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-20-810424-P

APPELLANT'S REPLY BRIEF

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made an order that the Justices of this Court may evaluate possible disqualification or recusal.

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

Attorneys of Record for Appellant Shari Kassebaum.

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I. JURISDICTIONAL AND CONSTITUTIONAL ARGUMENTS ARE NOT WAIVED BY ANY FAILURE TO RAISE THEM BEFORE THE HEARING OFFICER.

The Hearing Officer dismissed Sergeant Shari Kassebaum's appeal of her disciplinary suspension because she/her counsel did not attach to the NPD-54 Appeal Form the final decision of the appointing authority upholding the suspension. The Hearing Officer erroneously concluded that such an attachment was a non-curable "jurisdictional" defect. (JA Vol. I at 016-019).

NDOC's Answering Brief argues that Kassebaum did not oppose its jurisdictional arguments before the Hearing Officer and therefore may not preserve the issue for appeal.

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

("questions of jurisdiction can never be waived or stipulated away by the parties" and "may be raised at any time, even *sua sponte* by the court for the first time on appeal").

The second exception is that constitutional issues may be raised for the first time on appeal. *Tam v. Eighth Judicial District Court*, 131 Nev. 792, 358 P.3d 234 (2015). See also *Jones v. State*, 101 Nev. 573, 707 P.2d 1128 (1985) (where "fundamental rights are implicated, it is appropriate to hear a constitutional question for first time on appeal"). The right to a hearing in connection with being deprived of a property interest in employment is a fundamental right secured under the 14th Amendment. *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985); *Gilbert v. Homart*, 520 U.S. 924, 117 S. Ct. 1807 (1997).

Because the arguments raised by Kassebaum in her Petition go to both jurisdiction and federal constitutional due process, they were properly raised for before the district court below notwithstanding Kassebaum's former counsel's failure to recognize to recognize these issues before the Hearing Officer.

II. KASSEBAUM IS NOT BARRED BY JUDICIAL ESTOPPEL.

NDOC's Answering Brief argues that judicial estoppel prohibits her from challenging the Hearing Officer's determination that the failure to attach the appointing authority's final decision was a jurisdictional defect because her former counsel only filed a "limited opposition" with the administrative agency.

Recently this Court clarified the doctrine of judicial estoppel in *Kaur v. Singh*, 136 Nev. Adv. Op. 77, 477 P.3d 358 (2020). The Court reiterated that courts must apply a five-part test consisting of:

> (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.

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

NDOC has failed to establish all five (5) requirements of the test for judicial estoppel. Shari Kassebaum has not taken two (2) positions. In her Limited Opposition it merely states "procedurally, Employer will prevail on its Motion to Dismiss" without ever addressing the issue of jurisdiction. This is a prediction, not a concession. (JA at 024). A simple prediction that a hearing officer will erroneously rule is not actually an inconsistent position.

However, even if the court found Kassebaum's position before the Hearing Officer to be contrary to the position asserted in her Petition, NDOC still fails to establish elements three (3) and five (5). Kassebaum was not successful in asserting her position before the Hearing Officer; rather, she was unsuccessful in

opposing NDOC's position. Moreover, the position of Kassebaum through her Limited Opposition was the result of a mistake of law.

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

III. THE HEARING OFFICER'S INTERPRETATIONS OF NAC 284.6562 IS NOT ENTITLED TO DEFERENCE.

NDOC's argues that the Hearing Officer's "interpretations of NRS 284.390 and NAC 284.6562 are owed deference". (Answering Brief at p. 18). At the outset, it must be pointed out that an interpretation of NRS 284.390 is not at issue. As a statute passed by the Legislature, 284.390 does set a ten working day jurisdictional deadline for filing an appeal.

It is undisputed that Kassebaum's appeal was filed within the ten working day time limit. The effective date of her suspension was August 30, 2019. (JA at 193). Her appeal was received by the Appeals Office on September 12, 2019. (JA at 235).

Rather, the sole issue is the Hearing Officer's interpretation of NAC 284.6562 that the failure to attach Acting Director Harold Wickham's letter (JA at 193) is a jurisdictional defect which could not be cured after the 10 working day time limit.

The Hearing Officer's interpretation of NAC 284.6562 is not entitled to deference. On a Petition for Judicial Review, or appeal to this court to therefrom, issues of law, including statutory construction, are reviewed *de novo*. *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 349, 240 P.3d 2, 4 (2010). Courts are to "decide pure legal questions without deference to an agency determination." *City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 119, 9251 P.3d 718, 721 (2011).

The problem with NDOC's deference argument is that different hearing officers have interpreted the same issue differently. See *Wendland v. Office of Secretary of State*, Case No. 2003166-VO (Oldenburg May 21, 2020). Under NDOC's deference theory, hearing officer decisions finding NAC 284.6562 non-jurisdictional would be entitled to the same deference creating inconsistent results depending upon which hearing officer was randomly assigned.

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

IV. NAC 284.6562 IS A NON-JURISDICTIONAL CLAIM PROCESSING RULE.

As set forth in Kassebaum's Opening Brief, the requirement of NAC 284.6562 to attach Deputy Director Wickham's final decision must be a claim processing rule because administrative agencies such as the Personnel Commission lacked the authority to adopt rules regulations governing their own jurisdiction. Such jurisdictional determinations are solely the prerogative of the legislature. NDOC's Answering Brief cites no authority for the proposition that administrative agencies may enlarge or restrict their own jurisdiction.

Alternatively, NDOC argues that if NAC 284.6562 is a claim processing rule, Kassebaum's appeal should be dismissed nonetheless. However, NDOC's brief does not explain how Kassebaum's failure to provide a copy of Deputy Director Wickham's final decision (JA at 193), which was in the possession of NDOC (as evidenced by the fact that they attached it to its Motion to Dismiss), to the Hearing Officer within 10 days somehow prejudices NDOC's ability to defend against the appeal, or otherwise prejudices the Hearing Officer's ability to hear the case. As set forth in Kassebaum's Opening Brief, defects in connection with claim processing rules may be cured. *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainman General Committee of Adjustments, Central Region*, 558 U.S. 67, 81-82, 130 S. Ct. 584, 596-597 (2009).

V. CONSTITUTIONAL DUE PROCESS REQUIRES AN MEANINGFUL OPPORTUNITY FOR A HEARING BEFORE THE STATE MAY DEPRIVE A PERSON OF A PROPERTY INTEREST.

NDOC's Answering Brief acknowledges that due process requires an opportunity hearing for a hearing before the State deprives a person of their property interest in their employment. However, NDOC argues that no due process violation occurred because due process only requires an "opportunity" for a hearing, and Kassebaum failed to avail herself of such an opportunity. (Answering Brief at p. 32-33).

Due process requires more than a mere "opportunity"; it requires a *meaningful* opportunity. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (internal quotation marks omitted); *Levine v. City of Alameda*, 525 F.3d 903, 906 (9th Cir. 2008). The opportunity for a hearing is not meaningful when it may be taken away for failure to attach a piece of paper already in the possession of NDOC, and which has no impact on the Hearing Officer's determination of whether the deprivation was for "just cause" or for the "good of the public service" under the analysis set forth by this Court in *O'Keefe v. Department of Motor Vehicles*, 134 Nev. 752, 431 P.3d 350 (2018).

Likewise, as set forth in the Opening Brief, the "Appeal Instructions" inform employees "Attachments to the form may be provided however, evidence and back-up documents need not be provided at this time". (JA Vol I. at 236). NDOC's Answering brief does point out that elsewhere on the form it 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 (7) of NAC 284.6561".

However, the two (2) statements are fundamentally contradictory. Nothing within the instructions informs an employee that the failure to attach the appointing authority's decision *within 10 days* of the effective date of the decision will subject the appeal to dismissal at a later time. While, as set forth above, the requirement of NAC 284.6562 are not jurisdictional, in *Rust v. Clark County School Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987) this Court held that in order to comply with due process, jurisdictional rules must be "clear and absolute". Informing employees in the "Appeals Instructions" section that they may provide documents at a later time, and inserting in a section entitled "note" that they must attach the decision of the appointing authority without any mention of a time deadline, is anything but "clear and absolute".

CONCLUSION/ REMEDY REQUESTED

For all of the reasons set forth above, the decision of the district court to deny judicial review should be *reversed.* The matter should be remanded back to the district court with instructions to grant the Petition for Judicial Review and further remand the matter back to a hearing officer to hear Sgt. Shari Kassebaum's appeal of her discipline on the merits.

DATED this 15th day of August 2022.

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

I hereby certify that I have read this Appellant's Reply Brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose.

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

I further certify that this Appellant's Reply Brief is formatted in compliance with NRAP 32a)(4-6) as it has one (1) inch margins and uses New Times Roman - font size 14 has 17 pages, double-spaced, and contains 2,717 words. I understand that I may be subject to sanction in the event that the accompanying Appellant's

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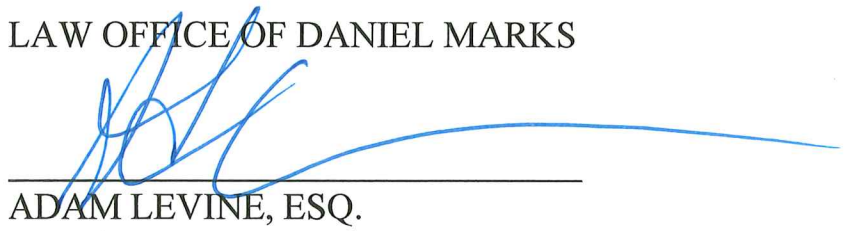
Reply Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of August 2022.

LAW OFFICE OF DANIEL MARKS



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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 17th day of August 2022, I did serve the above and foregoing APPELLANT'S REPLY BRIEF by the court mandated E-Flex filing service, to the following addresses on file for:

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