

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHARI KASSEBAUM,

Appellant,

vs.

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

Respondents.

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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NEV. R. APP. P. 3A(b)(1) and NRS 233B.150. The Eighth Judicial District Court entered its Order Denying Petition for Judicial Review on December 1, 2021. Joint Appendix (JA) at JA Vol. II 00355-369. Appellant filed a timely Notice of Appeal on December 10, 2021. JA Vol. II 00370-381.

II. ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals under NEV. R. APP. P. 17(b)(10) as it relates to an administrative agency appeal not involving tax, water, or public utilities commission determinations. Kassebaum requested that the Nevada Supreme Court retain the case as it involves an issue of first impression on whether the Personnel Commission can enact regulations of a jurisdictional nature. However, pursuant to NRS 284.065(2)(d), the Nevada Legislature delegated to the Personnel Commission authority to adopt all “regulations to carry out the provisions” of NRS Chapter 284.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Appellant failed to preserve any issues for appeal/judicial review when she did not oppose the legal arguments in NDOC’s motion to dismiss.

2. Was Appellant barred by judicial estoppel from taking inconsistent positions on judicial review when she had previously conceded that the requirements of NRS 284.390 and NAC 284.6562 *are* mandatory and jurisdictional?
3. Was Appellant barred from asserting new legal arguments for the first time on judicial review, after conceding to the legal arguments in NDOC's motion to dismiss?
4. Was Hearing Officer Gentile entitled to deference when he interpreted the governing statutes and regulations for administrative appeals in his February 12, 2020, Decision and Order?
5. Was Appellant's administrative appeal correctly dismissed on the basis that Appellant failed to submit a complete and proper appeal within the 10-day appeal period under NRS 284.390(1) and the mandatory filing requirements of NAC 284.6562?
6. Was due process satisfied by affording Appellant the opportunity to submit a complete and timely appeal of her 2-day suspension (which she failed to do)?

IV. STATEMENT OF THE CASE

This case involves the dismissal of Appellant's administrative appeal for failure to attach the written notification of the appointing authority's final disciplinary decision to her appeal form in accordance with NAC 284.6562 - a mandatory and jurisdictional requirement to request a hearing on discipline.

Appellant, Shari Kassebaum (Kassebaum), a correctional sergeant at the State of Nevada, Department of Corrections (NDOC), received a two-day suspension without pay for various acts of misconduct pursuant to NRS 284.385. JA Vol. I 00034-45; 00193-195. Kassebaum appealed her suspension to the Department of Administration Personnel Commission Hearing Officer pursuant to NRS 284.390. JA 00235-247. In filing her appeal, Kassebaum failed to comply with the mandatory and jurisdictional requirements of NAC 284.6562 because she did not attach the appointing authority's written notification of its final decision regarding discipline. *Id.* NDOC filed a "Motion to Dismiss Appeal for Lack of Jurisdiction." JA Vol. I, 00027-220. Kassebaum filed a "Limited Opposition" in which she did not oppose any of the legal issues raised by NDOC and only opposed the statement of facts. JA Vol. I 00024-26. After the matter was fully briefed, the hearing officer granted NDOC's motion to dismiss. JA Vol. I. 00016-19.

Kassebaum filed a petition for judicial review of the Order despite not opposing the underlying motion to dismiss. JA Vol. I 00001-8. After the matter was fully briefed, the district court heard oral argument on the petition for judicial review. JA Vol. II 00392-00405. The district court denied judicial review. JA Vol. II, 00343-354. Kassebaum now appeals the district court's denial of the petition for judicial review.

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V. STATEMENT OF FACTS

A. NDOC served Kassebaum with discipline

Sgt. Kassebaum was assigned to NDOC's Southern Desert Correctional Center. JA Vol. I 00083. On August 9, 2019, NDOC served Kassebaum with a Specificity of Charges (SOC), which recommended a two-day (sixteen hours) suspension without pay because of her continuous discourteous conduct towards her fellow employees and supervisors. JA Vol. I 00034-191. On August 23, 2019, NDOC Associate Warden, James Scally, conducted a pre-disciplinary review pursuant to NAC 284.6561. JA Vol. I 00194-195. Kassebaum did not attend her scheduled pre-disciplinary review. *Id.* After reviewing the evidence, Scally concurred with the recommended two-day suspension without pay. *Id.* On August 28, 2019, NDOC served Kassebaum with the written notification of the appointing authority, Acting Director Harold Wickham's final decision that Kassebaum would be suspended for two days without pay. JA Vol. I 00193. Kassebaum's suspension was effective August 30, 2019. *Id.*

B. Procedural History

On September 12, 2019, Kassebaum filed an appeal of her discipline by submitting the NPD-54 Form titled "Appeal of Dismissal, Suspension, Demotion, or Involuntary Transfer" (Appeal Form). JA Vol. I 00235-247. The Appeal Form specifically states, "*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." JA Vol. I 00235 (emphasis added). Kassebaum attached a typed statement totaling nine pages to the Appeal Form explaining why she believed the action taken was not reasonable and done in retaliation. JA Vol. I 00239-247. However, Kassebaum's Appeal Form was not accompanied by the written notification of Acting Director Wickham as required by NAC 284.6562(2)(b). *Id.*

On January 14, 2020, NDOC filed its "Motion to Dismiss Appeal for Lack of Jurisdiction." JA Vol. I 00027-220. NDOC argued that the appeal was jurisdictionally defective because Kassebaum failed to comply with the mandatory requirements of NAC 284.6562(2) and could not amend her appeal since the 10-day appeal period under NRS 284.390(1) had expired. JA Vol. I 00027-32.

Kassebaum filed a "Limited Opposition to Motion to Dismiss Appeal" in which she did not oppose any of the legal issues raised by NDOC and only opposed the statement of facts in the Motion. JA Vol. I 00024-26. In her limited opposition, Kassebaum "concedes that under the revised NAC 284.6562(2)(b) it is now required" for an Appeal to include the written notification of the appointing authority. JA Vol. I 00024. Kassebaum further conceded "procedurally, Employer will prevail on its Motion to Dismiss..." *Id.* Kassebaum did not dispute that the requirements of NAC 284.6562 and NRS 284.390 were mandatory and jurisdictional

or that she failed to comply with those sections. JA Vol. I 00024-25. Kassebaum further noted that “the language of NAC 284.6562 is clear...that employee must submit the written notification of the appointing authority’s decision.” JA Vol. I 00025. Accordingly, Kassebaum wholly conceded that she failed to comply with NAC 284.6562(2)(b) and thus failed to submit a complete and proper appeal within the 10-day filing period under NRS 284.390(1). JA Vol. I 00024-25. In fact, Kassebaum essentially consented to dismissal, choosing instead to “continue her pursuit of her federal lawsuit against NDOC...” JA Vol. I 00024.

NDOC filed its Reply in Support of Motion to Dismiss, which noted Kassebaum’s non-opposition to the legal arguments for dismissal. JA Vol. I 00020-23. NDOC further noted that the facts presented in the Motion were procedural in nature and identified documents and dates related to Kassebaum’s disciplinary process and did not discuss the underlying facts supporting the suspension. JA Vol. I 00021at footnote 1.

Hearing Officer Gentile granted NDOC’s Motion to Dismiss, citing that the appeal was deficient because it did not include the written notification of the appointing authority pursuant to NAC 284.6562. JA Vol. I 00016-19. Hearing Officer Gentile further found that the Kassebaum conceded procedurally that her appeal was deficient. JA Vol. I 00017. Hearing Officer Gentile further noted that

there was nothing extraordinary, unusual, or inappropriate about the facts or exhibits included in the Motion. *Id.*

Despite conceding to dismissal, Kassebaum filed a petition for judicial review and raised new arguments in her opening brief which were never set forth in her “limited opposition.” JA Vol. II 00248-266. NDOC filed its answering brief arguing amongst other things that Kassebaum was barred from raising new and inconsistent legal arguments on appeal and that Kassebaum failed to file a properly and timely appeal of her discipline. JA Vol. II 00267-323. Kassebaum filed an untimely reply brief. JA Vol. II 00327-341. After hearing oral argument, the district court denied the petition for judicial review. JA Vol. II 000343-348. The district court held:

- In reviewing statutory construction, the court “defer[s] to an agency’s interpretation of its governing statutes or regulations if the interpretation is within the language of the statute.” *Taylor v. Dep’t. of Health & Human Servs.*, 129 Nev. 928, 930, (2013) quoting *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, (2008). JA Vol. II 000345.
- NRS 284.390(1) establishes a mandatory 10-day deadline for employee disciplinary appeals. *Id.* at 000346.
- Under NRS 284.065(2)(d), the Nevada Legislature delegated to the Personnel Commission authority to adopt all “regulations to carry out the provisions” of NRS Chapter 284 and the Personnel Commission adopted

NAC 284.6562, which sets forth the requirements for satisfying the mandatory 10-day filing deadline under NRS 284.390(1). *Id.*

- One of the mandatory requirements is that the appeal “must” be accompanied by the written notification of the appointing authority’s decision regarding the discipline. *See* NAC 284.6562(2)(b). *Id.*
- The powers of an administrative agency are strictly limited to only those powers specifically set forth by statute and regulation. *Id.*
- NAC 284.6562 has the full force and effect of law and sets forth the mandatory requirements for submitting a proper and timely administrative appeal under NRS 284.390(1). *Id.*
- Substantial evidence supported that Kassebaum failed to attach the written notification of her final discipline and therefore her appeal was deficient and Kassebaum failed to file a proper and timely appeal under NRS 284.390. *Id.* at 000346-347.
- The hearing officer’s interpretation of NAC 284.6562 is owed deference. *Id.* at 00346.
- Kassebaum did not oppose or contest the jurisdictional challenge in her “limited opposition” and failed to preserve any issues for appeal and the jurisdictional issue was deem waived. *Id.* at 00347.

- Kassebaum was estopped from arguing that NAC 284.6562 is a claims processing rule as it was inconsistent from the position in her limited opposition. *Id.*
- The hearing officer properly determined that the plain language of NAC 284.6562 imposed mandatory and jurisdictional requirements for initiating an appeal under NRS 284.390. *Id.*

Thus, the district court denied Kassebaum's petition for judicial review. JA Vol. II 00343-348.

VI. SUMMARY OF THE ARGUMENT

This Court should affirm the district court's order denying Kassebaum's petition for judicial review and the hearing officer's final decision because the decision did not substantially violate the rights of Kassebaum. First, Kassebaum did not preserve any issues for appeal when she failed to oppose NDOC's motion to dismiss and conceded to the legal arguments; therefore, her failure to oppose was deemed an admission the motion to dismiss was meritorious. Second, Kassebaum is judicially estopped from arguing in her petition for judicial review and appeal that NAC 284.6562 is not jurisdictional when in her administrative appeal she did not oppose NDOC's argument that NAC 284.6562 is mandatory and jurisdictional. Third, Kassebaum is legally barred from raising new arguments in her petition for judicial review and appeal after conceding to the legal merits of the motion to

dismiss. Fourth, the hearing officer's interpretation that NAC 284.6562 and NRS 284.390 are mandatory and jurisdictional must be given deference. Fifth, even if Kassebaum were permitted to assert new/contrary arguments on judicial review, the hearing officer properly granted NDOC's motion to dismiss because the requirements of NRS 284.390(1) and NAC 284.6562(2)(b) are mandatory and jurisdictional – and whether strict or substantial compliance is applied, it is undisputed that Kassebaum failed to comply with the requirements and attach the written notification of the appointing authority. Even if NAC 284.6562 was a non-jurisdictional claims processing rule, dismissal was still permitted and necessary because she failed to comply with the mandatory requirements. The regulatory history of NAC 284.6562 is irrelevant because the language of the regulation is clear and unambiguous. But if reviewed, the history further supports the hearing officer's decision that attaching the written notification of the appointing authority is mandatory. The Appeal Form is not unconstitutionally vague and clearly states the requirements of NAC 284.6562. Sixth, Kassebaum was afforded all process due because she had the opportunity to appeal her suspension pursuant to NRS 284.390. Her failure to file a timely and proper appeal is not a denial of due process. Based on the foregoing, this Court should affirm the district court's order denying Kassebaum's petition for judicial review.

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VII. LEGAL ARGUMENT

A. Standard of Review

When an order deciding a petition for judicial review has been appealed, this Court reviews the administrative decision in the same manner as the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). The standard of review for evaluating a hearing officer's decision is governed by the Administrative Procedure Act, as set forth in NRS 233B.010, et seq. *See Dredge v. State, ex rel., Dep't of Prisons*, 105 Nev. 39, 43, 769 P.2d 56, 58 (1989). Pursuant to NRS 233B.135(3), a reviewing court may remand or affirm a final decision of a hearing officer, or set it aside in whole or in part, if the substantial rights of the petitioner have been prejudiced because the final decision of an agency is:

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

NRS 233B.135 (3).

The District Court “defer[s] to an agency’s interpretation of its governing statutes or regulations if the interpretation is within the language of the statute.” *Taylor v. Dep’t. of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951

(2013) (quoting *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008)). The District Court reviews other questions of law de novo. *See Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 334, 302 P.3d 1108, 1112 (2013). The District Court will uphold findings of fact when supported by substantial evidence, which is defined as “evidence that a reasonable person would accept as adequate to support [the] conclusion.” *Id.*

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

Kassebaum filed a “limited opposition” to NDOC’s Motion to Dismiss which was more akin to a non-opposition as Kassebaum did not oppose any legal arguments and only opposed the statement of facts and exhibits. JA Vol. I 00024. 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 Walls v. Brewster*, 112 Nev. 175, 178, 912 P.2d 261, 263 (1996) (district court properly construed plaintiffs failure to respond to a motion to dismiss as an admission that the motion was meritorious).

Here, in her “limited opposition” Kassebaum “concede[d] that procedurally, [NDOC] will prevail on its motion to dismiss.” JA Vol. I 00024. Kassebaum cannot

now file a petition for judicial review and related appeal to complain about NDOC's motion being granted. By failing to oppose the legal arguments, Kassebaum did not preserve any issues for judicial review and Kassebaum's consent to dismissal waives judicial review and subsequent appeals. Thus, the district court properly denied the petition for judicial review and this Court should affirm the decision of the district court.

C. Kassebaum is barred by the doctrine of judicial estoppel from taking inconsistent positions on appeal.

Kassebaum filed a "limited opposition" to NDOC's Motion to Dismiss admitting she failed to comply with the requirements of NAC 284.6562 by failing to attach the written notification of the appointing authority. JA Vol. I 00024. Kassebaum's limited opposition only opposed NDOC's presentation of the facts. JA Vol. I 00024-25. Kassebaum **did not** oppose any of the legal arguments made by NDOC, thereby conceding to the merits of the Motion to Dismiss. JA Vol. I 00024. In her petition for judicial review, however, Kassebaum takes an inconsistent position, arguing it was legal error for the hearing officer to grant the Motion despite her failure to oppose the legal arguments that compliance with NAC 284.6562 was mandatory and jurisdictional.

The primary purpose of judicial estoppel is to protect the judiciary's integrity, and a court may invoke the doctrine at its discretion. *See NOLM, LLC v. Cty. of*

Clark, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004). Courts must consider a five-factor test when determining whether judicial estoppel applies, i.e., whether “(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the 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.” *Kaur v. Singh*, 136 Nev. Adv. Op. 77, 477 P.3d 358, 362–63 (2020) citing *In re Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. 50, 56, 390 P.3d 646, 652 (2017).

Here, the five factors of judicial estoppel are met. First, Kassebaum has taken two different positions. Kassebaum did not oppose that the requirements of NAC 284.6562 were mandatory and that initiating a proper and timely appeal was jurisdictional before the hearing officer. JA Vol. I 00024-25. Now, Kassebaum has changed her position, arguing that NAC 284.6562 is *not* jurisdictional and her due process rights were violated.

Second, Kassebaum’s first position was taken in a quasi-judicial administrative proceeding pursuant to NRS 284.390 before the administrative hearing officer and her second position was taken in a judicial proceeding before the district court seeking judicial review and now on appeal.

Third, Kassebaum's first position, i.e., that she did not oppose the Motion's legal arguments, was accepted by the hearing officer and incorporated into the admissions and concessions in his Decision. *See* JA Vol. I 00017. Thus, the position was successful.

Fourth, the two positions are totally inconsistent because Kassebaum first did not oppose the legal arguments (including that compliance with NAC 284.6562 was mandatory and a proper and timely appeal was jurisdictional) and now argues NAC 284.6562 is a claims processing rule and the hearing officer violated her rights.

Fifth, there is no evidence that the first position was taken as a result of ignorance, fraud, or mistake. Kassebaum was represented by an attorney, Angela Lizada, Esq., the **same** attorney who represented Kassebaum in her petition for judicial review¹, who stated, "[t]he language of NAC 284.6562 is clear and neither the Hearing Officer nor opposing counsel need a non-controlling authority to be submitted to explain what it means when the NAC states that employee must submit the written notification of the appointing authority's decision." JA Vol. I 00025. Thus, Kassebaum's counsel clearly understood that the requirements of NAC

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¹ While Angela Lizada, Esq. filed the Petition for Judicial Review and the Opening Brief, Adam Levine, appeared at the oral argument and filed the instant appeal with the Nevada Supreme Court.

284.6562 were mandatory in order to properly initiate a timely appeal under NRS 284.390.

As all five factors are satisfied, judicial estoppel applies and the district court correctly ruled that Kassebaum was barred from taking an inconsistent position on judicial review.

D. Kassebaum is barred from raising new issues on judicial review

Kassebaum's legal arguments raised on judicial review were new and were never raised before Hearing Officer Gentile. In her opening brief to the district court, Kassebaum argued that NAC 284.6562(2)(b) is not jurisdictional and is instead a "claims processing rule."² See Appellant's Opening Brief at 7-18. Kassebaum further argued dismissal of her appeal for failure to comply with NAC 284.6562 is a violation of her due process. *Id.* Yet, Kassebaum never made these arguments before the hearing officer in her "limited opposition." Instead, Kassebaum conceded that procedurally NDOC would prevail on its motion to dismiss. Furthermore, Kassebaum did not dispute that compliance with NAC 284.6562 and NRS 284.390 were mandatory and jurisdictional.

"A point not urged in the trial court, unless it goes to the jurisdiction of the court, is deemed to have been waived and will not be considered on appeal." *Old*

² NDOC will oppose these new legal theories -the claims processing rule and due process violations in section F.

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

Here, Kassebaum did not make any legal arguments in her limited opposition at the administrative level. Instead, Kassebaum conceded to the legal merits of NDOC’s Motion to Dismiss. Kassebaum could not later argue on judicial review that NAC 284.6562 is a “claims processing rule” or that granting the motion to dismiss violated her due process rights and she cannot now do so on appeal. Since Kassebaum did not preserve any issues for judicial review, she cannot raise new issues on appeal. Thus, the district court correctly ruled that Kassebaum was judicially estopped from arguing that NAC 284.6562 was a claims processing rule

as it was inconsistent with her previous position and this Court should affirm the district court's denial of the petition for judicial review.

E. The Hearing Officer's interpretations of NRS 284.390 and NAC 284.6562 are owed deference

Although statutory construction is generally a question of law reviewed *de novo*, courts must “defer to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute.” *Taylor v. Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013). Accordingly, as long as a hearing officer's interpretation of NRS Chapter 284 and its associated regulations is “within the language of the statute,” a court must defer to that interpretation. Here, the hearing officer's interpretation of NRS 284.390 and NAC 284.6562 was consistent with the language of the statute and regulation.

When determining statutory meaning, we look first to the plain language of the statute. *Clay v. Eight Jud. Dist. Ct.*, 129 Nev. 445, 451, 305 P.3d 898, 902 (2013).

When the statute's language is plain and the meaning is clear, the courts will apply the plain language. *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007).

NAC 284.6562 states:

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.

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. (emphasis added).

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

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. JA Vol. I 00017. 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) of NAC 284.6562 did not apply. JA Vol. I 00016. The hearing officer

further found that Kassebaum's Appeal Form did not include the written notification and was thus deficient. JA Vol. I 00017. Kassebaum did not dispute that she failed to include the mandatory document with her appeal. *Id.* The hearing officer concluded that NAC 284.6562 sets forth the mandatory manner in which an appeal must be initiated and that "the proper and timely filing of a notice of appeal is jurisdictional. *Rust v. Clark Co. School Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987)." JA Vol. I 00017. Therefore, the hearing officer interpreted NAC 284.6562 and its use of the word "must" to create mandatory requirements for initiating an appeal pursuant to NRS 284.390. The hearing officer found Kassebaum's deficient appeal was not proper and timely and that a defect of appellant jurisdiction is never waived. JA Vol. I 00017. As the interpretation is within the language of the statute, this Court must defer to the hearing officer's interpretation and affirm the district court's denial of the petition for judicial review because the hearing officer did not abuse his discretion or act in excess of his statutory authority in his interpretation NAC 284.6562.

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

As thoroughly discussed above, Kassebaum did not oppose the Motion to Dismiss before the hearing officer. Despite her failure to oppose the motion, Kassebaum sought judicial review of the dismissal of her appeal and now appeals to

the Nevada Supreme Court. Based on Kassebaum's failure to preserve any issues for judicial review, the applicability of the doctrine of judicial estoppel, and Kassebaum's attempt to raise new arguments on appeal, this Court should affirm the district court's denial of her petition for judicial review on those issues alone. Should this Court reach the new arguments raised by Kassebaum, this Court should affirm the district court's denial of Kassebaum's petition for judicial review because the hearing officer properly dismissed Kassebaum's appeal for her failure to properly file her appeal per NAC 284.6562 within the 10 day filing period pursuant to NRS 284.390(1).

The Personnel Commission, pursuant to the authority granted to it by NRS 284.065(2)(d), has adopted regulations to carry out the provisions of NRS Chapter 284. In order to successfully invoke a hearing officer's jurisdiction to consider the reasonableness of disciplinary action, an employee must submit a timely notice of appeal. *See* NRS 284.390(1). NAC 284.6562(1) codifies the timing requirement for filing a notice of appeal, while NAC 284.6562(2) sets forth the manner requirements for filing a complete and proper appeal. NAC 284.6562(2)(b) specifically mandates that an appeal "must" be "accompanied by the written notification of the appointing authority's decision regarding the proposed action . . ." Similarly, the NPD-54 appeal form provided by DHRM expressly instructs that "[t]his 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 JA Vol. I 00235.

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

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

Moreover, the intent of the Personnel Commission in adopting NAC 284.6562(2) is 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. Regardless, because the language of NAC 284.6562 is unambiguous, 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 by NAC 284.6562(2). *See* JA Vol. II 00235-247. 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. JA Vol. I 00024-26. 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. JA Vol. I 00016-18. 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*.

In response to the foregoing, Kassebaum's Opening Brief raises several arguments that were raised for the first time on judicial review and again on appeal.

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

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

However, the holding in *Otto* confirms (1) a party seeking to invoke special statutory jurisdiction (such as the jurisdiction of an administrative hearing officer) must strictly comply with the procedures prescribed by statute; (2) when a petition is statutorily defective, a court does not obtain jurisdiction over it; and (3) that a defective appeal cannot be cured outside of the statutory filing deadline. *Otto*, 128 Nev. at 432. As in *Otto*, not every agency decision is reviewable under NRS 284.390

and NAC 284.6562; rather, only the decisions that fall within those provisions and are challenged in accordance with the mandatory requirements set forth therein are reviewable. Otherwise, a hearing officer would be improperly exercising authority outside the powers set forth by statute/regulation, which is an abuse of discretion. *See Clark Cty. Classroom Teachers Ass’n*, 115 Nev. at 102; *see also Bergmann*, 109 Nev. 674. As such, *Otto* is analogous to this case and confirms that the mandatory requirements for filing an appeal under NRS 284.390 and NAC 284.6562 are jurisdictional.

Additionally, as to whether the Personnel Commission is limited to regulating matters the Nevada Legislature has expressly or implicitly delegated to the agency, the Nevada Legislature enacted NRS 284.390 (which places a 10-day time limit on filing a notice of appeal) and then tasked the Personnel Commission (under NRS 284.065(2)(d)) with adopting “regulations to carry out the provisions of this chapter.” In turn, the Personnel Commission then adopted NAC 284.6562 to carry out the jurisdictional 10-day time limit for filing appeals. It is notable that the Nevada Legislature did not merely task the Personnel Commission with adopting *procedural* rules, but *all* rules to carry out the provisions of NRS Chapter 284. This is contrary to other statutes, such as NRS 281.641, in which the Nevada Legislature merely tasked the Personnel Commission with adopting procedural (i.e. non-jurisdictional) rules. *See NDOT v. Bronder*, 136 Nev. Advance Op. 76 (Dec. 3, 2020) (holding that

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

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

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

Furthermore, NRS 284.390 and NAC 284.6562 are not claims processing rules because rules governing the filing of a notice of appeal are jurisdictional even under analogous federal law. In *Bowles v. Russell*, 551 U.S. 205, 127 S. Ct. 2360 (2007), the Supreme Court held that a time limit governing the filing of a notice of appeal from a district court to a circuit court was jurisdictional. *Id.* at 209–15, 127 S. Ct. 2360. The Supreme Court emphasized that its own repeated interpretation of appeal deadlines as jurisdictional over the course of more than a century was determinative. *Id.* Likewise, the Nevada Supreme Court has expressly found that “[t]he proper and timely filing of a notice of appeal is jurisdictional.” *Rust*, 103 Nev. at 688. Accordingly, the 10-day filing limit for appealing an agency decision to a hearing officer under NRS 284.390 is jurisdictional and not merely a claims processing rule. Similarly, the provisions of NAC 284.6562, which regulate the manner of filing a complete and proper appeal under NRS 284.390, are also not claims processing rules.³

Additionally, Kassebaum’s argument that NRS 284.390 and NAC 284.6562 are claims processing rules is simply misplaced because the violation of a mandatory

³ As a brief aside, the Opening Brief cites NRAP 3(a)(2) and (3) to argue that even appeals to the Nevada Supreme Court need only be filed in a timely manner and that other deficiencies can be remedied after the fact. *See* Opening Brief, at 10. However, Kassebaum’s argument overlooks the fact that such a provision does not exist in NRS Chapter 284 or NAC Chapter 284 as there are no remedies, and that the authority of hearing officers is strictly limited. *See Bergmann*, 109 Nev. at 674.

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

3. The regulatory history is not needed where the statutory language is clear; however, it further supports the hearing officer's interpretation of NAC 284.6562

The regulatory history of the regulation is not needed as the plain language of the regulation is clear and the hearing officer's interpretation was within the language of the regulation. However, the regulatory history further supports

NDOC's position that the requirements of NAC 284.6562 were mandatory to initiate an appeal.

The Personnel Commission Meeting minutes clearly show that the intent in adopting NAC 284.6562 was "to move 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." JA Vol. II 297-3302. NAC 284.6562 sets forth the required procedures for a post-disciplinary hearing as opposed to a pre-disciplinary review found in NAC 284.6561. This was to make the procedures clear to the employee - not to assist DHRM in processing.

Further, the LCB's "Explanation of Proposed Change" very clearly explained that NAC 284.6562 "will place **procedures and requirements related to requesting a hearing** ...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.**" JA Vol. II 303-308 (emphasis added). The explanation further adds, "This amendment also adds a requirement that the written notification of an appointing authority's decision regarding proposed disciplinary action **must** accompany such a request." *Id.*

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

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

Kassebaum complains that the section on the NPD-54 form titled "Appeal Instructions" omits the requirements of NAC 284.6562(2), which (according to Kassebaum) renders the entire NPD-54 form unconstitutional. *See* Opening Brief, at 15-18. However, overlooked by Kassebaum is that the **very first page** of the NPD-54 form includes the language of NAC 284.6562(2)(b) in bold and italicized letters: *"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." JA Vol. II 00235. This warning is taken *verbatim* from NAC 284.6562(2)(b), which mandates that an 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." As such, the NPD-54 form clearly states the mandatory requirements of NAC 284.6562(2)(b). Therefore, no serious argument can be made that the NPD-54 is so vague as to amount to a violation of Kassebaum's due process rights. Furthermore, even if the NPD-54 did not exactly quote NAC 284.6562(2)(b) *verbatim*, Kassebaum, who was represented by counsel, is not relieved from complying with Nevada law, which is also clear and unambiguous.

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

Lastly, Kassebaum argues that she was constitutionally entitled to a post-deprivation hearing and that Hearing Officer Gentile violated Kassebaum's due process rights by dismissing her appeal. *See* Opening Brief, at 13-15 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985)). However, Kassebaum's argument misstates the holding in *Loudermill*. The law is well-established that the *opportunity* for a post-deprivation hearing before a neutral decisionmaker is needed in order to satisfy due process requirements. As long as the

procedural requirements are reasonable and give the employee notice and an opportunity to participate meaningfully, they are constitutionally adequate. *See Hennigh v. City of Shawnee*, 155 F.3d 1249, 1256 (10th Cir. 1998). As succinctly stated by the Seventh Circuit, the “availability of recourse to a constitutionally sufficient administrative procedure satisfies due process requirements if the complainant merely declines or fails to take advantage of the administrative procedure.” *Dusanek v. Hannon*, 677 F.2d 538, 542–43 (7th Cir.) (1982) (citations omitted), *cert. denied sub nom Dusanek v. O'Donnell*, 459 U.S. 1017, 103 S. Ct. 379, 74 L.Ed.2d 512 (1982). Consequently, where the employee refuses to participate or chooses not to participate in the post-termination proceedings, then the employee has waived her procedural due process claim. *See Krentz v. Robertson Fire Prot. Dist.*, 228 F.3d 897, 904 (8th Cir. 2000) (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 and failed to cure the deficiency 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.

VIII. CONCLUSION

Based on the foregoing, NDOC respectfully requests that this Court affirm the district court's order denying Kassebaum's Petition for Judicial Review and affirming Hearing Officer Gentile's decision to dismiss Kassebaum's administrative appeal.

DATED this 22nd day of June 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type face requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in font size 14 and font style Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 7,661 words and complies with NRAP 32(a)(7)(A)(ii).

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

DATED this 22nd day of June 2022.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I certify that on this 22 day of June 2022, I caused a true and correct copy of the foregoing **RESPONDENT’S ANSWERING BRIEF**, Supreme Court Case No. 83942, to be electronically filed and served upon the following individuals through the Supreme Court’s Electronic Case Filing System:

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