

IN THE SUPREME COURT OF THE STATE OF NEVADA

CASINO CONNECTION INTERNATIONAL, LLC, Appellant

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Elizabeth A. Brown
Clerk of Supreme Court

v.

NEVADA LABOR COMMISSIONER, a Nevada Administrative Agency, and
JOHN BUYACHEK, Respondents.

Supreme Court No. 82683

Eighth Judicial District Court
Case No. A-19-805612-J

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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 in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant CASINO CONNECTION INTERNATIONAL, LLC is a limited liability company but has no parent corporation to disclose and is not a publicly held company.

Appellant's law firm of record in this appeal is Garman Turner Gordon, LLP.

DATED this 22nd day of September 2021.

GARMAN TURNER GORDON LLP

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I. JURISDICTIONAL STATEMENT

This is an appeal from a trial in the Eighth Judicial District Court, Clark County, at which Appellant was represented by Garman Turner Gordon LLP.

II. THE PARTIES

Appellant, CASINO CONNECTION INTERNATIONAL, LLC (“Appellant”), is a limited liability company, authorized to do business, and doing business, in Clark County, Nevada. It publishes magazines focusing on gaming industry, primarily Global Gaming Business Magazine (“GGB”).

Respondents are the NEVADA LABOR COMMISSIONER (“Labor Commissioner”), and JOHN BUYACHEK (“Buyachek”) a former Sales and Marketing Director of GGB who makes a claim for compensation in the form of commissions.

Respondent Labor Commissioner is head of an administrative agency created by the State of Nevada pursuant to NRS Chapter 607. The Labor Commissioner issued the Award on October 18, 2019. APPELLANT sought relief from that award by appealing that decision to the Eighth Judicial District Court on a Petition for Judicial Review or, in the Alternative, Petition for Writ of Mandamus and/or Prohibition, which was filed on November 18, 2019.

The District Court Entered an Order Denying Casino Connection International, LLC’s Petition for Judicial Review or, in the Alternative, Petition for Writ of Mandamus and/or Prohibition on February 20, 2021. Notice of Entry of that Order was filed February 23, 2021.

The Notice of Appeal was timely filed on March 25, 2021.

III. ROUTING STATEMENT

Appellant cannot state sufficient reasons for the Supreme Court to retain this matter rather than assigning it to the Court of Appeals.

IV. ISSUES ON APPEAL

1. The hearing officer abused her discretion and acted in an arbitrary manner with regard to the interpretation of the contract, and the district court failed to address the Awards interpretation of the contract which must be reviewed de novo.

2. Whether an abuse of discretion occurred at the administrative and district court levels because the record does not contain substantial evidence supporting the administrative decision that 12.5% commission was due to claimant after his departure from the company.

V. STATEMENT OF THE CASE

On October 23, 2018, Buyachek initiated the action against APPELLANT by filing a claim with the Labor Commissioner for \$64,442.57 in commissions that were allegedly unpaid and due. Specifically, Buyachek's claim is comprised of commissions he alleges were due on all revenues collected by APPELLANT after his departure from the company in May 2018.

The Labor Commissioner commenced an investigation into the allegations, and on February 5, 2019, Investigator Ballard issued a determination for the time period of May 9, 2018, to June 30, 2018. Investigator Ballard's determination found \$11,554.21 in wages due; assessed a penalty \$1,485.00 payable to Buyachek

pursuant to NRS 608.040; and it assessed an administrative penalty in the amount of \$5,000.00 for violations of NAC 608.120 – Payment of Commissions.

APPELLANT tendered a timely payment and Investigator Ballard reduced the \$5,000.00 administrative penalty to \$1,000.00. Buyachek, however, filed an objection to the determination, on the grounds that it did not address the entire time period of his wage claim. On July 18, 2019, a pre-hearing conference was held. No resolution was reached, and a hearing date was set.

A hearing took place on October 8, 2019. At Buyachek's request, the Hearing Officer directly considered commissions claimed by him for the extended time period of May 10, 2018, to October 22, 2018. The Hearing Officer issued the Award on October 18, 2019, sustaining Buyachek's objection and awarding him additional amounts beyond what the Investigator Ballard had determined, even though he had not proved his entitlement to any amounts.¹

The Award concluded that by not paying him commissions of 12.5% on all revenue collected after Buyachek's departure from the company, Appellant violated NAC 608.120(1) and NAC 608.040. It then ordered that:

a. Casino Connection International, LLC, owes John Buyachek Jr. \$42,244.00 in unpaid commissions, for the time period of May 10, 2018, to October 22, 2018;

¹ AA000062-AA000068.

b. Assessed against Casino Connection International, LLC a penalty pursuant to NRS section 608.040 in the amount of \$1,980.00 payable to Buyachek.

c. Ordered that payment in the gross amount of \$44,224.00 should be remitted to the Office of the Labor Commissioner in the name of Buyachek within 15 days of issuance of the Award.

d. The Award did not preclude Buyachek from attempting to collect unpaid commissions for the time period after October 23, 2018.²

On November 18, 2019, APPELLANT filed its Petition for Judicial Review of the Award because the Hearing Officer failed to properly interpret the law, improperly shifted the burden of proof, and awarded 12.5% commissions on revenues received after Buyachek's employment ended, including amounts beyond what the Labor Commissions' investigator had determine, without substantial evidence. The latter ground focused primarily on the failure to reduce the commissions to 7.5% to account for paying others 5% to manage contracts to completion.³ The parties fully brief the arguments and presented oral argument, on

² Id. Though not before the Court at this time, Buyachek made a subsequent claim, disputed on the same grounds.

³ APPELLANT also challenged the regulation, NAC 608.120, on its face, which the district court rejected.

January 12, 2021.⁴ Judge Delany denied the Petition by an Order entered on February 20, 2021.⁵

In its Order, the district court glossed over the improper shifting of the burden of proof to Appellant, by simply concluding Buyachek met his burden of proving entitlement to a full 12.5% commission after his departure.

To APPELLANT's argument and evidence that commission should be reduced to 7.5%, since it was required to pay another employee 5% to manage existing sales, the district court provided no analysis of Buyachek's entitlement to any post-departure commission and as to the 5%, added opaquely:

There is no evidence that the 12.5% gets reduced by 5%. Substantial evidence supports the Hearing Officer's determination that, "based on the terms of the agreement the parties mutually entered into, the Claimant [Mr. Buyachek] should have continued to receive commissions even after he was terminated from his employment; he had completed the sale."⁶

APPELLANT now appeals from that decision of the district court. Here, Appellant argues: 1) The district court glossed over the significance of placing the burden of proof on the Buyachek employer; and 2) the district court disregarded a lack of substantial evidence existing in the record to support the Hearing Officer's

⁴ See Briefing, AA000461-AA000500.

⁵ AA000532-AA000537.

⁶ AA000544.

Award, and it acted arbitrarily in determining the 5% was attributable to “another component,” not defined, not the “sales process.” Appellant seeks reversal.

VI. FACTUAL BACKGROUND

A. Relevant Background.

At all relevant times, Appellant published a print magazine targeted to the gaming industry. Buyachek was employed by Appellant, for the time period from September 2015 until May 2018, to sell ad space in the magazine. During that time, Buyachek would enter into contracts with customers for add space in his capacity as a salesperson for Appellant. The contract with the customer would determine the total sales price, the number of times the add would run, and the terms of payment.⁷

On September 19, 2015, Appellant and Buyachek signed the Formal Offer of Employment, which contained a brief section regarding compensation:

5% commission will be paid on existing sales you will be managing.
12.5% commission will be paid on any new sales you make.
Commissions are paid on collected net revenues the month following the collections. Commissions are paid in equal installments-divided by the number of paychecks that month. While you are receiving your draw, only commissions that exceed your draw will be paid.⁸

The Offer of Employment is the only document that speaks to the payment of commissions in this relationship.

⁷ AA000064.

⁸ AA000165.

When Buyachek's employment with Appellant terminated in May 2018, he received commissions on sales for which payment had been received by Appellant. A new employee, Lauren Byrage, was brought on at that point to handle existing contracts initiated by Buyachek, and she managed those sales and received 5% commission on them once completed and paid by the customer.⁹ This was consistent with the 5% commissions Buyachek himself received when he started working for Appellant in 2015.¹⁰ Buyachek did not receive commissions on any sales he initiated but had not been paid by the customer as of the date he left the Appellant's employ.

On October 23, 2018, Buyachek filed his wage claim with the Labor Commissioner, and on February 5, 2019, a determination issued. In response, APPELLANT tendered a timely payment. Buyachek, however, filed an objection to the determination, and when no resolution was reached a hearing took place on October 8, 2019. The Hearing Officer issued the Award on October 18, 2019.

Appellant filed its Petition for Judicial Review, on November 18, 2019. The parties fully briefed the matter, and the district court heard oral argument on January 12, 2021. It then issued Findings of Fact, Conclusions of Law, and Order, and Notice

⁹ AA000456.

¹⁰ AA00165.

of Entry was filed on February 23, 2021.¹¹ Appellant filed the timely Notice of Appeal on March 25, 2021

B. Grounds for Relief

APPELLANT posed to the district court essentially three challenges to the award made by the Labor Commissioner's hearing officer, of which two come before this Court.

The first challenge was one of law and involves of statutory construction, namely, that the Hearing Officer improperly interpreted the wage statutes in applying NAC 608.120 to this case. This includes shifting the burden of proof from Buyachek -- the party who rejected the Labor Commissioner's initial determination and necessitated a hearing -- on to APPELLANT -- the party that actually tendered the amount of determination.

The second challenge was that the Hearing Officer abused her discretion by disregarding evidence that Buyachek knew of and agreed that he would not receive a 12.5% commission on revenues due and paid by clients on contracts after his departure from the company, and/or that any commissions would be reduced by 5% commission paid to others to manage any open contracts.

¹¹ AA000532-AA000537.

Appellant appeals the district court Order on the same two grounds and abandons the third previously raised with the district court.¹² In short:

1. The hearing officer misinterpreted statutes and/or regulation by improperly placing the burden of proof on Appellant; and while the district court perhaps agreed it provided no specific ruling and stated without analysis that Buyachek met the burden.
2. An abuse of discretion occurred at the administrative and district court levels because the record does not contain substantial evidence supporting the administrative decision that 12.5% commission was due to claimant after his departure from the company.
2. The hearing officer abused her discretion and acted in an arbitrary manner with regard to the interpretation of the contract, and the district court failed to address and overrule this interpretation of the contract which must be reviewed de novo.

APPELLANT is entitled to relief from the Award and reversal of the district court Order, because the Labor Commissioner's determination that APPELLANT violated NAC 608.120 and NAC 608.040 and that it owes 12.5% commissions to Buyachek on all revenues collected after his departure from the company is erroneous and contrary to both law and the substantial factual evidence. The Hearing Officer abused her discretion by disregarding evidence, intrinsic and extrinsic to the Offer of Employment, that Buyachek knew of and agreed to terms he would not receive commissions on revenues due and paid by clients on contracts after his departure from the company, and/or that any commissions would be reduced by 5% commission paid to others to manage any open contracts. Both the Hearing Officer

¹² APPELLANT's third challenge was to the validity and/or applicability of NAC 608.120, but does not make that challenge here.

and the district court lacked substantial evidence to support her findings and conclusions.

VII. LEGAL ARGUMENT

First, the hearing officer improperly interpreted the law in applying NAC 608.120. “[A] reviewing court may undertake independent review of the administrative construction of a statute.”¹³ If the district court did this, the Order does not include any analysis, simply a conclusion that Buyachek “met the burden,” without specifying on what evidence.

Second, the record lacked substantial evidence to support the hearing officer’s award; to wit, by arbitrarily disregarding evidence that Buyachek knew of and agreed to terms that he would not receive commissions on revenues due and paid by on contracts after his departure from the company, and/or that any commissions would be reduced by the 5% paid to others to administer any open contracts, the hearing officer reached an arbitrary decision in Buyachek’s favor without substantial evidence to support her findings and conclusions. The district court failed to address the inadequacies and inconsistencies of the Award and, instead, simply adopted them.

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¹³ *Coast Hotels and Casinos, Inc. v. Nevada State Labor Com’n*, 117 Nev. 835, 34 P.3d 546 (2001).

A court's review "determine[s], based on the administrative record, whether substantial evidence supports the administrative decision."¹⁴ This Court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is affected by an error of law; is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or is arbitrary or capricious or characterized by abuse of discretion. For this purpose, "substantial evidence" means evidence which a reasonable mind might accept as adequate to support a conclusion.¹⁵

1. The district court glossed over the significance of placing the burden of proof on the employer, Appellant.

Under Nevada law, "[i]f an employer fails to pay: (a) Within 3 days after the wages or compensation of a discharged employee becomes due; or (b) On the day the wages or compensation is due to an employee who resigns or quits, the wages or compensation of the employee continues at the same rate from the day the employee resigned, quit or was discharged until paid or for 30 days, whichever is less." NRS 608.040(1). Certainly, the parties would agree that APPELLANT could not violate NRS 608.040(1), or the corresponding regulation of NAC 608.040, unless

¹⁴ *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006); see also *City Plan Dev. v. State, Labor Comm'r*, 121 Nev. 419, 426, 117 P.3d 182, 187 (2005).

¹⁵ NRS 233B.135(4).

APPELLANT owed commissions to Buyachek under NAC 608.120(1).

Nevada Administrative Code 608.120(1) provides:

"Payment of Commissions"

(1) If an employer and an employee agree that the employee is to be paid by commission based upon a sale, the employer shall pay each commission to the employee when the commission becomes payable pursuant to the agreement.¹⁶

A determination under NAC 608.120 comes down to the central questions of “when the commission becomes payable pursuant to the agreement” and, in this case, the definition of “sale.” As noted below, Appellant points out to the Court that the Hearing Officer necessarily interpreted the regulation, or some other provision, as putting the burden of proof for the key question upon the employer; the Appellant in this case. In actuality Buyachek, the claimant and objector to the Labor Commission’s original determination, bore that burden.

Buyachek is the party who objected to the Labor Commissioner’s initial findings that he was entitled to just \$11,554.21; Buyachek is the one who instigated the hearing process as the claimant. Nowhere does NAC 608.120(1) put the burden

¹⁶ The regulation itself references 608.250. While NRS 608.250 relates to “minimum wage,” no evidence exists in the record that Buyachek did not receive at least a minimum wage during his employment (nor was that argued). Indeed, Buyachek admits to receiving a forgivable draw against commissions during his employment. Therefore, Appellant challenged the applicability of NAC 608.120 in its Petition for Judicial Review, which the district court rejected. Appellant does not seek review of that decision from this Court.

of proving “when the commission becomes payable pursuant to the agreement” upon the Buyachek. In fact, APPELLANT tendered payment through the Labor Commission based on the initial determination, which Buyachek rejected. That burden must be upon the claimant, particularly when he objects to the Labor Commissioner’s determinations and invokes the administrative law process.

The district court implicitly acknowledged the misplaced burden, though not directly ruling on the error. It simply stated, “Buyachek met his burden of proof.” Yet, neither the Award nor the Order makes reference to sufficient evidence offered by Buyachek, the claimant, aside from the Offer of Employment itself.¹⁷ They simply conclude that the agreement required Buyachek be paid on revenues collected even after his employment ended; this despite finding the agreement to be silent “as to the triggering event to be paid”¹⁸, and despite language in the agreement making clear that managing existing sales after a salesperson leaves has a specific value (a 5% commission to another salesperson) and expressly describing commission payments in terms of “paychecks.”¹⁹ If “silent,” the agreement alone could not be determinative. Whether “silent” or ambiguous, the burden fell on Buyachek to prove his entitlement to commissions for months after his employment.

¹⁷ See, the Award, AA000062-000068, and the Order, AA000532-AA000537.

¹⁸ AA000065, l. 13-14.

¹⁹ One does not receive a paycheck after leaving an employment.

Either through misapplication of NAC 608.120 or plain legal error, the Hearing Officer improperly placed this burden upon the Buyachek, APPELLANT.²⁰ Thus, the Award does not articulate how Buyachek met his burden, but only how Appellant failed to meet a burden not properly place on it. The district court saw the legal problem with that result but made only a conclusory statement that Buyachek met his burden, without pointing to any substantial evidence.

2. A lack of substantial evidence existed in the record to support the hearing officer award, but the district court disregarded this.

By disregarding evidence that Buyachek knew of and agreed to terms that he would not receive commissions on revenues due and paid by customers on contracts after his departure from the company, and/or that any commissions would be reduced by the 5% paid to others in order to administer any open contracts, the Hearing Officer acted arbitrarily and lacked substantial evidence to support her findings and conclusions as to the actual terms of the agreement.

The Hearing Officer ordered that Appellant, “owes [Buyachek] \$42,244.00 in

²⁰ Buyachek’s evidence consisted of the Offer of Employment and the following statement: “My case is based on a contract that I signed and solely focuses on how I was to be paid my wage.· As stated in the agreement, I will be paid on existing sales on 5 percent.· That's not in discussion at this point in time. 12.5 percent commissions will be paid at any new sales you make.· That is the crux of my case.· Commissions are paid on collecting net revenues the month following the collections.· Commissions are paid in equal installments divided by the number of paychecks that month.· While you are receiving your draw, which is a forgivable draw, your commissions that exceed your draw will be paid.” Hearing Transcript, AA00006, l. 11-22.

unpaid commissions for the time period of May 10, 2018, to October 22, 2018.”²¹ She came to that award by applying a 12.5% commission to the entire amount of \$337,952.60 collected from APPELLANT customers between May 10, 2018, to Oct 22, 2018. In order to get to the determination, however, the Hearing Officer acted arbitrarily and made certain factual findings that disregarded important evidence and, therefore, lacked substantial evidence to support those findings. The district let this error stand without any real analysis.

A. The hearing officer disregarded evidence that the rate of any commission must to be reduced by 5% to account for commissions paid to another salesperson required to manage Buyachek’s sale orders.

Buyachek does not dispute that he received all commissions due on “collected net revenues” through the end of his employment, May 9, 2018. He claims, however, entitlement to a full 12.5% of net revenues for ads he booked with clients who paid after his departure from APPELLANT, regardless of whether he saw the ad through to publication and payment, and regardless of the fact APPELLANT had to pay another salesperson 5% commission to manage those ad contracts to publication and payment.²² Buyachek asserts that all he had to do was get a customer to sign on the

²¹ AA000066.

²² Although Buyachek said at one point in his testimony, “I am not asking for anything that I was working on afterwards.” Hearing Transcript AA000006, l. 21-22.

dotted line, no matter what work it required to get an ad to print and the bill paid. He did not rebut evidence that APPELLANT paid another employee to complete his work, nor did not rebut evidence that he himself received a 5% commission for that same purpose when he started his employment with APPELLANT.

The Hearing Officer correctly noted that the Offer of Employment²³ was the only written agreement between the parties, but that Offer of Employment does in fact state that a “5% commission will be paid on existing sale you will be managing,” providing clear evidence salespersons did not complete a sale by simply obtaining a signed contract and confirming that 5% of commissions was allocated to the process of getting ads to publication and to payment.²⁴ Thus, the Award’s finding that “[if] and employee left employment...the contract would be re-assigned to a new salesperson who would then receive a management fee of 5%...[t]his is not memorialized in writing,” cannot be supported.²⁵

The findings of the Award fail to mention the 14 steps of the “sales cycle” required by APPELLANT to be completed in order to earn a 12.5% commission. Of these 14 steps, listed in Exhibit 4 and discussed in testimony, 11 come after the

²³ Formal Offer of Employment, AA000165.

²⁴ Id.

²⁵ AA000064, l. 5-8.

customer signs an advertising agreement, and nine of those come prior to payment.²⁶

Those latter steps include:

4. Share I/O with finance
5. Create manifest of ads to run
6. Share manifest with publisher/editor/art director
7. Meet with publisher/editor/art director to lay out where ads/editorial will be placed in upcoming publication
8. Contact advertiser & request ad for upcoming publication
9. Coordinate with art director to be sure all ads are received
10. Review digital version of prepress files to be sure all ads are in, placed correctly & formatted correctly
11. Track web campaigns (if applicable) for relevance & functionality
12. Assist finance with collections when necessary²⁷

Buyachek himself testified to post-contract tasks 4-10 being required of him.²⁸

He also acknowledged as to required Task 13, “Maintain relationship [with client],”

²⁶ AA000450.

²⁷ See Hearing Transcript, AA000016, p. 54, l. 1-5.

²⁸ See Hearing Transcript, AA000015: Item 4 at 50, l. 18-22; Item 5 at 50, l. 25 to 51, l. 4; Item 6 at 51, l. 5 to 9; Item 7 at 51, l. 10 - 16; Item 8 at 52, l. 1 to 8; Item 9 at 52, l. 9 - 14; Item 10 at- 53, l. 9 - 16.

that “there are relationships that need to be maintained.”²⁹ Forced to acknowledge these post-contract tasks, Buyachek stated at one point that, “I did that separate from my agreement.”³⁰ Buyachek, however, received no compensation separate and apart from commissions. This lack of separate compensation belies any insinuation that Buyachek’s sale responsibility was somehow separate from his post-sale responsibilities, and directly contradicts the district court.

Becky Kingman-Gros testified for APPELLANT and acknowledged the list of “cycle tasks,” Exhibit 4, was reduced to writing during the claim process, and was not itself part of a written contract. The Hearing Officer admitted the document with that understanding, because it listed, based upon APPELLANT’s testimony, the tasks a salesman was expected to complete.³¹ Again Buyachek, with some cajoling on a couple of the tasks, acknowledged that these things were part of the job, though claiming these required tasks to somehow be “separate from my agreement.”

From his written agreement, moreover, Buyachek knew at the inception of his employment that managing of existing sales, i.e., completing the remainder of tasks 4-14, had a specific monetary value. Managing existing sales entitled a new salesperson to a 5% commission. Buyachek himself received that 5% commission

²⁹ Hearing Transcript AA000016, p. 54, l. 21-33

³⁰ Hearing Transcript AA000015, p. 52, l. 11-14

³¹ Hearing Transcript AA000026, p. 94, l. 10 - 95, l. 2.

on existing sales when he became employed by APPELLANT.

Contrary to the evidence, and without substantial evidence from Buyachek, the Hearing Officer found that “the salesperson may or may not have to perform additional duties depending on the needs of the client.”³² She cited no evidence at all to support that finding. On the other hand, Buyachek did not dispute having received a 5% commission on existing sales himself, regardless of whether tasks 4-14 needed to be completed or merely tasks 12-14.³³ While Buyachek questioned that each and every step might not need to be done every time,³⁴ he did not dispute that these steps were required to get an ad to print and the bill paid. Nor did Buyachek deny that he received 5% to manage existing accounts when he began employment with APPELLANT, as the agreement provided.

Furthermore, the Hearing Officer noted the undisputed evidence that APPELLANT actually brought a new employee, Lauren Byrage, on to manage Buyachek’s accounts and that she actually received a 5% commission on the contracts Buyachek obtained during his employment but did not see through to receipt of payment. Buyachek knew from his own contract and own experience that would occur when he left. Nonetheless, the Award ignored these facts and made the

³² AA000064.

³³ See AA000450.

³⁴ Buyachek testified that sometimes a client would send over the ad for an upcoming publication without prompting. Hearing Transcript AA000015, 52, l. 1-8.

award based upon a full 12.5% commission being due to Buyachek.³⁵

To do this, the Award claims to rely on the terms of the Offer of Employment. Yet, the Award states that “the commission terms are silent as to what the triggering event to be paid were and how [APPELLANT] will distribute commissions for sales that were completed during an employee’s employment but were paid after an employee’s employment ended.” Again, it ignores the express term concerning payment to employees of a 5% commission on existing sales he or she manages, which speaks directly to “what is to happen upon separation of employment.”³⁶ The agreement escribes a specific value (5% commission) to the management that comes after the step of signing a contract for an ad. Buyachek is estopped to deny this value that he himself received when he was the new employee doing the work it takes to fully complete a sale for a magazine like the one APPELLANT put out. Nonetheless, the Hearing Officer then simply ignored this, and without substantial evidence, concluded that “[e]ntering into a contract was that sale (the triggering event).”³⁷

Without analysis, the district court simply took the position -- no more

³⁵ The Award mentions that fact that APPELLANT paid Byrage 5% and retained 7.5% to cover the expenses of having a new employee. AA000064, l. 20-25. It fails, however, to state the significance of that finding. Instead, it simply rejects the evidence concerning the 5% commissions and makes an award based on 12.5% commissions.

³⁶ *Cf.* the Award’s conclusion at AA000065, l. 24.

³⁷ AA000065, l. 20.

supported by the evidence than the Award -- concluding:

Lastly, Casino Connection argues that, since it was required to pay another employee 5% to manage existing sales, Mr. Buyachek's commissions should be reduced by this amount. There is no evidence that the 12.5% gets reduced by 5%. Substantial evidence supports the Hearing Officer's determination that, "based on the terms of the agreement the parties mutually entered into, the Claimant [Mr. Buyachek] should have continued to receive commissions even after he was terminated from his employment; he had completed the sale."³⁸

However, the district court does not specify the “substantial evidence” supporting the conclusion, though contrary evidence existed in the Employment Agreement itself and Buyachek offered nothing but that agreement to meet his burden. The determination inevitably leads to the conclusion the district court viewed the 5% as being for some component of the business other than sales. Buyachek, though, received no compensation separate and apart from commissions. This lack of separate compensation belies any insinuation that Buyachek’s sale responsibility was somehow separate from his post-sale responsibilities.³⁹

Moreover, the district court’s conclusion seems to come from Appellant’s argument that a completed “sale” means only obtaining a customer’s signature and requires no other work. That argument, however, as well as the district court’s conclusion, actually contradicts – indeed nullifies—the contract language itself.

³⁸ AA000535.

³⁹ Hearing Transcript AA00015, p. 52, l. 12

Again, the contract term pertaining to commissions states in relevant part:

5% commission will be paid on existing sales you will be managing.
12.5% commission will be paid on any new sales you make.⁴⁰

Under Buyachek's definition, and the district court's logic, only one kind of "sale" exists and it is completed once the customer signs on the dotted line and warrants a 12.5% commission even if he does nothing else. The district court's determination – despite evidence Buyachek received the same 5% commission in the past and a successor received it to shepherd his sales to payment -- directly contradicts the contract, which describes two kinds of sales – new and existing. If the contract said, "12.5% will be paid to you on sales you make and 5% for collecting payment on sales previously completed by others," then the district court's conclusion might make sense. As it stands, however, the district court's conclusion nullifies the contract language expressly providing that something remains to be done in the sales process after the customer signs. That something is, specifically, the sales process described in the evidence.⁴¹ Whether one of those things or ten of those things must be done in a given instance, they must be done to complete a sale, and this process is assigned a value of 5%. As was true of his predecessors, once he left Buyachek could not complete the sales process. Appellant paid someone else to do that, as it

⁴⁰ AA000165.

⁴¹ See pp. 19-20 above.

had paid Buyachek in the past. Thus, Buyachek could only receive 7.5% commission after his departure, and he knew this from not only the language of the contract but his own experience.

The Hearing Officer acted arbitrarily by disregarding the substantial evidence, both in the Offer of Employment and extrinsic to it that Buyachek, in concluding that Buyachek was to receive a full 12.5%. On review, the district court did no better and must be reversed.

B. Buyachek is not entitled to any commission at all, because he did not perform those additional tasks required to receive one.

Again, a determination under NAC 608.120 comes down to the central questions of “when the commission becomes payable pursuant to the agreement,” and this case the definition of “sale.” Buyachek is not entitled to any commission at all for revenue received after his employment concluded, because commissions were not payable. The Employment Agreement does not state that commissions become due to a former employee if APPELLANT receives revenues after his departure from a contract he booked during employment. In fact, the Hearing Officer concluded that agreement contained no express “triggering event to be paid [a 12.5% commission],”⁴² so she determined the sole triggering event to be obtaining a signed contract for ads to be run at some time in the future and to be paid for some time

⁴² AA000065, l. 13-14.

after that.⁴³

As stated above, the Hearing Officer's conclusion fails to mention any of the 14 steps of the "sales cycle" required by APPELLANT to be completed in order to earn a commission. Of these 14 steps, listed in Exhibit 4 and discussed in testimony, 11 come after the customer signs an advertising agreement.⁴⁴ The Award ignores that evidence and asserts that "the sales person may or may not have to preform [sic] additional duties depending on the needs of the client."⁴⁵ A difference of tasks required to reach the point of payment based upon "the needs of the client" is not found anywhere in the record. Essentially, the Award concludes, without any substantial evidence, that after step three, "Receive signed advertising agreement," Buyachek need never have done anything else to collect his commission, even if he still worked for APPELLANT. By denying the Petition, the district court confirmed that conclusion.

However, the conclusion lacks any evidentiary basis and is, frankly, absurd. It means that Buyachek would always be paid regardless of whether, for example, he did any of the following: created manifest of ads to run, shared the manifest with publisher/editor/art director, met with publisher/editor/art director to lay out where

⁴³ AA000065, l. 20.

⁴⁴ See Section 2. A. above.

⁴⁵ AA000064, l. 16-17.

ads/editorial will be placed in upcoming publication, contacted advertiser and request ad for upcoming publication, coordinated with art director to be sure all ads are received, reviewed digital version of prepress files to be sure all ads are in, placed correctly and formatted correctly, or assisted finance with collections when necessary. These management tasks do not depend “on the needs of the client,” but concern the needs of APPELLANT. The express language of the contract values that management component when it states “5% commission will be paid on existing sales you will be managing.”⁴⁶ Contrary to the arbitrary conclusion of the Hearing Officer and the district court, the substantial evidence, both in the agreement and in the record, shows the triggering event for entitlement to a commission to be the completion of a series of tasks. While some of those tasks might not need to be completed in a given instance, Buyachek offered no evidence as to which contracts and which tasks, those might be. Buyachek, despite what ought to be his burden of proof, simply stated the tasks were “separate from my agreement.”

In addition, the Hearing Officer’s conclusions, untouched by the district court, ignore another express provision. “Commissions are paid in equal installments –

⁴⁶ AA000165. To be clear, Buyachek’s objection sought, and the Award granted, a 12.5% commission. He did not offer to accept a 7.5% alternative, nor did the Award even suggest it. Undisputed evidence in the records shows that the 7.5% retained by APPELLANT would go to the costs of hiring a new employee. AA00064, l. 23-25.

divided by the number of paychecks that month.”⁴⁷ As stated in the agreement, the payment of commissions depends on the existence of “paychecks.” An employee receives a paycheck, not a former employee.

The Hearing Officer reach her central conclusion by misinterpreting the agreement, arbitrarily disregarding evidence offered by the Buyachek and not requiring the claimant to meet his burden of proof. In its review, the district court did the same and must be reversed.

VIII. CONCLUSION

APPELLANT appeals from that decision of the district court. Here, Appellant argues: 1) The district court glossed over the significance of placing the burden of proof on the Buyachek employer; and 2) the district court disregarded a lack of substantial evidence existing in the record to support the Hearing Officer’s Award, and it acted arbitrarily in determining the 5% was attributable to “another component,” not defined, not the “sales process.” Appellant seeks reversal.

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⁴⁷ AA00064.

For the reasons stated above, this Court should hold that the district court erred in entering judgment in favor of Appellee and should reverse that judgment.

DATED this 22nd day of September 2021.

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IX. ATTORNEY'S CERTIFICATION

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office 365 Word in 14-point Times New Roman font.

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 either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 6803 words; or

☐ does not exceed 30 pages.

Finally, I hereby certify that I have read this 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 28(e)(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 September 2021.

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CERTIFICATE OF SERVICE

I certify that on the 22nd day of September 2021, I served a copy of this completed **APPELLANT'S OPENING BRIEF** upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☒ By E-Service through Nevada Supreme Court; email and by first class mail with sufficient postage prepaid to the following address(es):
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