

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHARI KASSEBAUM

Appellant,

vs.

THE STATE OF NEVADA DEPARTMENT
OF CORRECTIONS,

Respondents.

Supreme Court No. 84008

District Court: A810424

Electronically Filed
Jan 07 2022 10:21 a.m.

DOCKETING STATEMENT
CIVIL APPEALS

Elizabeth A. Brown
Clerk of Supreme Court

GENERAL INFORMATION

Appellant(s) must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court May impose sanctions on counselor appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District: Eighth Judicial District Court

Department: 21

County: Clark County Judge: Tara Clark Newberry

District Ct. Case No.: A-20-811982-J

2. Attorney filing this docketing statement:

Attorney: Adam Levine Telephone: (702) 386-0536

Firm: Law Office of Daniel Marks

Address: 610 S. Ninth Street, Las Vegas, Nevada 89101

Client(s): Appellant, Shari Kassebaum

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney: Kevin Pick, Esq. Telephone: (775) 687-2129

Firm: Office of the Attorney General

Address: 5420 Kietzke Lane, Suite 202, Reno, Nevada 89511

Client(s): The State of Nevada Department of Corrections

Attorney: Telephone:

Firm:

Address:

Client(s):

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input checked="" type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

N/A

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Sherri Kassebaum v., Nevada Department of Corrections Docket No. 83942

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

N/A

8. Nature of the action. Briefly describe the nature of the action and the result below:

This was a Petition for Judicial Review pursuant to NRS 233B.130 of a decision of a State of Nevada Department of Administration/Personnel Commission Hearing Officer to dismiss the disciplinary appeal of Appellant brought under NRS 284.390. Judicial Review was granted and remanded back to the administrative agency for further proceedings.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Is the requirement under NAC 284.6562(2)(b) that a member of the classified service seeking to appeal a suspension, demotion or dismissal pursuant to NRS 284.390 attach a copy of the final decision of the appointing authority jurisdictional, or alternatively only a claims processing rule.

Does an administrative agency such as the Personnel Commission have authority to enact jurisdictional rules/regulations which supplements or alters the jurisdictional requirements established by the Legislature.

Did the dismissal of Appellant's appeal pursuant to NRS 284.390 without any post-suspension hearing violate her rights to due process of law under *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985) and *Gilbert v. Homar*, 520 U.S. 924 (1997).

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

Kassebaum v. Department of Corrections, Docket No. 83942 raises the identical issue. This Appeal (Docket 84008) involves the dismissal of Sgt. Shari Kassebaum's appeal of a fifteen (15) day suspension under NRS 289.390. Docket No. 83942 raises the exact same issues arising out of the dismissal of Sgt. Kassebaum's appeal of a two (2) day suspension under NRS.390. The two (2) Appeals should be consolidated.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of unsettled Nevada precedent (identify the case(s))

☒ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this Court's decisions

☐ A ballot question

If so, explain:

In *Cleveland Board of Education v. Loudermill* 470 U.S. 532 (1985) the United States Supreme Court held that once a property interest in employment is conferred by the State, an employee may not be deprived of that property interest without a full post-deprivation hearing which meets the requirements of federal constitutional law. In *Gilbert v. Homar*, 520 U.S. 924 (1997), the Supreme Court extended the holding of *Loudermill* to suspension cases.

In 2018 the State Personnel Commission amended NAC 284.6562 to require that an employee filing an appeal to the Department of Administration of a suspension, demotion or dismissal pursuant to NRS 284.390 attach a copy of the final decision of the appointing authority. Kassebaum did not attach the document when filing her appeal even though her employer had a copy of the document. The employer moved to dismiss Kassebaum's appeal arguing that NAC 284.6562 requirement of attaching the document was *jurisdictional* and could not be cured after the 10 working days for filing an appeal provided for under NRS 284.390(1). The hearing officer granted the motion, thus depriving Kassebaum of the hearing which *Loudermill* and *Homar* require.

Whether the requirement to attach the written decision of the appointing authority under NAC 284.6562 is jurisdictional, or alternatively only a claims processing rule, is an issue of first impression.

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

While the case would normally be assigned to the Court of Appeals pursuant to NRAP17(b)(9), the appeal(s) should be retained by the Court pursuant to NRAP

17(a)(11) because the distinguishing between jurisdictional, as opposed to claims processing, rules is a significant issue of first impression in Nevada, and depriving members of the classified service of their property interests without a hearing raises significant issues under the Due Process Clause of the 14th Amendment, and its Nevada Constitution's counterpart.

14. Trial. If this action proceeded to trial, how many days did the trial last?

Was it a bench or jury trial? N/A

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

N/A

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from

March 2, 2021. However, because the Order remanded the case back to a State of Nevada Hearing Officer for further proceedings, this Order did not become a final judgment until those proceedings on remand concluded on December 9, 2021.

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served:

March 3, 2021

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59) N/A

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

- | | |
|-------------------------------------|----------------|
| <input type="checkbox"/> NRCP 50(b) | Date of filing |
| <input type="checkbox"/> NRCP 52(b) | Date of filing |
| <input type="checkbox"/> NRCP 59 | Date of filing |

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ___, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion

(c) Date written notice of entry of order resolving tolling motion was served

Was service by:

- ☐ Delivery
☐ Mail

19. Date notice of appeal filed

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

The appeal was filed by Shari Kassebaum on December 21, 2021, which is within 30 days of the conclusion of the decision upon a remand by the Hearing Officer.

///
///

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)(1)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|---|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

The Order granting Judicial Review dated March 2, 2021 was not initially a final judgment as it included a remand to a State Hearing Officer for further substantive proceedings. See *Bally's Grand Hotel & Casino v. Reeves*, 112 Nev. 1487, 292 P.2d 936 (1996); *Clark County Liquor and Gaming Licensing Board v. Clark*, 102 Nev. 654, 730 P.2d 443 (1986). On the conclusion of the proceedings on remand which occurred on December 9, 2021. The March, 2, 2021 Order became a final judgment.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Petitioner: Shari Kassebaum

Respondents: State of Nevada ex rel, its Department of Corrections, and State of Nevada ex rel, its Department of Administration Personnel Commission, Hearing Officer, Cara Brown

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

No parties other than the Department of Corrections filed a Notice of Intent to Participate pursuant to NRS 233B.130(3).

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

A Petition for Judicial Review under NRS 233B.130 which was granted on March 2, 2021, and remanded back to the hearing officer to consider further issues. The hearing officer re-affirmed his prior decision on December 9, 2021.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered “No” to question 24, complete the following: N/A

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered “No” to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

27. Attached is file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
 - Any tolling motion(s) and order(s) resolving tolling motion(s)
 - Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, crossclaims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
 - Any other order challenged on appeal
 - Notices of entry for each attached order
1. District Court Clark County, Nevada Case No. A-20-810424-P, Petition for Judicial Review filed 2/13/2020;
 2. District Court Clark County, Nevada Case No. A-20-810424-P, Notice of Entry of Findings of Fact, Conclusion of Law and Order Granting Petition for Judicial Review;
 3. Before the Nevada State Personnel Commission Hearing Officer Case. No. 2111458-RZ - Kassebaum v. State of Nevada, Department of Corrections, Decision on Remand filed 12/9/2021.


VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Shari Kassebaum
Name of appellant

Adam Levine, Esq.
Name of counsel of record

Jan. 7, 2021
Date


Signature of counsel of record

Nevada, Clark County
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 7th day of January 2022, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By email serving it upon him/her; or

Lansford W. Levitt, Settlement Judge

LWL1@sbcglobal.net

☒ By mailing it by first class mail with sufficient postage prepaid to the following addressees): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Lansford W. Levitt, Settlement Judge

4230 Christy Way

Reno, Nevada 89519

(775) 857-9754

☒ I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 7th day of January 2022, I did serve the above and forgoing Docketing Statement, by way of Notice of Electronic Filing provided by the court mandated E-Flex filing service, at the following:

Michelle Di Silvestro Alanis, Esq.,

Supervising Sr. Deputy Attorney General

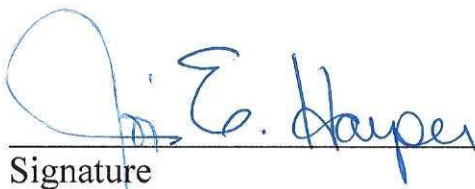
Office of the Attorney General

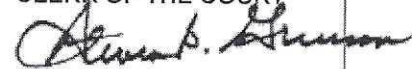
555 E. Washington Avenue, #3900

Las Vegas, Nevada 89101

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Attorneys for Respondents


Signature



CASE NO: A-20-810424-P
Department 31

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DISTRICT COURT

CLARK COUNTY, NEVADA

SHARI KASSEBAUM,

Case No.:

Petitioner,

Dept. No.:

v.

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

Respondents.

PETITION FOR JUDICIAL REVIEW

COMES NOW Petitioner, by and through undersigned counsel, Adam Levine, Esq., of the Law
Office of Daniel Marks and petitions the Court as follows:

1. Petitioner requests judicial review of the final decision of the State of Nevada
Department of Personnel Hearing Officer Cara Brown, Esq. a copy of which is attached hereto as
Exhibit "1".

2. This Court has jurisdiction pursuant to NRS 233B.130.

3. Petitioner has been aggrieved by the final decision of the State of Nevada Department of Personnel Hearing Officer, Cara Brown, Esq. and Petitioner's rights have been prejudiced because the final decision is:

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

4. Petitioner reserves the right to file a Memorandum of Points and Authorities after a copy of the entire record on appeal has been transmitted to the Court in accordance with NRS 233B.133.

5. Petitioner reserves his right to request oral argument on this matter pursuant to NRS 233B.133(4).

WHEREFORE, Petitioner prays as follows:

1. That this Court conduct a review of the final decision of the Nevada State Personnel Commission Hearing Officer and enter an Order setting aside the decision; and

2. For such further and other relief as the Court deems equitable and just in the premises.

DATED this 12 day of February, 2020.

LAW OFFICE OF DANIEL MARKS

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Kevin Pick, Esq.
Sr. Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
Attorney for Respondent NDOC
e-mail: kpick@ag.nv.gov

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EXHIBIT “1”

EXHIBIT “1”

1 BEFORE THE NEVADA STATE PERSONNEL COMMISSION

2 HEARING OFFICER

FILED

JAN 14 2020

3
4 SHARI KASSEBAUM,)

APPEALS OFFICE
Hearing No. 2001869-CB

5 Petitioner-Employee)

6 vs.)

7 STATE OF NEVADA, DEPARTMENT OF)
8 CORRECTIONS,)

9 Respondent-Employer)
10 _____)

11 DECISION AND ORDER

12 Before the undersigned Hearing Officer is the *Nevada Department of Corrections' Motion to Dismiss*
13 *Appeal for Lack of Jurisdiction* ("Motion") filed by Respondent-Employer, Nevada Department of
14 Corrections ("NDOC") on December 17, 2019. Petitioner-Employee, Shari Kassebaum ("Sgt. Kassebaum")
15 filed a *Limited Opposition to Motion to Dismiss Appeal* ("Opposition") and NDOC filed the *Department of*
16 *Corrections' Reply in Support of Motion to Dismiss Appeal for Lack of Jurisdiction* ("Reply").

17 BACKGROUND

18 On or about June 20, 2019, Sgt. Kassebaum, a Correctional Sargent with NDOC, was issued a
19 Revised Specificity of Charges ("SOC") which set forth a summary of alleged misconduct by Sgt.
20 Kassebaum; the rules and regulations the alleged misconduct violated; the recommended disciplinary action
21 suspension for 15 working days without pay beginning July 11, 2019; and the date and time of the pre-
22 disciplinary hearing to determine whether such discipline was warranted. On July 1, 2019 the pre-
23 disciplinary hearing was held but Sgt. Kassebaum did not attend. The Associate Warden responsible for
24 conducting the hearing issued a report of even date which set forth his conclusion which supported the
25 recommended 15-day suspension without pay. By letter dated July 3, 2019, the Deputy Director of
26 Operations for NDOC notified Sgt. Kassebaum of NDOC's decision to uphold the recommended suspension
27 with an effective date of July 12, 2019 instead of July 11, 2019 as was originally stated in the SOC.
28

1 On July 20, 2019, Sgt. Kassebaum timely filed an NPD-54 discipline appeal form ("Appeal Form")
2 with the Division of Human Resource Management ("DHRM"). The only two documents accompanying
3 Sgt. Kassebaum's Appeal Form were: 1) a cover letter from her attorney indicating the attorney had been
4 retained to represent Sgt. Kassebaum and the statement "[p]lease see the attached NPD-54;" and 2) Sgt.
5 Kassebaum's explanation as to why she believes the disciplinary action taken against her was unreasonable.
6 There were no attachments or enclosures or references to any document from the appointing authority (in this
7 case, NDOC) regarding the proposed or final disciplinary decision.

8 In its Motion, NDOC argues Sgt. Kassebaum's appeal is jurisdictionally defective and must be
9 dismissed with prejudice because she failed to comply with the requirement set forth in NAC 284.6562(2)(b)
10 which states the Appeal Form "must" be "accompanied by the written notification of the appointing
11 authority's decision regarding the proposed action." NDOC further argues that strict compliance with NAC
12 284.6562 is required and substantial compliance will not suffice. In her Opposition, Sgt. Kassebaum
13 "concedes that under the revised NAC 284.6562(2)(b) it is now required to provide the Employer a copy of
14 the SOC that Employer served on the Sgt. Kassebaum." Sgt. Kassebaum further states in her Opposition that
15 she "concedes that procedurally, employer will prevail on its Motion to Dismiss, however, Sgt. Kassebaum
16 disagrees to the completely inaccurate facts set forth in the Opposition." Opposition at page 1.

17 There is no dispute Sgt. Kassebaum timely filed her Appeal Form as required by NAC 284.6562(1)
18 and that she filed her Appeal Form in the manner required by NAC 284.6562(2)(a) and NAC 284.778(1) by
19 submitting it to the Administrator of the DHRM. What Sgt. Kassebaum failed to do was attach to or include
20 with her Appeal Form the written notification from NDOC informing her of its decision to uphold the
21 proposed discipline set forth in the SOC.

22 The issue presented is whether there must be strict compliance with the requirement in NAC
23 284.6562(2)(b) that the written notification of the appointing authority's decision regarding the proposed
24 discipline accompany the Appeal Form or whether substantial compliance is sufficient.
25
26
27
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DISCUSSION AND ANALYSIS

In *Markowitz v. Saxon Special Servicing, et al.* 129 Nev. 660, 310 P.3d 569 (2013), the Nevada Supreme Court set forth the analysis for determining whether a rule, statute or regulation requires strict or substantial compliance. In the *Markowitz* case the court addressed the issue of whether Nevada's Foreclosure Mediation Program Rules that state a beneficiary of a deed of trust "must" submit an appraisal and or a broker's price opinion prepared "no more than 60-days before the commencement date of the mediation" is subject to strict or substantial compliance. The court stated in pertinent part:

To determine if a rule's provisions require strict or substantial compliance, this court looks to the rule's language, and we also consider policy and equity principles. *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. ___, 255 P.3d 1275, 1278 (2011). A rule may contain both mandatory and directory provisions. See *Leven v. Frey*, 123 Nev. 399, 408 n. 31, 168 P.3d 712, 718 n. 31 (2007); see also *Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. ___, 290 P.3d 249, 254 (2012); 3 Norman J. Singer,

Statutes and Statutory Construction § 57:19 (6th ed.2001). Generally, a rule is mandatory and requires strict compliance when its language states a specific "time and manner" for performance. *Leven*, 123 Nev. at 407 n. 27, 408, 168 P.3d at 717 n. 27, 718. Time and manner refer to when performance must take place and the way in which the deadline must be met. See *Village League to Save Incline Assets, Inc. v. State Bd. of Equalization*, 124 Nev. 1079, 1088, 194 P.3d 1254, 1260 (2008) (discussing statutory deadlines); *Leven*, 123 Nev. at 407-08, 168 P.3d at 717-18 (addressing three-day recording statute's deadline). "[F]orm and content" provisions, on the other hand, dictate who must take action and what information that party is required to provide. *Einhorn*, 128 Nev. at ___, 290 P.3d at 254 (stating that "who brings which documents ... is a matter of 'form'"). Because they do not implicate notice, form and content-based rules are typically directory and may be satisfied by substantial compliance. *id.*, "sufficient to avoid harsh, unfair or absurd consequences." *Leven*, 123 Nev. at 407, 168 P.3d at 717 (quotation omitted). When substantial compliance is sufficient, a party's literal noncompliance with a rule is excused provided that the party complies with "respect to the substance essential to every reasonable objective" of the rule. *Stasher v. Harger-Haldeman*, 58 Cal.2d 23, 22 Cal.Rptr. 657, 372 P.2d 649, 652 (1962); see also 3 *Sutherland Statutory Construction* § 57:26 (7th ed.2012). When a party accomplishes such actual compliance as to matters of substance, technical deviations from form requirements do not rise to the level of noncompliance. *Stasher*, 22 Cal.Rptr. 657, 372 P.2d at 652.

Deciding whether a rule is intended to impose a mandatory or directory obligation is a question of statutory interpretation. See *Village League*, 124 Nev. at 1088, 194 P.3d at 1260 (interpreting a statutory time limit); see also *Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1156, 146 P.3d 1130, 1136 (2006) (applying rules of statutory construction to the interpretation of a court rule). We review de novo issues of statutory construction. *Leven*, 123 Nev. at 402, 168 P.3d at 714. Our objective when interpreting a rule is to determine and implement its purpose. *Village League*, 124 Nev. at 1088, 194 P.3d at 1260; see *Leyva*, 127 Nev. at ___, 255 P.3d at 1278-79.

1 The administrative regulation at issue is NAC 284.6562 which provides:

2 **NAC 284.6562 Request for hearing to determine reasonableness of dismissal,**
3 **demotion or suspension.**

4 1. A permanent Sgt. Kassebaum who has been dismissed, demoted or suspended
5 may request a hearing before the hearing officer of the Commission, pursuant to NRS
6 284.390, within 10 working days after the effective date of his or her dismissal, demotion
7 or suspension. For the purpose of determining the time limit for making such a request,
8 the effective date of the dismissal, demotion or suspension is the first day that the
9 disciplinary action takes effect.

10 2. *Except as otherwise provided in subsection 3, such a request must be:*
11 *(a) Addressed and submitted as required pursuant to NAC 284.778; and*
12 *(b) Accompanied by the written notification of the appointing authority's decision*
13 *regarding the proposed action provided to the Sgt. Kassebaum pursuant to subsection 7*
14 *of NAC 284.6561. (emphasis added)*

15 3. If the appointing authority failed to provide the notification required pursuant to
16 subsection 7 of NAC 284.6561 or the disciplinary action imposed was an immediate
17 suspension or dismissal pursuant to the standards and procedures set forth in NAC
18 284.6563, the written notification of the appointing authority's decision regarding the
19 proposed action need not accompany the request for a hearing.

20 In this case, no matter whether the NAC 284.6562(2)(b) requirement is deemed to be a "manner"
21 requirement which requires strict compliance or a "content" requirement which permits substantial
22 compliance, the fact is, there was neither strict compliance nor substantial compliance with the requirement
23 that NDOC's written notice of its decision regarding Sgt. Kassebaum's proposed discipline accompany her
24 Appeal Form. Sgt. Kassebaum did not attach to, cite, reference, nor enclose or include with her Appeal Form
25 any document(s) from the appointing authority regarding its disciplinary decision. While this Hearing Officer
26 has not found anything that expresses the Personnel Commission's purpose or objective in requiring the
27 written notice be attached to the Appeal Form *if the appointing authority gives such written notice* to the
28 employee; *yet does not require* the written notice be attached to the Appeal Form *if the appointing authority*
fails to give such written notice to the employee (see NAC 284.6562(3)¹), it is undisputed that there was no
compliance with the substance or any reasonable objective of NAC 284.6562(2)(b). For the foregoing reason,
Sgt. Kassebaum's appeal was defective and must be dismissed.

1 There is no assertion that NDOC failed to give Sgt. Kassebaum written notice of its decision
regarding the proposed discipline and thus the exception in NAC 284.6562(3) does not apply.

1 Sgt. Kassebaum's defective appeal cannot be cured because the 10-day time period for filing an
2 appeal of disciplinary action has expired. See *Washoe Cty. v. Otto*, 128 Nev. 424, 435, 282 P.2d 719, 727.
3

4 ORDER

5 IT IS HEREBY ORDERED that the *Department of Corrections' Motion to Dismiss Appeal for*
6 *Lack of Jurisdiction* is GRANTED and Shari Kassebaum's appeal is DISMISSED WITH PREJUDICE.

7 IT IS SO ORDERED this 13th day of January 2020,
8

9 
10 CARA BROWN, ESQ.
11 HEARING OFFICER

12 NOTICE: Pursuant to NRS 233B.130, should any party desire to appeal this final determination of
13 the Hearing Officer, a Petition for Judicial Review must be filed with the District Court within 30 days
14 after service by mail of this decision.
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1 CERTIFICATE OF SERVICE

2 The undersigned, an employee of the State of Nevada, Department of Administration,
3 Appeals Division, does hereby certify that on the date shown below, a true and correct copy of the
4 foregoing **DECISION AND ORDER** was duly mailed, postage prepaid, OR transmitted via
5 interoffice mail to the following:
6

7 SHARI KASSEBAUM
8 7644 SPLASHING RIVER COURT
9 LAS VEGAS NV 89131


10 ANGELA LIZADA ESQ
11 LIZADA LAW FIRM LTD
12 711 S 9TH ST
13 LAS VEGAS NV 89101-7014

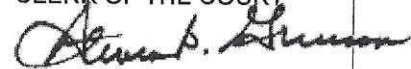
14 CHARLES DANIELS, DIRECTOR
15 DEPARTMENT OF CORRECTIONS
16 3955 W RUSSELL RD
17 LAS VEGAS NV 89118

18 CHRISTINA LEATHERS
19 CHIEF OF HUMAN RESOURCES
20 NEVADA DEPARTMENT OF CORRECTIONS
21 3955 W RUSSELL RD
22 LAS VEGAS NV 89118-2316

23 KEVIN PICK ESQ
24 SENIOR DEPUTY ATTORNEY GENERAL
25 OFFICE OF THE ATTORNEY GENERAL
26 5420 KIETZKE LANE STE 202
27 RENO NV 89511
28

Dated this 14th day of January, 2020.

23
24 
25
26
27
28
Vanessa Curiel, Administrative Assistant IV
Employee of the State of Nevada



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Email: office@danielmarks.net
7 Attorneys for Petitioner

8 DISTRICT COURT

9 CLARK COUNTY, NEVADA

10 SHARI KASSEBAUM,

11 Petitioners,

12 v.

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

16 Respondents.

Case No.: A-20-810424-P

Dept. No.: 31

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

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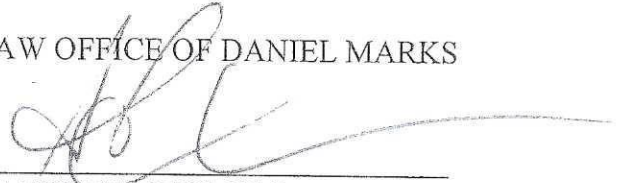
24

1 NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
2 GRANTING PETITION FOR JUDICIAL REVIEW

3 PLEASE TAKE NOTICE that an Order Granting Petition for Judicial Review was entered in
4 the above-entitled action on the 2nd day of March 2021 a copy of which is attached hereto.

5 DATED this 3rd day of March 2021.

6 LAW OFFICE OF DANIEL MARKS

7 

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Kevin Pick, Esq.
Sr. Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
Attorney for Respondent NDOC
e-mail: kpick@ag.nv.gov

3

Steven D. Grierson

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11 (702) 386-0536: FAX (702) 386-6812
12 *Attorneys for*

DISTRICT COURT
CLARK COUNTY, NEVADA

11 SHARI KASSEBAUM,

12 Petitioners,

13 v.

14 STATE OF NEVADA ex rel. its DEPARTMENT
15 OF CORRECTIONS, and STATE OF NEVADA ex
16 rel. its DEPARTMENT OF ADMINISTRATION
17 PERSONNEL COMMISSION, HEARING
18 OFFICER, CARA BROWN

17 Respondents.

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

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

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

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

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FINDINGS OF FACT

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

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

3. NRS 284.390(1) provides in pertinent part "Within 10 working days after the effective date of an employee's dismissal, demotion or suspension pursuant to NRS 284.385, the employee who has been dismissed, demoted or suspended may request in writing a hearing before the hearing officer of the Commission to determine the reasonableness of the action."

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

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

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

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

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

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

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

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

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

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

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

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CONCLUSIONS OF LAW

15. Pursuant to NRS 233B.135 the court may remand a final decision of an administrative agency, or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the decision of the agency is:

(a) In violation of constitutional or statutory provisions;

(b) In excess of the statutory authority of the agency;

(c) Affected by other error of law;

The arguments and authorities raised by Petitioner in her Petition implicate all three (3) subsections of NRS 233B.135 identified above.

16. Because the Hearing Officer's Decision did not adequately analyze or consider whether NAC 284.6562(2)(b) is a claims processing rule or a jurisdictional requirement, and if NAC 284.6562(2)(b) is a claims processing rule whether the case should be dismissed or proceed to a hearing on the merits, this matter must be remanded for assignment to a new Hearing Officer for proper consideration of the arguments raised by the parties.

17. The Court need not reach Petitioner's constitutional argument that dismissal of her Appeal violates the 14th Amendment's Due Process Clause as there are adequate statutory grounds to grant her Petition. *Spears v. Spears*, 95 Nev. 416, 596 P.2d 210 (1979); *Union Pacific R. R. Co. v. Adams*, 77 Nev. 282, 362 P.2d 450 (1961).

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

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DECISION


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

DATED this 2nd day of March 2021.


DISTRICT COURT JUDGE


Respectfully submitted by:

LAW OFFICE OF DANIEL MARKS



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ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
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Las Vegas, Nevada 89101
Attorneys for Petitioner

Approval as to Form and Content:



AARON D. FORD, Nevada Attorney General
KEVIN A. PICK, ESQ., Sr. Deputy Attorney General
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Reno, Nevada 89511
*Attorneys for Respondent State of Nevada
ex rel Department of Corrections*

BEFORE THE NEVADA STATE PERSONNEL COMMISSION APPEALS OFFICE

HEARING OFFICER

SHARI KASSEBAUM,

PETITIONER/EMPLOYEE,

VS.

STATE OF NEVADA, DEPARTMENT OF
CORRECTIONS,

RESPONDENT/EMPLOYER.

CASE NO.: 2111458-RZ

DECISION ON REMAND

THIS MATTER COMES before this Hearing Officer based on an order of remand issued by the Honorable Judge Joanna S. Kishner, 8th Judicial District Court Department 31 in Case No.: A-20-810424-P.

In that proceeding the Court found Hearing Officer Brown failed to adequately "analyze whether NAC 284.6562(2)(b) is a claims processing rule or a jurisdictional requirement, and if NAC 284.6562(2)(b) is a claims processing rule whether the case should be dismissed or proceed to a hearing on the merits."¹

Based on that finding the Court remanded the matter for analysis and consideration of the following: (1) Is NAC 284.6562(2)(b) a claims processing rule, or a jurisdictional requirement? And (2) if NAC 284.6562(2)(b) is a claims processing rule should the case be dismissed or proceed to a hearing on the merits.

In these proceedings Shari Kassebaum (Employee) is represented by the law office of Daniel Marks and Adam Levine, Esq. The State of Nevada, Department of Corrections (Employer) is

¹ When this matter was before Hearing Officer Brown it was assigned Case #2001869-CB.

1 represented by Arron D. Ford, Attorney General for the State of Nevada and senior deputy attorney
2 general Kevin Pick, Esq.

3 **1. Is NAC 284.6562(2)(b) a claims processing rule, or a jurisdictional requirement?**

4 This Hearing Officer finds NAC 284.6562(2)(b) is a jurisdictional requirement and is a regulation
5 adopted to carry out the provisions of NRS Chapter 284 as required by NRS 284.065(2)(d), NRS
6 284.383 and NRS 284.390.

7 The right to seek a hearing to determine the reasonableness of disciplinary action before the
8 Hearing Officer of the Commission is limited and to be invoked the employee must present evidence
9 establishing that the requested hearing for determination of reasonableness of discipline is properly
10 before a Hearing Officer.

11
12 **ANALYSIS**

13 NRS Chapter 284 establishes that to properly bring the matter for hearing regarding the
14 reasonableness of the disciplinary action the employee as the burden of proof must establish the
15 following at the time of filing:

- 16
- 17 1. That the employee requesting the hearing holds the status of a permanent State employee as
defined by NRS 284.290. The employee cannot be a probationary employee.
 - 18 2. That the hearing is limited to disciplinary action in which the employee has been "dismissed,
19 demoted or suspended."
 - 20 3. That a timely request for hearing must be served or postmarked within 10 working days after
the effective date of the employee's dismissal, demotion, or suspension.

21 If the employee fails to provide evidence of these prerequisites a Hearing Officer lacks the
22 jurisdiction to entertain the matter.

23
24 It must be noted that the requirement of attaching the written notification of the appointing
25 authority's decision regarding the proposed action establishes all the requirements stated above. The
26 notice includes a statement of the employee's employment status, the specific discipline imposed and
27 the effective date of that discipline. When that notice is submitted with the form provided by the
28 Division of Human Resource Management there is no issue with respect to the effective date of the

1 discipline and the date the request for hearing is filed. Clearly, this is a regulation was designed to
2 carry out the provisions of NRS 284.383. Further, no challenge was presented to the District Court
3 regarding the requirement found in NAC 284.778(1) that the employee use the form provided by the
4 Division of Human Resource Management. At the time of this request that form was designated as
5 NPD-54, and it explicitly requires the written notification of the appointing authority's decision be
6 attached.

8 DECISION

9 Based upon the foregoing and good cause appearing:

10 NAC 284.6562(2)(b) is a regulation adopted by the Nevada Personnel Commission to carry out
11 the provisions of NRS Chapter 284. It's requirement of attaching the appointing authority's decision
12 regarding the proposed action is reasonable and a jurisdictional mandate.

13
14 DATED this 9th day of December 2021.

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17 
18 Robert Zentz, Esq.
Hearing Officer

19 **NOTICE: Pursuant to NRS 233B.130, should any party desire to appeal this final**
20 **determination of the Hearing Officer a Petition for Judicial Review must be filed with the**
21 **District Court within 30 days after service by mail of this decision.**
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1 CERTIFICATE OF SERVICE

2 The undersigned, an employee of the State of Nevada, Department of Administration,
3 Appeals Division, does hereby certify that on the date shown below, a true and correct copy of the
4 foregoing DECISION ON REMAND was duly mailed, postage prepaid, OR transmitted via
5 interoffice mail to the following:
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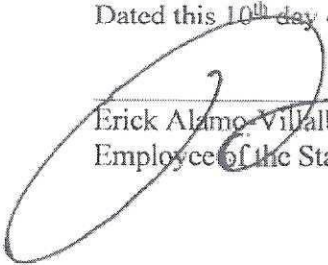
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10 ADAM LEVINE ESQ
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15 CHARLES DANIELS, DIRECTOR
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17 LAS VEGAS NV 89118

18 KEVIN PICK ESQ, SENIOR DEPUTY ATTORNEY GENERAL
19 OFFICE OF THE ATTORNEY GENERAL
20 5420 KIETZKE LANE STE 202
21 RENO NV 89511

22 Dated this 10th day of December, 2021.

23 
24 Erick Alamo Villalba, Administrative Assistant IV
25 Employee of the State of Nevada
26
27
28