVADA ex rel, its
DEPARTMENT OF ADMINISTRATION
PERSONNEL COMMISSION, HEARING
OFFICER,

Respondent.

CASE NO. A-20-811982-J
DEPT. VIII

**APPENDIX TO RESPONDENT'S
ANSWERING BRIEF**

INDEX TO APPENDIX TO RESPONDENT'S ANSWERING BRIEF

Appendix A: Personnel Commission Meeting Minutes, June 8, 2018

Appendix B: LCB Explanation of Proposed Change

Appendix C: Findings of Fact, Conclusions of Law and Order Granting Petition for Judicial Review

Appendix D: Order Denying Petition for Judicial Review

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I electronically filed the foregoing **APPENDIX TO RESPONDENT'S**
3 **ANSWERING BRIEF** with the Clerk of the Court by using the electronic filing system on the 8th day
4 of April, 2021.

5 I certify that the following participants in this case are registered electronic filing systems users
6 and will be served electronically:

7
8 Angela Lizada, Esq.
9 Lizada Law Firm, Ltd.
10 711 S. 9th St.
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14 Via Email to:

15 Mark Gentile
16 Hearing Officer
17 Hearings Division
18 nrann@admin.nv.gov

19 I further certify that on April 14th, 2021 the foregoing will be mailed by United States Mail to the
20 following:

21 Mark Gentile
22 Hearing Officer
23 Hearings Division
24 Department of Administration
25 2200 S. Rancho Dr. Ste. 220
26 Las Vegas, NV 89102

27
28 /s/ Anela Kaheaku
An employee of Office of the Attorney General

APPENDIX A

STATE OF NEVADA
PERSONNEL COMMISSION
MEETING MINUTES 6/8/2018

APPENDIX A

**STATE OF NEVADA
PERSONNEL COMMISSION**

Held at the Legislative Counsel Bureau, 401 S. Carson Street, Room 3138, Carson City, Nevada 89701; and via video conference in Las Vegas at the Grant Sawyer Building, Room 4412, 555 East Washington Avenue

MEETING MINUTES

June 8, 2018

COMMISSIONERS PRESENT

IN CARSON CITY:

Ms. Katherine Fox, Chairperson
Ms. Patricia Knight, Commissioner
Ms. Mary Day, Commissioner

COMMISSIONERS PRESENT

IN LAS VEGAS:

Mr. Gary Mauger, Commissioner
Mr. Andreas Spurlock, Commissioner

STAFF PRESENT IN CARSON CITY:

Mr. Peter Long, Administrator, Division of Human Resource Management (DHRM)
Ms. Shelley Blotter, Deputy Administrator, DHRM
Ms. Beverly Ghan, Deputy Administrator, DHRM
Ms. Carrie Hughes, Personnel Analyst, DHRM
Ms. Michelle Garton, Supervisory Personnel Analyst, DHRM
Ms. Carrie Lee, Executive Assistant, DHRM

STAFF PRESENT IN LAS VEGAS:

Ms. Heather Dapice, Supervisory Personnel Analyst, DHRM

I. CALL TO ORDER, WELCOME, ROLL CALL, ANNOUNCEMENTS

Chairperson Fox: Opened the meeting at approximately 9:00 a.m. She welcomed everyone and took roll, noting that Alternate Commissioner Mary Day was seated for Commissioner David Sanchez in his absence. She indicated that newly appointed Alternate Commissioners Susana McCurdy and Dana Carvin were present but not serving. Chairperson Fox also welcomed Beverly Ghan, the newly appointed Deputy Administrator of the Compensation, Classification and Recruitment Section.

II. PUBLIC COMMENT

Chairperson Fox: Advised that no vote or action may be taken upon a matter raised under this item of the agenda until the matter itself has been specifically included on an agenda as an item upon which action may be taken. She asked if there were any public comments. Commissioner Spurlock stated that staff requested that he read some brief instructions about microphone etiquette for speakers. There were no public comments.

III. APPROVAL OF MINUTES OF PREVIOUS MEETING DATED MARCH 19, 2018 – Action Item

Chairperson Fox: Called for revisions or additions. **Commissioner Day:** Stated that on page 11 in the packet, page 7 of the minutes, there is an extra word and a missing word where Commissioner Spurlock asked, "...who the Audit Manager reports to who;" the second "who" shouldn't be there, and where Ms. Dapice responded, "I believe the Audit Manager reports to an ESD," there should be some title after "ESD." **Heather Dapice:** Answered it should read, "ESD Manager." **Chairperson Fox:** Inquired if there were any other edits for the minutes and there were none. Chairperson Fox wanted the record to indicate that Commissioner Day did serve as Commissioner at the March meeting so she was eligible to render a vote on this item.

Held March 19, 2018

MOTION: Moved to approve the minutes of the March 19, 2018, meeting with the changes noted.
BY: Commissioner Mauger
SECOND: Commissioner Spurlock
VOTE: The vote was unanimous in favor of the motion.

IV. DISCUSSION AND APPROVAL OF ADDITION OF POSITIONS AND TITLE CODES APPROVED FOR PRE-EMPLOYMENT SCREENING FOR CONTROLLED SUBSTANCES – Action Item

- A. The Department of Motor Vehicles requests the addition of a classified position and two unclassified title codes to the list approved for pre-employment screening for controlled substances:

11.358 Compliance Investigator II, PCN: RE4079
U9005 Deputy Administrator, Compliance Enforcement Division, PCN: RE2013 and WF2014
U9021 Division Administrator, Compliance Enforcement Division, PCN: CC1003

Carrie Hughes: Personnel Analyst with the Division of Human Resource Management, advised NRS 284.4066 provides for the pre-employment screening for controlled substances of candidates for positions affecting public safety prior to hire. This statute requires an appointing authority to identify the specific positions that affect public safety subject to the approval of the Personnel Commission. Additionally, federal courts have indicated that pre-employment drug screening by public entities may constitute a search within the meaning of the Fourth Amendment, and if so, must be justified by a special need that outweighs the expectation of privacy.

The Department of Motor Vehicles has requested to add the requirement of pre-employment screening for controlled substances to the positions listed in Agenda Item IV. We are recommending approval of the Compliance Investigator position, as DMV has indicated that this position performs background checks on members of the public, and a candidate for this position would be subject to a background check and medical and psychological tests which may diminish an individual's expectation of privacy. Additionally, Department of Motor Vehicle positions in this class have previously been approved for pre-employment screening for controlled substances by the Commission. We are also recommending approval of the Compliance Enforcement Division's Division Administrator and Deputy Administrator, as these positions are required to obtain and maintain Peace Officer Standards and Training (POST) Category 2 certification, which requires a pre-employment drug screening test. My understanding is that there is a representative present from the Department of Motor Vehicles if there are any questions. Thank you.

Chairperson Fox: Asked if there were questions or public comment. Hearing none, she made a motion.

MOTION: Moved to approve the addition of positions with the Department of Motor Vehicles for pre-employment screening for controlled substances to include Compliance Investigator II, PCN RE4079; Deputy Administrator, Compliance Enforcement Division, PCNs RE2013 and WF2014; and Division Administrator, Compliance Enforcement Division, PCN CC1003.
BY: Chairperson Fox
SECOND: Commissioner Knight
VOTE: The vote was unanimous in favor of the motion.

V. DISCUSSION AND APPROVAL OF PROPOSED REGULATIONS CHANGES TO NEVADA ADMINISTRATIVE CODE, CHAPTER 284 – Action Item

- A. LCB File No. R098-17
Sec. 1. NEW Letter of instruction: Use and administration.
Sec. 2. NAC 284.458 Rejection of probationary employees.
Sec. 3. NAC 284.692 Agreement for extension of time to file grievance or complaint, or take required action.
Sec. 4. Section 19 of LCB File No. R033-17, Removal of ineligible grievance or complaint from procedure.

V-D LCB File No. R150-17

- Sec. 1. NEW Procedure to request hearing to determine reasonableness of dismissal, demotion or suspension.
- Sec. 2. NAC 284.589 Administrative leave with pay.
- Sec. 3. NAC 284.642 Suspensions and demotions.
- Sec. 4. NAC 284.656 Notice.
- Sec. 5. NAC 284.6561 Pre-disciplinary review.
- Sec. 6. NAC 284.778 Request for hearing and other communications.

Michelle Garton: Stated Section 1, Procedure to request hearing to determine reasonableness of dismissal, demotion, or suspension, is a newly proposed regulation that moves the procedures for an employee who is dismissed, demoted, or suspended to request a hearing by a hearing officer into a separate regulation. This will serve to distinguish the hearing that may be requested after disciplinary action has been taken from the hearing that occurs prior to disciplinary action, now referred to as a pre-disciplinary review which will be presented in a moment. Also included in this new regulation is the effective date of a dismissal, demotion, or suspension is the first day that the disciplinary action takes effect. In the case of a 5-day suspension, for example, the effective date of the discipline is the first day and not any other day after that up to the fifth day. Finally, if the appointing authority's final determination of discipline is provided to the employee, he or she must include that documentation along with his or her appeal. The amendments to Section 2, NAC 284.589, specify that the provisions requiring an appointing authority to grant administrative leave with pay pertain to an employee to prepare for, and appear at, his or her pre-disciplinary review. As noted in the explanation of change for this regulation on page 60 of your binders and highlighted on page 61, the Division is recommending the adoption of this regulation with the word "and" rather than "or." The highlighted language provided on page 2 of the handout in the front of your binders, and available in the back of the room for the public today, is the language the Division is recommending. This will ensure that up to eight hours of administrative leave will be granted to an employee for each type of meeting rather than a combination of up to eight hours for both types of meetings. Section 3, NAC 284.642 simply makes a conforming change to incorporate the new regulation presented in Section 1 of this LCB file into regulation. Section 4, NAC 284.656 of this regulation makes a conforming change to replace "hearing" with "pre-disciplinary review," because the requirement for the pre-disciplinary review pursuant to NAC 284.6561 is being described here. Section 5, NAC 284.6561. The amendments to this regulation replace the term "hearing" with the term "pre-disciplinary review" to describe the meeting that is required prior to disciplinary action being taken. The amendment to subsection 5 will include that an employee will have the opportunity to rebut allegations made against them and provide mitigating information. This will assist an employee in preparation for the pre-disciplinary review. Also included in the amendments to this regulation is that the effective date of the dismissal, demotion, or suspension is the first day that the disciplinary action takes effect. Finally, subsection 9 has been removed from this regulation because it provides the basis for the new regulation presented in Section 1 of this LCB file. Section 6, NAC 284.778, provides the manner in which a request for a hearing after disciplinary action has been taken must be made. The amendment specifies that such a request be made for a hearing on the appeal rather than a request for an appeal.

Chairperson Fox: Stated because I can be a process person sometimes, an investigation is conducted, and a decision is made, let's say, to suspend an employee for 10 days. Prior to meting out that discipline, there's a pre-disciplinary review process where the employee has the opportunity to rebut, clarify the results of the investigation and the proposed disciplinary action. That's a whole separate process from, "I'm suspended for 10 days and now I want to go to a hearing." That 10 days would commence at the first day of the suspension, is that correct? **Michelle Garton:** Confirmed this was correct.

Chairperson Fox: Asked if there were questions or comments.

Kevin Ranft: Stated he was appreciative of the opportunity to speak on behalf of State employees' concerns. He said AFSCME is actually very grateful for clarifying language throughout these sections. A lot of concerns over the years with State employees not understanding the clarification when the hearing comes forward or they file an appeal; this really just provides a lot of great detail for clarification. I do have a concern on Section 5, and I ask DHRM and this body to consider another clarification change or maybe what the intent of the purpose is. Often, representatives like myself or an individual of the employee's choosing will attend these pre-disciplinary hearings; there's just no consistency. Agencies often will allow us to speak on behalf of the employee that's really nervous or who doesn't understand the process. This is their opportunity to really be given a chance to fix any concerns prior to the formal disciplinary action taking place, but there's also a lot of agencies that don't allow the person of their choosing or the representative to speak. The employee goes in there, or they don't have the words to express, and the decision is

upheld by the appointing authority. We're sitting there with our hands tied. I'm not going to call out the agencies, but some even go as far as putting in their letter that they read to the employee, specifically saying, "Your representative cannot speak today. I want to hear from you only." We don't feel that that's what the intent is of this. So, we feel this is a great opportunity to simply add under NAC 284.6561, Section 5, where the new language says, "The employee will be given an opportunity to rebut the allegations against the employee and provide mitigating information," to also say an employee "and/or an employee's representative." I think with those simple terms, it could allow an opportunity or even prevent an appeal hearing from going forward, saving the State a lot of money. There's a couple different sections that can be processed. If it's not done through change today, I think it can be done through DHRM notifying agencies, saying allow the employee's representative or the person of their choosing to be a part of the process during the pre-disciplinary hearings.

Shelley Blotter: Responded we haven't had an opportunity to discuss this ahead of the meeting today; I don't have any objections to that language. I believe that's the intent, that it would be an informal process. **Peter Long:** Responded I think that that may be the intent. I'm not sure, but currently, the regulation is specific to the appointing authority and/or his or her designated representative and the employee. So, I think that since the first section talks about a designated representative and it's specific to employee only, that I'm unsure that we would have the authority to tell an agency that they have to allow a representative there. I'm certainly willing to discuss that as we move forward, but I don't want to put something in place or suggest something be put in place without agencies having the opportunity to weigh in on this.

Kevin Ranft: Replied there's already a regulation that allows us as representatives to be present at the hearing, so we already attend these. We just want to make sure that we have a voice to ensure that the employee is successful. We're missing an opportunity here, and I think that if an employee could show through their representatives that the agency missed something, rather than providing a 10-day, a 5-day suspension, or maybe even a termination, if it could be discussed through means of testimony or providing necessary documents or explaining those necessary documents. Often these employees will provide a document, but they don't get the message across of what it is intended for and how it's to be used for the recommendation when they go back to the agency. I get that, and going back to the regulation which is already there, agencies use it or interpret it differently. If we don't correct it today offline, we could look at the intent of the original NAC and maybe advise these agencies to allow the prevention of potentially unnecessary suspensions, demotions, or terminations. I thought maybe this would be a good avenue to put that in there to ensure success for the employee. **Peter Long:** Responded I don't disagree with you that that might be beneficial. All I'm saying is that the way the reg is written now, I can't commit to that without us going back and seeing what the intent was when the reg passed and then I would be more comfortable providing that direction if that was the intent, or to suggest a change by the Commission to the verbiage absent input from agencies on that. So, I'm not disagreeing with you. That wasn't what I wanted to represent.

Chairperson Fox: Asked once these changes to the Nevada Administrative Code occur, is there training sessions or information provided to division HR representatives about the use of these items, and could there be some narrative that says departments are encouraged to have the employee bring a representative of their choosing to this informal meeting so that somehow we can get employees feeling comfortable if they need to have a representative with them at the informal piece? They can do so and that representative can speak for that employee.

Peter Long: Added I won't say that there's training provided to agencies for every new regulation that passes, but we do send out all new regulations and amended regulations once approved, usually with an explanation, and we are there to answer any questions. If the determination is that that was the intent of this, we could certainly include that in the handouts that we provide the agencies.

Commissioner Mauger: Stated a lot of my questions in these hearings is when they hold workshops, that was there a labor representative present, and to my knowledge, I don't remember ever hearing "yes." It's frustrating to me to sit here and listen to all these questions come up that could have been done in the workshop. There's a lot of questions here that, to me, should have come up in the workshop, and I think the representative should make more of an effort to participate in those workshops to help alleviate what we're now going through.

MOTION: Moved to approve LCB File No. R150-17 for changes to the Nevada Administrative Code, Section 1, NEW Procedure to request hearing to determine reasonableness of dismissal, demotion, or suspension; Section 2, NAC 284.589, Administrative leave with pay; Section 3, NAC 284.642, Suspensions and demotions; Section 4, NAC 284.656; Section 5, NAC 284.6561; and Section 6, NAC 284.778, with the language that was provided to the

Commissioners in their packet that says under NAC 284.589, Administrative leave with pay, up to 8 hours for preparation for any pre-disciplinary review and up to 8 hours for preparation for any hearing described in paragraph 6(e).

BY: Chairperson Fox
SECOND: Commissioner Knight
VOTE: Motion passed unanimously.

Chairperson Fox: Requested if we could have an update in December or 2019 about how the pre-disciplinary review process is going; is it found to be an effective mechanism, and additionally, if employees are bringing a representative with them and does that representative have an opportunity to speak.

V-E LCB File No. R151-17

- Sec. 1. NAC 284.5385 Annual leave: Leave without pay; catastrophic leave; receipt of benefits for temporary total disability.
- Sec. 2. NAC 284.544 Sick leave: Leave without pay; catastrophic leave; receipt of benefits for temporary total disability; computation.
- Sec. 3. NAC 284.5775 Temporary total disability: Use of sick leave, compensatory time, annual leave and catastrophic leave; leave of absence without pay.
- Sec. 4. NAC 284.882 Administration of screening tests.

Carrie Hughes: Presented the regulation amendments proposed for permanent adoption in LCB File No. R151-17. The amendments to Sections 1, 2, and 3 bring into agreement the provisions relating to sick and annual leave when used in combination with the temporary total disability benefit under the Workers' Compensation Program. The amendments standardize the language "leave of absence without pay" across the three regulations. Finally, the Legislative Counsel Bureau has replaced references to statutes with references directing to NAC 284.5775, removed provisions in NAC 284.5385 and 284.544 that are addressed in NAC 284.5775, and consolidated similar provisions in NAC 284.5385 and 284.544 to a single provision in NAC 284.5775. The amendment in Section 4 addresses the breath alcohol testing equipment standard. As of January 1, 2018, alcohol breath testing regulated by the U.S. Department of Transportation may be performed on equipment approved by the National Highway Traffic Safety Administration, but not yet published on their conforming products list. This amendment is intended to conform NAC 284.882 to the new U.S. Department of Transportation standard. Matching equipment standard for testing that is and is not federally regulated will prevent the need to identify or track which collection sites can be utilized for testing that are and are not subject to US Department of Transportation regulation.

Chairperson Fox: Thanked Ms. Hughes and asked if there were questions or comments. Hearing none, she entertained a motion.

MOTION: Moved to approve Item V-E, LCB File No. R151-17, Section 1, NAC 284.5385, Annual leave: Leave without pay; catastrophic leave; receipt of benefits for temporary total disability; Section 2, NAC 284.544, Sick leave: Leave without pay; catastrophic leave; receipt of benefits for temporary total disability; computation; Section 3, NAC 284.5775, Temporary total disability: Use of sick leave, compensatory time, annual leave and catastrophic leave; leave of absence without pay; and Section 4, NAC 284.882, Administration of screening tests.

BY: Commissioner Knight
SECOND: Commissioner Day
VOTE: Motion passed unanimously.

VI. DISCUSSION AND APPROVAL OF PROPOSED CLASS SPECIFICATION MAINTENANCE REVIEW OF CLASSES RECOMMENDED FOR REVISIONS – Action Item

- A. Fiscal Management & Staff Services
 - 1. Subgroup: Actuarial/Research/Grants Analysis
 - a. 7.711 Insurance and Loss Prevention Specialist
 - 2. Subgroup: Public Information
 - a. 7.814 Geologic Information Specialist
 - b. 7.849 Publications Editor Series

IN THE SUPREME COURT OF THE STATE OF NEVADA

Docket No. 83942

SHARI KASSEBAUM

Appellant,

vs.

THE STATE OF NEVADA DEPARTMENT
OF CORRECTIONS,

Respondents.

Eighth Judicial District Court
Case No.: A-20-811982-J

JOINT APPENDIX
VOLUME II Part 2 of 3

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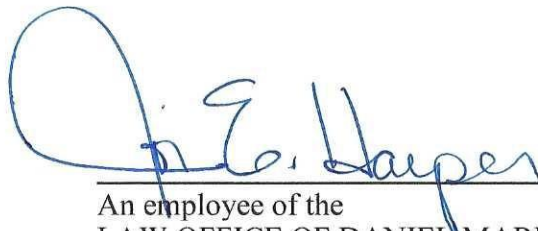
	<u>Description</u>	<u>Vol(s)</u>	<u>Pg(s)</u>
1.	Petition for Judicial Review 03/10/2020	I	JA 00001 - JA 00008
2.	Statement of Intent to Participate in Petition for Judicial Review	I	JA 00009 - JA 00011
3.	Transmittal of Record on Appeal 02/08/2021	I	JA 00012 – JA 00247
4.	Petitioner Shari Kassebaum’s Opening Brief 02/22/2021	II	JA 00248 – JA 00266
5.	Respondent’s Answering Brief 04/08/2021	II	JA 00267 – JA 00294
6.	Appendix to Respondent’s Answering Brief 04/08/2021	II	JA 00295 – JA 00323
7.	Respondent, Department of Corrections’ Request to Set Matter for Hearing 05/13/21	II	JA 00324 – JA 00326
8.	Petitioner Shari Kassebaum’s Reply Brief 05/25/2021	II	JA 00327 – JA 00341
9.	Minute Order 10/01/21	II	JA 00342
10.	Findings of Fact, Conclusions of Law and Order 11/19/2021	II	JA 00343 – JA 00354
11.	Notice of Entry of Findings of Facts, Conclusions of Law, and Order Denying Petition for Judicial Review 12/01/2021	II	JA 00355 – JA 00369
12.	Notice of Appeal 12/10/2021	II	JA 00370 – JA 00387

13.	Case Appeal Statement 12/10/2021	II	JA 00388 – JA00391
14.	Recorder's Transcript of Proceedings 02/24/2022	II	JA 00392 – JA 00405

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 forgoing JOINT APPENDIX Volume I Part 2 of 3, by way of Notice of Electronic Filing provided by the court mandated E-Flex filing service, at the following:

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APPENDIX B

LCB Explanation of Proposed Change

APPENDIX B



STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION
Division of Human Resource Management
209 E. Musser Street, Suite 101 | Carson City, Nevada 89701
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MEMORANDUM
HR#22-18

May 4, 2018

TO: DHRM Listserv Recipients
Nevada County Libraries
State Library and Archives

FROM: Peter Long, Administrator *Peter Long*
Division of Human Resource Management

SUBJECT: NOTICE OF PUBLIC HEARING – Adoption and Amendment of
Regulations that Pertain to NAC 284

The regulation changes included with this memorandum are being proposed for adoption at the June 8, 2018, Personnel Commission meeting. This meeting will be held at 9:00 a.m. at the Legislative Counsel Building, Room 3138, 401 South Carson Street, Carson City, Nevada, with videoconferencing to the Grant Sawyer Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada.

Please circulate and post the attached Notice of Hearing along with the text of the proposed regulations.

PL:mg

Attachments

NOTICE OF INTENT TO ACT UPON A REGULATION
Notice of Hearing for the Permanent Adoption and Amendment
of Regulations of the
Department of Administration
Division of Human Resource Management

The Personnel Commission will hold a public hearing at 9:00 a.m. on June 8, 2018, at the Legislative Counsel Building, Room 3138, 401 South Carson Street, Carson City, Nevada with videoconferencing to the Grant Sawyer Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. The purpose of the hearing is to receive comments from all interested persons regarding the adoption and amendment of regulations that pertain to Chapter 284 of the Nevada Administrative Code.

The following information is provided pursuant to the requirements of NRS 233B.0603:

- These regulations do not have a direct economic effect on any business or the public.
- Enforcement of these regulations will not result in an increased cost.
- To our knowledge, these regulations do not overlap or duplicate the regulations of other State or local governmental agencies.
- These regulations do not establish any new fee or increase an existing fee.

<u>LCB File:</u>	<u>Section:</u>	<u>NAC:</u>	<u>Leadline or Description</u>
R098-17	Sec. 1	NEW	Letter of instruction: Use and administration.
	Sec. 2	NAC 284.458	Rejection of probationary employees.
	Sec. 3	NAC 284.692	Agreement for extension of time to file grievance or complaint, or take required action.
	Sec. 4	Section 19 of LCB File No. R033-17	Removal of ineligible grievance or complaint from procedure.
R119-17	Sec. 1	NAC 284.888	Request for employee to submit to screening test: Interpretation of grounds; completion of required form.
R121-17	Sec. 1	NAC 284.358	Types of lists and priority for use.
	Sec. 2	NAC 284.360	Reemployment lists; certification or waiver of lists.
	Sec. 3	NAC 284.361	Use of lists and consideration of eligible persons.
	Sec. 4	NAC 284.618	Layoffs: Voluntary demotions.
R150-17	Sec. 1	NEW	Procedure to request hearing to determine reasonableness of dismissal, demotion or suspension.
	Sec. 2	NAC 284.589	Administrative leave with pay.
	Sec. 3	NAC 284.642	Suspensions and demotions.
	Sec. 4	NAC 284.656	Notice.
	Sec. 5	NAC 284.6561	Hearing.
	Sec. 6	NAC 284.778	Request for hearing and other communications.
R151-17	Sec. 1	NAC 284.5385	Annual leave: Leave without pay; catastrophic leave; receipt of benefits for temporary total disability.
	Sec. 2	NAC 284.544	Sick leave: Leave without pay; catastrophic leave; receipt of benefits for temporary total disability; computation.

- | | | |
|--------|--------------|--|
| Sec. 3 | NAC 284.5775 | Temporary total disability: Use of sick leave, compensatory time, annual leave and catastrophic leave; leave of absence without pay. |
| Sec. 4 | NAC 284.882 | Administration of screening tests. |

Persons wishing to comment upon the proposed action of the Personnel Commission may appear at the scheduled public hearing or may address their comments, data, views, or arguments, in written form, to the Department of Administration, Division of Human Resource Management, 209 East Musser Street, Suite 101, Carson City, Nevada 89701, Attention: Shelley Blotter. Written submissions must be received by the Division of Human Resource Management on or before June 8, 2018. If no person who is directly affected by the proposed action appears to request time to make an oral presentation, the Personnel Commission may proceed immediately to act upon any written submissions.

A copy of this notice and the regulations to be adopted and amended will be on file at the Nevada State Library, Archives and Public Records, 100 North Stewart Street, Carson City, Nevada, for inspection by members of the public during business hours. Additionally, copies of this notice and the regulations to be adopted and amended will be available at the Division of Human Resource Management, 100 North Stewart Street, Suite 200, Carson City, Nevada, and 555 East Washington Avenue, Suite 1400, Las Vegas, Nevada; and in all counties in which an office of the agency is not maintained, at the main public library, for inspection and copying by members of the public during business hours. This notice and the text of the proposed regulations are also available in the State of Nevada Register of Administrative Regulations, which is prepared and published monthly by the Legislative Counsel Bureau pursuant to NRS 233B.0653, and on the internet at <http://www.leg.state.nv.us>. Copies of this notice and the proposed regulations will also be mailed to members of the public upon request. A reasonable fee may be charged for copies if it is deemed necessary.

Upon adoption and amendment of any regulation, the agency, if requested to do so by an interested person, either before adoption and amendment, or within 30 days thereafter, will issue a concise statement of the principal reasons for and against its adoption and amendment, and incorporate therein its reason for overruling the consideration urged against its adoption and amendment.

This notice of hearing has been posted at the following locations:

Carson City

Blasdel Building, 209 East Musser Street
Nevada State Library & Archives Building, 100 North Stewart Street
Legislative Counsel Bureau, 401 South Carson Street

Las Vegas

Grant Sawyer Building, 555 East Washington Avenue

Websites

Legislative Counsel Bureau website: www.leg.state.nv.us
Nevada Public Notice website: <http://notice.nv.gov>
Division of Human Resource Management website: www.hr.nv.gov

**REGULATIONS PROPOSED
FOR PERMANENT ADOPTION AND AMENDMENT**

LCB File No. R098-17

Section 1. Chapter 284 of NAC is hereby amended by adding thereto a new section to read as follows:

Explanation of Proposed Change: This amendment, proposed by the Division of Human Resource Management, amends NAC 284 by adding a new section to place a commonly used coaching tool, letter of instruction, into regulation. While “letter of instruction” is the commonly used term, it may take the form of a memorandum or other written documentation provided to an employee.

The new regulation explains how a letter of instruction is to be used and clarifies that it is not part of the disciplinary process. The regulation outlines what a letter of instruction must contain, and that it must not contain any threat of disciplinary action or consequences. Also included is the requirement for a discussion about the contents of the letter of instruction between the supervisor and employee, and the retention of a letter of instruction is addressed.

NEW Letter of instruction: Use and administration.

- 1. A letter of instruction is a document that is in written or electronic form and that:***
 - (a) A supervisor of an employee may provide to the employee as a coaching or performance management tool to:***
 - (1) Address the job performance or behavior of the employee; and***
 - (2) Provide evidence of the job performance or behavior expected of the employee; and***
 - (b) Is not part of the formal disciplinary process.***
- 2. A letter of instruction must include at least the following elements:***
 - (a) A brief statement identifying the deficiency or area of concern in the job performance or behavior of the employee;***
 - (b) An outline of the expectations of the supervisor of the employee relating to the job performance or behavior of the employee;***
 - (c) Instructions or a recommended course of action for overcoming the deficiency or area of concern and a description of any additional training that will be provided to the employee; and***
 - (d) A time frame for the completion of any recommended action items and for the proposed improvement in the job performance or behavior of the employee.***
- 3. A letter of instruction must not include any reference to disciplinary action or consequences for failure to comply with the expectations of the supervisor of the employee relating to the job performance or behavior of the employee.***
- 4. The supervisor of the employee and the employee must meet to discuss the expectations of the supervisor relating to the job performance or behavior of the employee outlined in the letter of instruction.***
- 5. The supervisor of the employee shall retain a copy of the letter of instruction in the supervisor's working file for the employee. The supervisor must attach any written response by the employee to the letter of instruction. These documents must not be retained in the permanent personnel file of the employee unless they are attached to documentation of a subsequent***

Section 1. Chapter 284 of NAC is hereby amended by adding thereto a new section to read as follows:

Explanation of Proposed Change: This amendment, proposed by the Division of Human Resource Management, will place procedures and requirements related to requesting a hearing to determine the reasonableness of a dismissal, demotion or suspension into a separate regulation. Removing this language from NAC 284.6561 will ensure that it is clear that these procedures are to be used specifically when requesting a hearing pursuant to NRS 284.390.

The amendment also clarifies that the effective date of the discipline is the *first* day the discipline takes effect. In the case of a dismissal or demotion, there is only one clear effective date of the discipline. In order to apply one clear effective date of discipline in the case of a suspension, it is necessary to use the first date of the suspension as the effective date. This will clarify that an employee who receives a suspension has the same rights to appeal, 10 working days, as an employee who is dismissed or demoted.

This amendment also adds the requirement that the written notification of an appointing authority's decision regarding proposed disciplinary action must accompany such a request.

NEW Procedure to request hearing to determine reasonableness of dismissal, demotion or suspension.

1. A permanent employee who has been dismissed, demoted or suspended may request a hearing before the hearing officer of the Commission, pursuant to NRS 284.390, within 10 working days after the effective date of his or her dismissal, demotion or suspension. For the purpose of determining the time limit for making such a request, the effective date of the dismissal, demotion or suspension is the first day that the disciplinary action takes effect.

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.

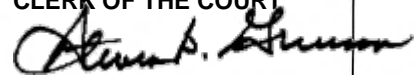
Sec. 2. NAC 284.589 is hereby amended to read as follows:

Explanation of Proposed Change: This amendment, proposed by the Division of Human Resource Management, makes a conforming change based on the proposed amendment to NAC 284.6561, included below. This amendment will ensure that 8 hours of administrative leave is provided for preparation for a "pre-disciplinary review," as that phrase is proposed to replace the word "hearing" in NAC 284.6561. The word "hearing" will now refer to hearings to determine the reasonableness of dismissal, demotion or suspension, as provided in NRS 284.390.

APPENDIX C

Findings of Fact, Conclusions of Law and Order
Granting Petition for Judicial Review

APPENDIX C



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Attorneys for

DISTRICT COURT
CLARK COUNTY, NEVADA

SHARI KASSEBAUM,

Petitioners,

v.

STATE OF NEVADA ex rel, its DEPARTMENT
OF CORRECTIONS, and STATE OF NEVADA ex
rel, its DEPARTMENT OF ADMINISTRATION
PERSONNEL COMMISSION, HEARING
OFFICER, CARA BROWN

Respondents.

Case No.: A-20-810424-P
Dept. No.: 31

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER GRANTING
PETITION FOR JUDICIAL REVIEW**

This matter having come on for hearing on Petitioner's Petition for Judicial Review on the 18th day of February, 2021 at the hour of 9:30 a.m. with Petitioner Shari Kassebaum being represented by and through Adam Levine, Esq. of the Law Office of Daniel Marks and Respondents Nevada Department of Corrections being represented by Kevin A. Pick, Esq. Deputy Attorney General and the remaining Respondents having declined to file a Notice of Intent to Participate; and the Court having heard arguments from the parties hereby makes the following findings of fact and conclusions of law:

<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Motion to Dismiss by Deft(s)	<input type="checkbox"/> Judgment of Arbitration

FINDINGS OF FACT

1. Shari Kassebaum (hereafter "Kassebaum") was a post-probationary member of the classified service of the State of Nevada employed as a Corrections Sergeant with the Department of Corrections (hereafter "NDOC").

2. Effective July 12, 2019 Kassebaum received a disciplinary suspension of 15 days.

3. NRS 284.390(1) provides in pertinent part "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."

4. Kassebaum filed an appeal of the disciplinary suspension on the NPD-54 "Appeal of Dismissal, Suspension, Demotion or Involuntary Transfer" form provided by the State of Nevada Department of Administration within the 10 working days provided for by NRS 284.390. However, Kassebaum did not attach to that NPD-54 form the written notification of the appointing authority's decision as provided for under NAC 284.6562(2)(b). Kassebaum's Appeal was assigned Case No. 2001869 and assigned to Hearing Officer Cara L. Brown.

5. NDOC filed a Motion to Dismiss Kassebaum's Appeal arguing that the failure to attach the written notification as provided for under NAC 284.6562(2)(b) was a jurisdictional defect which could not be cured after the expiration of the 10 working days to file the Appeal.

6. Kassebaum's former counsel filed a "Limited Opposition" which conceded that Employer would prevail on its Motion.

7. Hearing Officer Brown agreed with NDOC that the requirement was jurisdictional and dismissed the Appeal.

8. Kassebaum filed a timely Petition for Judicial Review of the Hearing Officer's decision under NRS 233.130.

1 9. In briefing in support of the Petition for Judicial Review, Kassebaum asserts that NAC
2 284.6562(2)(b) is not jurisdictional, but rather a claims processing rule for which a violation may be
3 waived if not timely asserted, or alternatively cured, that the Appeals form violated due process
4 because its Instructions inform employees they can supplement the form, and that the dismissal of her
5 Appeal unconstitutionally deprived her of a right to a post-deprivation hearing of the sort required by
6 the 14th Amendment's Due Process Clause.

7 10. NDOC asserted in its briefing that NAC 284.6562(2)(b) is jurisdictional, that NAC
8 284.6562(2)(b) is not a claims processing rule, that dismissal is still required even if NAC
9 284.6562(2)(b) is a claims processing rule, that Kassebaum is judicially estopped from making the
10 contrary arguments asserted in her Petition, that Kassebaum is raising new issues for the first time on
11 appeal, that deference must be shown to Hearing Officer Brown's interpretation of NAC
12 284.6562(2)(b), and that Kassebaum had the opportunity to obtain a post-deprivation hearing but failed
13 to take advantage of the administrative procedure.

14 11. Kassebaum asserted in her Reply Brief that the elements of judicial estoppel were not
15 met, that jurisdictional and constitutional claims may be asserted for the first time on appeal, that the
16 requirements to waive a constitutional right to a hearing were not met, and that they Hearing Officer's
17 interpretation was not entitled to deference as it is purely a question of statutory construction and other
18 Hearing Officers had reached the opposite conclusion.

19 12. The Hearing Officer's Decision did not analyze whether NAC 284.6562(2)(b) is a claims
20 processing rule and, if so, whether the appeal should be dismissed or proceed to a hearing on the merits.

21 13. It was agreed by the parties before the Court that Hearing Officer Brown has recently
22 resigned from her position as a Hearing Officer.

23 14. If any of these Findings of Fact are properly considered as Conclusions of Law, they
24 shall be so construed.

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1 DECISION

2 For all the reasons set forth above the Petition for Judicial Review is *granted*. The Order of the
3 Hearing Officer in Case No. 2001869-CB filed January 14, 2020 dismissing Kassebaum's Appeal with
4 prejudice is *reversed* and remanded back to the Department of Administration for assignment of a new
5 Hearing Officer for further proceedings to determine whether the Appeal should be dismissed, or
6 alternatively heard on the merits.

7 DATED this 2nd day of March 2021.


8 
9 JOANNA S. KISHNER
DISTRICT COURT JUDGE

10 Respectfully submitted by:

11 LAW OFFICE OF DANIEL MARKS

12 
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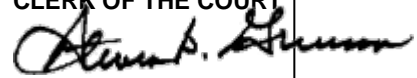
18 Approval as to Form and Content:

19 
20 AARON D. FORD, Nevada Attorney General
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24 *ex rel Department of Corrections*

APPENDIX D

Order Denying Petition for Judicial Review

APPENDIX D



ODJR
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*Attorneys for Respondent State of Nevada
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DISTRICT COURT
CLARK COUNTY, NEVADA

RAY ALLEN,

Petitioner,

v.

STATE OF NEVADA ex rel, its
DEPARTMENT OF CORRECTIONS,
and STATE OF NEVADA ex rel, its
DEPARTMENT OF ADMINISTRATION
PERSONNEL COMMISSION,
HEARING OFFICER MARK GENTILE,

Respondents.

Case No. A-20-813237-J

Dept. No. ● XI

ORDER DENYING
PETITION FOR JUDICIAL REVIEW

This matter comes before the Court pursuant to Petitioner's April 3, 2020, Petition for Judicial Review requesting review of the Decision and Order issued by Hearing Officer Mark Gentile on March 4, 2020, under Appeal No. 2008570-MG. Petitioner filed his Opening Brief on October 8, 2020. Thereafter, Respondent, Nevada Department of Corrections ("NDOC") filed its Answering Brief on December 22, 2020, and Petitioner filed his Reply Brief on February 22, 2020. The Court, having reviewed the record and considered the parties' respective pleadings, and good cause appearing, hereby denies the Petition based upon the following:

I.

PROCEDURAL HISTORY

Petitioner Ray Allen (“Allen”) is a correctional officer employed at NDOC. On October 17, 2019, Allen was served with a Specificity of Charges that recommended he be suspended for fifteen (15) days as a result of the discourteous treatment of a fellow employee. Specifically, Allen was alleged to have called fellow correctional officer Nilo Glean a “dumb fuck” and “stupid” during a shift change at the prison. *See* ROA, at 18–20. This was Allen’s third time being disciplined for discourteous treatment of coworkers. *Id.* He previously served a ten (10) day suspension in March of 2019 for making profane statements to a coworker and received a written reprimand in July of 2018 for engaging in a verbal altercation with a coworker. *See* ROA, at 20.

On November 19, 2019, Allen received and signed a written notification from Deputy Director Harold Wickham, advising Allen that he would be suspended for 15 days, effective November 24, 2019. *See* ROA, at 26.

Allen filed an Appeal of Dismissal, Suspension, Demotion, or Involuntary Transfer (Form NPD-54) one day after the effective date of his suspension. *See* ROA, at 28–31. The NPD-54 conspicuously instructs that “***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 subsection 7 of NAC 284.6561.***” *See* ROA, at 28. This instruction is taken directly from NAC 284.6562(2)(b), which mandates that any appeal “must” be “[a]ccompanied 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.”

However, Allen failed to attach any documents to his appeal form and did not attach Wickham’s written notification, as required by NAC 284.6562(2)(b). Allen also failed to cure his defective NPD-54 within the 10-day appeal period under NRS 284.390(1). Accordingly, NDOC moved to dismiss Allen’s appeal as jurisdictionally defective. *See* ROA, at 9–43.

Rule 5.1(b) of the Hearing Officer Rules of Procedure instructs that “the responding party shall file and serve upon all parties, within 10 days after service of a motion answering

1 points and authority and counter-affidavits.” *See* ROA, at 6–8. However, Allen chose not to
2 oppose NDOC’s motion to dismiss and did not request an extension of time to file points and
3 authorities.

4 Ultimately, Hearing Officer Gentile granted NDOC’s motion to dismiss on two separate
5 grounds: (1) that the motion to dismiss was not opposed by Allen, no extensions were sought,
6 and that “under local rules, failure to oppose a motion is deemed an admission that the motion is
7 meritorious and a consent to granting the same”; and (2) that NAC 284.6562 sets forth the
8 “mandatory manner in which an appeal must be initiated” and Allen failed to file a proper and
9 timely appeal in accordance with these mandatory requirements. *See* ROA, at 3–4.

10 II.

11 LAW AND ANALYSIS

12 A. STANDARD OF REVIEW.

13 Pursuant to NRS 284.390(1), classified employees of the State of Nevada may seek
14 review of a dismissal, demotion, or suspension before an administrative hearing officer. The
15 ultimate decision of the hearing officer is binding on the parties and any petition for judicial
16 review of the hearing officer decision must be filed in accordance with the provisions of NRS
17 Chapter 233B. *See* NRS 284.390.

18 Under NRS 233B.135(1), judicial review of a final decision of an agency is confined to
19 the record and a court shall not substitute its judgment for that of the agency on a question of
20 fact. Absent a legal error, review of an appeals officer's decision is limited to determining
21 whether there was substantial evidence in the record to support the appeals officer's decision.
22 *Maxwell v. State Indus. Ins. Sys.*, 109 Nev. 327, 331, 849 P.2d 267, 270 (1993). Moreover,
23 although statutory construction is generally a question of law reviewed *de novo*, courts must
24 “defer to an agency's interpretation of its governing statutes or regulations if the interpretation is
25 within the language of the statute.” *Taylor v. Dep't of Health & Human Servs.*, 129 Nev. 928,
26 930, 314 P.3d 949, 951 (2013).

27 The burden of proof is on the party attacking or resisting the administrative decision to
28 show the final decision is invalid. *See* NRS 233B.135(2). The court may remand or affirm the

1 final decision or set it aside in whole or in part if substantial rights of the petitioner have been
2 prejudiced because the final decision of the agency is: (a) in violation of constitutional or
3 statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon
4 unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the
5 reliable, probative and substantial evidence on the whole record; or (f) arbitrary capricious or
6 characterized by an abuse of discretion.” *See* NRS 233B.135(3).

7 **B. THE HEARING OFFICER CORRECTLY RULED THAT ALLEN’S FAILURE TO OPPOSE**
8 **NDOC’S MOTION TO DISMISS WAS AN ADMISSION THAT THE MOTION WAS**
9 **MERITORIOUS.**

10 Hearing Officer Gentile granted NDOC’s motion to dismiss on two separate grounds,
11 the first of which was that Allen failed to oppose NDOC’s motion to dismiss and that no
12 extensions were sought; therefore, “under local rules, failure to oppose a motion is deemed an
13 admission that the motion is meritorious and a consent to granting the same.” *See* ROA, at 3–4.

14 Apart from the fact that this issue was entirely ignored in Allen’s Opening Brief, the
15 Hearing Officer correctly held that Allen’s failure to oppose NDOC’s motion to dismiss was an
16 admission that the motion was meritorious. Indeed, Hearing Officer Gentile’s ruling on this
17 issue finds broad support among well-established Nevada law.

18 Rule 5.1(b) of the Hearing Officer Rules of Procedure instructs that “the responding
19 party **shall** file and serve upon all parties, within 10 days after service of a motion answering
20 points and authority and counter-affidavits.” *See* ROA, at 6–8 (emphasis added). Moreover, not
21 only did Rule 5.1(b) required Allen to file a brief in order to oppose NDOC’s motion to dismiss,
22 but Nevada courts have consistently instructed that a respondent’s failure to oppose a motion
23 may be construed as an admission that the motion is meritorious and as consent to granting the
24 same. EDCR 2.20(e) instructs that “[f]ailure of the opposing party to serve and file written
25 opposition may be construed as an admission that the motion and/or joinder is meritorious and a
26 consent to granting the same.” Likewise, DCR 13(3) instructs that “[f]ailure of the opposing
27 party to serve and file his written opposition may be construed as an admission that the motion
28 is meritorious and a consent to granting the same.” Furthermore, the Nevada Supreme Court has
repeatedly found that courts have discretion to construe a party’s failure to respond to a motion

1 as an admission that the motion is meritorious and as consent to granting the same. *See Walls v.*
2 *Brewster*, 112 Nev. 175, 178, 912 P.2d 261, 263 (1996) (district court properly construed
3 plaintiffs failure to respond to a motion to dismiss as an admission that the motion was
4 meritorious); *see also King v. Carlidge*, 121 Nev. 926, 928, 124 P.3d 1161, 1162 (2005)
5 (holding that the failure to timely oppose a motion for summary judgment was sufficient
6 grounds for the district court to, in its discretion, “construe that failure as an admission that the
7 motion is meritorious and a consent to granting the motion” for summary judgment).

8 Accordingly, Hearing Officer Gentile did not commit an error of law or abuse of
9 discretion when holding that Allen’s failure to oppose NDOC’s motion was an admission that
10 the motion was meritorious and was consent to granting the same.

11 **C. THE HEARING OFFICER'S DECISION ON THE JURISDICTIONAL DEFECT WAS NOT**
12 **LEGAL ERROR OR A MISAPPLICATION OF THE EXISTING REGULATIONS GOVERNING**
13 **THE REVIEW PROCESS.**

14 In addition to not opposing dismissal before Hearing Officer Gentile, it is undisputed
15 that Allen failed to attach written notification of his suspension to his NPD-54 appeal form, as
16 specifically required in NAC 284.6562(2)(b). *See ROA*, at 52–55. Allen also failed to timely
17 cure his defective NPD-54 appeal form within the 10-day appeal period under NAC
18 284.6562(1) and NRS 284.390(1). Accordingly, and based on his interpretation of the Personnel
19 Commission’s own governing statutes and regulations, Hearing Officer Gentile found that NAC
20 284.6562 sets forth the “mandatory manner in which an appeal must be initiated,” that Allen
21 had not filed a complete and proper notice of appeal within the 10-day filing deadline, and that
22 Allen’s defective appeal failed to meet mandatory and jurisdictional requirements for bringing
23 an administrative appeal. *See ROA*, at 3–4.

24 This Court finds that the Hearing Officer's decision with respect to this jurisdictional
25 defect was not legal error or a misapplication of the existing regulations governing the review
26 process. The Court also notes that Allen did not oppose NDOC’s jurisdictional arguments
27 during the administrative proceeding.

28 NRS 284.390(1) establishes a mandatory 10-day deadline for employee disciplinary
appeals. Under NRS 284.065(2)(d), the Nevada Legislature delegated to the Personnel

1 Commission authority to adopt all “regulations to carry out the provisions” of NRS Chapter
2 284. This delegated authority was not limited to the adoption of mere procedural rules but all
3 regulations. *Compare with NDOT v. Bronder*, 136 Nev. Advance Op. 76 (Dec. 3, 2020)
4 (holding that the Personnel Commission could not adopt jurisdictional rules under NRS
5 281.641, because the authority granted under that statute was limited to the adoption of
6 procedural rules.) With that delegated power, the Personnel Commission adopted NAC
7 284.6562, which sets forth the requirements for satisfying the mandatory 10-day filing deadline
8 under NRS 284.390(1). Among these mandatory requirements is that the appeal “must” be
9 “accompanied by the written notification of the appointing authority’s decision regarding the
10 proposed [disciplinary] action.” *See* NAC 284.6562(2)(b). The intent of the Personnel
11 Commission in adopting NAC 284.6562(2)(b) was plain and the only exception to this
12 mandatory requirement is enumerated in NAC 284.6562(3), which does not apply here. NAC
13 284.6562(2)(b) is also quoted verbatim, in bold and italicized letters, on the first page of every
14 NPD-54 appeal form. *See* ROA, at 28.

15 Regulations adopted by the Personnel Commission, such as NAC 284.6562(2)(b), have
16 the full force and effect of law. *Turk v. Nev. State Prison*, 94 Nev. 101, 104, 575 P.3d 599, 601
17 (1978). Moreover, the powers of an administrative agency are strictly limited to only those
18 powers specifically set forth by statute and regulation. *See Clark Cty. Sch. Dist. v. Clark Cty.*
19 *Classroom Teachers Ass’n*, 115 Nev. 98, 102 977 P.2d 1008, 1010 (1999). Indeed, an
20 administrative agency cannot act outside its legal authority without committing an abuse of
21 discretion. *See Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993) (“[W]here a
22 trial court exercises its discretion in clear disregard of the guiding legal principles, this action
23 may constitute an abuse of discretion.”)

24 Accordingly, NAC 284.6562 has the full force and effect of law and sets forth the
25 mandatory requirements for submitting a proper and timely administrative appeal under NRS
26 284.390(1). Furthermore, the Nevada Supreme Court has held that the proper and timely filing
27 of a notice of appeal is jurisdictional. *See Rust v. Clark Co. School Dist.*, 103 Nev. 686, 688,
28 747 P.2d 1380, 1382 (1987) (“[t]he proper and timely filing of a notice of appeal is

jurisdictional.”) Also, not every agency decision is reviewable under NRS 284.390 and NAC 284.6562, but only the decisions that fall within those provisions are challenged in accordance with the mandatory requirements set forth therein. *See Clark Cty. Classroom Teachers Ass’n*, 115 Nev. at 102. Otherwise, it would be outside a hearing officer’s limited authority and an abuse of discretion to allow an appeal to proceed in disregard of a party’s non-compliance with the mandatory provisions of NAC 284.6562(2).

It is undisputed that Allen’s appeal omitted the written notification required pursuant to NAC 284.6562(2)(b) and Allen failed to timely cure his defective appeal within the 10-day appeal period. Accordingly, Hearing Officer Gentile did not commit legal error or misapply relevant legal authority when he found that Allen’s appeal was jurisdictionally defective. Not only was Hearing Officer Gentile’s conclusion correct, but his interpretation of NRS 284.390 and NAC 284.6562 are entitled to deference as a matter of law. *See Taylor*, 129 Nev. at 930 (“Although statutory construction is generally a question of law reviewed de novo, this court ‘defer[s] to an agency’s interpretation of its governing statutes or regulations if the interpretation is within the language of the statute.’”))

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that the Petitioner’s April 3, 2020, Petition for Judicial Review is DENIED and that the Decision and Order issued by Hearing Officer Mark Gentile on March 4, 2020, under Appeal No. 2008570-MG, is AFFIRMED.

DATED March 25th, 2021.


ELIZABETH GONZALEZ
District Court Judge

1 Respectfully submitted by:

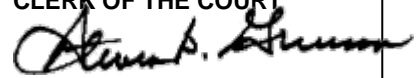
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DISTRICT COURT
CLARK COUNTY, NEVADA

SHARI KASSEBAUM,

Petitioner,

vs.

STATE OF NEVADA ex rel. its
DEPARTMENT OF CORRECTIONS; STATE
OF NEVADA ex rel., its DEPARTMENT OF
ADMINISTRATION, PERSONNEL
COMMISSION, HEARING OFFICER,

Respondents.

Case No: A-20-811982-J
Dept. No: 8

**RESPONDENT, DEPARTMENT OF
CORRECTIONS' REQUEST TO SET
MATTER FOR HEARING**

Request for Hearing

Pursuant to NRS 233B.133(4), any party may request a hearing on a Petition for Judicial Review within seven (7) days after the expiration of the time within which the petitioner is required to reply. Unless a request for hearing has been filed, the matter shall be deemed submitted.

Petitioner, Shari Kassebaum, filed her Petition for Judicial Review (PJR) on March 10, 2020, and her Memorandum of Points and Authorities (Opening Brief) on February 22, 2021. NDOC filed its Reply Memorandum Points and Authorities (Answering Brief) on April 8, 2021. Petitioner had until May 10, 2021, to file a Reply Brief but has not filed one. Therefore, the matter has been fully briefed but not calendared for argument and/or decision. This request for hearing is being made within seven days after the expiration of the time within which the petitioner is required to reply. Thus, pursuant to

1 NRS 233B.133(4), Respondent hereby respectfully requests a hearing and/or oral argument on the merits
2 of the Petition for Judicial Review.

3 DATED: May 13, 2021.

4
5 AARON D. FORD
6 Attorney General

7 By: /s/ Michelle Di Silvestro Alanis
8 MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)
9 Supervising Senior Deputy Attorney General
10 *Attorney for Respondent, Department of Corrections*
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1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that
3 on May 13, 2021 I electronically filed the foregoing **RESPONDENT, DEPARTMENT OF**
4 **CORRECTIONS' REQUEST TO SET MATTER FOR HEARING** via this Court's electronic filing
5 system. Parties that are registered with this Court's electronic filing system will be served electronically.
6

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18 /s/ Anela Kaheaku
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7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 SHARI KASSEBAUM,

Case No.: A-20-811982-J

Dept. No.: 8

10 Petitioners,

11 v.

12 STATE OF NEVADA ex rel, its DEPARTMENT
OF CORRECTIONS, and STATE OF NEVADA ex
13 rel, its DEPARTMENT OF ADMINISTRATION
PERSONNEL COMMISSION, HEARING
14 OFFICER, CARA BROWN

15 Respondents.
16

PETITIONER SHARI KASSEBAUM'S REPLY BRIEF

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1 ARGUMENT

2 **I. JUDICIAL ESTOPPEL DOES NOT APPLY.**

3 The Nevada Department of Corrections (hereafter "NDOC") argues that Kassebaum's Petition
4 is barred by the doctrine of judicial estoppel because her former counsel filed what was titled a
5 "limited opposition" to NDOC's Motion to Dismiss. In that filing Kassebaum predicted that the Motion
6 would be granted because NAC 284.6562(2)(b) was changed to require the attachment of the final
7 disciplinary document. There was no analysis as to any jurisdictional issues.

8 NDOC is not entitled to judicial estoppel. In December of 2020 the Nevada Supreme Court
9 clarified the doctrine of judicial estoppel in *Kaur v. Singh*, 136 Nev. Adv. Op. 77, 477 P.3d 358 (2020).
10 The court reiterated that courts must apply a five-part test consisting of:

11 (1) the same party has taken two positions; (2) the positions were taken in judicial or
12 quasi-judicial administrative proceedings; (3) the party was successful in asserting the
13 first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two
positions are totally inconsistent; and (5) the first position was not taken as a result of
ignorance, fraud, or mistake.

14 477 P.3d at 362 item 363 citing *In re Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. 50, 56, 390
15 P.3d 646, 652 (2017). The Supreme Court emphasized "judicial estoppel should be applied only when
16 a party's inconsistent positions arises from *intentional* wrongdoing or an attempt to obtain an unfair
17 advantage". Id at 363.

18 NDOC has failed to establish all 5 requirements of the test for judicial estoppel. Shari
19 Kassebaum has not taken two (2) positions. In her Limited Opposition it merely states "procedurally,
20 Employer will prevail on its Motion to Dismiss" without ever addressing the issue of jurisdiction. This
21 is a prediction, not a concession. (ROA at 011). A simple prediction that a Hearing Officer will
22 erroneously rule is not actually an inconsistent position.

23 However, even if the court found Kassebaum's position before the Hearing Officer to be
24 contrary to the position asserted in her Petition, NDOC still fails to establish elements three (3) and

1 five (5). Kassebaum was not successful in asserting her position before the Hearing Officer; rather, she
2 was unsuccessful in opposing NDOC's position. Moreover, the position of Kassebaum through her
3 Limited Opposition was the result of a mistake of law.

4 Finally, NDOC cannot make a showing that Kassebaum's legal arguments in her Petition for
5 Judicial Review arose "from intentional wrongdoing or an attempt to obtain an unfair advantage." This
6 is fatal to NDOC's argument regarding judicial estoppel.

7 **II. BOTH JURISDICTIONAL AND CONSTITUTIONAL ARGUMENTS MAY BE**
8 **RAISED FOR THE FIRST TIME ON APPEAL.**

9 In attempting to counter the arguments put forth by Kassebaum in her Petition that NAC
10 284.6562(2)(b) is not jurisdictional, and that her due process rights were violated, NDOC asserts that
11 Kassebaum cannot raise new issues for the first time, and has waived any right to judicial review by
12 doing so. (Answering Brief at pp. 5-6, 7-8).

13 However, there are two (2) well-established exceptions to the rule that new issues may not be
14 raised on appeal. The first is that arguments relating to jurisdiction are never waived. As noted in *Old*
15 *Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 623 P.2d 98 (1981) "A point not urged in the trial court, *unless*
16 *it goes to the jurisdiction of that court*, is deemed to have been waived and will not be considered on
17 appeal". (*Emphasis added*). See also *Garmong v. Lyon County Bd. of Commissioners*, 439 P.3d 962
18 (2019) ("issue of jurisdiction may be considered for the first time on appeal"); *Wallace v. Smith*, 2018
19 WL 142-6396 (Nev. 2018) ("questions of jurisdiction can never be waived or stipulated away by the
20 parties" and "may be raised at any time, even *sua sponte* by the court for the first time on appeal").

21 The second exception is that constitutional issues may be raised for the first time on appeal.
22 *Tam v. Eighth Judicial District Court*, 131 Nev. 792, 358 P.3d 234 (2015). See also *Jones v. State*, 101
23 Nev. 573, 707 P.2d 1128 (1985) (where "fundamental rights are implicated, it is appropriate to hear a
24 constitutional question for first time on appeal"). The right to a hearing in connection with being

1 deprived of a property interest in employment is a fundamental right secured under the 14th
2 Amendment. *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985); *Gilbert v.*
3 *Homart*, 520 U.S. 924, 117 S. Ct. 1807 (1997).

4 Because the arguments raised by Kassebaum in her Petition go to both jurisdiction and federal
5 constitutional due process, they may be raised for the first time in this Petition notwithstanding former
6 counsel's failure to recognize them.

7 **III. NDOC'S ANSWERING BRIEF FAILS TO CITE ANY RELEVANT AUTHORITIES**
8 **TO ESTABLISH THAT NAC 284.6562(1) IS JURISDICTIONAL.**

9 As set forth in Kassebaum's Opening Brief, "administrative agencies cannot enlarge their own
10 jurisdiction" and "the scope of an agency's authority is limited to the matters the legislative body has
11 expressly or implicitly delegated to the agency." *City of Reno v. Civil Service Commission of City of*
12 *Reno*, 117 Nev. 855, 34 P.3d 120 (2001). As more recently explained by the Nevada Supreme Court in
13 *McNeill v. State*:

14 [a]lthough the legislature may not delegate its power to legislate, it may delegate the
15 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.

16 Thus, the legislature can make the application or operation of a statute complete within
17 itself dependent upon the existence of certain facts or conditions, the ascertainment of
18 which is left to the administrative agency. *Telford v. Gainesville* [208 Ga. 56], 65
19 S.E.2d 246 (1951). In doing so the legislature vests the agency with mere fact finding
20 authority and not the authority to legislate. *Ex rel. Ginocchio v. Shaughnessy*, [47 Nev.
21 129, 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).

22 132 Nev. 551, 556, 375 P.3d 1022, 1025-1026 (2016) quoting *Sheriff v. Luqman*, 101 Nev. 149, 153,
23 697 P.2d 107, 110 (1985).

1 The Legislature determines the jurisdiction of Personal Commission hearing officers to hear
2 appeals under NRS 284.690, not the Personnel Commission. Nowhere in NRS 284.065, wherein the
3 Legislature authorized the Personal Commission to adopt regulations "to carry out the provisions" of
4 Chapter 284, did the Legislature gives the Commission authority to adopt rules of jurisdictional
5 dimension. See e.g. *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and*
6 *Trainman General Committee of Adjustments, Central Region*, 558 U.S. 67, 130 S. Ct. 584 (2009)
7 ("Congress gave the Board no authority to adopt rules of jurisdictional dimension").

8 NDOC's Answering Brief cites *Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 310 P.3d
9 569 (2013) in support of its jurisdictional argument claiming that NAC 284.6562 states a specific "time
10 and manner" for filing an appeal. However, a review of *Markowitz* reveals that it does not address
11 jurisdiction. Rather, it addresses whether a rule is "mandatory" and where substantial compliance is
12 sufficient.

13 As pointed out in Kassebaum's Opening Brief, it is the Legislature, not the Personnel
14 Commission, which has determined through NRS 284.390 the "time and manner" in which an appeal
15 must be filed. Under the statute, the "time" for filing the appeal is "10 working days"; the "manner" is
16 that the appeal must be "in writing". No other jurisdictional requirements are established by the
17 Legislature.

18 Kassebaum's Opening Brief attached the Meeting Minutes of the Personnel Commission for
19 June 8, 2018 and the Legislative Counsel Bureau's "Explanation of Proposed Change" to its Opening
20 Brief. Nothing within those materials supports NDOC's claim that the change was intended to be
21 jurisdictional. Rather, the intent of the rule change was to be procedural in nature only, and it was to
22 assist the Department of Administration in distinguishing between hearings which occur prior to, and
23 subsequently after the discipline is imposed.

1 NDOC's Answering Brief cites *Turk v. Nevada State Prison*, 94 Nev. 101, 575 P.3d 599 (1978)
2 for the proposition the regulations adopted by the Personnel Commission have the "force and effect of
3 law". While undoubtedly true, this does not make them "jurisdictional". As set forth in Kassebaum's
4 Opening brief, because only the Legislature may set jurisdictional limits it renders the provisions of
5 NAC 284.6562 to be a "claims processing rule".

6 NDOC's Answering Brief cites no reason(s) that the written decision of the appointing
7 authority could not have been provided at a later date. Such documents were not even required prior to
8 the 2018 revision to the regulation. Proceedings may be suspended under claims processing rules in
9 order to bring parties into compliance. *Union Pacific Railroad Co. v. Brotherhood of Locomotive*
10 *Engineers and Trainman General Committee of Adjustments, Central Region*, supra.

11 **IV. THE FAILURE TO PROVIDE KASSEBAUM WITH A POST SUSPENSION**
12 **HEARING VIOLATED DUE PROCESS.**

13 **A. The 14 Amendment Mandates A Post-Termination Hearing.**

14 As set forth in Kassebaum's Brief, the provisions of NRS 281.390 (7) create a property interest
15 in Kassebaum's employment within the meaning of the 14th Amendment. Under *Cleveland Board of*
16 *Education v. Loudermill*, supra, and *Gilbert v. Homart*, supra, a more comprehensive post-termination
17 evidentiary hearing is mandatory where, as in Kassebaum's case, she was only provided with an
18 informal pre-deprivation hearing. NDOC does not dispute that as a result of the dismissal of
19 Kassebaum's appeal, she did not receive that more comprehensive post-termination hearing.

20 NDOC cites an Eighth Circuit case, *Krentz v. Robertson Fire Protection District*, 228 F.3d. 897
21 (8th Cir. 2000) to argue that where an employee refuses to participate in a post-termination proceeding,
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1 the employee has waived their procedural due process rights.¹ However, Kassebaum did not refuse to
2 participate in any post-termination proceedings. To the contrary, Kassebaum filed an appeal seeking a
3 post-termination hearing. *She was denied that hearing at the urging of NDOC for the failure to attach*
4 *a piece of paper which NDOC does not dispute that it already had in its possession.*

5 Implicit in NDOC's argument is that failing to fully comply with the provisions of NAC
6 284.6562 is akin to a waiver. This argument fails for two (2) reasons. First, *Loudermill* itself rejects the
7 argument that constitutionally adequate process is to be determined by state law. The *Loudermill*
8 emphasized that the right to due process "is conferred, not by legislative grace, but by constitutional
9 guarantee", and while the Nevada Legislature may elect not to confer a property interest, "it may not
10 constitutionally authorize the deprivation of such an interest, once conferred, without appropriate
11 procedural safeguards". 470 U.S. at 541, 105 S. Ct. at 1493. If the Nevada Legislature cannot
12 constitutionally authorize the deprivation of a property interest without the procedural safeguard of a
13 deprivation hearing, the Nevada Personnel Commission certainly cannot do so.

14 The second problem with NDOC's "waiver by failure to attach a piece of paper theory" is that
15 to waive a fundamental constitutional right, the waiver must be "knowing and intelligent". *Johnson v.*
16 *Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Housewright v. Lefrak*, 99 Nev. 684, 669
17 P.2d 711 (1983). The right to due process before being deprived of property is a fundamental
18 constitutional right, and the failure to attach a piece of paper could not be deemed a knowing and
19 intelligent waiver because, as set forth below, the appeal form is fundamentally contradictory.

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24 ¹ NDOC also cites *Dusanek v. Hannon*, 677 F.2d 538 (7th Cir. 1982). However, this case is of little utility as it
predates *Loudermill* which was not decided until 1985.

1 **B. Kassebaum's Due Process Rights Were Violated Because The Appeal Form Had**
2 **Contradictory Instructions And Did Not Appraise Kassebaum That Failure To**
3 **Attach The Final Decision Would Result In Dismissal Of The Appeal.**

4 As set forth in Kassebaum's Opening Brief, NAC 284.778(1) provides that the appeal under
5 NRS 284.390 is to be submitted "on the form provided by the Division of Human Resource
6 Management". That form is the NPD-54 entitled "Dismissal, suspension, demotion or Involuntary
7 Transfer." (ROA at 069-070).

8 The NPD-54 contains a section entitled "Appeal Instructions". Those "Appeal Instructions"
9 make no mention of attachments to the appeal form, and instead states "Attachments to this Board may
10 be provided however, evidence and back up documents need not be provided at this time; prior to the
11 hearing, the clerk will send a request for any supporting material." The next sentence states "If you
12 have received a Specificity of Charges or written notice of involuntary transfer, you must attach it to
13 this appeal. A Specificity of Charges is a different document than the final disciplinary decision. The
14 Specificity is the notice of the charges and the "recommendation" for disciplinary action which is the
15 HR-41 form. [https://hr.nv.gov/uploadedFiles/hrnvgov/Content/Resources/Forms/Disciplinary/HR-](https://hr.nv.gov/uploadedFiles/hrnvgov/Content/Resources/Forms/Disciplinary/HR-41%2010_20.pdf)
16 [41%2010_20.pdf](https://hr.nv.gov/uploadedFiles/hrnvgov/Content/Resources/Forms/Disciplinary/HR-41%2010_20.pdf).²

17 NDOC's Answering Brief correctly notes that the first page of the NPD-54 states "This appeal
18 form must be accompanied by the written notification of the appointing authority's decision regarding
19 the proposed action provided to the employee pursuant to (7) of NAC 284.6561". However, this is in a
20 section entitled "Note" as opposed to the "Appeal Instructions".

21 The failure to place this information in the "Appeal Instructions", coupled with the contrary
22 instructions informing an employee that documents may be provided at a later date, violates due
23 process. As noted in the Opening Brief, the Nevada Supreme Court in *Rust v. Clark County School*

24 ² Prior to November of 2020 it was designated the "NPD-41" form.

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

4 **V. THE HEARING OFFICER'S DECISION IS NOT ENTITLED TO DEFERENCE.**

5 NDOC argues that Hearing Officer Brown's interpretation of NAC 284.6562 should be deferred
6 to. However, issues of law, including statutory interpretation, are to be reviewed *de novo*. The fact that
7 NAC 284.6562 is a claims processing rule, and not jurisdictional, and the due process violation of
8 depriving an employee with a property interest of a post-termination hearing, is outcome
9 determinative.

10 However, on a Petition for Judicial Review issues of law, including statutory construction, are
11 reviewed *de novo*. *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. —, —, 240 P.3d 2, 4 (2010).
12 Courts are to "decide pure legal questions without deference to an agency determination." *City of Reno*
13 *v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 119, 251 P.3d 718, 721 (2011).

14 The problem with NDOC's deference is that different hearing officers have interpreted the same
15 issue differently. (See Appendix A to this Brief). Under NDOC's deference theory, hearing officer
16 decisions finding NAC 284.6562 non-jurisdictional would be entitled to the same deference creating
17 inconsistent results depending upon which hearing officer was randomly assigned.

18 Whether a regulation adopted by the Personal Commission is jurisdictional, or alternatively he
19 claims processing rule, and whether depriving an employee of the post-termination hearing mandated
20 by *Loudermill*, are not the sort of analyses which are entitled to any deference. They are purely issues
21 of law to be determined by the court *de novo*.

22 **VI. CLAIM PRECLUSION DOES APPLY.**

23 As set forth in Kassebaum's Opening Brief Kassebaum raised the same issues in her Petition for
24 Judicial Review against NDOC in Case No. A-20-811982-J in connection with another appeal which

1 was dismissed. That Petition was *granted* by Department 31, the Hon. Joanna Kishner, on February 18,
2 2021.

3 NDOC argues that the pollution is applicable because "another District Court's ruling which is
4 published is not controlling legal authority and not binding on this Court in any way". (Answering
5 Brief at p. 18). NDOC fundamentally misconstrues issue preclusion. That doctrine is not based on
6 district court decisions being "published" or "precedent". It is based upon the principle that once an
7 issue is litigated to a final judgment, it may not be re-litigated by the party against whom the prior
8 judgment is asserted.

9 All of the elements from *Five Star Capital Corporation v. Ruby*, 124 Nev. 1048, 194 P.3d 709
10 (2008) are present. The issue decided in Case No. A-20-811982-J is identical – whether NAC
11 284.6562 is jurisdictional, or alternatively a claims processing rule, and whether the dismissal violates
12 the 14th Amendment's Due Process Clause. Judge Kishner's Decision was on the merits in final. The
13 party against whom the judgment is asserted is the same – NDOC. Finally, the issue of whether NAC
14 284.6562 is jurisdictional, or alternatively a claims processing rule, and whether the dismissal violates
15 the 14th Amendment's Due Process Clause, were actually and necessarily litigated.

16 Judge Kishner determines that judicial review must be granted because the hearing officer
17 below did not consider the issue of whether the regulation is a claims processing rule, or whether
18 granting a dismissal violates due process. While Sergeant Kassebaum believes that Petitioner should
19 have granted the review and remanded with instructions to proceed with the appeal, as opposed to
20 simply examine the issues not previously considered, Kassebaum, like NDOC is bound by the prior
21 decision.

22 Because this issue was first litigated to a final judgment in Case No. A-20-811982-J, and
23 because all of the elements of issue preclusion have been met, the results in this case are required to be
24 the same.

1 **VII. CONCLUSION.**

2 For all of the reasons set forth above, Kassebaum's Petition for Judicial Review should be
3 GRANTED in this matter remitted back to the hearing officer to determine whether NAC 284.6562 is
4 a claims processing rule, and whether the failure to provide a post-termination evidence year he
5 hearing violates due process of law.

6 DATED this 25th day of May 2021.

7 LIZADA LAW FIRM, LTD.

8 

9 ANGELA J. LIZADA, ESQ.

10 Nevada Bar No. 11637

11 711 S. 9th St.

12 Las Vegas, NV 89101

13 angela@lizardalaw.com
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Michelle D. Alanis, Esq.
Senior Deputy Attorney General
NEVADA ATTORNEY GENERAL'S OFFICE
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**DISTRICT COURT
CLARK COUNTY, NEVADA****Other Judicial Review/Appeal****COURT MINUTES****October 01, 2021**

A-20-811982-J

Shari Kassebaum, Petitioner(s)

vs.

Nevada Department of Corrections, Respondent(s)

October 01, 2021**3:00 AM****Minute Order - Petition for Judicial Review:
Respondent, Department of Corrections' Request to
Set Matter for Hearing****HEARD BY:** Clark Newberry, Tara**COURTROOM:** Chambers**COURT CLERK:** Carina Bracamontez-Munguia/cbm**PARTIES** None. Minute order only – no hearing held.**PRESENT:****JOURNAL ENTRIES**

The Court having further reviewed District Court Case. A-20-811982-J, Ray Allen v. State of Nevada ex rel, the September 22, 2021 Hearing in this matter, the February 22, 2021 Petitioners Opening Brief, the April 8, 2021 Respondent's Answering Brief, the May 25, 2021 Petitioner's Reply Brief, the February 8, 2021 Transmittal of Record on Appeal, and the entirety of the Record, finds the legal assertions in Respondent's Answering Brief persuasive. Specifically, the COURT FINDS substantial evidence to support the Appeal's Officer's granting of NDOC's Motion to Dismiss Appeal for Lack of Jurisdiction. Pursuant to NAC 284.6562(2)(b), Kassebaum failed to attach the written notification of her final discipline to her appeal form. Additionally, Kassebaum failed to oppose NDOC's Motion to Dismiss as her Limited Opposition did not contest the jurisdictional challenge by NDOC in failing to attach the final discipline form, but rather solely disputed the facts. In doing so, Kassebaum failed to preserve the jurisdictional issue for appeal and therefore it is deemed waived for purposes of this Petition for Judicial Review. Lastly, the COURT FINDS the Appeal's Officer applied the appropriate standard of evidence, made thorough findings of fact, and applied the relevant law to the case. Therefore, it is ORDERED that the Petition for Judicial Review is DENIED.

Per EDCR 7.21, within 14 days, Counsel for Respondent to prepare the Proposed Order, circulate to Counsel for Petitioner for signature as to Form and Content, and submit to dc21inbox@clarkcountycourts.us. Counsel for Respondent may use the legal arguments contained within their Answering Brief as a basis of the Order.

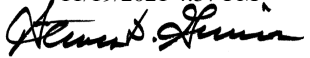
CLERK'S NOTE: The above minute order has been electronically served to parties via e-mail and/or Odyssey File & Serve. //cbm 10-01-2021

PRINT DATE: 10/01/2021

Page 1 of 1

Minutes Date: October 01, 2021

JA 00342


CLERK OF THE COURT

AARON D. FORD
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*Attorneys for Respondent State of Nevada
ex rel. Department of Corrections*

DISTRICT COURT
CLARK COUNTY, NEVADA

SHARI KASSEBAUM,

Petitioner,

vs.

STATE OF NEVADA ex rel. its
DEPARTMENT OF CORRECTIONS; STATE
OF NEVADA ex rel., its DEPARTMENT OF
ADMINISTRATION, PERSONNEL
COMMISSION, HEARING OFFICER,

Respondents.

Case No: A-20-811982-J
Dept. No: 21

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER DENYING PETITION
FOR JUDICIAL REVIEW**

This matter having come on for hearing on the 22nd day of September 2021, on Petitioner, Shari Kassebaum's Petition for Judicial Review filed on March 10, 2020, requesting review of the Hearing Officer's Decision and Order. Respondent, State of Nevada ex rel. its Department of Corrections' (NDOC) appearing by and through its counsel Michelle Di Silvestro Alanis, Supervising Senior Deputy Attorney General of the Attorney General's Office; and Petitioner, Shari Kassebaum (Kassebaum), appearing by and through her counsel Adam Levine, Esq., of the Law Office of Daniel Marks; the Court having reviewed the papers and pleadings on file, including Petitioner's Opening Brief, filed on February 22, 2021; Respondent's Answering Brief, filed on April 8, 2021; Petitioner's Reply Brief, filed on May 25, 2021, the Record on Appeal, and having reviewed *Allen v. State of Nevada*, District Court

1 Case A-20-811982-J, having heard the arguments of counsel, and good cause appearing hereby makes
2 the following findings of fact, conclusions of law, and order:

3 **A. FINDINGS OF FACT**

4 THE COURT HEREBY FINDS the legal assertions in Respondent's Answering Brief persuasive.

5 THE COURT FURTHER FINDS the Hearing Officer applied the appropriate standard of
6 evidence and made thorough findings of fact.

7 THE COURT FURTHER FINDS Kassebaum was a correctional sergeant employed at NDOC
8 and assigned to Southern Desert Correctional Center. ROA 71.

9 On August 9, 2019, NDOC served Kassebaum with a Specificity of Charges (SOC), which
10 recommended a two-day (sixteen hour) suspension without pay as a result of her continuous discourteous
11 conduct towards her fellow employees and supervisors. ROA 21-179.

12 On August 23, 2019, NDOC conducted a pre-disciplinary review pursuant to NAC 284.6561 but
13 Kassebaum chose not to attend her scheduled pre-disciplinary review. The pre-disciplinary review officer
14 concurred with the proposed discipline of a two-day suspension without pay. ROA 182.

15 On August 28, 2019, NDOC served Kassebaum with the written notification of Acting Director
16 Harold Wickham's final decision that Kassebaum would be suspended for two days without pay effective
17 August 30, 2019. ROA 181.

18 On or about September 12, 2019, Kassebaum filed an appeal of her discipline by filing the NPD-
19 54 Form titled "Appeal of Dismissal, Suspension, Demotion, or Involuntary Transfer" (Appeal Form).
20 The Appeal Form specifically states, "***This appeal form must be accompanied by the written notification***
21 ***of the appointing authority's decision regarding the proposed action provided to the employee pursuant***
22 ***to subsection 7 of NAC 284.6561.***" ROA 223-235.

23 Kassebaum attached a typed statement totaling nine pages to the Appeal Form explaining why
24 she believed the action taken was not reasonable and done in retaliation. However, Kassebaum's Appeal
25 Form was not accompanied by the written notification of Acting Director Wickham as required by NAC
26 284.6562(2)(b). ROA 223-235.

27 NDOC filed its "Motion to Dismiss Appeal for Lack of Jurisdiction." NDOC argued that the
28 appeal was jurisdictionally defective because Kassebaum failed to comply with the mandatory

1 requirements of NAC 284.6562(2) and could not amend since the 10-day appeal period under NRS
2 284.390(1) had expired. ROA 14-208.

3 Kassebaum filed a “Limited Opposition to Motion to Dismiss Appeal” in which she did not
4 oppose any of the legal issues raised by NDOC and only opposed the statement of facts in the Motion to
5 Dismiss. In her limited opposition, Kassebaum “concedes that under the revised NAC 284.6562(2)(b) it
6 is now required” for an Appeal to include the written notification of the appointing authority. Kassebaum
7 did not dispute that the requirements of NAC 284.6562 and NRS 284.390 were mandatory and
8 jurisdictional. Kassebaum further noted that “the language of NAC 284.6562 is clear...that employee
9 must submit the written notification of the appointing authority’s decision.” Accordingly, Kassebaum
10 wholly conceded that she failed to comply with NAC 284.6562(2)(b) and that she failed to submit a
11 complete and proper appeal within the 10-day filing period under NRS 284.390(1). ROA 11-12.

12 NDOC filed its Reply in Support of Motion to Dismiss, which noted Kassebaum’s non-opposition
13 to the legal arguments for dismissal. ROA 7-10.

14 Hearing Officer Gentile granted NDOC’s Motion to Dismiss. The Hearing Officer found that in
15 her “limited opposition” Kassebaum conceded that procedurally her notice of appeal was deficient. The
16 Hearing Officer further concluded that “NAC 284.6562 sets forth the mandatory manner in which an
17 appeal must be initiated” and that Kassebaum’s notice of appeal was deficient. ROA 0003-5.

18 If any of these Findings of Fact are properly considered as Conclusions of Law, they shall be so
19 construed.

20 **B. CONCLUSIONS OF LAW**

21 THE COURT HEREBY CONCLUDES that the standard of review for evaluating a hearing
22 officer’s decision is set forth in NRS 233B.010.

23 THE COURT FURTHER CONCLUDES that the District Court defers to the agency’s findings
24 of fact that are supported by substantial evidence and reviews questions of law de novo. *Taylor v. Dep’t.*
25 *of Health & Human Servs.*, 129 Nev. 928, 930, (2013). However, in reviewing statutory construction, the
26 Court “defer[s] to an agency’s interpretation of its governing statutes or regulations if the interpretation
27 is within the language of the statute.” *Id.* quoting *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*,
28 124 Nev. 701, 709, (2008).

1 NRS 284.390(1) establishes a mandatory 10-day deadline for employee disciplinary appeals.
2 Under NRS 284.065(2)(d), the Nevada Legislature delegated to the Personnel Commission authority to
3 adopt all “regulations to carry out the provisions” of NRS Chapter 284. This delegated authority was not
4 limited to the adoption of mere procedural rules but all regulations.

5 With that delegated power, the Personnel Commission adopted NAC 284.6562, which sets forth
6 the requirements for satisfying the mandatory 10-day filing deadline under NRS 284.390(1). Among
7 these mandatory requirements is that the appeal “must” be “accompanied by the written notification of
8 the appointing authority’s decision regarding the proposed [disciplinary] action.” *See* NAC
9 284.6562(2)(b).

10 The word “must,” as used in NAC 284.6562(2), imposes a mandatory requirement. *See Washoe*
11 *Cty. v. Otto*, 128 Nev. 424, 432 (2012).

12 NAC 284.6562(2)(b) is quoted verbatim, in bold and italicized letters, on the first page of every
13 NPD-54 appeal form. ROA 223.

14 Regulations adopted by the Personnel Commission, such as NAC 284.6562, have the full force
15 and effect of law. *See Turk v. Nev. State Prison*, 94 Nev. 101, 104, 575 P.3d 599, 601 (1978).

16 The powers of an administrative agency are strictly limited to only those powers specifically set
17 forth by statute and regulation. *See Clark Cty. Sch. Dist. V. Clark Cty. Classroom Teachers Ass’n*, 115
18 Nev. 98, 102 977 P.2d 1008, 1010 (1999). Indeed, an administrative agency cannot act outside its legal
19 authority without committing an abuse of discretion.

20 NAC 284.6562 has the full force and effect of law and sets forth the mandatory requirements for
21 submitting a proper and timely administrative appeal under NRS 284.390(1). The Nevada Supreme Court
22 has held that the proper and timely filing of a notice of appeal is jurisdictional. *See Rust v. Clark Co.*
23 *School Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987).

24 THE COURT FURTHER CONCLUDES There was substantial evidence to support the Hearing
25 Officer’s granting of NDOC’s Motion to Dismiss Appeal for Lack of Jurisdiction.

26 The Hearing Officer’s interpretation of NAC 284.6562 is owed deference.

27 Pursuant to NAC 284.6562(2)(b), Kassebaum failed to attach the written notification of her final
28 discipline to her appeal form.

1 Kassebaum failed to oppose NDOC's Motion to Dismiss as her Limited Opposition did not
2 contest the jurisdictional challenge by NDOC in failing to attach the final discipline form, but rather
3 solely disputed the facts. In doing so, Kassebaum failed to preserve the jurisdictional issue for appeal and
4 therefore it is deemed waived for purposes of this Petition for Judicial Review.

5 The Hearing Officer applied the appropriate standard of evidence, made thorough findings of fact,
6 and applied the relevant law to the case.

7 Kassebaum is judicially estopped from arguing in her petition for judicial review that NAC
8 284.6562 is not jurisdictional and is a claims processing rule as it is inconsistent from the position set
9 forth in her Limited Opposition before the Hearing Officer.

10 Kassebaum cannot raise a new theory for the first time on appeal which is inconsistent from the
11 one she raised before the Hearing Officer.

12 The Hearing Officer properly determined that the plain language of NAC 284.6562 imposed
13 mandatory and jurisdictional requirements for initiating an appeal under NRS 284.390.

14 The Hearing Officer properly ruled that Kassebaum's appeal was deficient and Kassebaum did
15 not file a proper and timely appeal under NRS 284.390 or NAC 284.6562.

16 The District Court's decision in *Kassebaum v. NDOC*, Case No. A-20-810424-P did not create
17 issue preclusion with the issues raised herein.

18 If any of these Conclusions of Law are properly considered as Findings of Fact, they shall be so
19 construed.

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1 **C. ORDER**

2 IT IS THEREFORE ORDERED that Kassebaum's Petition for Judicial Review is DENIED
3 and the Hearing officer's ruling is hereby AFFIRMED.

4 DATED: _____

Dated this 19th day of November, 2021

6 

7 3A9 2CA 45ED FBCF
8 Tara Clark Newberry
9 District Court Judge

10 Respectfully submitted by:

11 AARON D. FORD
12 Attorney General

13 By: /s/ Michelle Di Silvestro Alanis
14 MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)
15 Supervising Senior Deputy Attorney General
16 *Attorney for Respondent, Department of Corrections*

17 Approved as to form and content:

18 LAW OFFICE OF DANIEL MARKS
19

20 By: /s/ Adam Levine
21 Adam Levine, Esq.
22 *Attorney for Petitioner, Shari Kassebaum*
23
24
25
26
27
28

From: [Joi Harper](#)
To: [Michelle D. Alanis](#); [Adam Levine](#); [Anela P. Kaheaku](#)
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J
Date: Thursday, November 18, 2021 11:47:04 AM

WARNING - This email originated from outside the State of Nevada. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Good morning Michelle,

You have his permission to esign the Proposed Order. Sorry he has not been able to respond to you. He is in an arbitration all day today and yesterday was involved with preparing for his arbitration and dealing with the officer involved shooting and other matters.

Thank you,

Joi E. Harper, Paralegal
Law Office of Daniel Marks
610 South Ninth Street
Las Vegas, Nevada 89101
O: (702) 386-0536; F: (702) 386-6812
JHarper@danielmarks.net

From: Michelle D. Alanis [<mailto:MAlanis@ag.nv.gov>]
Sent: Thursday, November 18, 2021 10:15 AM
To: Adam Levine <ALevine@danielmarks.net>; Anela P. Kaheaku <AKaheaku@ag.nv.gov>
Cc: Joi Harper <JHarper@danielmarks.net>
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

Good morning Adam,

I am following up on this matter that was originally sent on 10/22/21.

You have now stated you do not have any changes to the Order but when I asked if I have permission to submit with your electronic signature you did not respond. Please advise if we have your permission to use your electronic signature. If I do not have a response by tomorrow, November 19, 2021 at noon, I plan to submit the proposed Order to the Judge without your signature.

I look forward to hearing from you. Thank you.

Michelle Di Silvestro Alanis
Supervising Senior Deputy Attorney General
702-486-3268

JA 00349

From: Michelle D. Alanis
Sent: Tuesday, November 16, 2021 5:18 PM
To: Adam Levine <ALevine@danielmarks.net>; Anela P. Kaheaku <AKaheaku@ag.nv.gov>
Cc: Joi Harper <JHarper@danielmarks.net>
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

Do I have your permission to use your electronic signature on the order? Thanks.

Michelle Di Silvestro Alanis
Supervising Senior Deputy Attorney General
702-486-3268

From: Adam Levine <ALevine@danielmarks.net>
Sent: Tuesday, November 16, 2021 4:25 PM
To: Michelle D. Alanis <MAlanis@ag.nv.gov>; Anela P. Kaheaku <AKaheaku@ag.nv.gov>
Cc: Joi Harper <JHarper@danielmarks.net>
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

WARNING - This email originated from outside the State of Nevada. Exercise caution when opening attachments or clicking links, especially from unknown senders.

No.

Adam Levine, Esq.
Law Office of Daniel Marks
610 S. Ninth Street
Las Vegas, NV 89101
(702) 386-0536: Office
(702) 386-6812: Fax
alevine@danielmarks.net

From: Michelle D. Alanis [<mailto:MAlanis@ag.nv.gov>]
Sent: Tuesday, November 16, 2021 4:26 PM
To: Adam Levine; Anela P. Kaheaku
Cc: Joi Harper
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

Adam,

Do you have any changes to the Kassebaum Order?

Thank you.

Michelle Di Silvestro Alanis
Supervising Senior Deputy Attorney General
702-486-3268

From: Michelle D. Alanis
Sent: Wednesday, November 10, 2021 10:44 AM
To: Adam Levine <ALevine@danielmarks.net>; Anela P. Kaheaku <AKaheaku@ag.nv.gov>
Cc: Joi Harper <JHarper@danielmarks.net>
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

Adam,

I am following up on the draft of the Order in Kassebaum.

Please let me know if you have any specific changes to the Order. I would like to submit to the Court by Friday. Thank you.

Michelle Di Silvestro Alanis
Supervising Senior Deputy Attorney General
702-486-3268

From: Michelle D. Alanis
Sent: Tuesday, November 2, 2021 5:10 PM
To: Adam Levine <ALevine@danielmarks.net>; Anela P. Kaheaku <AKaheaku@ag.nv.gov>
Cc: Joi Harper <JHarper@danielmarks.net>
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

Hi Adam,

I prepared the Order not Anela. She only emailed the draft for your review.

The Order does contain more than the minutes because it contains findings of fact and conclusions of law that lead us to the Court's decision. In the Court minutes, it states that "Counsel for Respondent may use the legal arguments within their Answering Brief as a basis of the Order." The proposed order contains information relevant to the ruling.

Your office has prepared other orders that included more than language of the minutes. Off the top of my head, I recall the Bilavarn/Olague Order and the Navarrete Order.

If you have more specific changes, please let me know. I am also available to discuss on Friday if you would like. Thank you.

Michelle Di Silvestro Alanis
Supervising Senior Deputy Attorney General
702-486-3268

From: Adam Levine <ALevine@danielmarks.net>
Sent: Tuesday, November 2, 2021 4:19 PM
To: Anela P. Kaheaku <AKaheaku@ag.nv.gov>
Cc: Joi Harper <JHarper@danielmarks.net>; Michelle D. Alanis <MAlanis@ag.nv.gov>
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

For your patience. My review of your proposed order reveals that it has all sorts of things, including citations to cases, which are not contained within the Minutes of the District Court's ruling. I would request that you revise the Order to reflect only those matters identified in the Court Minutes.

If Michelle wishes to discuss the matter, I can do so this Friday. I am going to be out of the office in Carson City for Supreme Court arguments tomorrow, and do not fly back until Thursday whereupon I have to proceed immediately to Pahrump upon landing.

Adam Levine, Esq.
Law Office of Daniel Marks
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(702) 386-0536: Office
(702) 386-6812: Fax
alevine@danielmarks.net

From: Anela P. Kaheaku [<mailto:AKaheaku@ag.nv.gov>]
Sent: Wednesday, October 27, 2021 12:42 PM
To: Adam Levine
Cc: Joi Harper; Michelle D. Alanis
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

Hello.

I am following up on the email below. Please advise.

Thank you,

Reply/Forward From:

Anela Kaheaku, LS II

AKaheaku@ag.nv.gov

From: Anela P. Kaheaku

Sent: Friday, October 22, 2021 3:10 PM

To: Adam Levine <alevine@danielmarks.net>

Cc: Joi Harper <JHarper@danielmarks.net>; Michelle D. Alanis (MAlanis@ag.nv.gov)
<MAlanis@ag.nv.gov>

Subject: Kassebaum v NDOC, Case No. A-20-81182-J

Good afternoon,

Attached for your review and approval is the Findings of Fact, Conclusions of Law and Order Denying Petition for Judicial Review. If acceptable, please authorize the use of your e- signature.

Thank you,

Anela Kaheaku, LS II

State of Nevada*Office of the Attorney General

Personnel Division

555 E. Washington Ave., Ste. 3900 * Las Vegas, NV 89101

AKaheaku@ag.nv.gov

PLEASE BE GREEN. *Please don't print this email unless necessary.*

This e-mail contains the thoughts and opinions of Anela Kaheaku and does not represent official Office of the Attorney General policy.

CONFIDENTIALITY NOTICE

This message and attachments are intended only for the addressee(s) and may contain information that is privileged and confidential. If the reader of this message is not the intended recipient, I did not intend to waive and do not waive any privileges or the confidentiality of this message and attachments and you are hereby notified that any dissemination of this communication is strictly prohibited. If you receive this communication in error, please notify me immediately and destroy this document and all attachments. Thank you.

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Shari Kassebaum, Petitioner(s) | CASE NO: A-20-811982-J
7 vs. | DEPT. NO. Department 21
8 Nevada Department of
9 Corrections, Respondent(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the
14 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

15 Service Date: 11/19/2021

16 Michelle Alanis	malanis@ag.nv.gov
17 Anela Kaheaku	akaheaku@ag.nv.gov
18 Daniel Marks	Office@danielmarks.net
19 Angela Lizada	angela@lizardalaw.com
20 Joi Harper	Jharper@danielmarks.net
21	
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IN THE SUPREME COURT OF THE STATE OF NEVADA

Docket No. 83942

SHARI KASSEBAUM

Appellant,

vs.

THE STATE OF NEVADA DEPARTMENT
OF CORRECTIONS,

Respondents.

Eighth Judicial District Court
Case No.: A-20-811982-J

**JOINT APPENDIX
VOLUME II Part 3 of 3**

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Attorneys for Respondents

	<u>Description</u>	<u>Vol(s)</u>	<u>Pg(s)</u>
1.	Petition for Judicial Review 03/10/2020	I	JA 00001 - JA 00008
2.	Statement of Intent to Participate in Petition for Judicial Review	I	JA 00009 - JA 00011
3.	Transmittal of Record on Appeal 02/08/2021	I	JA 00012 – JA 00247
4.	Petitioner Shari Kassebaum’s Opening Brief 02/22/2021	II	JA 00248 – JA 00266
5.	Respondent’s Answering Brief 04/08/2021	II	JA 00267 – JA 00294
6.	Appendix to Respondent’s Answering Brief 04/08/2021	II	JA 00295 – JA 00323
7.	Respondent, Department of Corrections’ Request to Set Matter for Hearing 05/13/21	II	JA 00324 – JA 00326
8.	Petitioner Shari Kassebaum’s Reply Brief 05/25/2021	II	JA 00327 – JA 00341
9.	Minute Order 10/01/21	II	JA 00342
10.	Findings of Fact, Conclusions of Law and Order 11/19/2021	II	JA 00343 – JA 00354
11.	Notice of Entry of Findings of Facts, Conclusions of Law, and Order Denying Petition for Judicial Review 12/01/2021	II	JA 00355 – JA 00369
12.	Notice of Appeal 12/10/2021	II	JA 00370 – JA 00387

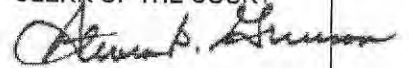
13.	Case Appeal Statement 12/10/2021	II	JA 00388 – JA00391
14.	Recorder's Transcript of Proceedings 02/24/2022	II	JA 00392 – JA 00405

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 20th day of April 2022, I did serve the above and forgoing JOINT APPENDIX Volume I Part 3 of 3, by way of Notice of Electronic Filing provided by the court mandated E-Flex filing service, at the following:

Aaron D. Ford, Esq.
Nevada Attorney General
Michelle Di Silvestro Alanis, Esq.,
Supervising Sr. Deputy Attorney General
Office of the Attorney General
555 E. Washington Avenue, #3900
Las Vegas, Nevada 89101
Tel: (702) 486-3268
Fax: (702) 486-3773
Email: MAlanis@ag.nv.gov
Attorneys for Respondents


An employee of the
LAW OFFICE OF DANIEL MARKS



AARON D. FORD
Attorney General
MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)
Supervising Senior Deputy Attorney General
State of Nevada
Office of the Attorney General
555 East Washington Avenue, #3900
Las Vegas, Nevada 89101
(702) 486-3268 (phone)
(702) 486-3773 (fax)
malanis@ag.nv.gov

*Attorneys for Respondent,
State of Nevada ex rel its Department of Corrections*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

SHARI KASSEBAUM,

Petitioner,

v.

STATE OF NEVADA ex rel, its
DEPARTMENT OF CORRECTIONS, and
STATE OF NEVADA ex rel, its
DEPARTMENT OF ADMINISTRATION
PERSONNEL COMMISSION, HEARING
OFFICER,

Respondent.

CASE NO. A-20-811982-J
DEPT. 21

**NOTICE OF ENTRY OF FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
ORDER DENYING PETITION FOR
JUDICIAL REVIEW**

TO: Sheri Kassebaum, Petitioner; and,

TO: Adam Levine, Esq., Petitioner's Attorney,

///

///

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///

1 PLEASE TAKE NOTICE that the ***FINDINGS OF FACT, CONCLUSIONS OF LAW AND***
2 ***ORDER DENYING PETITION FOR JUDICIAL REVIEW*** was entered in the above-entitled action on
3 the 19th day of November, 2021, a copy of which is attached hereto.

4 DATED this 1st day of December, 2021.

5
6 AARON D. FORD
7 ATTORNEY GENERAL

8 By: /s/ Michelle Di Silvestro Alanis
9 Michelle Di Silvestro Alanis (Bar No. 10024)
10 Supervising Senior Deputy Attorney General
11 Attorney for Respondent
12
13
14
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1 CERTIFICATE OF SERVICE

2 I hereby certify that I electronically filed the foregoing *NOTICE OF ENTRY OF FINDINGS*
3 *OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING PETITION FOR JUDICIAL*
4 *REVIEW* with the Clerk of the Court by using the electronic filing system on the December 1, 2021.

5 I certify that the following participants in this case are registered electronic filing systems users
6 and will be served electronically:

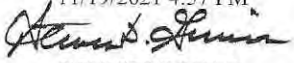
7
8 Adam Levine, Esq.
9 Law Office of Daniel Marks
610 S. Ninth St.
10 Las Vegas, NV 89101
alevine@danielmarks.net

11
12 I further certify that on December 1, 2021 the foregoing will be mailed by United States Mail to
13 the following:

14 Mark Gentile
15 Hearing Officer
16 Hearings Division
Department of Administration
2200 S. Rancho Dr. Ste. 220
17 Las Vegas, NV 89102

18 Angela Lizada, Esq.
19 Lizada Law Firm, Ltd.
711 S. 9th St.
20 Las Vegas, NV 89101

21
22
23 /s/ Anela Kaheaku
An employee of Office of the Attorney General


CLERK OF THE COURT

AARON D. FORD
Attorney General
MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)
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malanis@ag.nv.gov
*Attorneys for Respondent State of Nevada
ex rel. Department of Corrections*

DISTRICT COURT

CLARK COUNTY, NEVADA

SHARI KASSEBAUM,

Petitioner,

vs.

STATE OF NEVADA ex rel. its
DEPARTMENT OF CORRECTIONS; STATE
OF NEVADA ex rel., its DEPARTMENT OF
ADMINISTRATION, PERSONNEL
COMMISSION, HEARING OFFICER,

Respondents.

Case No: A-20-811982-J

Dept. No: 21

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER DENYING PETITION
FOR JUDICIAL REVIEW**

This matter having come on for hearing on the 22nd day of September 2021, on Petitioner, Shari Kassebaum's Petition for Judicial Review filed on March 10, 2020, requesting review of the Hearing Officer's Decision and Order. Respondent, State of Nevada ex rel. its Department of Corrections' (NDOC) appearing by and through its counsel Michelle Di Silvestro Alanis, Supervising Senior Deputy Attorney General of the Attorney General's Office; and Petitioner, Shari Kassebaum (Kassebaum), appearing by and through her counsel Adam Levine, Esq., of the Law Office of Daniel Marks; the Court having reviewed the papers and pleadings on file, including Petitioner's Opening Brief, filed on February 22, 2021; Respondent's Answering Brief, filed on April 8, 2021; Petitioner's Reply Brief, filed on May 25, 2021, the Record on Appeal, and having reviewed *Allen v. State of Nevada*, District Court

1 Case A-20-811982-J, having heard the arguments of counsel, and good cause appearing hereby makes
2 the following findings of fact, conclusions of law, and order:

3 **A. FINDINGS OF FACT**

4 THE COURT HEREBY FINDS the legal assertions in Respondent's Answering Brief persuasive.

5 THE COURT FURTHER FINDS the Hearing Officer applied the appropriate standard of
6 evidence and made thorough findings of fact.

7 THE COURT FURTHER FINDS Kassebaum was a correctional sergeant employed at NDOC
8 and assigned to Southern Desert Correctional Center. ROA 71.

9 On August 9, 2019, NDOC served Kassebaum with a Specificity of Charges (SOC), which
10 recommended a two-day (sixteen hour) suspension without pay as a result of her continuous discourteous
11 conduct towards her fellow employees and supervisors. ROA 21-179.

12 On August 23, 2019, NDOC conducted a pre-disciplinary review pursuant to NAC 284.6561 but
13 Kassebaum chose not to attend her scheduled pre-disciplinary review. The pre-disciplinary review officer
14 concurred with the proposed discipline of a two-day suspension without pay. ROA 182.

15 On August 28, 2019, NDOC served Kassebaum with the written notification of Acting Director
16 Harold Wickham's final decision that Kassebaum would be suspended for two days without pay effective
17 August 30, 2019. ROA 181.

18 On or about September 12, 2019, Kassebaum filed an appeal of her discipline by filing the NPD-
19 54 Form titled "Appeal of Dismissal, Suspension, Demotion, or Involuntary Transfer" (Appeal Form).
20 The Appeal Form specifically states, "*This appeal form must be accompanied by the written notification*
21 *of the appointing authority's decision regarding the proposed action provided to the employee pursuant*
22 *to subsection 7 of NAC 284.6561.*" ROA 223-235.

23 Kassebaum attached a typed statement totaling nine pages to the Appeal Form explaining why
24 she believed the action taken was not reasonable and done in retaliation. However, Kassebaum's Appeal
25 Form was not accompanied by the written notification of Acting Director Wickham as required by NAC
26 284.6562(2)(b). ROA 223-235.

27 NDOC filed its "Motion to Dismiss Appeal for Lack of Jurisdiction." NDOC argued that the
28 appeal was jurisdictionally defective because Kassebaum failed to comply with the mandatory

1 requirements of NAC 284.6562(2) and could not amend since the 10-day appeal period under NRS
2 284.390(1) had expired. ROA 14-208.

3 Kassebaum filed a "Limited Opposition to Motion to Dismiss Appeal" in which she did not
4 oppose any of the legal issues raised by NDOC and only opposed the statement of facts in the Motion to
5 Dismiss. In her limited opposition, Kassebaum "concedes that under the revised NAC 284.6562(2)(b) it
6 is now required" for an Appeal to include the written notification of the appointing authority. Kassebaum
7 did not dispute that the requirements of NAC 284.6562 and NRS 284.390 were mandatory and
8 jurisdictional. Kassebaum further noted that "the language of NAC 284.6562 is clear...that employee
9 must submit the written notification of the appointing authority's decision." Accordingly, Kassebaum
10 wholly conceded that she failed to comply with NAC 284.6562(2)(b) and that she failed to submit a
11 complete and proper appeal within the 10-day filing period under NRS 284.390(1). ROA 11-12.

12 NDOC filed its Reply in Support of Motion to Dismiss, which noted Kassebaum's non-opposition
13 to the legal arguments for dismissal. ROA 7-10.

14 Hearing Officer Gentile granted NDOC's Motion to Dismiss. The Hearing Officer found that in
15 her "limited opposition" Kassebaum conceded that procedurally her notice of appeal was deficient. The
16 Hearing Officer further concluded that "NAC 284.6562 sets forth the mandatory manner in which an
17 appeal must be initiated" and that Kassebaum's notice of appeal was deficient. ROA 0003-5.

18 If any of these Findings of Fact are properly considered as Conclusions of Law, they shall be so
19 construed.

20 **B. CONCLUSIONS OF LAW**

21 THE COURT HEREBY CONCLUDES that the standard of review for evaluating a hearing
22 officer's decision is set forth in NRS 233B.010.

23 THE COURT FURTHER CONCLUDES that the District Court defers to the agency's findings
24 of fact that are supported by substantial evidence and reviews questions of law de novo. *Taylor v. Dep't.*
25 *of Health & Human Servs.*, 129 Nev. 928, 930, (2013). However, in reviewing statutory construction, the
26 Court "defer[s] to an agency's interpretation of its governing statutes or regulations if the interpretation
27 is within the language of the statute." *Id.* quoting *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*,
28 124 Nev. 701, 709, (2008).

1 NRS 284.390(1) establishes a mandatory 10-day deadline for employee disciplinary appeals.
2 Under NRS 284.065(2)(d), the Nevada Legislature delegated to the Personnel Commission authority to
3 adopt all “regulations to carry out the provisions” of NRS Chapter 284. This delegated authority was not
4 limited to the adoption of mere procedural rules but all regulations.

5 With that delegated power, the Personnel Commission adopted NAC 284.6562, which sets forth
6 the requirements for satisfying the mandatory 10-day filing deadline under NRS 284.390(1). Among
7 these mandatory requirements is that the appeal “must” be “accompanied by the written notification of
8 the appointing authority’s decision regarding the proposed [disciplinary] action.” See NAC
9 284.6562(2)(b).

10 The word “must,” as used in NAC 284.6562(2), imposes a mandatory requirement. See *Washoe*
11 *Cty. v. Otto*, 128 Nev. 424, 432 (2012).

12 NAC 284.6562(2)(b) is quoted verbatim, in bold and italicized letters, on the first page of every
13 NPD-54 appeal form. ROA 223.

14 Regulations adopted by the Personnel Commission, such as NAC 284.6562, have the full force
15 and effect of law. See *Turk v. Nev. State Prison*, 94 Nev. 101, 104, 575 P.3d 599, 601 (1978).

16 The powers of an administrative agency are strictly limited to only those powers specifically set
17 forth by statute and regulation. See *Clark Cty. Sch. Dist. V. Clark Cty. Classroom Teachers Ass’n*, 115
18 Nev. 98, 102 977 P.2d 1008, 1010 (1999). Indeed, an administrative agency cannot act outside its legal
19 authority without committing an abuse of discretion.

20 NAC 284.6562 has the full force and effect of law and sets forth the mandatory requirements for
21 submitting a proper and timely administrative appeal under NRS 284.390(1). The Nevada Supreme Court
22 has held that the proper and timely filing of a notice of appeal is jurisdictional. See *Rust v. Clark Co.*
23 *School Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987).

24 THE COURT FURTHER CONCLUDES There was substantial evidence to support the Hearing
25 Officer’s granting of NDOC’s Motion to Dismiss Appeal for Lack of Jurisdiction.

26 The Hearing Officer’s interpretation of NAC 284.6562 is owed deference.

27 Pursuant to NAC 284.6562(2)(b), Kassebaum failed to attach the written notification of her final
28 discipline to her appeal form.

1 Kassebaum failed to oppose NDOC's Motion to Dismiss as her Limited Opposition did not
2 contest the jurisdictional challenge by NDOC in failing to attach the final discipline form, but rather
3 solely disputed the facts. In doing so, Kassebaum failed to preserve the jurisdictional issue for appeal and
4 therefore it is deemed waived for purposes of this Petition for Judicial Review.

5 The Hearing Officer applied the appropriate standard of evidence, made thorough findings of fact,
6 and applied the relevant law to the case.

7 Kassebaum is judicially estopped from arguing in her petition for judicial review that NAC
8 284.6562 is not jurisdictional and is a claims processing rule as it is inconsistent from the position set
9 forth in her Limited Opposition before the Hearing Officer.

10 Kassebaum cannot raise a new theory for the first time on appeal which is inconsistent from the
11 one she raised before the Hearing Officer.

12 The Hearing Officer properly determined that the plain language of NAC 284.6562 imposed
13 mandatory and jurisdictional requirements for initiating an appeal under NRS 284.390.

14 The Hearing Officer properly ruled that Kassebaum's appeal was deficient and Kassebaum did
15 not file a proper and timely appeal under NRS 284.390 or NAC 284.6562.

16 The District Court's decision in *Kassebaum v. NDOC*, Case No. A-20-810424-P did not create
17 issue preclusion with the issues raised herein.

18 If any of these Conclusions of Law are properly considered as Findings of Fact, they shall be so
19 construed.

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1 C. ORDER

2 IT IS THEREFORE ORDERED that Kassebaum's Petition for Judicial Review is DENIED
3 and the Hearing officer's ruling is hereby AFFIRMED.

4 DATED: _____

5 Dated this 19th day of November, 2021

6 

7
8 3A9 2CA 45ED FBCF
9 Tara Clark Newberry
10 District Court Judge

11 Respectfully submitted by:

12 AARON D. FORD
13 Attorney General

14 By: /s/ Michelle Di Silvestro Alanis
15 MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)
16 Supervising Senior Deputy Attorney General
17 Attorney for Respondent, Department of Corrections

18 Approved as to form and content:

19 LAW OFFICE OF DANIEL MARKS

20 By: /s/ Adam Levine
21 Adam Levine, Esq.
22 Attorney for Petitioner, Shari Kassebaum
23
24
25
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27
28

From: [Joi Harper](#)
To: [Michelle D. Alanis](#); [Adam Levine](#); [Anela P. Kaheaku](#)
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J
Date: Thursday, November 18, 2021 11:47:04 AM

WARNING - This email originated from outside the State of Nevada. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Good morning Michelle,

You have his permission to esign the Proposed Order. Sorry he has not been able to respond to you. He is in an arbitration all day today and yesterday was involved with preparing for his arbitration and dealing with the officer involved shooting and other matters.

Thank you,

Joi E. Harper, Paralegal
Law Office of Daniel Marks
610 South Ninth Street
Las Vegas, Nevada 89101
O: (702) 386-0536; F: (702) 386-6812
JHarper@danielmarks.net

From: Michelle D. Alanis [<mailto:MAlanis@ag.nv.gov>]
Sent: Thursday, November 18, 2021 10:15 AM
To: Adam Levine <ALevine@danielmarks.net>; Anela P. Kaheaku <AKaheaku@ag.nv.gov>
Cc: Joi Harper <JHarper@danielmarks.net>
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

Good morning Adam,

I am following up on this matter that was originally sent on 10/22/21.

You have now stated you do not have any changes to the Order but when I asked if I have permission to submit with your electronic signature you did not respond. Please advise if we have your permission to use your electronic signature. If I do not have a response by tomorrow, November 19, 2021 at noon, I plan to submit the proposed Order to the Judge without your signature.

I look forward to hearing from you. Thank you.

Michelle Di Silvestro Alanis
Supervising Senior Deputy Attorney General
702-486-3268

JA 00364

From: Michelle D. Alanis
Sent: Tuesday, November 16, 2021 5:18 PM
To: Adam Levine <ALevine@danielmarks.net>; Anela P. Kaheaku <AKaheaku@ag.nv.gov>
Cc: Joi Harper <JHarper@danielmarks.net>
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

Do I have your permission to use your electronic signature on the order? Thanks.

Michelle Di Silvestro Alanis
Supervising Senior Deputy Attorney General
702-486-3268

From: Adam Levine <ALevine@danielmarks.net>
Sent: Tuesday, November 16, 2021 4:25 PM
To: Michelle D. Alanis <MAlanis@ag.nv.gov>; Anela P. Kaheaku <AKaheaku@ag.nv.gov>
Cc: Joi Harper <JHarper@danielmarks.net>
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

WARNING - This email originated from outside the State of Nevada. Exercise caution when opening attachments or clicking links, especially from unknown senders.

No.

Adam Levine, Esq.
Law Office of Daniel Marks
610 S. Ninth Street
Las Vegas, NV 89101
(702) 386-0536: Office
(702) 386-6812: Fax
alevine@danielmarks.net

From: Michelle D. Alanis [<mailto:MAlanis@ag.nv.gov>]
Sent: Tuesday, November 16, 2021 4:26 PM
To: Adam Levine; Anela P. Kaheaku
Cc: Joi Harper
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

Adam,

Do you have any changes to the Kassebaum Order?

Thank you.

Michelle Di Silvestro Alanis
Supervising Senior Deputy Attorney General
702-486-3268

From: Michelle D. Alanis
Sent: Wednesday, November 10, 2021 10:44 AM
To: Adam Levine <ALevine@danielmarks.net>; Anela P. Kaheaku <AKaheaku@ag.nv.gov>
Cc: Joi Harper <JHarper@danielmarks.net>
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

Adam,

I am following up on the draft of the Order in Kassebaum.

Please let me know if you have any specific changes to the Order. I would like to submit to the Court by Friday. Thank you.

Michelle Di Silvestro Alanis
Supervising Senior Deputy Attorney General
702-486-3268

From: Michelle D. Alanis
Sent: Tuesday, November 2, 2021 5:10 PM
To: Adam Levine <ALevine@danielmarks.net>; Anela P. Kaheaku <AKaheaku@ag.nv.gov>
Cc: Joi Harper <JHarper@danielmarks.net>
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

Hi Adam,

I prepared the Order not Anela. She only emailed the draft for your review.

The Order does contain more than the minutes because it contains findings of fact and conclusions of law that lead us to the Court's decision. In the Court minutes, it states that "Counsel for Respondent may use the legal arguments within their Answering Brief as a basis of the Order." The proposed order contains information relevant to the ruling.

Your office has prepared other orders that included more than language of the minutes. Off the top of my head, I recall the Bilavarn/Olague Order and the Navarrete Order.

If you have more specific changes, please let me know. I am also available to discuss on Friday if you would like. Thank you.

Michelle Di Silvestro Alanis
Supervising Senior Deputy Attorney General
702-486-3268

From: Adam Levine <ALevine@danielmarks.net>
Sent: Tuesday, November 2, 2021 4:19 PM
To: Anela P. Kaheaku <AKaheaku@ag.nv.gov>
Cc: Joi Harper <JHarper@danielmarks.net>; Michelle D. Alanis <MAlanis@ag.nv.gov>
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

For your patience. My review of your proposed order reveals that it has all sorts of things, including citations to cases, which are not contained within the Minutes of the District Court's ruling. I would request that you revise the Order to reflect only those matters identified in the Court Minutes.

If Michelle wishes to discuss the matter, I can do so this Friday. I am going to be out of the office in Carson City for Supreme Court arguments tomorrow, and do not fly back until Thursday whereupon I have to proceed immediately to Pahrump upon landing.

Adam Levine, Esq.
Law Office of Daniel Marks
610 S. Ninth Street
Las Vegas, NV 89101
(702) 386-0536: Office
(702) 386-6812: Fax
alevine@danielmarks.net

From: Anela P. Kaheaku [<mailto:AKaheaku@ag.nv.gov>]
Sent: Wednesday, October 27, 2021 12:42 PM
To: Adam Levine
Cc: Joi Harper; Michelle D. Alanis
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

Hello.

I am following up on the email below. Please advise.

Thank you,

Reply/Forward From:

Anela Kaheaku, LS II

AKaheaku@ag.nv.gov

From: Anela P. Kaheaku

Sent: Friday, October 22, 2021 3:10 PM

To: Adam Levine <alevine@danielmarks.net>

Cc: Joi Harper <JHarper@danielmarks.net>; Michelle D. Alanis (MAlanis@ag.nv.gov)
<MAlanis@ag.nv.gov>

Subject: Kassebaum v NDOC, Case No. A-20-81182-J

Good afternoon,

Attached for your review and approval is the Findings of Fact, Conclusions of Law and Order Denying Petition for Judicial Review. If acceptable, please authorize the use of your e- signature.

Thank you,

Anela Kaheaku, LS II

State of Nevada*Office of the Attorney General

Personnel Division

555 E. Washington Ave., Ste. 3900 * Las Vegas, NV 89101

AKaheaku@ag.nv.gov

PLEASE BE GREEN. Please don't print this email unless necessary.

This e-mail contains the thoughts and opinions of Anela Kaheaku and does not represent official Office of the Attorney General policy.

CONFIDENTIALITY NOTICE

This message and attachments are intended only for the addressee(s) and may contain information that is privileged and confidential. If the reader of this message is not the intended recipient, I did not intend to waive and do not waive any privileges or the confidentiality of this message and attachments and you are hereby notified that any dissemination of this communication is strictly prohibited. If you receive this communication in error, please notify me immediately and destroy this document and all attachments. Thank you.

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

5
6 Shari Kassebaum, Petitioner(s)

CASE NO: A-20-811982-J

7 vs.

DEPT. NO. Department 21

8 Nevada Department of
9 Corrections, Respondent(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the
14 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

15 Service Date: 11/19/2021

16 Michelle Alanis

malanis@ag.nv.gov

17 Anela Kaheaku

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21 Joi Harper

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Las Vegas, Nevada 89101
(702) 386-0536; FAX (702) 386-6812
Attorneys for Appellant Shari Kassebaum

DISTRICT COURT

CLARK COUNTY, NEVADA

SHARI KASSEBAUM,

Petitioners,

v.

STATE OF NEVADA ex rel, its DEPARTMENT
OF CORRECTIONS, and STATE OF NEVADA ex
rel, its DEPARTMENT OF ADMINISTRATION
PERSONNEL COMMISSION, HEARING
OFFICER, CARA BROWN

Respondents.


Case No.: A-20-811982-J
Dept. No.: 21

NOTICE OF APPEAL

Petitioner Shari Kassebaum hereby appeals the Findings of Fact, Conclusion of Law and Order Denying Petition for Judicial Review entered in this action on November 19, 2021 and for which Notice of Entry was filed on December 1, 2021. (Exhibit "1" attached hereto).

DATED this 10th day of December 2021.

LAW OFFICE OF DANIEL MARKS



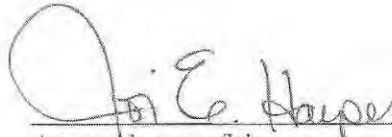
DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
ADAM LEVINE, ESQ.
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(702) 386-0536; FAX (702) 386-6812
Attorneys for Plaintiffs

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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 10th day of December 2021, I did serve the above and forgoing NOTICE OF APPEAL, by way of Notice of Electronic Filing provided by the court mandated E-file & Serve service, upon Respondents at the following:

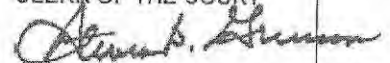
Aaron D. Ford, Esq.
Attorney General
Michelle Di Silvestro Alanis, Esq.,
Supervising Sr. Deputy Attorney General
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Email: MAlanis@ag.nv.gov
Attorneys for Respondent
State of Nevada ex rel its Department of Corrections



An employee of the
LAW OFFICE OF DANIEL MARKS

EXHIBIT 1

EXHIBIT 1



1 AARON D. FORD
2 Attorney General
3 MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)
4 Supervising Senior Deputy Attorney General
5 State of Nevada
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7 555 East Washington Avenue, #3900
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9 (702) 486-3268 (phone)
10 (702) 486-3773 (fax)
11 malanis@ag.nv.gov

12 *Attorneys for Respondent,*
13 *State of Nevada ex rel its Department of Corrections*

14 DISTRICT COURT
15 CLARK COUNTY, NEVADA

16 SHARI KASSEBAUM,

17 Petitioner,

18 v.

19 STATE OF NEVADA ex rel, its
20 DEPARTMENT OF CORRECTIONS, and
21 STATE OF NEVADA ex rel, its
22 DEPARTMENT OF ADMINISTRATION
23 PERSONNEL COMMISSION, HEARING
24 OFFICER,

25 Respondent.

CASE NO. A-20-811982-J
DEPT. 21

NOTICE OF ENTRY OF FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
ORDER DENYING PETITION FOR
JUDICIAL REVIEW

26 TO: Sheri Kassebaum, Petitioner; and,

27 TO: Adam Levine, Esq., Petitioner's Attorney,

28 ///

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///

1 PLEASE TAKE NOTICE that the *FINDINGS OF FACT, CONCLUSIONS OF LAW AND*
2 *ORDER DENYING PETITION FOR JUDICIAL REVIEW* was entered in the above-entitled action on
3 the 19th day of November, 2021, a copy of which is attached hereto.

4 DATED this 1st day of December, 2021.

5
6 AARON D. FORD
7 ATTORNEY GENERAL

8 By: /s/ Michelle Di Silvestro Alanis
9 Michelle Di Silvestro Alanis (Bar No. 10024)
10 Supervising Senior Deputy Attorney General
11 Attorney for Respondent
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1 CERTIFICATE OF SERVICE

2 I hereby certify that I electronically filed the foregoing *NOTICE OF ENTRY OF FINDINGS*
3 *OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING PETITION FOR JUDICIAL*
4 *REVIEW* with the Clerk of the Court by using the electronic filing system on the December 1, 2021.

5 I certify that the following participants in this case are registered electronic filing systems users
6 and will be served electronically:

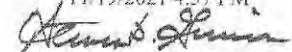
7
8 Adam Levine, Esq.
9 Law Office of Daniel Marks
610 S. Ninth St.
10 Las Vegas, NV 89101
alevine@danielmarks.net

11
12 I further certify that on December 1, 2021 the foregoing will be mailed by United States Mail to
13 the following:

14 Mark Gentile
15 Hearing Officer
Hearings Division
16 Department of Administration
2200 S. Rancho Dr. Ste. 220
17 Las Vegas, NV 89102

18 Angela Lizada, Esq.
19 Lizada Law Firm, Ltd.
711 S. 9th St.
20 Las Vegas, NV 89101

21
22
23 /s/ Anela Kaheaku
24 An employee of Office of the Attorney General
25
26
27
28


CLERK OF THE COURT

1 AARON D. FORD
2 Attorney General
3 MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)
4 Supervising Senior Deputy Attorney General
5 State of Nevada, Office of the Attorney General
6 555 E. Washington Ave., Ste. 3900
7 Las Vegas NV 89101-1068
8 Tel: (702) 486-3268
9 Fax: (702) 486-3773
10 malanis@ag.nv.gov
11 *Attorneys for Respondent State of Nevada*
12 *ex rel. Department of Corrections*

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DISTRICT COURT
CLARK COUNTY, NEVADA

11 SHARI KASSEBAUM,
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Petitioner,

Case No: A-20-811982-J
Dept. No: 21

vs.

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER DENYING PETITION
FOR JUDICIAL REVIEW**

STATE OF NEVADA ex rel. its
DEPARTMENT OF CORRECTIONS; STATE
OF NEVADA ex rel., its DEPARTMENT OF
ADMINISTRATION, PERSONNEL
COMMISSION, HEARING OFFICER,

Respondents.

20 This matter having come on for hearing on the 22nd day of September 2021, on Petitioner, Shari
21 Kassebaum's Petition for Judicial Review filed on March 10, 2020, requesting review of the Hearing
22 Officer's Decision and Order. Respondent, State of Nevada ex rel. its Department of Corrections'
23 (NDOC) appearing by and through its counsel Michelle Di Silvestro Alanis, Supervising Senior Deputy
24 Attorney General of the Attorney General's Office; and Petitioner, Shari Kassebaum (Kassebaum),
25 appearing by and through her counsel Adam Levine, Esq., of the Law Office of Daniel Marks; the Court
26 having reviewed the papers and pleadings on file, including Petitioner's Opening Brief, filed on
27 February 22, 2021; Respondent's Answering Brief, filed on April 8, 2021; Petitioner's Reply Brief, filed
28 on May 25, 2021, the Record on Appeal, and having reviewed *Allen v. State of Nevada*, District Court

1 Case A-20-811982-J, having heard the arguments of counsel, and good cause appearing hereby makes
2 the following findings of fact, conclusions of law, and order:

3 **A. FINDINGS OF FACT**

4 THE COURT HEREBY FINDS the legal assertions in Respondent's Answering Brief persuasive.

5 THE COURT FURTHER FINDS the Hearing Officer applied the appropriate standard of
6 evidence and made thorough findings of fact.

7 THE COURT FURTHER FINDS Kassebaum was a correctional sergeant employed at NDOC
8 and assigned to Southern Desert Correctional Center. ROA 71.

9 On August 9, 2019, NDOC served Kassebaum with a Specificity of Charges (SOC), which
10 recommended a two-day (sixteen hour) suspension without pay as a result of her continuous discourteous
11 conduct towards her fellow employees and supervisors. ROA 21-179.

12 On August 23, 2019, NDOC conducted a pre-disciplinary review pursuant to NAC 284.6561 but
13 Kassebaum chose not to attend her scheduled pre-disciplinary review. The pre-disciplinary review officer
14 concurred with the proposed discipline of a two-day suspension without pay. ROA 182.

15 On August 28, 2019, NDOC served Kassebaum with the written notification of Acting Director
16 Harold Wickham's final decision that Kassebaum would be suspended for two days without pay effective
17 August 30, 2019. ROA 181.

18 On or about September 12, 2019, Kassebaum filed an appeal of her discipline by filing the NPD-
19 54 Form titled "Appeal of Dismissal, Suspension, Demotion, or Involuntary Transfer" (Appeal Form).
20 The Appeal Form specifically states, "*This appeal form must be accompanied by the written notification*
21 *of the appointing authority's decision regarding the proposed action provided to the employee pursuant*
22 *to subsection 7 of NAC 284.6561.*" ROA 223-235.

23 Kassebaum attached a typed statement totaling nine pages to the Appeal Form explaining why
24 she believed the action taken was not reasonable and done in retaliation. However, Kassebaum's Appeal
25 Form was not accompanied by the written notification of Acting Director Wickham as required by NAC
26 284.6562(2)(b). ROA 223-235.

27 NDOC filed its "Motion to Dismiss Appeal for Lack of Jurisdiction." NDOC argued that the
28 appeal was jurisdictionally defective because Kassebaum failed to comply with the mandatory

1 requirements of NAC 284.6562(2) and could not amend since the 10-day appeal period under NRS
2 284.390(1) had expired. ROA 14-208.

3 Kassebaum filed a "Limited Opposition to Motion to Dismiss Appeal" in which she did not
4 oppose any of the legal issues raised by NDOC and only opposed the statement of facts in the Motion to
5 Dismiss. In her limited opposition, Kassebaum "concedes that under the revised NAC 284.6562(2)(b) it
6 is now required" for an Appeal to include the written notification of the appointing authority. Kassebaum
7 did not dispute that the requirements of NAC 284.6562 and NRS 284.390 were mandatory and
8 jurisdictional. Kassebaum further noted that "the language of NAC 284.6562 is clear...that employee
9 must submit the written notification of the appointing authority's decision." Accordingly, Kassebaum
10 wholly conceded that she failed to comply with NAC 284.6562(2)(b) and that she failed to submit a
11 complete and proper appeal within the 10-day filing period under NRS 284.390(1). ROA 11-12.

12 NDOC filed its Reply in Support of Motion to Dismiss, which noted Kassebaum's non-opposition
13 to the legal arguments for dismissal. ROA 7-10.

14 Hearing Officer Gentile granted NDOC's Motion to Dismiss. The Hearing Officer found that in
15 her "limited opposition" Kassebaum conceded that procedurally her notice of appeal was deficient. The
16 Hearing Officer further concluded that "NAC 284.6562 sets forth the mandatory manner in which an
17 appeal must be initiated" and that Kassebaum's notice of appeal was deficient. ROA 0003-5.

18 If any of these Findings of Fact are properly considered as Conclusions of Law, they shall be so
19 construed.

20 **B. CONCLUSIONS OF LAW**

21 THE COURT HEREBY CONCLUDES that the standard of review for evaluating a hearing
22 officer's decision is set forth in NRS 233B.010.

23 THE COURT FURTHER CONCLUDES that the District Court defers to the agency's findings
24 of fact that are supported by substantial evidence and reviews questions of law de novo. *Taylor v. Dep't.*
25 *of Health & Human Servs.*, 129 Nev. 928, 930, (2013). However, in reviewing statutory construction, the
26 Court "defer[s] to an agency's interpretation of its governing statutes or regulations if the interpretation
27 is within the language of the statute." *Id.* quoting *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*,
28 124 Nev. 701, 709, (2008).

1 NRS 284.390(1) establishes a mandatory 10-day deadline for employee disciplinary appeals.
2 Under NRS 284.065(2)(d), the Nevada Legislature delegated to the Personnel Commission authority to
3 adopt all “regulations to carry out the provisions” of NRS Chapter 284. This delegated authority was not
4 limited to the adoption of mere procedural rules but all regulations.

5 With that delegated power, the Personnel Commission adopted NAC 284.6562, which sets forth
6 the requirements for satisfying the mandatory 10-day filing deadline under NRS 284.390(1). Among
7 these mandatory requirements is that the appeal “must” be “accompanied by the written notification of
8 the appointing authority’s decision regarding the proposed [disciplinary] action.” See NAC
9 284.6562(2)(b).

10 The word “must,” as used in NAC 284.6562(2), imposes a mandatory requirement. See *Washoe*
11 *Cty. v. Otto*, 128 Nev. 424, 432 (2012).

12 NAC 284.6562(2)(b) is quoted verbatim, in bold and italicized letters, on the first page of every
13 NPD-54 appeal form. ROA 223.

14 Regulations adopted by the Personnel Commission, such as NAC 284.6562, have the full force
15 and effect of law. See *Turk v. Nev. State Prison*, 94 Nev. 101, 104, 575 P.3d 599, 601 (1978).

16 The powers of an administrative agency are strictly limited to only those powers specifically set
17 forth by statute and regulation. See *Clark Cty. Sch. Dist. V. Clark Cty. Classroom Teachers Ass’n*, 115
18 Nev. 98, 102 977 P.2d 1008, 1010 (1999). Indeed, an administrative agency cannot act outside its legal
19 authority without committing an abuse of discretion.

20 NAC 284.6562 has the full force and effect of law and sets forth the mandatory requirements for
21 submitting a proper and timely administrative appeal under NRS 284.390(1). The Nevada Supreme Court
22 has held that the proper and timely filing of a notice of appeal is jurisdictional. See *Rust v. Clark Co.*
23 *School Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987).

24 THE COURT FURTHER CONCLUDES There was substantial evidence to support the Hearing
25 Officer’s granting of NDOC’s Motion to Dismiss Appeal for Lack of Jurisdiction.

26 The Hearing Officer’s interpretation of NAC 284.6562 is owed deference.

27 Pursuant to NAC 284.6562(2)(b), Kassebaum failed to attach the written notification of her final
28 discipline to her appeal form.

1 Kassebaum failed to oppose NDOC's Motion to Dismiss as her Limited Opposition did not
2 contest the jurisdictional challenge by NDOC in failing to attach the final discipline form, but rather
3 solely disputed the facts. In doing so, Kassebaum failed to preserve the jurisdictional issue for appeal and
4 therefore it is deemed waived for purposes of this Petition for Judicial Review.

5 The Hearing Officer applied the appropriate standard of evidence, made thorough findings of fact,
6 and applied the relevant law to the case.

7 Kassebaum is judicially estopped from arguing in her petition for judicial review that NAC
8 284.6562 is not jurisdictional and is a claims processing rule as it is inconsistent from the position set
9 forth in her Limited Opposition before the Hearing Officer.

10 Kassebaum cannot raise a new theory for the first time on appeal which is inconsistent from the
11 one she raised before the Hearing Officer.

12 The Hearing Officer properly determined that the plain language of NAC 284.6562 imposed
13 mandatory and jurisdictional requirements for initiating an appeal under NRS 284.390.

14 The Hearing Officer properly ruled that Kassebaum's appeal was deficient and Kassebaum did
15 not file a proper and timely appeal under NRS 284.390 or NAC 284.6562.

16 The District Court's decision in *Kassebaum v. NDOC*, Case No. A-20-810424-P did not create
17 issue preclusion with the issues raised herein.

18 If any of these Conclusions of Law are properly considered as Findings of Fact, they shall be so
19 construed.

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1 C. ORDER

2 IT IS THEREFORE ORDERED that Kassebaum's Petition for Judicial Review is DENIED
3 and the Hearing officer's ruling is hereby AFFIRMED.

4 DATED: _____

5 Dated this 19th day of November, 2021

6 

7 3A9 2CA 45ED FBCF
8 Tara Clark Newberry
9 District Court Judge

10 Respectfully submitted by:

11 AARON D. FORD
12 Attorney General

13 By: /s/ Michelle Di Silvestro Alanis
14 MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)
15 Supervising Senior Deputy Attorney General
16 Attorney for Respondent, Department of Corrections

17 Approved as to form and content:

18 LAW OFFICE OF DANIEL MARKS

19 By: /s/ Adam Levine
20 Adam Levine, Esq.
21 Attorney for Petitioner, Shari Kassebaum
22
23
24
25
26
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28

From: Joi Harper
To: Michelle D. Alanis; Adam Levine; Anela P. Kaheaku
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J
Date: Thursday, November 18, 2021 11:47:04 AM

WARNING: This email originated from outside the State of Nevada. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Good morning Michelle,

You have his permission to esign the Proposed Order. Sorry he has not been able to respond to you. He is in an arbitration all day today and yesterday was involved with preparing for his arbitration and dealing with the officer involved shooting and other matters.

Thank you,

Joi E. Harper, Paralegal
Law Office of Daniel Marks
610 South Ninth Street
Las Vegas, Nevada 89101
O: (702) 386-0536; F: (702) 386-6812
JHarper@danielmarks.net

From: Michelle D. Alanis [mailto:MAlanis@ag.nv.gov]
Sent: Thursday, November 18, 2021 10:15 AM
To: Adam Levine <ALevine@danielmarks.net>; Anela P. Kaheaku <AKaheaku@ag.nv.gov>
Cc: Joi Harper <JHarper@danielmarks.net>
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

Good morning Adam,

I am following up on this matter that was originally sent on 10/22/21,

You have now stated you do not have any changes to the Order but when I asked if I have permission to submit with your electronic signature you did not respond. Please advise if we have your permission to use your electronic signature. If I do not have a response by tomorrow, November 19, 2021 at noon, I plan to submit the proposed Order to the Judge without your signature.

I look forward to hearing from you. Thank you.

Michelle Di Silvestro Alanis
Supervising Senior Deputy Attorney General
702-486-3268

From: Michelle D. Alanis
Sent: Tuesday, November 16, 2021 5:18 PM
To: Adam Levine <ALevine@danielmarks.net>; Anela P. Kaheaku <AKaheaku@ag.nv.gov>
Cc: Joi Harper <JHarper@danielmarks.net>
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

Do I have your permission to use your electronic signature on the order? Thanks.

Michelle Di Silvestro Alanis
Supervising Senior Deputy Attorney General
702-486-3268

From: Adam Levine <ALevine@danielmarks.net>
Sent: Tuesday, November 16, 2021 4:25 PM
To: Michelle D. Alanis <MAlanis@ag.nv.gov>; Anela P. Kaheaku <AKaheaku@ag.nv.gov>
Cc: Joi Harper <JHarper@danielmarks.net>
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

WARNING - This email originated from outside the State of Nevada. Exercise caution when opening attachments or clicking links, especially from unknown senders.

No.

Adam Levine, Esq.
Law Office of Daniel Marks
610 S. Ninth Street
Las Vegas, NV 89101
(702) 386-0536: Office
(702) 386-6812: Fax
alevine@danielmarks.net

From: Michelle D. Alanis [<mailto:MAlanis@ag.nv.gov>]
Sent: Tuesday, November 16, 2021 4:26 PM
To: Adam Levine; Anela P. Kaheaku
Cc: Joi Harper
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

Adam,

Do you have any changes to the Kassebaum Order?

Thank you.

Michelle Di Silvestro Alanis
Supervising Senior Deputy Attorney General
702-486-3268

From: Michelle D. Alanis
Sent: Wednesday, November 10, 2021 10:44 AM
To: Adam Levine <ALevine@danielmarks.net>; Anela P. Kaheaku <AKaheaku@ag.nv.gov>
Cc: Joi Harper <JHarper@danielmarks.net>
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

Adam,

I am following up on the draft of the Order in Kassebaum.

Please let me know if you have any specific changes to the Order. I would like to submit to the Court by Friday. Thank you.

Michelle Di Silvestro Alanis
Supervising Senior Deputy Attorney General
702-486-3268

From: Michelle D. Alanis
Sent: Tuesday, November 2, 2021 5:10 PM
To: Adam Levine <ALevine@danielmarks.net>; Anela P. Kaheaku <AKaheaku@ag.nv.gov>
Cc: Joi Harper <JHarper@danielmarks.net>
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

Hi Adam,

I prepared the Order not Anela. She only emailed the draft for your review.

The Order does contain more than the minutes because it contains findings of fact and conclusions of law that lead us to the Court's decision. In the Court minutes, it states that "Counsel for Respondent may use the legal arguments within their Answering Brief as a basis of the Order." The proposed order contains information relevant to the ruling.

Your office has prepared other orders that included more than language of the minutes. Off the top of my head, I recall the Bilavarn/Olague Order and the Navarrete Order.

If you have more specific changes, please let me know. I am also available to discuss on Friday if you would like. Thank you.

Michelle Di Silvestro Alanis
Supervising Senior Deputy Attorney General
702-486-3268

From: Adam Levine <ALevine@danielmarks.net>
Sent: Tuesday, November 2, 2021 4:19 PM
To: Anela P. Kaheaku <AKaheaku@ag.nv.gov>
Cc: Joi Harper <JHarper@danielmarks.net>; Michelle D. Alanis <MAlanis@ag.nv.gov>
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

For your patience. My review of your proposed order reveals that it has all sorts of things, including citations to cases, which are not contained within the Minutes of the District Court's ruling. I would request that you revise the Order to reflect only those matters identified in the Court Minutes.

If Michelle wishes to discuss the matter, I can do so this Friday. I am going to be out of the office in Carson City for Supreme Court arguments tomorrow, and do not fly back until Thursday whereupon I have to proceed immediately to Pahrump upon landing.

Adam Levine, Esq.
Law Office of Daniel Marks
610 S. Ninth Street
Las Vegas, NV 89101
(702) 386-0536: Office
(702) 386-6812: Fax
alevine@danielmarks.net

From: Anela P. Kaheaku [<mailto:AKaheaku@ag.nv.gov>]
Sent: Wednesday, October 27, 2021 12:42 PM
To: Adam Levine
Cc: Joi Harper; Michelle D. Alanis
Subject: RE: Kassebaum v NDOC, Case No. A-20-81182-J

Hello.

I am following up on the email below. Please advise.

Thank you,

Reply/Forward From:

Anela Kaheaku, LS II

AKaheaku@ag.nv.gov

From: Anela P. Kaheaku

Sent: Friday, October 22, 2021 3:10 PM

To: Adam Levine <alevine@danielmarks.net>

Cc: Joi Harper <JHarper@danielmarks.net>; Michelle D. Alanis (MAlanis@ag.nv.gov)
<MAlanis@ag.nv.gov>

Subject: Kassebaum v NDOC, Case No. A-20-81182-J

Good afternoon,

Attached for your review and approval is the Findings of Fact, Conclusions of Law and Order Denying Petition for Judicial Review. If acceptable, please authorize the use of your e- signature.

Thank you,

Anela Kaheaku, LS II

State of Nevada*Office of the Attorney General

Personnel Division

555 E. Washington Ave., Ste. 5900 * Las Vegas, NV 89101

AKaheaku@ag.nv.gov

PLEASE BE GREEN. *Please don't print this email unless necessary.*

This e-mail contains the thoughts and opinions of Anela Kaheaku and does not represent official Office of the Attorney General policy.

CONFIDENTIALITY NOTICE

This message and attachments are intended only for the addressee(s) and may contain information that is privileged and confidential. If the reader of this message is not the intended recipient, I did not intend to waive and do not waive any privileges or the confidentiality of this message and attachments and you are hereby notified that any dissemination of this communication is strictly prohibited. If you receive this communication in error, please notify me immediately and destroy this document and all attachments. Thank you.

1 CSERV

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Shari Kassebaum, Petitioner(s) CASE NO: A-20-811982-J
7 vs. DEPT. NO. Department 21
8 Nevada Department of
9 Corrections, Respondent(s)

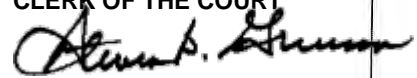
10
11 AUTOMATED CERTIFICATE OF SERVICE

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the
14 court's electronic eFile system to all recipients registered for e-Service on the above entitled
15 case as listed below:

16 Service Date: 11/19/2021

17 Michelle Alanis	malanis@ag.nv.gov
18 Anela Kaheaku	akaheaku@ag.nv.gov
19 Daniel Marks	Office@danielmarks.net
20 Angela Lizada	angela@lizadaalaw.com
21 Joi Harper	Jharper@danielmarks.net

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23
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LAW OFFICE OF DANIEL MARKS
DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
610 South Ninth Street
Las Vegas, Nevada 89101
(702) 386-0536; FAX (702) 386-6812
Attorneys for Appellant Shari Kassebaum

DISTRICT COURT
CLARK COUNTY, NEVADA

SHARI KASSEBAUM,
Petitioner/Appellant,

Case No.: A-20-811982-J
Dept. No.: 21

v.

STATE OF NEVADA ex rel, its DEPARTMENT
OF CORRECTIONS, and STATE OF NEVADA ex
rel, its DEPARTMENT OF ADMINISTRATION
PERSONNEL COMMISSION, HEARING
OFFICER, CARA BROWN

Defendants/Respondents.

CASE APPEAL STATEMENT

1. Name of appellant filing this case appeal statement:

Shari Kassebaum.

2. Identify the judge issuing the decision, judgment or order appealed from:

District Court Judge Tara Clark Newberry.

3. Identify each appellant and the name and address of counsel for each appellant:

Shari Kassebaum, Appellant:

Adam Levine, Esq., Law Office of Daniel Marks, 610 South Ninth Street, Las Vegas, Nevada
89101.

1 **4. Identify each respondent and the names and address of appellant counsel, if known, for**
2 **each respondent (if the names of a respondent's appellant counsel is unknown, indicate as much**
3 **and provide the name and address of that respondent's trial counsel):**

4 State of Nevada, ex rel. its Department of Corrections, Respondent:

5 Michelle Di Silvestro Alanis, Esq., Supervising Sr. Deputy Attorney General, State of Nevada,
6 Office of the Attorney General, 555 E. Washington Avenue, #3900, Las Vegas, Nevada 89101

7 State of Nevada ex rel its Department of Administration Personnel Commission, Respondent:

8 Michelle Di Silvestro Alanis, Esq., Supervising Sr. Deputy Attorney General, State of Nevada,
9 Office of the Attorney General, 555 E. Washington Avenue, #3900, Las Vegas, Nevada 89101;

10 Hearing Officer Cara Brown, unknown whether this entity will be Respondent or Cross
11 Appellant;

12 Michelle Di Silvestro Alanis, Esq., Supervising Sr. Deputy Attorney General, State of Nevada,
13 Office of the Attorney General, 555 E. Washington Avenue, #3900, Las Vegas, Nevada 89101

14 **5. Indicate whether any attorney identified above in response to question 3 or 4 is not**
15 **licensed to practice law in Nevada and, if so, whether the district court granted that attorney**
16 **permission to appear under SCR 42 (attach a copy of any district court order granting such**
17 **permission):**

18 n/a.

19 **6. Indicate whether appellant was represented by appointed or retained counsel in district**
20 **court:**

21 Appellant was represented by retained counsel.

22 **7. Indicate whether appellant was representing by appointed or retained counsel on appeal:**

23 Appellant are being represented by retained counsel.

24 ///

25 ///

26 ///

1 8. Indicate whether appellant is granted leave to proceed in forma pauperis, and the date of
2 entry of the district court order granting such leave:

3 n/a.

4 9. Indicate the date the proceedings commenced in the district court:

5 The Petition for Judicial Review was filed on March 10, 2020.

6 10. A brief description of the nature of the action and result in the district court:

7 The Petition for Judicial Review was filed by Appellant challenging the dismissal of her appeal
8 under NRS 284.390 without a hearing. The District Court denied judicial review.

9 11. Indicate whether this case has previously been the subject on appeal:

10 No.

11 12. Indicate whether this appeal involves child custody or visitation:

12 No.

13 13. Indicate whether this appeal involves the possibility of settlement:

14 No.

15 DATED this 10th day of December 2021.

16 LAW OFFICE OF DANIEL MARKS

17 
18 DANIEL MARKS, ESQ.

19 Nevada State Bar No. 002003

20 ADAM LEVINE, ESQ.

21 Nevada State Bar No. 004673

22 610 South Ninth Street

23 Las Vegas, Nevada 89101

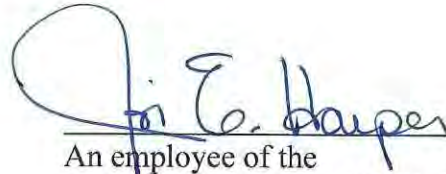
24 (702) 386-0536; FAX (702) 386-6812

25 Attorneys for Appellant

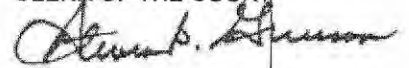
1 **CERTIFICATE OF SERVICE BY ELECTRONIC MEANS**

2 I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 10th
3 day of December 2021, I did serve the above and forgoing CASE APPEAL STATEMENT, by way of
4 Notice of Electronic Filing provided by the court mandated E-file & Serve service, upon Respondents
5 at the following:

6 Aaron D. Ford, Esq.
7 Attorney General
8 Michelle Di Silvestro Alanis, Esq.,
Supervising Sr. Deputy Attorney General
State of Nevada
Office of the Attorney General
9 555 E. Washington Avenue, #3900
Las Vegas, Nevada 89101
10 Email: MAlanis@ag.nv.gov
Attorneys for Respondent
11 *State of Nevada ex rel its Department of Corrections*

12
13
14 

15 An employee of the
16 LAW OFFICE OF DANIEL MARKS
17
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1 RTRAN

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4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 SHARI KASSEBAUM,
9 Petitioner(s),

CASE NO. A-20-811982-J

10 vs.

DEPT. NO. XXI

11 NEVADA DEPARTMENT OF
12 CORRECTIONS,

13 Respondent(s).

14 BEFORE THE HONORABLE TARA CLARK NEWBERRY,
15 DISTRICT COURT JUDGE

16 WEDNESDAY, SEPTEMBER 22, 2021

17 **RECORDER'S TRANSCRIPT OF HEARING RE:**
18 **PETITION FOR JUDICIAL REVIEW: RESPONDENT, DEPARTMENT**
19 **OF CORRECTIONS' REQUEST TO SET MATTER FOR HEARING**

20 APPEARANCES VIA BLUEJEANS:

21
22 For the Petitioner(s): ADAM LEVINE, ESQ.

23 For the Respondent(s): MICHELLE DI SILVESTRO ALANIS, ESQ.
24

25 RECORDED BY: ROBIN PAGE, COURT RECORDER

1 Las Vegas, Nevada; Wednesday, September 22, 2021

2 * * * * *

3 [Proceeding commenced at 1:35 p.m.]

4 THE COURT: We're going to start with Page 25. I do
5 apologize to everyone in advance. This case waited for a long calendar,
6 we had to continue it; so I promised that they could go first. So bear with
7 us and we will get to the expedited matters shortly thereafter.

8 So Page 25, Shari Kassebaum versus Nevada Department of
9 Corrections.

10 Appearances for the petitioner, please.

11 MR. LEVINE: Adam Levine, Bar Number 4673.

12 MS. DI SILVESTRO ALANIS: Good afternoon, Michelle Di
13 Silvestro Alanis, Bar Number 10024.

14 THE COURT: All right. Thank you, Counsel. All right. This is
15 your petition for judicial review. I have reviewed the briefs. I have a
16 pretty good inclination of how I'm going to rule on this, but I will take brief
17 argument from both sides. Petitioner go first.

18 MR. LEVINE: Yes, so I intend to keep it brief. As I have laid
19 out in the pleadings, 284.6562(b) NAC, which was adopted by the
20 personnel commission, cannot be a jurisdictional rule. Only the
21 legislature can impose jurisdictional rules, which it did in 284.390, which
22 provides an appeal must be in writing and within ten working days. The
23 administrative agencies cannot enlarge or restrict their jurisdiction. I've
24 cited the cases from the U.S. Supreme Court about claims-processing
25 rules and scolding lower courts for treating such rules as jurisdictional

1 when they are not.

2 I have pointed out that the appeal instruction does not say you
3 must attach the decision of the final agency. The case of *Rust versus*
4 *Clark County School District* makes clear that in any jurisdictional rule it
5 must be clear and unambiguous, which at this point clearly is not and
6 most importantly, the due process argument, which is that the personnel
7 commission cannot alter the requirements of constitutional due process.
8 *Loudermill -- Cleveland Board of Education versus Loudermill* says that
9 it rejects the bitter with the sweet approach and says that while a state
10 may not -- may choose not to confer a property interest, once conferred,
11 it cannot be taken away without meeting the requirements of federal
12 constitutional due process.

13 *Loudermill* and *Gilbert versus Homar* say that for terminations
14 and suspensions, and this is a suspension case, there must be a quote,
15 unquote, more comprehensive, closed quote, post-deprivation hearing.
16 It was that hearing that was -- Shari Kassebaum was denied when her
17 appeal was dismissed for the failure to attach a piece of paper, which
18 was already in the possession of the Department of Corrections. And
19 the -- to the State's point that, oh, well it was deemed, her appeal rights
20 -- due process rights were deemed waived, which she didn't attach that.
21 That is not the case. As I cited in the reply brief the waiver of a
22 constitutional right must be knowing and intelligent, failure to attach a
23 piece of paper does not meet the requirements for waiving a
24 constitutional right.

25 And, most significantly, issue preclusion applies in this case.

1 This case has -- this issue has already been decided by Judge Kushner
2 in the other suspension appeal case, which was dismissed. That was
3 decided by Judge Kushner back on March 3, 2021. All of the elements of
4 issue preclusion are met; it's the same parties, the exact same issue.
5 While I would have preferred that Judge Kushner make a flat out
6 determination that it is a claims-processing rule and not a jurisdictional
7 rule, she chose to send it back to the hearing officer to examine both that
8 issue and the federal due process issue.

9 Ms. Kassebaum is bound to it the same way that the State of
10 Nevada is and I don't believe that -- well, I believe issue of preclusion
11 applies to both parties and that it should be sent back to the hearing
12 officer under the same parameters that Judge Kushner granted judicial
13 review.

14 Thank you.

15 THE COURT: All right. Thank you, Counsel.

16 Response for the respondent.

17 MS. DI SILVESTRO ALANIS: Thank you, your Honor. I will
18 do my best to be brief here. As you see from the briefs, NRS 284.390
19 and NAC 284.6562 set out the mandatory and jurisdictional
20 requirements for an appeal hearing of employee discipline. And
21 Ms. Kassebaum failed to comply with the mandatory and jurisdictional
22 statute and regulation governing that process.

23 Before I address the points raised by Mr. Levine, I want to point
24 out some important things from the hearing below. Ms. Kassebaum filed
25 the appeal to her discipline; we filed a motion to dismiss that appeal

1 based on her failure to invoke the jurisdiction of the hearing officer. It's
2 important to note that she did -- she filed a limited opposition, but her
3 limited opposition was essentially akin to a non-opposition. She admitted
4 to the arguments made below, she conceded the legal arguments and
5 said we were correct, she did not attach the mandatory document and
6 that we would prevail. She only disputed a few facts and exhibits that
7 were attached to that motion. So essentially --

8 [Audio disruption regarding another matter]

9 [Colloquy between the Court and Recorder]

10 THE COURT: I'm sorry for the disruption.

11 Go ahead, Counsel.

12 MS. DI SILVESTRO ALANIS: That's okay.

13 MR. LEVINE: I wasn't familiar with that argument that -- I
14 wasn't familiar with that argument that we just heard.

15 MS. DI SILVESTRO ALANIS: I'm not either.

16 In any event, so none of these issues were raised below at the
17 appeal. So it was a non-opposition, she failed to oppose the motion and
18 didn't preserve any of these issues for appeal. She essentially admitted
19 that the motion was meritorious. Based on that, we feel that she is
20 judicially estopped from now raising these arguments here before the
21 District Court.

22 There is a five-factor test, I won't go through it all, but all of the
23 factors are met. It was a quasi-judicial setting, she was successful in her
24 position because she said it was a mandatory rule and she didn't comply
25 with it. She had concessions in that limited opposition. Her two

1 positions are now inconsistent, now she's coming to the Court saying
2 that this is a claims-processing rule and her due process rights were
3 violated. None of those issues were raised below. This wasn't a result
4 of ignorance, fraud or mistake. Ms. Kassebaum was represented by
5 counsel; she is still represented by the same counsel in this case, but
6 Mr. Levine has joined on as co-counsel. She said that the language of
7 the regulation was clear.

8 So, again, she didn't raise these arguments below, she did not
9 raise that it was a claims-processing rule or a violation of due process,
10 cannot raise these new theories for the first time on appeal in this
11 petition for judicial review. Now, she does argue, like Mr. Levine pointed
12 out, that she can raise jurisdiction and constitutional issues for the first
13 time, but her arguments are inconsistent.

14 *Landreth versus Malik* cites that whether a Court lacks subject
15 matter jurisdiction can be raised at any time. Kassebaum is not arguing
16 that the hearing officer lacks jurisdiction, she's saying the opposite.
17 She's saying the hearing officer had jurisdiction and that -- and that NAC
18 284.6562 is non-jurisdictional. So if that's the case and if the hearing
19 officer had jurisdiction, then she should have raised these arguments
20 below that this is a claims-processing rule or that she believed her rights
21 were violated.

22 They're not jurisdictional, that's what she's arguing. She's
23 arguing that it's not jurisdictional and so her claims-processing argument
24 should be waived because it was not -- it was not addressed below.
25 Second, she argues that you can hear this now because she's raising

1 constitutional issues, but she's really making -- muddying that up. She
2 was not deprived of her due process rights.

3 The *Loudermill, Cleveland v. Loudermill*, case says she needs
4 to have notice of the allegations against her, which she received when
5 she received her specificity of charges and she needs the opportunity for
6 a hearing. She had an opportunity; she had a pre-disciplinary hearing
7 prior to the discipline taking effect. And it's important to note that she
8 failed to show up at that hearing, she did not show, but she had the
9 opportunity for a hearing.

10 Then once the discipline was imposed, she had an opportunity
11 to request a post-disciplinary hearing. She did -- she made that request,
12 but she completely failed to follow the mandatory and jurisdictional rules,
13 so she was not deprived of due process. She was afforded every right
14 along the way. Because she failed to follow the rules in timely filing her
15 appeal, doesn't mean that she was not afforded due process.

16 It's also important to note that the hearing officer's
17 interpretation of the governing regulation is of deference, this is an
18 exception to the rule. In the briefs, opposing counsel argued that
19 normally questions of law are reviewed *de novo*, but the *Taylor* case
20 points out that statutory construction, while normally would be reviewed
21 *de novo*, an agencies interpretation of its governing statutes or
22 regulations, we would defer to that if the interpretation is within the
23 language of the statute.

24 Language is very clear, the statute requires that the request
25 be filed within ten days and submitted in writing. The regulations say

1 that it must be submitted on the form to the administrator of the hearings
2 division and must include the appointing authorities' written notification.
3 Kassebaum did not attach the written -- the appointing authorities'
4 written notification. The language is clear, it uses the term must, it is
5 mandatory.

6 Opposing counsel mentions that it's not jurisdictional because
7 the personnel commission -- it's a regulation of the personnel
8 commission. NRS 284.065 gives authority to the personnel commission
9 to adopt regulations to carry out the provisions of NRS 284.390. It didn't
10 limit which regulations it could carry out, it gave the personnel
11 commission the authority to adopt any regulations, all regulations,
12 including those that are jurisdictional, not just procedural.

13 Be it Kassebaum admits this language of the statute in her
14 brief. So we have a statute that gets us the procedure to file an appeal,
15 the regulation which sets forth the time and manner of that appeal. And
16 we do have Supreme Court case law that says regulations from the
17 personnel commission are given the full force and effect of law. That is
18 the *Turk versus NDOC* case. So strict compliance is required with this
19 regulation and Kassebaum did not comply.

20 The intent of the regulation was clear; the language is clear
21 and unambiguous. The form that opposing counsel referenced that she
22 uses to file her appeal with the hearing's division is very clear. It says
23 right on the form that the appointing authorities' written notification must
24 be attached. It's in bold and italicized font. There is nothing ambiguous
25 about that. It is right there on the form in addition to the language of the

1 regulation.

2 And again, not only was this clear, Ms. Kassebaum was not
3 pro per, she was represented by counsel. So that some waiver wasn't --
4 she has to be knowing and intelligently, is what opposing counsel said.
5 She was represented, she filed an appeal; she attached about 11 pages
6 to that appeal with a long narrative, but failed to follow the rules of filing
7 a timely and effective appeal to the hearings division.

8 We did put in our briefs we do not believe this is a claim's-
9 processing rule. There's -- opposing counsel doesn't cite to any case
10 law within this jurisdiction or anything related to employee discipline,
11 they're all other cases. There's nothing to suggest that this is a claims-
12 processing rule. The language of NRS 284.390 and NAC 284.6562 are
13 very clear and those are the laws that govern these appeals.

14 The Supreme Court has also said that the proper and timely
15 filing of a notice of appeal is jurisdictional. I wanted to touch on the --
16 that's through the due process argument -- the issue preclusion. There
17 is no issue preclusion here. For that to apply, as this Court is aware,
18 there has to be four elements met. Kassebaum cannot meet elements
19 two or four. She did have another PJR pending in front of another judge,
20 Ms. -- Judge Kishner and it was for a similar type of case, she failed to
21 attach the written notification of the appointing authority.

22 However, Judge Kishner did not make a ruling on the merits;
23 she remanded the case to the hearing officer to determine whether or
24 not it was a claims-processing rule. She wanted them to consider
25 whether NAC 284.6562 was a claims-process rule. With all due respect

1 to Judge Kishner, the hearing officer didn't analyze that issue because
2 that argument was never raised because Kassebaum did not make any
3 arguments in her opposition or in her limited opposition.

4 Further, the petitioner did not rule on the merits of the petition
5 for judicial review. She remanded it to the hearing officer, so it is not a
6 final decision. And that goes to number four that the issue is not actually
7 and necessarily litigated, it was not a final ruling. The hearing officer, I
8 believe, hasn't even analyzed that issue yet. I'm not sure where they
9 are in that process, but there hasn't even been a decision from the
10 hearing officer on that. Judge Kishner did not rule on the merits of that
11 case.

12 And if we're going to look at Judge Kishner's ruling, then we
13 would also be able to look at Judge Gonzalez's ruling in the *Allen v.*
14 *NDOC* case. That case is also on point. It wasn't Ms. Kassebaum who
15 filed the PJR, it was another NDOC employee, but again, the facts were
16 similar. There was a motion to dismiss for failing to attach the written
17 notification. In that case, there was no opposition and there was a
18 petition for judicial review -- I'm sorry, the motion was granted, so the
19 case was dismissed. *Allen* filed a petition for a judicial review to the
20 Court, he was represented by Mr. Levine in that case and the same legal
21 arguments were made, that this was a claims-processing rule and there
22 were constitutional violations.

23 Judge Gonzalez denied the petition for judicial review because
24 Mr. Allen failed to comply with the mandatory and jurisdictional
25 requirements of NRS 284.390 and NAC 284.6562. So if this Court --

1 neither one of those cases is controlling precedent, but if this Court were
2 inclined to look at the other Kassebaum case, I think this Court would
3 also need to look at the *Allen* case that was actually decided, it was not
4 remanded. Judge Gonzalez denied the petition.

5 Your Honor, and again, just to point out here, we believe that,
6 number one, the petition should be denied for the simple reason that
7 Ms. Kassebaum did not -- she did not make any of these arguments
8 below. So we should not even be here because she has essentially
9 waived this. She filed a limited opposition, which essentially was not an
10 opposition at all. But if this Court were to reach that and agree that it is
11 not jurisdictional, that the regulation is not jurisdictional in nature and it's
12 a claims-processing rule, you would still have to go back to the first
13 argument here that you would still have to deny the petition for judicial
14 review on the basis that she didn't oppose it because you can't raise
15 non-jurisdictional issues for the first time on appeal. Saying that it is a
16 claims-processing rule is not saying that the Court lacks jurisdiction.
17 She's saying the Court had jurisdiction and it was a claims-processing
18 rule.

19 Either way we look at it, you failed to comply with the statutes
20 and the regs governing her appeal and we would ask that this Court
21 deny the petition for judicial review.

22 THE COURT: All right. Thank you, Counsel.

23 Brief response, Mr. Levine.

24 MR. LEVINE: Okay.

25 First and foremost, *Allen versus NDOC* is not entitled to issue

1 preclusive effect because one of the key elements of *Five Star Capitol*
2 *versus Ruby* is not met; it is not the same parties or their privies. Shari
3 Kassebaum is not in privity with Ray Allen. Second, the only reason the
4 *Allen* case was not submitted for reconsideration in light if Kassebaum
5 won or appealed to Supreme Court was is that Mr. Allen was subject to
6 termination, subsequent to that and entered into a settlement agreement
7 which required him to waive all claims against the department.

8 But I would point out that the same argument regarding
9 judicial estoppel was made in front of Judge Kishner and was rejected.
10 The reason it was rejected is judicial estoppel requires, one, requires a
11 change of position whereby a party prevails. Kassebaum did not prevail
12 before the hearing officer below. And most importantly, it requires -- let
13 me find the final requirement of judicial estoppel -- that basically there be
14 an attempt to mislead or gain an unfair advantage. That clearly is not
15 the case.

16 With due respect Ms. Di Silvestro Alanis is incorrect with
17 regard to jurisdiction. It is not just that lack of jurisdiction may be raised;
18 any jurisdictional issues may be raised for the first time on appeal. I
19 have actually cited the case law in my brief -- let me -- in my reply brief,
20 let me locate it. As a matter of fact, if you take a look at the case law I
21 have cited, it can be raised *sua sponte* by the Court at any time, any
22 jurisdictional issue.

23 Here it is, the cases are *Garmong versus Lyon County*, quote,
24 issues of jurisdiction may be considered for the first time on appeal,
25 close quote. Not lack of jurisdiction, it says issues of jurisdiction. And

1 then *Wallace versus Smith*, 2018, a non-published decision, but still post
2 2016, so it may be considered. And the quote is, questions of
3 jurisdiction can never be waived or stipulated away by the parties and
4 may be raised at any time even *sua sponte* by the Court for the first time
5 on appeal.

6 There was -- there was ignorance or mistake by Shari
7 Kassebaum's counsel, Angela Lizada. She was not familiar with this
8 due process cases, she was not familiar, obviously, with the issue of
9 claims-processing rules. The statute cited by Ms. Di Alanis authorizing
10 the personnel commission to adopt regulations to carry out the
11 provisions of this chapter do not allow the commission to enlarge or
12 restrict its jurisdiction. In fact, Subsection 1 of that statute, which she
13 cites, says -- and the portion she cited is in Subsection 2. Subsection 1
14 says the commission has only such powers and duties as are authorized
15 by law. The legislature has not delegated its right to set jurisdictional
16 limits to the personnel commission.

17 With regard to the argument, oh, the issue of claims-
18 processing rule wasn't raised below, well, that is the issue that goes to
19 the issue of jurisdiction. If it's not jurisdictional, it's a claim-processing
20 rule, so it can be raised for the first time on appeal. I think the Judge
21 indicated she understands the case well.

22 I would finally note that Ms. Di Alanis is misciting *Loudermill*.
23 *Loudermill* says that if you offer only a limited pre-termination hearing,
24 you must have a more comprehensive post-termination evidentiary
25 hearing. The State offers only a limited pre-termination hearing with no

1 rights to call witnesses and which, by the regulation, you don't have to
2 attend; you have the right to waive. But you -- if you only offer a limited
3 pre-term hearing or pre-disciplinary hearing of the sort that the State
4 only offers due process, which cannot be altered by the Nevada
5 Legislature, much less the personnel commission, requires that --
6 requires not -- says may -- must give the more comprehensive post-
7 suspension or termination evidentiary hearing. And Ms. Kassebaum
8 didn't get it, despite the fact that she submitted her appeal within -- in
9 writing and within the ten days, which are the only jurisdictional
10 limitations imposed by the legislature.

11 I think the Court understands the case law.

12 THE COURT: All right. Thank you, Counsel. The matter is
13 submitted. I will have a decision out within a few days of today's
14 hearing. Thank you.

15 MR. LEVINE: Thank you.

16 MS. DI SILVESTRO ALANIS: Thank you, Your Honor.

17 [Proceeding concluded at 1:58 p.m.]

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20 ATTEST: I do hereby certify that I have truly and correctly transcribed
21 the audio/video proceedings in the above-entitled case to the best of my
22 ability. Please note: Technical glitches in the BlueJeans audio/video,
23 which resulted in distortion and/or audio cutting out completely, were
24 experienced and are reflected in the transcript.

25 

Robin Page
Court Recorder/Transcriber