

N THE SUPREME COURT OF THE STATE OF NEVADA

Docket No.: 84008

Electronically Filed
Apr 21 2022 12:09 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

SHARI KASSEBAUM

Appellant,

vs.

THE STATE OF NEVADA DEPARTMENT
OF CORRECTIONS,

Respondents.

Eighth Judicial District Court
Case No.: A-20-810424-P

JOINT APPENDIX
VOLUME I – Part 1 of 4

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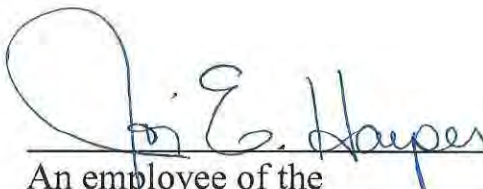
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	<u>Description</u>	<u>Vol(s)</u>	<u>Pg(s)</u>
1.	Petition for Judicial Review (02/13/2020)	I	JA 00001-JA 00013
2.	Statement of Intent to Participate (03/03/2020)	I	JA 00014-JA00016
3.	Transmittal of Record on Appeal (10/16/2020)	I	JA 00017- JA 00091
4.	Petitioner's Opening Brief (12/14/2020)	I	JA 00092- JA 00118
5.	Department of Correction's Answering Brief (01/12/2021)	I	JA 0011- JA 00138
6.	Petitioner Shari Kassebaum's Reply Brief (02/02/2021)	I	JA 00139- JA 00163
7.	Findings of Facts, Conclusions of law, Decision and Order Granting Petition for Judicial Review (03/02/2021)	I	JA 00164-JA 00168
8.	Notice of Entry of Findings of Facts, Conclusions of Law, Decision and Order Granting Petition for Judicial Review (03/03/2021)	I	JA 000169- JA 000176
9.	Decision on Remand (12/09/2021)	I	JA 000177- JA 000180
10.	Case Appeal Statement (12/21/2021)	I	JA 000181-JA 000184
11.	Notice of Appeal (12/21/2021)	I	JA 000185- JA 000194
12.	Transcript of Proceedings (03/01/2022)	I	JA 000195- JA 000223

CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 20th day of April 2022, I did serve the above and foregoing JOINT APPENDIX VOLUME I – Part 1 of 4 by way of Notice of Electronic Filing provided by the court mandated E-Flex filing service, upon the Respondents at the following:

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CASE NO: A-20-810424-P
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DISTRICT COURT
CLARK COUNTY, NEVADA

SHARI KASSEBAUM,

Petitioner,

Case No.:
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.

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

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

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

12 5. Petitioner reserves his right to request oral argument on this matter pursuant to NRS
13 233B.133(4).

14 WHEREFORE, Petitioner prays as follows:

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

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

18 DATED this 12th day of February, 2020.

19 LAW OFFICE OF DANIEL MARKS

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Glenda Jew
Employee of the
OFFICE OF DANIEL MARKS

EXHIBIT “1”

EXHIBIT “1”

1 BEFORE THE NEVADA STATE PERSONNEL COMMISSION

2 HEARING OFFICER

FILED

JAN 14 2020

4 SHARI KASSEBAUM,

5 Petitioner-Employee

6 vs.

7 STATE OF NEVADA, DEPARTMENT OF
8 CORRECTIONS,

9 Respondent-Employer.

APPEALS OFFICE
Hearing No. 2001869-CB

10 DECISION AND ORDER

11 Before the undersigned Hearing Officer is the *Nevada Department of Corrections' Motion to Dismiss*
12 *Appeal for Lack of Jurisdiction* ("Motion") filed by Respondent-Employer, Nevada Department of
13 Corrections ("NDOC") on December 17, 2019. Petitioner-Employee, Shari Kassebaum ("Sgt. Kassebaum")
14 filed a *Limited Opposition to Motion to Dismiss Appeal* ("Opposition") and NDOC filed the *Department of*
15 *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.
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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 *Id.* at 571-572.

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 "*
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)⁴), 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.

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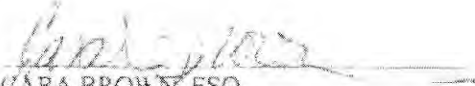
⁴ There is no assertion that NDOC failed to give Sgt. Kassebaum written notice of its decision regarding the proposed discipline and thus the exception in NAC 284.6562(3) does not apply.

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
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28

Dated this 14th day of January, 2020.

Vanessa Curiel, Administrative Assistant IV
Employee of the State of Nevada



1 SIPP
2 AARON D. FORD
3 Attorney General
4 KEVIN A. PICK
5 Senior Deputy Attorney General
6 Nevada Bar No. 11683
7 State of Nevada
8 Office of the Attorney General
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14 *Attorneys for Respondent State of Nevada*
15 *ex rel. Department of Corrections*

9 DISTRICT COURT
10 CLARK COUNTY, NEVADA

11 SHARI KASSEBAUM,

12 Petitioner,

13 v.

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

20 Respondents.

Case No. A-20-810424-P

Dept. No. 31

19 STATEMENT OF INTENT TO PARTICIPATE
20 IN PETITION FOR JUDICIAL REVIEW

21 Respondent, State of Nevada, Department of Corrections (hereinafter "NDOC"), by and
22 through its attorneys, Nevada Attorney General, Aaron D. Ford, and Senior Deputy Attorney General,
23 Kevin A. Pick, hereby notifies the District Court and all interested parties pursuant to NRS
24 233B.130(3), that it intends to participate in the Petition for Judicial Review filed in the Eighth
25 Judicial District Court by Shari Kassebaum on February 13, 2020.

26 NDOC denies the allegations of errors set forth in the Petition for Judicial Review.

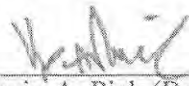
27 By filing this Statement of Intent to Participate, NDOC does not waive any defenses, including
28 the ability to contest subject matter jurisdiction and the Petitioner's compliance with NRS 233B.130.

1 **NOTICE IS HEREBY GIVEN** that all documents to Respondent, NDOC, should be
2 addressed as follows: Office of the Attorney General, Attention: Kevin A. Pick, 5420 Kietzke Lane,
3 Suite 202, Reno, Nevada, 89511.

4 **WHEREFORE**, Respondent State of Nevada, Department of Corrections, prays that the Court
5 dismiss the Petition as a matter of law, affirm the decision of the Hearing Officer, and for such other
6 and further relief as the Court may deem just and proper.

7 DATED this 3rd day of March 2020.

8 AARON D. FORD
9 Attorney General

10 By: 
11 Kevin A. Pick (Bar. No. 11683)
12 Senior Deputy Attorney General
13 Attorneys for Respondent, State of Nevada
14 ex rel. Department of Corrections
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CERTIFICATE OF SERVICE

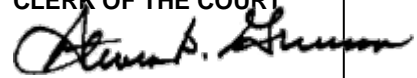
I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 3rd day of February 2020, I served a copy of the foregoing **STATEMENT OF INTENT TO PARTICIPATE IN PETITION FOR JUDICIAL REVIEW** by causing a true copy thereof to be filed with the Clerk of the Court using the eFlex system and by email or by depositing a true copy of the same for mailing addressed as follows:

Adam Levine, Esq.
Law Offices of Daniel Marks
610 S. 9th St.
Las Vegas, NV 89101
alevine@danielmarks.net
Attorney for Petitioner

Cara Brown, Esq.
Hearing Officer
State of Nevada
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Las Vegas, NV 89102
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State of Nevada
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Appeals Division
2200 South Rancho Dr., Suite 220
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An employee of the State of Nevada,
Office of the Attorney General



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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

SHARI KASSEBAUM,

Petitioner,

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

v.

**STATEMENT OF INTENT TO
PARTICIPATE IN PETITION FOR
JUDICIAL REVIEW**

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

Respondent.

COMES NOW, Respondent, STATE OF NEVADA ex rel, its DEPARTMENT OF CORRECTIONS (NDOC), by and through its legal counsel, Nevada Attorney General, AARON D. FORD, and Supervising Senior Deputy Attorney General, MICHELLE DI SILVESTRO ALANIS, hereby files its Statement of Intent to Participate in Petition for Judicial Review, pursuant to NRS 233B.130(3).

Respondent denies the allegations of errors as set forth in the Petition for Judicial Review.

NOTICE IS HEREBY GIVEN that all documents to Respondent should be sent c/o: Office of the Attorney General, Attn: Michelle Di Silvestro Alanis, 555 East Washington Avenue, Suite 3900, Las Vegas, Nevada 89101.

1 **WHEREFORE**, Respondent, NDOC, prays the Court affirm the decision of the Personnel
2 Commission Hearing Officer, and for such other and further relief as the Court may deem just and
3 proper.

4 DATED: April 14, 2020.

5 AARON D. FORD
6 Attorney General

7
8 By: /s/ Michelle Di Silvestro Alanis
9 Michelle Di Silvestro Alanis (Bar No. 10024)
10 Supervising Senior Deputy Attorney General
11 Attorneys for Respondent
12 State of Nevada ex rel its Department of Corrections
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CERTIFICATE OF SERVICE

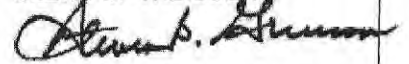
I hereby certify that I electronically filed the foregoing **STATEMENT OF INTENT TO PARTICIPATE IN PETITION FOR JUDICIAL REVIEW** with the Clerk of the Court by using the electronic filing system on the 14th day of April, 2020.

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

Angela Lizada, Esq.
Lizada Law Firm, Ltd.
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Attorneys for Petitioner

Robert Zentz
Hearing Officer
Department of Administration
2200 S. Rancho Dr. Ste. 220
Las Vegas, NV 89102
vcuriel@admin.nv.gov

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



1 TROA
2 APPEALS OFFICE
3 2200 S. Rancho Drive Suite 220
4 Las Vegas NV 89102
5 (702) 486-2527

6 DISTRICT COURT
7 CLARK COUNTY, NEVADA

8 SHARI KASSEBAUM,
9 Petitioner,

10 vs.

Case No.: A-20-810424-P
Dept. No.: 31
ROA No.: 2016253-CB

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

17 Respondents.

18 TRANSMITTAL OF RECORD ON APPEAL


19 TO: STEVEN GRIERSON, Clerk of the above-captioned Court:

20 Pursuant to NRS 233B.131, the transmittal of the entire Record on Appeal, in
21 accordance with the Nevada Administrative Procedure Act (Chapter 233B of the Nevada
22 Revised Statutes), is hereby made as follows:

23 1. The entire Record herein, including each and every pleading, document, affidavit,
24 order, decision and exhibit now on file with the Appeal Office, at 2200 S. Rancho Drive Suite
25 220, Las Vegas, Nevada 89102, under the Nevada Industrial Insurance Act, in the above-
26 captioned action, including the court reporter's transcripts if available, of the testimony of the
27 Appeal Officer hearing.

28 2. This Transmittal.

DATED this 16th day of October, 2020.


Violeta Martinez, Legal Secretary II
An Employee of the Hearings Division

DOC001
00001

INDEX

ROA NUMBER: 2016253-CB
Appeal No.: 2001869-CB

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BEFORE THE NEVADA STATE PERSONNEL COMMISSION

HEARING OFFICER

FILED

JAN 14 2020

APPEALS OFFICE

Hearing No. 2001869-CB

SHARI KASSEBAUM,

Petitioner-Employee

vs.

STATE OF NEVADA, DEPARTMENT OF
CORRECTIONS,

Respondent-Employer.

DECISION AND ORDER

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

BACKGROUND

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

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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

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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, *572*572 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.

Id. at 571-572.

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*
29 *fails to give such written notice* to the employee (see NAC 284.6562(3)¹), it is undisputed that there was no
30 compliance with the substance or any reasonable objective of NAC 284.6562(2)(b). For the foregoing reason,
31 Sgt. Kassebaum's appeal was defective and must be dismissed.

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33

34 ¹ There is no assertion that NDOC failed to give Sgt. Kassebaum written notice of its decision
35 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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KEVIN PICK ESQ
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OFFICE OF THE ATTORNEY GENERAL
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VERD

Vanessa Curiel, Administrative Assistant IV
Employee of the State of Nevada

FILED
JAN 06 2020
APPEALS OFFICE

BEFORE THE NEVADA PERSONNEL COMMISSION
HEARING OFFICER

SHARI KASSEBAUM,

Petitioner-Employee,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent-Employer.

Case No. 2001869-CB

DEPARTMENT OF CORRECTIONS'
REPLY IN SUPPORT OF
MOTION TO DISMISS APPEAL FOR
LACK OF JURISDICTION

Employer, STATE OF NEVADA, *ex rel.* its DEPARTMENT OF CORRECTIONS ("NDOC"), by and through its counsel, AARON D. FORD, Attorney General for the State of Nevada, and Kevin A. Pick, Senior Deputy Attorney General, and pursuant to Hearing Officer Rule 5.1, hereby submits its Reply in Support of Motion to Dismiss Petitioner-Employee Shari Kassebaum's appeal for lack of jurisdiction. This Reply is made and based upon the memorandum of points and authorities set forth below, the exhibits attached hereto, and any other papers and pleadings on file herein.

MEMORANDUM OF POINTS AND AUTHORITIES

Chapter 284 of the Nevada Administrative Code governs the process by which a state employee may appeal a suspension, demotion, or termination. NAC 284.6562(1) sets forth the timing requirement for filing a timely appeal, while NAC 284.6562(2) sets forth the content and manner requirement for filing a complete and proper appeal. NAC 284.6562(2) specifically mandates that an appeal "must" be "accompanied by the written notification of the appointing authority's decision regarding the proposed action . . ." Similarly, the appeal form provided by DHRM (NPD-54) expressly instructs that "[t]his appeal form must be accompanied by the written notification of the appointing authority's decision regarding the proposed action provided to the employee pursuant to subsection 7 of NAC 284.6561."

Timely compliance with NAC 284.6562 is jurisdictional, because the proper and timely filing of a notice of appeal is jurisdictional. *See Rust v. Clark Co. School Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987) ("[t]he proper and timely filing of a notice of appeal is jurisdictional.") What is more, NAC 284.6562 has the full force and effect of law, *see Turk v. Nev. State Prison*, 94 Nev. 101,

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1 104, 575 P.2d 599, 601 (1978), and the powers of the Hearing Division are limited to only those powers
2 “specifically set forth by statute.” See *Clark Cty. Sch. Dist. v. Clark Cty. Classroom Teachers Ass’n*,
3 115 Nev. 98, 102, 977 P.2d 1008, 1010 (1999). Thus, the mandatory filing requirements of NAC
4 284.6562 are jurisdictional, have the full force and effect of law, and the hearing officer lacks authority
5 to overlook these filing requirements.

6 Here, Ms. Kassebaum’s appeal was not accompanied by written notification of NDOC’s
7 decision regarding the 15 day suspension (as required by NAC 284.6562(2)) and Kassebaum’s appeal
8 was not timely amended in order to conform with NAC 284.6562(2) within the 10-day appeal period
9 under NAC 284.6562(1) and NRS 284.390(1). These procedural facts are undisputed and irrefutable.

10 As a result, NDOC filed the present Motion to Dismiss, which asks the Hearing Officer to
11 dismiss this appeal as a matter of law, because Kassebaum failed to file a proper, complete, and timely
12 appeal that vested jurisdiction in the Hearings Division. Put another way, Kassebaum’s incomplete
13 appeal is incapable (as a matter of law) of invoking the jurisdiction of the Hearings Division, as no
14 complete and proper appeal was filed before expiration of the 10-day filing deadline.

15 On December 27, 2019, Ms. Kassebaum filed a “Limited-Opposition to Motion to Dismiss
16 Appeal” (hereinafter, “Limited Opposition”). As explained therein, Kassebaum filed a *limited*
17 opposition (as opposed to a *full* opposition) because Kassebaum readily admits that she failed to timely
18 comply (either strictly or even substantially) with NAC 284.6562(2). See Limited Opposition, at 1.
19 What is more, Kassebaum does not dispute that the requirements of NAC 284.6562 are mandatory. *Id.*
20 at 1–2. Nor does Kassebaum dispute that the proper and timely filing of a notice of appeal is
21 jurisdictional. *Id.*¹

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

Moreover, the intent of the Personnel Commission in adopting NAC 284.6562(2) is plain and
the only exception to its mandatory provisions is enumerated in NAC 284.6562(3), which excuses the

Indeed, the Limited Opposition is more akin to a non-opposition or stipulation to dismiss, as Kassebaum readily concedes that “**procedurally, Employer will prevail on its motion to dismiss . . .**” See Limited Opposition, at 1 (emphasis added). In making this concession, the Limited Opposition acknowledges that dismissal is appropriate on the procedural/jurisdictional grounds outlined in NDOC’s Motion. In fact, the entire purpose of the “limited opposition” is that Kassebaum does not oppose dismissal for lack of jurisdiction, as Kassebaum apparently prefers to pursue other claims/actions against NDOC. *Id.* at 2.²

requirements of NAC 284.6562(2)(b) *only if* the appointing authority failed to provide the notification required or the disciplinary action was immediate. These enumerated exceptions to NAC 284.6562(2), neither of which apply here, are further proof that this provision was intended as a mandatory rule that requires strict compliance. See *Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009) (“the mention of one thing implies the exclusion of another.”) Indeed, to interpret NAC 284.6562(2) as anything other than mandatory would effectively nullify NAC 284.6562(3). See *Nevada Dept. of Motor Vehicles v. Turner*, 89 Nev. 514, 517, 515 P.2d 1265 (1973) (it is established law in Nevada that all parts of an act are to be construed harmoniously). Furthermore, the legislative history of NAC 284.6562 does not suggest that substantial compliance is the applicable standard, and regardless, the language of NAC 284.6562 is unambiguous and it would be clear legal error to even resort to legislative history when interpreting NAC 284.6562. See *State v. Beemer*, 51 Nev. 192, 199, 272 P.2d 656, 657 (1928) (“[w]here the language of a statute is plain, the intention of the legislature must be deduced from such language, and the court has no authority to look beyond it, or behind it, or to the proceedings of the legislative body to ascertain its meaning.”)

Still, even if substantial compliance did apply, Kassebaum admits that her appeal did not even substantially comply with NAC 284.6562(2). See Limited Opposition, at 1. Nor could Kassebaum have substantially complied with NAC 284.6562(2)(b) via non-compliance with NAC 284.6562(2)(b). Therefore, even under the more relaxed (and inapplicable) substantial compliance standard, Kassebaum’s appeal was defective to initiate an appeal and was not properly amended within the 10-day filing deadline.

² While the Limited Opposition does not oppose dismissal for lack of jurisdiction, Kassebaum notes her disagreement with the underlying factual basis for discipline and Kassebaum also objects to the relevancy of several exhibits attached to the Motion to Dismiss. However, NDOC’s Motion to Dismiss is procedural in nature and the underlying factual basis for discipline is irrelevant to the jurisdictional defects at issue, which is (again) undisputed. Moreover, Exhibit A (Specificity of Charges), Exhibit B (Pre-Disciplinary Hearing Memo), and Exhibit C (Letter of Discipline) are all relevant to establishing the procedural history leading up to the appeal and are only being offered for that limited purpose, which (again) is undisputed. Likewise, Exhibit F is plainly relevant because *Donyil Livingston v. NDOC* involved the exact same legal issue now present in the current appeal (i.e. non-compliance with NAC 284.6562), which (again) is not opposed by Ms. Kassebaum.

1 As such, because the relevant procedural facts are undisputed, because the law is undisputed,
2 and because Kassebaum does not oppose dismissal for lack of jurisdiction, NDOC respectfully moves
3 the hearing officer to grant the present motion and dismiss this matter for lack of jurisdiction.

4 Based on the foregoing, NDOC moves the Hearing Officer to dismiss the present appeal with
5 prejudice for lack of jurisdiction.

6 DATED this 31st day of December 2019.

7 AARON D. FORD
8 Attorney General

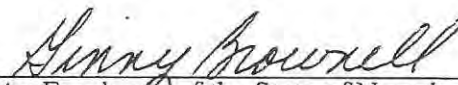
9 By: 
10 Kevin A. Pick
11 Senior Deputy Attorney General
12 Nevada Bar No. 11683
13 State of Nevada
14 Office of the Attorney General
15 5420 Kietzke Lane, Suite 202
16 Reno, Nevada 89511
17 (775) 687-2129
18 kpick@ag.nv.gov
19 *Attorneys for Employer/Respondent*
20 *Nevada Department of Corrections*
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1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that
3 on this 2nd day of January 2020, I served a true and correct copy of the foregoing **DEPARTMENT OF**
4 **CORRECTIONS' REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL FOR LACK OF**
5 **JURISDICTION**, by email and U.S. Mail, postage prepaid, at Reno, Nevada, as follows:

6 Cara Brown, Hearing Officer
7 State of Nevada, Dept. of Administration
8 Appeals Division
9 2200 South Rancho Drive, Suite 220
10 Las Vegas, NV 89102
11 Vanessa.curiel@admin.nv.gov

12 Angela Lizada, Esq.
13 Lizada Law Firm Ltd.
14 711 S. 9th St.
15 Las Vegas, NV 89101-7014
16 angela@lizardalaw.com
17 *Attorney for Petitioner-Employee*

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An Employee of the State of Nevada,
Office of the Attorney General

1 ANGELA J. LIZADA, ESQ.
2 Nevada Bar No. 11637
3 LIZADA LAW FIRM, LTD.
4 711 S. 9TH St.
5 Las Vegas, NV 89101
6 Phone: (702) 979-4676
7 Fax: (702) 979-4121
8 angela@lizadalaw.com
9 Attorney for Shari Kassebaum

STATE OF NEVADA
DEPT. OF ADMINISTRATION
PERSONNEL DIVISION

2019 DEC 31 A 11:06

RECEIVED
AND
FILED

BEFORE THE NEVADA PERSONNEL COMMISSION
HEARING OFFICER

SHARI KASSEBAUM,

Petitioner-Employee,

v.

DEPARTMENT OF CORRECTIONS,

Respondent-Employer.

Appeal No.: 2001869-CB

LIMITED OPPOSITION TO MOTION
TO DISMISS APPEAL

COMES NOW Petitioner, SHARI KASSEBAUM ("Sgt. Kassebaum"), by and through Angela J. Lizada, Esq., her attorney, and hereby opposes Respondent's Motion to Dismiss Appeal. This Limited Opposition is made and based on the enclosed Memorandum of Points and Authorities and the pleadings and papers on file herein.

Sgt. Kassebaum concedes that under the revised NAC 284.6562(2)(b) it is now required to provide the Employer a copy of the SOC that Employer served on the Employee. Sgt. Kassebaum concedes that procedurally, Employer will prevail on its Motion to Dismiss, however, Sgt. Kassebaum disagrees to the completely inaccurate facts set forth in the Opposition. If the matter were to proceed on the merits, it would be shown that Sgt. Kassebaum did not engage in any dishonest, insubordinate, or neglect of duty. Instead, NDOC disciplined Sgt. Kassebaum in retaliation for her refusal to ignore the grossly dangerous illegal activities that are

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1 occurring in NDOC. It will further be shown that NDOC disparately disciplined Sgt. Kassebaum
2 for this incident when it did not discipline the other 25-50 employees who did the same thing on
3 the same day, nor did it discipline the supervisor that actually submitted Sgt. Kassebaum's
4 timesheet for her. It will be publicly demonstrated all of the illegal actions being continuously
5 conducted by NDOC's managerial employees that Sgt. Kassebaum has reported to try to better
6 NDOC for the employees and the public. Sgt. Kassebaum will continue her pursuit of her federal
7 lawsuit against NDOC for its discrimination and retaliation, regardless of whether NDOC
8 manages to continue to sweep issues under the rug with technicalities on the
9 personnel/administrative level.
10

11 Sgt. Kassebaum also objects to the Exhibits attached, outside of Exhibit D. The only issue
12 argued is that the appeal did not include the written notification issued by the appointing
13 authority. Exhibit D is the appeal, so it is relevant. Exhibits A through C are submitted for NDOC
14 to make one last accusatory public statement against Sgt. Kassebaum. Further, Exhibit E's
15 inclusion is simply a copy of a Decision entered by another hearing officer. The decision of a
16 hearing officer in another case is in no way controlling in this matter, and in fact, is completely
17 irrelevant. The language of NAC 284.6562 is clear, and neither the Hearing Officer nor opposing
18 counsel need a non-controlling authority to be submitted to explain what it means when the NAC
19 states that employee must submit the written notification of the appointing authority's decision.
20
21
22

23 Dated this 27th day of December, 2019.

24 LIZADA LAW FIRM, LTD.

25 

26 ANGELA J. LIZADA, ESQ.
27 Nevada Bar No. 11637
28 711 S. 9th St.
Las Vegas, NV 89101

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day and pursuant to NRCP 5(b), I submitted a true and correct copy of the foregoing **LIMITED OPPOSITION TO MOTION TO DISMISS**, by email to the following:

Kevin A. Pick, Esq.
Deputy Attorney General

Carolyn M. Broussard
Hearing Officer

Dated this 7th day of June, 2019.

/s/ Angela J. Lizada, Esq.
An Employee of Lizada Law Firm, Ltd.

FILED

DEC 19 2019

APPEALS OFFICE

BEFORE THE NEVADA PERSONNEL COMMISSION

HEARING OFFICER

SHARI KASSEBAUM,

Petitioner-Employee,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent-Employer.

Case No. 2001869-CB

DEPARTMENT OF CORRECTIONS'
MOTION TO DISMISS APPEAL FOR
LACK OF JURISDICTION

Employer, STATE OF NEVADA, *ex rel.* its DEPARTMENT OF CORRECTIONS ("NDOC"), by and through its counsel, AARON D. FORD, Attorney General for the State of Nevada, and Kevin A. Pick, Senior Deputy Attorney General, and pursuant to Hearing Officer Rule 5.1, hereby moves to dismiss Petitioner-Employee Shari Kassebaum's appeal for lack of jurisdiction.

This motion is made and based upon the memorandum of points and authorities set forth below, the exhibits attached hereto, and any other papers and pleadings on file herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

FACTUAL AND PROCEDURAL HISTORY

Petitioner, Shari Kassebaum ("Kassebaum"), is a correctional sergeant currently employed at NDOC. On June 20, 2019, Kassebaum was served with a Specificity of Charges (SOC), which recommended that she be suspended from state service for fifteen (15) days as a result of serious misconduct, including, but not limited to, dishonesty, insubordination, and neglect or duty. In short, on January 7, 2019, and January 8, 2019, Kassebaum knowingly put incorrect information on her timesheets and also left her assigned post early on January 8, 2019, without authorization and without properly indicating a corresponding reduction in hours on her timesheet – thereby misappropriating State funds. *See* Exhibit A, Specificity of Charges.

A pre-disciplinary hearing was scheduled for July 1, 2019, which Kassebaum waived by failing to attend. *See* Exhibit B, Memorandum from Associate Warden Bean. Following the pre-disciplinary

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1 hearing, Associate Warden Bean concurred with the recommendation to suspend Kassebaum from state
2 service for fifteen (15) days. *Id.*

3 On July 3, 2019, Deputy Director Harold Wickham sent Kassebaum a letter advising that
4 Kassebaum would be suspended for fifteen (15) days, effective July 11, 2019. *See* Exhibit C, Letter of
5 Termination.

6 On or about July 20, 2019, Kassebaum filed an Appeal of Dismissal, Suspension, Demotion, or
7 Involuntary Transfer. *See* Exhibit D, Appeal. However, Kassebaum failed to comply with the
8 requirements necessary to initiate an appeal. Namely, Kassebaum attached only an unsigned one-page
9 statement that was prepared by either Kassebaum or her counsel, and not the written notification from
10 Deputy Director Wickham as required by NAC 284.6562(2)(b).

11 Because Kassebaum's appeal fails to comply with the mandatory requirements set forth in NAC
12 284.6562, Kassebaum failed to file a complete and proper appeal with the Hearings Division.
13 Moreover, Kassebaum's defective appeal cannot be amended since the 10-day appeal period under
14 NRS 284.390(1) has expired. Accordingly, Kassebaum's appeal is jurisdictionally defective and must
15 be dismissed with prejudice.

16 II.

17 LEGAL ARGUMENT

18 A. APPLICABLE LEGAL STANDARD.

19 Chapter 284 of the Nevada Administrative Code governs the process by which a state employee
20 may appeal a termination. Mandatory requirements must be satisfied to initiate an appeal. "A
21 permanent employee who has been dismissed, demoted, or suspended may request a hearing before the
22 hearing officer of the Commission pursuant to NRS 284.390, within 10 working days after the effective
23 date of his or her dismissal, demotion or suspension." NAC 284.6562(1). Such a request "*must*" be:

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

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

27 NAC 284.6562(2) (Emphasis added).

28 ///

1 Indeed, the NPD-54 appeal form provided by DHRM (which every appeal must use) actually
2 mandates as follows: "*This appeal form must be accompanied by the written notification of the*
3 *appointing authority's decision regarding the proposed action provided to the employee pursuant to*
4 *subsection 7 of NAC 284.6561.*"

5 The Supreme Court has repeatedly affirmed that the word "must," as used in NAC 284.6562(2)
6 and the DHRM appeal form, imposes a mandatory requirement. *See Washoe Cty. v. Otto*, 128 Nev.
7 424, 432, 282 P.3d 719, 725 (2012); *see also Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 665,
8 310 P.3d 569, 572 (2013) ("The word 'shall' is generally regarded as mandatory.")

9 Moreover, the regulations adopted by the Personnel Commission, such as NAC 284.6562, have
10 the full force and effect of law. *Turk v. Nev. State Prison*, 94 Nev. 101, 104, 575 P.2d 599, 601 (1978).
11 Indeed, "[w]hen the legislature creates a specific procedure for review of administrative agency
12 decisions, such procedure is controlling." *Crane v. Continental Telephone*, 105 Nev. 399, 401, 775 P.2d
13 705, 706 (1989). Likewise, the powers of an administrative agency, such as the hearing division, are
14 limited to those powers "specifically set forth by statute." *See Clark Cty. Sch. Dist. v. Clark Cty.*
15 *Classroom Teachers Ass'n*, 115 Nev. 98, 102, 977 P.2d 1008, 1010 (1999).

16 What is more, the requirements of NAC 284.6562 are not only mandatory, but timely
17 compliance with NAC 284.6562 is also jurisdictional. *Rust v. Clark Co. School Dist.*, 103 Nev. 686,
18 688, 747 P.2d 1380, 1382 (1987) ("[t]he proper and timely filing of a notice of appeal is
19 jurisdictional."); *see also 73A C.J.S. Public Administrative Law and Procedure* § 338 (2004) ("Since
20 jurisdiction is dependent on statutory provisions, the extent of the jurisdiction is limited to that
21 conferred by statute, and courts may lack jurisdiction under, or in the absence of, statutory provisions."
22 (Footnotes omitted)).

23 Accordingly, in order to successfully invoke a hearing officer's jurisdiction to consider the
24 reasonableness of disciplinary action, a petitioning employee must comply with the mandatory and
25 jurisdictional requirements for filing such an appeal under NRS 284.390 and NAC 284.6562.
26 Otherwise, an incomplete/defective appeal fails to vest jurisdiction in the hearings division.
27 Furthermore, since NRS 284.390(1) creates a 10-day appeal period for review of employee discipline, a
28 defective appeal cannot be amended outside of the statutory filing period. *See Otto*, 128 Nev. at 435

(citing *Commissioner v. Bethlehem Steel Corp.*, 703 N.E.2d 680, 683 (Ind. Ct. App. 1998) (when a petition is “statutorily defective,” a court does not obtain jurisdiction over it; thus, the district court “[has] no jurisdiction to allow an amendment relating back to the original day of filing”)).

B. KASSEBAUM FAILED TO COMPLY WITH THE MANDATORY REQUIREMENTS OF NAC 284.6562(2) AND FAILED TO VEST JURISDICTION WITH THE HEARING OFFICER.

Here, the July 3, 2019, written notification from Deputy Director Wickham included an effective date of July 11, 2019, for Kassebaum’s suspension. *See* Exhibit C. As such, Kassebaum had 10 workdays (until July 25, 2019) to file a timely appeal under NRS 284.390(1). Kassebaum filed a DHRM appeal form (NPD-54) on July 20, 2019; however, Kassebaum failed to attach the July 3, 2019, written notification from Deputy Director Wickham. *See* Exhibit D. Accordingly, it is irrefutable that Kassebaum filed an incomplete and defective appeal, in violation of the mandatory and jurisdictional requirements of NAC 284.6562.

As discussed *supra*, NAC 284.6562 has the full force and effect of law, while NRS 284.390(1) instructs that a complete (i.e. non-defective) appeal must be filed within 10 days of the effective date of discipline in order to vest jurisdiction in the hearing division. *See Turk*, 94 Nev. at 104; *see also Rust*, 103 Nev. at 688. Accordingly, since Kassebaum failed to file a complete appeal within the 10-day appeal period, Kassebaum has failed to invoke the jurisdiction of the Hearing Officer.

What is more, these same legal arguments were recently affirmed by Hearing Officer Zentz in Case No. 1915389-RZ, *Donyil Livingston v. NDOC*. *See* Exhibit E, Decision and Order. Therein, Hearing Officer Zentz granted NDOC’s motion to dismiss for lack of jurisdiction and found as follows:

1. That a hearing officer has no greater authority than that granted to the Personnel Commission, which has only “such power and duties as are authorized by law.” *See* Exhibit E (citing NRS 284.065(1)).
2. That NAC 284.6562(2)(b) was properly adopted by the Personnel Commission and that a hearing officer cannot disregard the plain, mandatory language of NAC 284.6562(2)(b). *Id.*
3. That the “proper and timely” filing of a notice of appeal is jurisdictional. *Id.* (citing *Rust*, 103 Nev. at 688).

1 4. That Mr. Livingston's appeal did not comply with the express provisions of NAC
2 284.6562(2)(b) and was not proper, since Livingston's appeal was not accompanied by a
3 copy of the written notification of the appointing authority's decision. *Id.*

4 5. And finally, that Mr. Livingston's incomplete appeal could not be cured because NAC
5 284.6562(2)(b) instructs that an appeal "must" be "accompanied" by written notification
6 of the appointing authority's decision and, regardless, the 10 day time period to file a
7 complete and proper appeal had expired. *Id.*

8 NDOC respectfully urges this Hearing Officer to take notice of this Decision and Order issued
9 in Case No. 1915389-RZ, which is directly applicable to the situation at bar and is well grounded in
10 clear Nevada law.

11 Additionally, since the requirements of NRS 284.390 and NAC 284.6562(2) are a mandatory
12 rule, strict compliance applies and substantial compliance cannot suffice as a matter of law. *See*
13 *Wishengrad v. JP Morgan Chase Bank Nat'l Ass'n*, No. 67045, 2016 WL 6089390, at *2 (Nev. App.
14 Oct. 6, 2016) (Finding that a time and manner rule, which uses the mandatory word "shall," is a
15 mandatory rule that requires strict compliance). Generally, a rule is mandatory and requires strict
16 compliance when its language states a specific "time and manner" for performance. *Markowitz v. Saxon*
17 *Special Servicing*, 129 Nev. 660, 664, 310 P.3d 569, 572 (2013). Here, NAC 284.6562(1) states a
18 specific "time" for performance (10 working days) and NAC 284.6562(2) states a specific "manner" for
19 performance (addressed/submitted to DHRM and "accompanied by the written notification of the
20 appointing authority's decision"). Therefore, NAC 284.6562 is a mandatory rule and strict compliance
21 applies. However, it is irrefutable that Kassebaum did not strictly comply with NAC 284.6562 when
22 she failed to attach the July 3, 2019, written notification from Deputy Director Wickham. *See* Exhibit
23 D. As such, since her appeal was incomplete and defective, Kassebaum failed to timely invoke the
24 jurisdiction of the Hearings Division before expiration of the 10 day appeal period. *See Turk*, 94 Nev. at
25 104; *see also Rust*, 103 Nev. at 688.

26 Still, even if *substantial* compliance could satisfy the mandatory requirements of NRS 284.390
27 and NAC 284.6562, it is irrefutable that Kassebaum did not even substantially comply with these
28 mandatory provisions. The July 3, 2019, written notification from Deputy Director Wickham does not

1 "accompany" the NPD-54 filed by Kassebaum, as required by NAC 284.6562(2). *Id.* Nor does the
2 NPD-54 filed by Kassebaum cite or incorporate by reference the July 3, 2019, written notification from
3 Deputy Director Wickham. Therefore, since a party cannot *substantially* comply through complete *non-*
4 *compliance*, Kassebaum failed to file a complete appeal and thus failed to timely invoke the jurisdiction
5 of the Hearings Division. As such, Kassebaum's appeal is jurisdictionally defective and cannot be
6 amended or otherwise corrected at this time.

7 III.

8 CONCLUSION

9 Based on the foregoing, NDOC moves the Hearing Officer to dismiss the present appeal with
10 prejudice for lack of jurisdiction.

11 DATED this 17 day of December, 2019.

12 AARON D. FORD
13 Attorney General

14 By: 

15 Kevin A. Pick
16 Senior Deputy Attorney General
17 Nevada Bar No. 11683
18 State of Nevada
19 Office of the Attorney General
20 5420 Kietzke Lane, Suite 202
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25 *Nevada Department of Corrections*
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 17th day of December 2019, I served a true and correct copy of the foregoing **DEPARTMENT OF CORRECTIONS' MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION**, by email and U.S. Mail, postage prepaid, at Reno, Nevada, as follows:

Angela Lizada, Esq.
Lizada Law Firm Ltd.
711 S. 9th St.
Las Vegas, NV 89101-7014
Attorney for Employee/Petitioner

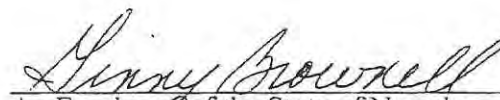

An Employee of the State of Nevada,
Office of the Attorney General

EXHIBIT A

EXHIBIT A

REVISED
STATE OF NEVADA
SPECIFICITY OF CHARGES

SP-19119

Name: Kaiserstein, Shari

Employee ID#: 42134

Budget Account: 2718

Current Title: Correctional Sergeant

Grade: 27 Step: 05

Supervisor: Gary Flinchum, AW

Department: Corrections

Division: SDCC Section: Casidy

Date: 06/20/2019 Time: 2000 PM

This is to inform you that you are alleged to have violated section 284.650 of the Nevada Administrative Code, as follows:

Date(s)	Violation(s)
See Attached	See Attached

A recommendation has been made by: Dwight Neven

Warden

Name

Title

that it is in the best interest of the State of Nevada to take the following disciplinary action(s):

Suspended from State service for fifteen (15) working days or one hundred twenty (120) hours without pay

Proposed/Actual Effective Date: 07/11/2019

7-12-19

Signature (Person recommending action)

☒ In accordance with NAC 284.656, a hearing has been scheduled on your behalf to determine whether such action is warranted. Following the hearing and prior to the proposed effective date, you will be given a copy of the finding(s) and recommendation(s), if any, resulting from the hearing and be informed in writing of the appointing authority's decision regarding the recommended action(s).

☐ In accordance with paragraph 2(b) of NAC 284.6563, the effective date of your discipline is immediate as noted above. A hearing in accordance with NAC 284.656 will follow as soon as practicable after the effective date of your discipline.

Note: If you wish to appeal your discipline, please be aware that pursuant to NRS 284.390, an appeal is deemed timely if it is postmarked within 10 working days after the proposed effective date of the disciplinary action.

The hearing will be conducted by:

Jeremy Bean,

Associate Warden

1300 PM

07/01/2019

Name

Title

At

Time

On

Date

High Desert State Prison, Admin Building, Warden's Conference Room

21

Location (include complete address)

Pursuant to NAC 284.656, the hearing process is an informal proceeding between you and the appointing authority or his or her designated representative. Witnesses are not permitted. Each party may be accompanied by a person of his or her choice. Please refer to NAC 284.656 or direct questions concerning this notice and hearing to the appointing authority, personnel officer, or other agency personnel familiar with the procedure. (For information regarding the hearing and your right to waive the hearing, you should refer to NAC 284.6561.)

[Signature]

Deputy Director of Operations

Signature of Appointing Authority or Designated Representative

Signature of Employee: I understand that by acknowledging receipt of this Specificity of Charges, I am neither admitting guilt nor giving up any appeal rights I may have under NRS 284.390.

Refused to sign

Date 06/20/2019

Time 2000 PM

Employee's Signature

[Signature]

Witness Signature (Required if employee refuses to sign)

[Signature]

Signature and Title (Person serving this notice)

Copy: Division of Human Resource Management - Central Records Service (4/24); Department; Appointing Authority; Employee.

NPL2-1 (Rev. 4/13)

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JA00042

Name: Kassebaum, Shari
Title: Correctional Sergeant
Duty Station: Southern Desert Correctional Center

I. ADMINISTRATIVE REGULATIONS AND APPLICABLE POST ORDERS, DIRECTIVES, AND CODES TO BE CHARGED:

You are considered to be in violation of the following:

A. NAC 284.650 Causes for disciplinary action (NRS 284.065, 284.155, 284.383). Appropriate disciplinary or corrective action may be taken for the following causes:

NAC 284.650(1) Activity which is incompatible with an employee's conditions of employment established by law or which violates a provision of NAC 284.653 or NAC 284.738 to 284.771, inclusive.

NAC 284.650(6) Insubordination or willful disobedience.

NAC 284.650(7) Inexcusable neglect of duty.

NAC 284.650(10) Dishonesty.

NAC 284.650(15) Unauthorized absence from duty or abuse of leave privileges.

B. AR 339.07 CLASS OF OFFENSE GUIDELINES

AR 339.07.8 DISHONESTY

- A. Theft, misappropriation, or other fraudulent activity involving Department or State funds, property, or resources, including but not limited to falsification of a timesheet. **CLASS 5**

AR 339.07.12 INSUBORDINATION

- A. Disobeying or refusing to obey a statute, regulation, written or verbal instruction, or lawful order. **CLASS 4-5**

AR 339.07.15 NEGLECT OF DUTY

- TT. Leaving an assigned post while on duty without authorization of a supervisor. **CLASS 5**

Name: Kassebaum, Shari
Title: Correctional Sergeant
Duty Station: Southern Desert Correctional Center

AR 322 TYPES OF LEAVE AND LEAVE PROCEDURE

322.07 NOTIFICATION OF ABSENCES

1. An employee must notify their supervisor, or appointed designee, of an absence from duty in a prompt manner.
 - A. This notice should be prior to the start of the shift, but no later than one half hour after the start of the shift.
 - B. The institutional staff must speak directly to the available supervisor.
 - C. Central staff must speak to the supervisor, or appointed designee, when the work day starts.
 - D. Employees should personally notify the shift supervisor unless physically unable to do so.
2. Employees are expected to report to duty on time each day.
 - A. Employees are expected to be at their assignment location and ready to work at the start of the shift.
 - B. Delays should be reported as soon as practical.
 - C. Failure to notify or excessive tardiness will result in progressive disciplinary action.

322.08 SUBMISSION OF LEAVE FORMS, OVERTIME REQUESTS, AND TIMESHEETS

1. Requests for leave must be submitted and approved on the Authorization for Leave and Overtime request Form DOC-1000 or in NEATS as directed by the Human Resources Administrator.
 - A. Leave requests should be submitted and approved well in advance of the requested leave.
 - B. Leave is not authorized until approved and economic commitments should not be made by the employee until approval is obtained.

AR 342 EMPLOYEE REPRESENTATION WITNESS COMPENSATION

342.01 EMPLOYEE REPRESENTATION

1. Representation at an Internal Investigation Interview, a Pre/Post Disciplinary Hearing, or an Administrative Appeal Hearing:
 - C. If the representative is a state or department employee, they may only assist on their own time. Release time can be approved at the discretion of the Supervisor/Warden, and must be requested in a timely manner and charged to appropriate leave.

Name: Kassebaum, Shari
Title: Correctional Sergeant
Duty Station: Southern Desert Correctional Center

SUMMARY OF FACTS:

Sgt. Shari Kassebaum's regular shift in January, 2019, was from 5 a.m. to 1 p.m. at Southern Desert Correctional Center. Sgt. Kassebaum was specifically assigned to teach Core Correctional Practices at Florence McClure Women's Correctional Center from 8 a.m. to 4 p.m. on January 7, 2019, and January 8, 2019, and to therefore deviate on those dates from her regular shift hours. Sgt. Kassebaum's timesheets for these dates reflect that she worked her regular shift from 5 a.m. to 1 p.m.; however, these times are not an accurate reflection of the hours Sgt. Kassebaum was actually present and working on January 7, 2019, and January 8, 2019.

Staff noted that Sgt. Kassebaum began her shift around 7 a.m. on January 7, 2019, and January 8, 2019. Additionally, Sgt. Kassebaum left Florence McClure at approximately 1 p.m. on January 8, 2019, to attend another employee's disciplinary matter at Casa Grande. Sgt. Kassebaum did not have permission from her supervisor or the Warden to leave her assigned duty station early for the purpose of serving as an employee representative for another employee.

Sgt. Kassebaum's actions are in violation of NDOC Administrative Regulation (AR) 342.01(1)(C), Nevada Administrative Code (NAC) 650, et. seq., and AR 339.07, et. seq.

CONCLUSION AND BASIS FOR RECOMMENDATION:

Based upon Sgt. Shari Kassebaum's failure to accurately reflect on her time sheet the hours she worked on January 7, 2019, and January 8, 2019, and her failure to obtain prior approval from her Supervisor or Warden to leave her assigned post on January 8, 2019, during her designated working hours for the purpose of attending another employee's personnel matter, it is recommended that Sgt. Kassebaum be suspended for a period of fifteen (15) working days or one hundred twenty (120) hours without pay. Sgt. Kassebaum acted in a knowing and deliberate fashion in her failure to record her true working hours. Further, Sgt. Kassebaum failed to obtain prior permission from her assigned Supervisor or Warden to leave her assigned post while on the clock to act as an employee representative in direct violation of AR 342.01.

II. **LENGTH OF EMPLOYMENT:** Hired with the Department on January 23, 2012

III. **PRIOR DISCIPLINARIES:**

Date	Type of Discipline	Reason(s)
11-18-13	Written Reprimand	Neglect of Duty- Failure to report

IV. **EVALUATIONS:**

Date	Rating
04-02-17	Meets Standards
02-17-16	Meets Standards
02-13-15	Meets Standards
06-25-14	Meets Standards
01-17-13	Meets Standards
09-25-12	Meets Standards

Name: Kassebaum, Shari
 Title: Correctional Sergeant
 Duty Station: Southern Desert Correctional Center

V. TRAINING:

Date	Hours	Topic of Training
2018		CBT
05-26-17	40	IST
05-27-16	40	IST
04-16-15	16	CER
12-31-14	40	IST
08-12-13	40	IST
02-10-12		Basic Training
01-24-12	16	SER

VI. LETTER OF REFERENCE, COMMENDATION AND/OR APPRECIATION: None

VIII. EXHIBITS:

Exhibit	Date	Author	Description
A	03-18-19	Philip Gang Criminal Investigator	Report of Personnel Complaint Investigation (IA-2019-0012)
B	04-02-19	Dwight Neven, Warden	Adjudication Report – IA-2019-0012
C			DHRM Extension request from John Borrowmen, Deputy Director of Support Services dated 04-18-19. Memorandum from Peter Long, Administrator granting DHRM Extension dated 04-22-19.
NRS 284.383, NRS 284.385			
NAC 284.650, NAC 284.646			
Administrative Regulations 322- TYPES OF LEAVE AND LEAVE PROCEDURE			
Administrative Regulation 339 – CODE OF ETHICS; EMPLOYEE CONDUCT; PROHIBITIONS AND PENALTIES			
Administrative Regulation 342- EMPLOYEE REPRESENTATION WITNESS COMPENSATION			

339.01 CODE OF ETHICS

Name: Kassebaum, Shari
Title: Correctional Sergeant
Duty Station: Southern Desert Correctional Center

1. Employees of the Nevada Department of Corrections shall at all times adhere to the following Code of Ethics.

A. The Nevada Department of Corrections is committed to a code of ethics that will guide the performance, conduct and behavior of its employees. This code will ensure that our professionalism is reflected in the operation and activities of the Department and is recognized by all interested parties. In this light, the following principles are practiced:

- (1) Employees shall maintain high standards of honesty, integrity, and impartiality, free from any personal considerations, favoritism, or partisan demands.
- (2) Employees shall be courteous, considerate, and prompt when dealing with the public, realizing that we serve the public.
- (3) Employees shall maintain mutual respect and professional cooperation in their relationships with other staff members of the Department of Corrections.
- (4) Employees shall be firm, fair, and consistent in the performance of their duties. Employees should treat others with dignity, respect, and compassion and provide humane custody and care, void of all retribution, harassment, or abuse.
- (5) Employees shall uphold the tenets of the United States Constitution, its amendments, the Nevada Constitution, federal and State laws, rules, and regulations, and policies of the Department.
- (6) Whether on or off duty, in uniform or not, employees shall conduct themselves in a manner that will not tend to bring discredit or embarrassment to the Department of Corrections and the State of Nevada.
- (7) Employees shall report without reservation any corrupt or unethical behavior that could affect either inmates, employees, or the integrity of the Department of Corrections.
- (8) Employees shall not use their position for personal gain.
- (9) Employees shall maintain confidentiality of information that has been entrusted to them.
- (10) Employees shall not permit themselves to be placed under any kind of personal obligation that could lead any person to expect official favors.
- (11) Employees shall not accept or solicit from anyone, either directly or indirectly, anything of economic value, such as a gift, gratuity, favor, entertainment, or loan which is, or may appear to be, designed to influence their official conduct.

Name: Kassebaum, Shari
Title: Correctional Sergeant
Duty Station: Southern Desert Correctional Center

(12) Employees shall not discriminate against any inmate, employee, or any member of the public on the basis of race, color, religion, sex, sexual orientation, age, disability, gender identity or expression, or national origin.

(13) Employees shall not sexually harass or condone sexual harassment with or against any person, including but not limited to any inmate, employee, volunteer, vendor, or any member of the public.

(14) Employees shall maintain the highest standards of personal hygiene, grooming and neatness while on duty or otherwise representing the Department.

339.02 EMPLOYEE CONDUCT ON AND OFF DUTY

1. All Department employees are responsible, at all times, to conduct themselves in an appropriate manner, with honor, integrity, and impartiality whether on or off duty, to obey and support the letter and spirit of the law, and to always exercise appropriate self-discipline in the use of the power and authority entrusted to them.

2. The penalty imposed for a violation of 339.07 Class of Offense Guidelines (18. R.) can range from a CLASS 1-5 violation depending upon the facts and circumstances of the particular case.3. Under the law, Peace Officers are expected to abide by the laws they are empowered to enforce. Peace Officer employees will obey all laws of the United States (US), State of Nevada, and ordinances in force in their jurisdiction. Violations of law, an indictment or information filed against an officer, or a conviction can be cause for disciplinary action up to and including termination from employment, especially where off-duty conduct tends to bring the Department into public discredit or which tends to affect the employee's ability to perform assigned duties efficiently. Employees must also be careful that the authority vested in them as Peace Officers is not abused.

339.03 GOALS OF CORRECTIVE AND DISCIPLINARY MEASURES

1. Public employees have an affirmative duty to serve the public. The public trusts that the Department will operate within legal and procedural boundaries. Occasionally an employee will step beyond these boundaries, resulting in a misconduct and/or performance complaint. Each time the Appointing Authority adjudicates a complaint public trust is impacted.

2. When an allegation of misconduct and/or performance is sustained, corrective or disciplinary action shall be applied.

3. Disciplinary action is intended to serve three purposes which are weighed carefully when making recommendations:

A. To modify the offending employee's behavior.

B. To set expectations for other employees.

Name: Kassebaum, Shari
Title: Correctional Sergeant
Duty Station: Southern Desert Correctional Center

C. To assure the public that the Department strives to maintain the public trust by holding employees accountable.

4. The offending employee's Appointing Authority, Division Head or Warden is generally the best person to review and recommend the corrective or disciplinary action that will best serve to modify that employee's behavior. However, the recommendation will be superseded by the appointing authority who has the ultimate authority for administering employee discipline, if the recommended discipline does not set consistent expectations for all employees or fails to uphold the public trust.

339.04 REPORTING COMPLAINTS OR MISCONDUCT

1. All Department employees, regardless of rank or position, who witness or become aware of an alleged act of employee misconduct, shall take immediate and appropriate action to control the situation, prevent aggravation of the incident, and notify their chain of command regarding the allegation.

2. All employees at any location must accept complaints of employee misconduct from any source, in any format. If the receiving employee is not a supervisor, a supervisor must be notified immediately.

A. Complaints may be based on affirmative acts or failures to act.

B. Any failure to comply with posted AR's, Operating Procedures (OPs), Post Orders, Unit Rules, or other procedures should be reported,

C. Lower level issues related to performance need not be investigated by IG staff, as long as an "impartial fact-finding" process is followed.

D. An employee who takes a complaint from an outside source shall provide the complainant with a copy of the completed DOC Form 028, including any documentation the outside source provided in support of the complaint, if requested.

E. An employee taking a complaint shall have a supervisor or another employee take over if it becomes clear that the complaint is about the employee.

F. If the complaint being received is about the employee's immediate supervisor, the employee is authorized to report the complaint to any other supervisor.

3. A supervisor who is informed of a complaint shall immediately complete an entry in the Nevada Offender Tracking Information System (NOTIS) or a DOC-028. The supervisor shall make certain that any documentation is attached or sent to the IG's Office for inclusion with the DOC-028 or NOTIS entry.

4. The Division Head or Warden is responsible for making certain that reporting forms are correct and complete. Deficient reports will be returned to the Division Head or Warden for corrections.

Name: Kassebaum, Shari
Title: Correctional Sergeant
Duty Station: Southern Desert Correctional Center

339.05 PRELIMINARY INQUIRIES AND INVESTIGATIONS

1. The Division Head or Warden is responsible for ensuring that allegations of employee misconduct are referred for possible preliminary inquiry and/or official internal administrative investigation to the IG's Office. The Division Head or Warden shall request a review of the reported allegation or report of misconduct using the "refer to IG" function in NOTIS.
 - A. A preliminary inquiry is conducted for the purpose of determining whether, in the opinion of the reviewing staff member, there is some information, documentation, or other type of evidence warranting an official internal administrative investigation into the complaint or allegation(s) of misconduct.
 - B. An official internal administrative investigation is conducted to uncover *additional* facts, information, evidence or documentation relevant to the complaint or allegations of misconduct to enable the adjudicator to reach a finding.
 - C. A report of staff misconduct that involves or may involve discrimination, sexual harassment, or other Title VII violations shall be referred to the Equal Employment Opportunity (EEO) Officer where they will document the report in their internal tracking system.
 - D. Any report of alleged misconduct by a staff member contained within the NOTIS Incident Report module (IR) that includes information, documentation or other evidence sufficient to form a reasonable belief that the alleged misconduct could have occurred will not require a preliminary inquiry.
 - E. Following receipt of an preliminary inquiry request, the IG or IG Supervisory staff member will review the NOTIS preliminary reports (DOC-028), any attachments, and any other reports related to the allegations of employee misconduct to determine if a preliminary inquiry is appropriate. The IG or the IG Supervisory staff member or a member of the Prison Rape Elimination Act (PREA) Management Team shall make a determination whether or not to initiate a Preliminary Inquiry or close the referral within 30-days from the date of the IR IG referral.
2. If a preliminary inquiry is initiated, the IG or IG supervisory staff member will provide a Criminal Investigator, Warden or Division Head with the NOTIS Incident Report, file folder, and a specific time frame in which the preliminary inquiry must be completed, not to exceed 30-calendar days from the date the supervisor notifies the staff member assigned to conduct the preliminary inquiry. All preliminary inquiries shall be maintained as confidential.
3. Upon completion of the preliminary inquiry by the assigned staff member, a conclusion report will be entered into the NOTIS IR as a Resolution report for review by the IG or IG Supervisory Staff member.

Name: Kassebaum, Shari
Title: Correctional Sergeant
Duty Station: Southern Desert Correctional Center

- A. Any incomplete report or report that leaves the IG or IG Supervisory Staff member with questions shall be returned to the staff member assigned to the preliminary inquiry for additional work.
- B. The EEO Officer will conduct and complete a preliminary inquiry to the point where there is some information to support or refute allegation or report of misconduct and notify the IG only in cases where the alleged conduct is in violation of Title VII.
- C. Any completed Preliminary Inquiry that recommends further action in the form of an official Internal Administrative Investigation will be addressed accordingly, to include entry of a NOTIS IR and referral to the IG Office.
- D. A preliminary inquiry resulting in a finding that some information, documentation, or other type of evidence exists warranting an official internal investigation into the complaint or allegation(s) of misconduct will be submitted to the IG. The IG will then notify the Director, as the appointing authority, via **DOC form 1906**, that a preliminary inquiry has revealed evidence of misconduct warranting an official internal administrative investigation that could lead to disciplinary/punitive action against the accused staff member. A preliminary inquiry that results in a conclusion that the allegation of misconduct is refuted and/or lacking sufficient information, documentation and/or evidence will be closed. If additional information, documentation or evidence is later provided or discovered, the preliminary inquiry may be reopened.
- E. Incidents of poor or below standard performance that do not contain an element of misconduct shall be assigned to the Division Head or Warden for appropriate action during the preliminary inquiry.
- F. If the IG or IG Supervisor reviews a NOTIS IR that includes sufficient information or evidence that an alleged act of misconduct may have reasonably occurred, the IG shall notify the Director, as the appointing authority, via DOC form 1906 that there appears to be cause to initiate an internal administrative investigation that could lead to disciplinary/punitive action against the named staff member for the named allegation(s).
- G. The DOC form 1906 shall be provided to the Director in person by the IG, when possible;
- H. The IG shall provide the Director all information related to the preliminary inquiry upon request;
- I. The official internal administrative investigation shall commence, and the accused staff member shall be provided written notification of the allegations against him or her and the date of Interrogation, if applicable, no later than 30-calendar days from the date the Director receives the DOC 1906 from the IG.
- J. If an official internal administrative investigation reveals, prior to the expiration of the 30-calendar days, evidence or additional information demonstrating that the alleged misconduct *did not occur*, the internal administrative investigation may be closed as Unfounded via a written and Supervisory approved official report.

Name: Kassebaum, Shari
Title: Correctional Sergeant
Duty Station: Southern Desert Correctional Center

- K. All Internal Administrative investigations that are closed prior to adjudication are confidential and not subject to disclosure unless authorized by the Director as the appointing authority or the IG as the Director's designee.
- L. The IG and/or IG Supervisors shall identify within the IR and the DOC 1906 signed by the Director the applicable charges based upon the Class of Offense Guidelines outlined below. The IR will be assigned to an Internal Administrative Criminal Investigator.

- 1) The DOC 1906 shall be maintained within the investigative file and the NOTIS entry.
- 2) The Investigator assigned to the official internal administrative investigation can be the same investigator that conducted the preliminary inquiry.
- 3) The IG's office will insure compliance with the 30-calendar day time frame associated with the initiation of the internal administrative investigation.
- 4) The IG's office can assign an internal administrative investigation to a Division Head or Warden. Generally, investigation of offenses identified as Class 1 or 2 will be assigned to the Division Head or Warden responsible for supervision of the employee. At the discretion of the IG or Supervisory IG staff member, investigation of Class 3, 4 or 5 offenses may be assigned to the responsible Division Head, Warden or an investigator within the IG's Office.

7. Any employee who is the focus of an investigation shall be afforded all rights and protections provided by law, by Department regulation and directive. Current requirements are in the "Office of the Inspector General – a Guide for Investigators."

8. If it becomes necessary to conduct parallel administrative and criminal investigations regarding a complaint of employee misconduct, the IG shall ensure that the investigations are bifurcated. Information developed during the administrative investigation growing out of the subject's interview shall not be shared in the criminal investigation.

9. If additional misconduct is discovered during the course of an investigation which is related to the original misconduct, the investigator shall amend the allegations and continue with investigation. If the discovered misconduct is not related to the current investigation, the investigator shall generate a new NOTIS entry and submit it for Inspector General review and possible preliminary inquiry or formal assignment after notification to the Director of additional allegations of misconduct warranting further investigation.

10. Upon completion of an employee misconduct investigation, the assigned investigator shall document investigative facts in a final IA case report.

339.06 PROHIBITIONS AND PENALTIES

Name: Kassebaum, Shari
Title: Correctional Sergeant
Duty Station: Southern Desert Correctional Center

1. The Chart of Corrective/Disciplinary measures ascribes an available range of Corrective/Disciplinary action for each Class of prohibited activity. This chart indicates the suggested level of discipline, from less serious to more serious, for the Class of Offense and for first, second and third offenses.
2. Penalties for prohibited activities should be assessed based upon criteria established in the Chart of Corrective/Disciplinary Sanctions.
3. Multiple Infractions: In cases involving more than one sustained violation, disciplinary action should begin with the most serious violation. Other related violations may then be considered as aggravating circumstances when determining the appropriate penalty from within the minimum and maximum recommended range, or each violation may be individually considered and the penalties cumulated.
4. Progressive Discipline: Grave acts of misconduct may warrant dismissal of an employee without previous corrective action or progressive discipline. However, less serious acts of misconduct may warrant the use of progressive discipline, i.e., lesser to greater discipline, to give the employee a chance to reform his or her conduct. The increasing level of concern expressed through progressive discipline may begin with corrective action or proceed to a written reprimand, suspension for up to 30 calendar days, demotion, or dismissal.
5. Division Heads, Wardens and employees must recognize that penalty schedules cannot accurately, fairly, or consistently address every situation; a comprehensive list of DOs and DON'Ts of employee conduct is not possible. **Division Heads and Wardens must conduct an individual analysis of each employee for each incident and exercise their professional judgment and discretion in recommending a penalty.** Training, education, actions, awards, and punishments are interrelated, not separate elements.
6. **There is no requirement that charges similar in nature must result in identical penalties.** Employees sometimes incorrectly equate fairness and consistency as synonyms; they are not.
 - A. Consistency within a disciplinary system means holding every employee equally accountable for unacceptable behavior. Unacceptable behavior for one is unacceptable behavior for all, regardless of rank, status, or tenure.
 - B. Fairness within a disciplinary system means understanding the numerous circumstances that could contribute to the unacceptable behavior. Disciplinary recommendations must consider these circumstances. Thus, two employees accused of the same misconduct could face different consequences.
7. **Division Heads and Wardens and their reviewers should neither rely solely on previously imposed penalties nor quote them as an authority in penalty rationales. It must be remembered that this is a historical document of penalties. As such, it may not reflect an appropriate penalty for the misconduct. Indeed, an appropriate penalty may be higher or lower depending upon current issues and the impact of the particular misconduct on the Department and/or fellow employees.**

Name: Kassebaum, Shari
 Title: Correctional Sergeant
 Duty Station: Southern Desert Correctional Center

8. Failure to report, failure to act, or failure to disclose is considered misconduct.

9. The Department has developed Class of Offense Guidelines which describe many prohibited employee actions and a Chart of Corrective/Disciplinary Sanctions which recommends penalties for inappropriate conduct.

10. Conflicting activities pursuant to NAC 284.738 include but are not limited to any activity prohibited by AR 332, Employee Reporting Responsibilities; AR 345, Unauthorized Relationships; AR 346, Nepotism; AR 347, Political Activities by Employees; and AR 355, Employee Secondary Employment.

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Chart of Corrective/Disciplinary Sanctions						
	First Offense		Second Offense		Third Offense	
Class	Minimum	Maximum	Minimum	Maximum	Minimum	Maximum
1	Verbal Counseling	Written Reprimand	Written Reprimand	Suspension	Suspension	Dismissal
2	Written Reprimand	Suspension	Suspension	Suspension Demotion	Suspension Demotion	Dismissal
3	Suspension	Suspension Demotion	Suspension Demotion	Dismissal	Dismissal	N/A
4	Suspension Demotion	Dismissal	Suspension Demotion	Dismissal	Dismissal	N/A
5	Dismissal	Dismissal				

N THE SUPREME COURT OF THE STATE OF NEVADA

Docket No.: 84008

SHARI KASSEBAUM

Appellant,

vs.

THE STATE OF NEVADA DEPARTMENT
OF CORRECTIONS,

Respondents.

Eighth Judicial District Court
Case No.: A-20-810424-P

JOINT APPENDIX
VOLUME I – Part 2 of 4

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State of Nevada Department
of Corrections

	<u>Description</u>	<u>Vol(s)</u>	<u>Pg(s)</u>
1.	Petition for Judicial Review (02/13/2020)	I	JA 00001-JA 00013
2.	Statement of Intent to Participate (03/03/2020)	I	JA 00014-JA00016
3.	Transmittal of Record on Appeal (10/16/2020)	I	JA 00017- JA 00091
4.	Petitioner's Opening Brief (12/14/2020)	I	JA 00092- JA 00118
5.	Department of Correction's Answering Brief (01/12/2021)	I	JA 0011- JA 00138
6.	Petitioner Shari Kassebaum's Reply Brief (02/02/2021)	I	JA 00139- JA 00163
7.	Findings of Facts, Conclusions of law, Decision and Order Granting Petition for Judicial Review (03/02/2021)	I	JA 00164-JA 00168
8.	Notice of Entry of Findings of Facts, Conclusions of Law, Decision and Order Granting Petition for Judicial Review (03/03/2021)	I	JA 000169- JA 000176
9.	Decision on Remand (12/09/2021)	I	JA 000177- JA 000180
10.	Case Appeal Statement (12/21/2021)	I	JA 000181-JA 000184
11.	Notice of Appeal (12/21/2021)	I	JA 000185- JA 000194
12.	Transcript of Proceedings (03/01/2022)	I	JA 000195- JA 000223

CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 20th day of April 2022, I did serve the above and foregoing JOINT APPENDIX VOLUME I – Part 2 of 4 by way of Notice of Electronic Filing provided by the court mandated E-Flex filing service, upon the Respondents at the following:

Kevin A. Pick
Senior Deputy Attorney General
Office of the Attorney General
5420 Kietzke Lane, Suite 202
Reno, NV 89511
Tel: (775) 687-2129
Fax: (775) 688-1822
Attorneys for Respondents
State of Nevada Department
of Corrections

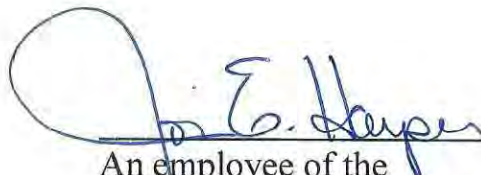

An employee of the
LAW OFFICE OF DANIEL MARKS

EXHIBIT B

EXHIBIT B

Northern Administration
5500 Snyder Ave.
Carson City, NV 89701
(775) 887-3285

Southern Administration
3955 W. Russell Rd.
Las Vegas, NV 89118
(702) 486-9938



State of Nevada
Department of Corrections

Steve Sisolak
Governor

James Dzurenda
Director

Brian E. Williams, Sr.
Warden

MEMORANDUM

Date: July 1st, 2019
To: James Dzurenda, Director, Nevada Department of Corrections
From: Jeremy Bean, Associate Warden (HDSP)
Re: Pre-Disciplinary Hearing for Correctional Sergeant Shari Kassebaum

On Monday July 1st 2019 at approximately 1:30 PM, a pre disciplinary hearing was conducted for Correctional Sergeant Shari Kassebaum in reference to IA-2019-0012.

Present at the hearing were:

- Jeremy Bean, Associate Warden
- Correctional Sergeant Shari Kassebaum did not attend this hearing

Summary:

ALLEGATION 1

It is alleged that Correctional Sergeant Shari Kassebaum engaged in **DISHONESTY** when she submitted her timesheet with inaccurate information regarding her days worked for the time period (PP15) 12/31/2018 thru 1/13/2019. Correctional Sergeant Kassebaum was scheduled to work a modified shift on January 7th and January 8th, 2019 to instruct the Core Correctional Practices class at Florence McClure Women's Correctional Center from 8:00 a.m. to 4:00 p.m. daily. She submitted her timesheet with a 5:00 a.m. to 1:00 p.m. shift worked on January 7th, and January 8th, 2019.

ALLEGATION 2

It is alleged that Correctional Sergeant Shari Kassebaum engaged in **INSUBORDINATION** when she failed to follow Administrative Regulation 342 in obtaining permission from a Supervisor/Warden to change her modified work schedule from 8:00 a.m. to 4:00 p.m. on January 8th, 2019 to 5:00 a.m. to 1:00 p.m. on January 8th, 2019.

High Desert State Prison
22010 Cold Creek Road
Indian Springs, NV 89070
(702) 879-6789

Northern Administration
5500 Snyder Ave.
Carson City, NV 89701
(775) 887-3285

Southern Administration
3955 W. Russell Rd.
Las Vegas, NV 89118
(702) 486-9938
ALLEGATION 3



**State of Nevada
Department of Corrections**

Steve Sisolak
Governor

James Dzurenda
Director

Brian E. Williams, Sr.
Warden

It is alleged that Correctional Sergeant Shari Kassebaum engaged in **NEGLECT OF DUTY** when she left her assigned post at Florence McClure Women's Correctional Center on January 8th, 2019 at approximately 1:00 p.m., without permission or authorization from a Supervisor or Associate Warden or Warden when she was assigned to instruct the Core Correctional Practices class at Florence McClure Women's Correctional Center from 8:00 a.m. to 4:00 p.m.

Correctional Sergeant Shari Kassebaum did not attend the hearing and as such made no statements.

Conclusion:

The evidence provided in the investigation does not conflict with the adjudicated charges.

The recommended disciplinary action of fifteen (15) days or (120) working hours suspension from state service is consistent with the allegations sustained.

A handwritten signature in black ink, appearing to read "J. Bean", is written over a horizontal line.

Jeremy Bean, Associate Warden HDSP

A handwritten date "7/1/19" is written over a horizontal line.

Date

cc: Harold Wickham, Deputy Director, Nevada Department of Corrections
Christina Leathers, Personnel Officer 1, Nevada Department of Corrections
Dwight Neven, Warden, Florence McClure Women's Correctional Center
Jerry Howell, Warden, Southern Desert Correctional Center

PR/hs

High Desert State Prison
22010 Cold Creek Road
Indian Springs, NV 89070
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Page 2 of 2
06040

JA00057

EXHIBIT C

EXHIBIT C

Northern Administration
5500 Snyder Ave.
Carson City, NV 89701
(775) 887-3285

Southern Administration
3955 W. Russell Rd.
Las Vegas, NV 89118
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**State of Nevada
Department of Corrections**

Steve Sisolak
Governor

James Dzurenda
Director

Harold Wickham
Deputy Director of
Operations

July 3, 2019

Shari Kassebaum
7644 Splashing River Court
Las Vegas, Nevada 89131

RE: Specificity # SP-1911S

Dear Ms. Kassebaum:

On June 20, 2019, you were served a specificity of charges for alleged violations of NAC 284.650, AR 339, AR 322 and AR 342.

A pre-disciplinary hearing was scheduled for you on July 1, 2019, with Jeremy Bean, Associate Warden. You failed to appear. After review of the specificity of charges and the pre-disciplinary hearing report, it is the Department's decision that you be suspended from State service for fifteen (15) working days or one hundred twenty (120) hours without pay. The original effective date of your suspension was on July 11, 2019. The new effective date will be on July 12, 2019.

This is to inform you that you have ten (10) working days to appeal this disciplinary action from the effective date of July 12, 2019. If you wish to appeal, such request must be on the prescribed "Formal Appeal Form" (NPD 54) and addressed to the Administrator, Division of Human Resource Management at 100 North Stewart Street, Suite 200, Carson City, NV 89701, phone number 775-684-0109.

Sincerely,

A handwritten signature in black ink, appearing to read "Harold J. Wickham".

Harold J. Wickham
Deputy Director of Operations
Nevada Department of Corrections

HJW/ns

Enc: Pre-disciplinary Hearing Officer Report

00042

JA00059

EXHIBIT D

EXHIBIT D

Date Received:

APPEAL OF DISMISSAL, SUSPENSION, DEMOTION, OR INVOLUNTARY TRANSFER

This form is required for an employee or former employee to request a hearing to determine the reasonableness of his or her dismissal, suspension, demotion, or involuntary transfer.

Name: Shari Kassebaum

Mailing Address: 7644 Splashing River Court, Las Vegas, NV 89131

RECEIVED

JUL 20 2019

Contact Phone: 559-903-3225

Email: slredelfs@yahoo.com

NEVADA DIV. OF HR MANAGEMENT
GRIEVANCES APPEALS
CARSON CITY, NEVADA

Employee I.D. #: 42134

Department/Agency at time of Action: Department of Corrections

I am appealing the action of: ☐ Dismissal ☒ Suspension ☐ Demotion ☐ Involuntary Transfer

The effective date of the action was: 7/11/2019 or 7/12/2019

Note: The appeal will be deemed timely if it is postmarked or received by the Administrator of the Division of Human Resource Management within the first 10 working days after the effective date of the action. This appeal form must be accompanied by the written notification of the appointing authority's decision regarding the proposed action provided to the employee pursuant to subsection 7 of NAC 284.6561.

Immediately prior to the action, were you a permanent, classified, State employee? ☒ Yes ☐ No

Note: Employees who were probationary, unclassified, or not employed by the Executive Branch or the Nevada System of Higher Education are not eligible to appeal the action.

The remedy I seek is:

☒ For the dismissal, suspension or demotion to be set aside; and to be reinstated with full pay and benefits for the period the action was in effect.

☐ For the involuntary transfer to be set aside; to be returned to my former position; and if entitled, receive a per diem allowance and travel expenses paid for the period the transfer was in effect.

☐ Other: _____

Note: "Other" remedies may not be within the jurisdiction of the hearing officer to grant.

Briefly explain why you believe the action taken against you was not reasonable; in the case of an involuntary transfer, please explain how the transfer was made to discipline and/or harass you. Please reference any statute, regulation, policy, or procedure you believe was violated. Attachments may be added.

You may represent yourself or be represented by an attorney or other person of your choosing. A representative may be designated at a later date. I choose to:

☐ Represent myself

☒ Designate the following representative to act on my behalf during the course of this appeal:

Name: Angela I. Lizada, Esq.
Address: 711 S. 9th St., Las Vegas, NV 89101

Phone: 702-979-4676
Fax: 702-979-4121
Email: angela@lizardalaw.com

By signing this form, you are requesting a hearing to determine the reasonableness of the action and affirming that the information you provided is true and correct.

Appellant Signature: *Mathew*

Date: 7.15.19

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

The appeal procedures and statements made on this form do not include all of the rights available to an appellant. It is advisable to review NRS 284 and NAC 284 prior to requesting a hearing. Appeal hearings are open to the public and decisions by a hearing officer are public information.

When to File an Appeal: The appeal will be deemed timely filed if it is either postmarked or received by the Administrator of the Division of Human Resource Management during the period beginning on the first working day after the effective date of the action that is being appealed and ending on the 15th working day after the effective date. Appeals received before or after this period may be dismissed as untimely.

Whistleblower Retaliation Appeal: If you believe the action you are appealing was based on retaliation due to your disclosure of information concerning improper governmental action, please submit your appeal on the NPD-53 form, "Appeal of Whistleblower Retaliation Under the Provisions of NRS 281.641."

Where to File an Appeal: The appeal may be submitted by mail, email, fax or hand delivery. Please submit this appeal to:

Administrator, Division of Human Resource Management
c/o Employee and Management Services
100 N. Stewart St., Suite 200
Carson City, Nevada 89701-4204
Fax (775) 684-0118 Phone (775) 684-0135
Email: HearingClerk@adm.hrmv.gov

NRS 284.390 states, "Hearing to determine reasonableness of dismissal, demotion or suspension; judicial review.

1. Within 10 working days after the effective date of an employee's dismissal, demotion or suspension pursuant to NRS 284.385, the employee who has been dismissed, demoted or suspended may request in writing a hearing before the hearing officer of the Commission to determine the reasonableness of the action. The request may be made by mail and shall be deemed timely if it is postmarked within 10 working days after the effective date of the employee's dismissal, demotion or suspension.

2. The hearing officer shall grant the employee a hearing within 20 working days after receipt of the employee's written request unless the time limitation is waived, in writing, by the employee or there is a conflict with the hearing calendar of the hearing officer, in which case the hearing must be scheduled for the earliest possible date after the expiration of the 20 days.

3. *Upon verification that a request for a hearing has been made pursuant to subsection 1, the appointing authority of the employee who was the subject of the internal administrative investigation shall, within 5 days after receiving a request by the employee or his or her representative, produce and allow the employee or his or her representative to inspect or receive a copy of any document concerning the internal administrative investigation, including, without limitation, any recordings, notes, transcripts of interviews or other documents or evidence related to the internal administrative investigation.*

4. The employee may represent himself or herself at the hearing or be represented by an attorney or other person of the employee's own choosing.

5. Technical rules of evidence do not apply at the hearing.

6. After the hearing and consideration of the evidence, the hearing officer shall render a decision in writing, setting forth the reasons therefor.

7. If the hearing officer determines that the dismissal, demotion or suspension was without just cause as provided in NRS 284.385, the action must be set aside and the employee must be reinstated, with full pay for the period of dismissal, demotion or suspension.

8. The decision of the hearing officer is binding on the parties.

9. Any petition for judicial review of the decision of the hearing officer must be filed in accordance with the provisions of chapter 233B of NRS."

NRS 284.376 states, "Involuntary transfer; hearing; remedies.

1. Within 10 working days after the effective date of a transfer pursuant to the provisions of NRS 284.375, a permanent classified employee who has been transferred without the employee's consent may request in writing a hearing before the hearing officer of the Commission to determine whether the transfer was made for the purpose of harassing the employee. The request may be made by mail and shall be deemed timely if it is postmarked within 10 working days after the effective date of the employee's transfer. The hearing must be conducted in accordance with the procedures set forth in NRS 284.390 to 284.405, inclusive.

2. If the hearing officer determines that the transfer was made for the purpose of harassing the employee, the transfer must be set aside and the employee must be returned to the employee's former position. If the transfer caused the employee to be away from the employee's original headquarters, the employee is entitled to receive the per diem allowance and travel expenses provided for state officers and employees generally for the period the transfer was in effect.

3. The decision of the hearing officer is binding on the parties."

NAC 284.6562 states, "Request for hearing to determine reasonableness of dismissal, demotion or suspension

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

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

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

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

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

NAC 284.778 states in part, "Request for hearing and other communications.

1. A request for an appeal must be addressed to the Administrator and submitted on the form provided by the Division of Human Resource Management."

On January 4, 2019, Sgt. Kassebaum was sent an email from Associate Warden Gabriela Garcia ("AW Garcia") stating that "You have been selected to attend the Core Correctional Practices MANDATORY Training" scheduled for January 7th and 8th from 8am to 4pm. On January 5, 2019 at 5:18am, Sgt. Kassebaum replied asking why she would need to attend the email because she is an instructor for Core Correctional Practices. Sgt. Kassebaum also emailed Amanda Amacker about the email and voicing her concerns that she was being sent notice to attend a class as a student, since she is an instructor, and that she cannot see that she is needed as an instructor as the class is in two days and Sgt. Kassebaum was never provided approval for teaching the class. Ms. Kassebaum also indicated she had a meeting on January 8th at 2pm that she could not miss. After AW Garcia responded on January 5th at 4:34pm stating that she included Sgt. Kassebaum in the email so that she had information for the class, Sgt. Kassebaum had a telephone conversation with Ms. Amacker, where Ms. Amacker pleaded with Sgt. Kassebaum to help teach the class, because there were 50 students and they needed two instructors, Sgt. Kassebaum agreed, and sent an email on January 6th at 5:26am to AW Garcia and Ms. Amacker stating that she would agree to teaching even though it had been a month since anyone had mentioned a class and no one had confirmed a date. She agreed to be there on Monday January 7th to discuss modifying the schedule, and specifically stating that she would need to leave by 1:15pm on Tuesday to make the appointment where she was representing a fellow employee in her capacity as a union representative for AFSCME Local 4041.

Neither AW Garcia nor Amacker objected to Ms. Kassebaum's stating in writing that she would need to modify the schedule and leave on Tuesday by 1:15pm. In fact, the entire training was rescheduled, and yet the majority of the employees did not modify their time sheets to show the training times instead of their normal schedule. No other employees were disciplined, only Sgt. Kassebaum who was being retaliated against for reporting multiple instances of illegal conduct by NDOC employees and administrators. Sgt. Kassebaum was placed on administrative leave for approximately five months while NDOC conducted "interrogations" in furtherance of its witch hunt against Sgt. Kassebaum. Based on the four different investigations thrown at Sgt. Kassebaum as punishment for speaking against the state, this is the only discipline that has been filed.

It is clear that this discipline is disparate treatment in furtherance of the retaliatory conduct by NDOC, for which there is a current and open whistleblower case. Further, the majority of the reasons used to support the discipline by NDOC comes from AR 339, which has been found by the Nevada Supreme Court to be invalid and cannot be considered.

It is clear that Sgt. Kassebaum was not dishonest, did not neglect her duties, was not insubordinate and did not have an unauthorized absence from duty, and thus the fifteen (15) day suspension is not reasonable and is not in the good of the public.



Lizada Law Firm, Ltd.

711 S. 9th Street
Las Vegas, NV 89101
www.lizadalaw.com

Phone: 702.979.4676
Fax: 702.979.4121
angela@lizadalaw.com

July 20, 2019

SENT VIA FACSIMILE AND EMAIL

Administrator
Division of Human Resource Management
c/o Employee Management Services
100 N Stewart St., Ste. 200
Carson City, NV 89701-4204
Fax: (775) 684-0118

Re: Disciplinary Appeal

Dear Sir or Madam:

My office has been retained to represent Sgt. Kassebaum with regards to her disciplinary appeal.
Please see the attached NPD-54.

Best Regards,

LIZADA LAW FIRM, LTD.

ANGELA J. LIZADA, ESQ.
Managing Partner

EXHIBIT E

EXHIBIT E

BEFORE THE NEVADA STATE PERSONNEL COMMISSION
HEARING OFFICER

FILED

NOV 21 2019

DONYIL LIVINGSTON,

Petitioner/Employee,

vs.

STATE OF NEVADA, DEPARTMENT OF

CORRECTIONS,

Respondent/Employer

APPEALS OFFICE

Case No.: 1915389-RZ

DECISION AND ORDER

The Nevada Department of Corrections (Employer) filed its Motion to Dismiss Appeal for Lack of Jurisdiction the appeal of his termination from employment filed by Donyil Livingston (Employee).

The Employer is represented by Arron D. Ford, Attorney General for the State of Nevada and Senior Deputy Attorney General Kevin A. Pick, Esq.

The Employee is represented by the Law Office of Daniel Marks and Adam Levine, Esq. The undersigned has not considered the merits of the underlying disciplinary action and limited his focus to the issue raised in this Motion.¹

...

¹ The Employer attached the following Exhibits to its Motion:

- A. Specificity of charges, consisting of 172 pages.
- B. Memorandum re Pre-Disciplinary Hearing dated March 19, 2019, consisting of 3 pages.
- C. Letter dated March 20, 2019 regarding Specificity #SP-1859S, consisting of 1 page.
- D. Employee's Appeal of Dismissal form NDP-54, dated April 11, 2019, consisting of 6 pages.

The Employee attached to his Opposition the following Exhibits:

1. Approved Regulation of the Personnel Commission #R150-17, consisting of 8 pages.
2. Email dated March 18, 2019 re: Donyil Livingston Hearing, consisting of 1 page.

1 **I. FACTS**

2 On March 20, 2019 the Employer notified the Employee that his employment was
3 terminated effective March 29, 2019. (Employer's Exhibit C).

4
5 On April 11, 2019 the Employee filed an appeal of his dismissal from employment with
6 the Nevada Division of Human Resource Management Grievances Appeals, Carson City,
7 Nevada, utilizing form NDP-54. (Employers Exhibit D).

8 The form includes the following admonition:

9
10 NOTE: The appeal will be deemed timely if it is postmarked or received by
11 the Administrator of the Division of Human Resource Management within
12 the first 10 working days after the effective date of the action. This appeal
13 form must be accompanied by the written notification of the appointing
authority's decision regarding the proposed action provided to the employee
pursuant to subsection 7 of NAC 284.6561. (emphasis added)

14 The Employee attached two documents to his NDP-54. The first page of the NPD-41
15 (Specificity of Charges) and a copy of the Notice of Interrogation/Interview, Administrative
16 Investigation in case #IA-2018-0130 (DOC 1606).

17 **II. ARGUMENTS**

18 The Employer argues that compliance with NAC 284.6562(2) is jurisdictional and an
19 untimely or incomplete filing is invalid, and a hearing officer therefore lacks jurisdiction to hear
20 the merits of the appeal.
21

22 The Employee makes the following arguments:

- 23 1. The only statutory provision vesting jurisdiction over an appeal of disciplinary
24 action in accordance with Nevada Revised Statutes Chapter 284 is found in NRS
25 284.390. That the provisions of NAC 284.6562 as an administrative regulation
26 does not have the force of law and consequently is not jurisdictional.
27
28

2. That the Hearings Division would have administratively rejected and not docketed the matter for hearing if the documentation was inadequate.
3. That any defects in the appeal documentation can be cured providing the Appeal was timely filed in accordance with NRS 284.390.
4. That the Employer failed to properly inform the Employee of the reasons for the disciplinary action as required by NAC 284.6561(7).

III. ANALYSIS

A Hearing Officer has no greater authority than that granted to the Personnel Commission which "only such powers and duties as are authorized by law." NRS 284.065(1). The Commission has the responsibility to adopt by regulation a system for administering disciplinary measures against a state employee. NRS 284.383. NRS 284.091 directs the Commission to appoint Hearing Officers "to conduct hearings and render decisions as provided in NRS 284.376 and 284.390." A hearing officer is limited to determining the reasonableness of a disciplinary action in accordance with the provisions of the Nevada Revised Statutes and the regulations found in the Nevada Administrative Code.

NAC 284.6562 was properly adopted by the Commission and compliance is therefore mandatory. This Hearing Officer has no authority to disregard the plain language of NAC 284.6562.

The Nevada Supreme Court found in *Rust v. Clark County School District*, 103 Nev. 686, at 688, 747 P.2d 1380 (1987) that "the proper and timely filing of a notice of appeal is jurisdictional." NAC 284.6562 specifically states that a request for a hearing before the hearing officer of the Commission must be accompanied by the written notification of the appointing authority's decision regarding the proposed action provided to the employee pursuant to

1 subsection 7 of NAC 284.6561. The Employee's request for hearing (Employer Exhibit D) did
2 not include a copy of the written notification of the appointing authority's decision. The Appeal
3 here did not comply with the express provisions of NAC 284.6562 and was not proper.
4

5 The Employee's argument that the defect can be cured is unpersuasive. Use of the word
6 "[a]ccompanied" in NAC 284.6562(2)(b) makes clear that the submission of the written
7 notification of the appointing authority's decision must be contemporaneous with the request for
8 hearing. Even if the written notification of the appointing authority's decision could be
9 submitted following the filing of the NDP-54 to be timely it must be submitted "within 10
10 working days after the effective date of his or her dismissal, demotion or suspension." That
11 time expired on April 12, 2019. The Employee did not submit the written notification of the
12 appointing authority's decision prior to that date. Therefore, this Appeal is improper and must
13 be denied, unless the appointing authority failed to provide the notification required pursuant to
14 subsection 7 of NAC 284.6561. The Employee received the written notification of decision on
15 March 22, 2019. (Employer Exhibit C).
16
17

18 The Employee's additional argument that the written notification of decision is
19 insufficient as it does not state the reasons for the decision, is unpersuasive. NAC 284.6561
20 states that the letter must state the reasons for the decision, however it does not specify the
21 degree of detail required. Here the written notification of decision states that it was made
22 following "review of the specificity of charges and the pre-disciplinary hearing report"
23 (Employer Exhibit C). Based upon the NDP-54 and attachments filed by the Employee it is
24 clear that he had been provided a copy the Specificity of Charges and therefore was aware of the
25 reasons for the decision. Further, there is reference on the written notification of decision
26 accepted by the Employee on March 22, 2019 to an enclosure titled "Pre-disciplinary Hearing
27
28

1 Officer Report." The Employee knew what was alleged and the reasons for the Employers
2 decision.

3 Finally, the staff of the Department cannot make legal determinations regarding the
4 sufficiency of any request for hearing.
5

6 **IV. DECISION**

7 Based upon the preponderance of evidence the Employer's disciplinary decision was
8 reasonable, based upon substantial evidence and not for a purpose other than the good of the
9 public service.
10

11 **V. ORDER**


12 Based upon foregoing findings of fact, and conclusions of law and good cause
13 appearing therefore,
14

15 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

16 That the Employer's Motion to Dismiss for Lack of Jurisdiction is **GRANTED**.

17 That the hearing scheduled for December 18 and 19, 2019 is **VACATED**.
18

19 **DATED** this 20th day of November 2019.
20

21
22
23 
24 Robert Zentz, Esq.
Hearing Officer

25 **NOTICE:** Pursuant to NRS 233B.130, should any party desire to appeal this final
26 determination of the Hearing Officer a Petition for Judicial Review must be filed with the
27 District Court within 30 days after service by mail of this decision.
28

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
4 the foregoing **DECISION AND ORDER** was duly mailed, postage prepaid, **OR** transmitted via
interoffice mail to the following:

5 DONYIL LIVINGSTON
6 702 NEWQUAY COURT
LAS VEGAS NV 89178

7 ADAM LEVINE ESQ
8 LAW OFFICES OF DANIEL MARKS
610 S 9TH ST
9 LAS VEGAS NV 89101

10 HAROLD WICKHAM, INTERIM DIRECTOR
11 DEPARTMENT OF CORRECTIONS
500 SNYDER AVE
12 CARSON CITY NV 89701

13 CHRISTINA LEATHERS
14 HUMAN RESOURCES MANAGER I
NEVADA DEPARTMENT OF CORRECTIONS
15 3955 W RUSSELL RD
LAS VEGAS NV 89118-2316

16 KEVIN PICK ESQ.
17 SENIOR DEPUTY ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
18 5420 KIETZKE LANE, SUITE 202
19 RENO, NV 89511

20 Dated this 21st day of November, 2019.

21 Zoe McGough
22 Zoe McGough, Legal Secretary II
23 Employee of the State of Nevada
24
25
26
27
28

1 BEFORE THE NEVADA STATE PERSONNEL COMMISSION

2 HEARING OFFICER

3 SHARI KASSEBAUM,)

4 Petitioner-Employee,)

5 vs.)

6 DEPARTMENT OF CORRECTIONS,)

7 Respondent-Employer.)

Appeal No: 2001869-CB

8 **FILED**

DEC 19 2019

9 NOTICE OF RESETTING

APPEALS OFFICE

10 The hearing in the above entitled action is originally scheduled to begin on December 4,
11 2020, has been reschedule to May 13, 2020 at 9:00 a.m.

12 **State of Nevada**
13 **Department of Administration**
14 **2200 South Rancho Drive, Suite 220**
15 **Las Vegas, Nevada 89102**

16 On or before May 4, 2020, Pre-Hearing Statements must be served and filed setting
17 forth the following matters in the following order:

- 18 a) A statement of admitted or undisputed facts.
- 19 b) A concise statement of the claimed facts supporting the party's claims or
20 defenses.
- 21 c) A statement of issues of law with supporting case and statutory authority
22 (memorandum of authorities) and appropriate supporting legal argument.
- 23 d) All Exhibits intended to be introduced with an explanation of each Exhibit's
24 relevance to the party's case.
- 25 e) The names and addresses of all witnesses.
- 26 f) Any other appropriate comment, suggestion, or information for the assistance of
27 the hearing officer in the hearing of the case.
- 28 g) Certification by counsel that discovery has been completed, unless late
discovery has been allowed by order of the hearing officer.

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JA00074


1 A hard copy of the Pre-Hearing Statement and any Exhibits must be filed with the State
2 of Nevada Department of Administration at 2200 South Rancho Drive, Suite 220, Las Vegas,
3 Nevada, 89102. Pre-Hearing Statements and Exhibits must be served upon the opposing party.
4 In addition, an electronic copy of Pre-Hearing Statements and Exhibits must be sent to the
5 Hearing Officer's designated assistant.

6 If either party needs the Hearing Officer to issue Subpoenas, the Subpoenas must be
7 emailed to the Hearing Officer's designated assistant for issuance no later than April 13, 2020.

8 Motions must be filed no later than April 1, 2020.

9 If either party needs additional assistance of the Hearing Officer to resolve any
10 disputes regarding this matter, please contact the Hearing Officer's designated assistant to
11 schedule a conference call.

12 DATED this 19th day of December, 2019.

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16 CARA BROWN, ESQ.
17 HEARING OFFICER
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JA00076

1 BEFORE THE NEVADA STATE PERSONNEL COMMISSION

2 HEARING OFFICER

3 SHARI KASSEBAUM,)

4 Petitioner-Employee.)

5 vs.)

6 DEPARTMENT OF CORRECTIONS,)

7 Respondent-Employer.)

Appeal No: 2001869-CB

FILED

SEP 23 2019

APPEALS OFFICE

8 NOTICE OF HEARING

9
10 The hearing in the above entitled action is scheduled to begin on December 4, 2019, at
11 9:00 a.m. at the following location:

12 State of Nevada
13 Department of Administration
14 2200 South Rancho Drive, Suite 220
15 Las Vegas, Nevada 89102

16 On or before November 22, 2019, Pre-Hearing Statements must be served and filed
17 setting forth the following matters in the following order:

- 18 a) A statement of admitted or undisputed facts.
- 19 b) A concise statement of the claimed facts supporting the party's claims or
20 defenses.
- 21 c) A statement of issues of law with supporting case and statutory authority
22 (memorandum of authorities) and appropriate supporting legal argument.
- 23 d) All Exhibits intended to be introduced with an explanation of each Exhibit's
24 relevance to the party's case.
- 25 e) The names and addresses of all witnesses.
- 26 f) Any other appropriate comment, suggestion, or information for the assistance of
27 the hearing officer in the hearing of the case.
- 28 g) Certification by counsel that discovery has been completed, unless late
discovery has been allowed by order of the hearing officer.

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1 A hard copy of the Pre-Hearing Statement and any Exhibits must be filed with the State of
2 Nevada Department of Administration at 2200 South Rancho Drive, Suite 220, Las Vegas,
3 Nevada, 89102. Pre-Hearing Statements and Exhibits must be served upon the opposing party.
4 In addition, an electronic copy of Pre-Hearing Statements and Exhibits must be emailed to the
5 Hearing Officer's designated assistant.

6 If either party needs the Hearing Officer to issue Subpoenas, the Subpoenas must be
7 emailed to the Hearing Officer's designated assistant for issuance no later than November 20,
8 2019.

9 Motions must be filed no later than October 23, 2019.

10 If either party needs additional assistance of the Hearing Officer to resolve any
11 disputes regarding this matter, please contact the Hearing Officer's designated assistant to
12 schedule a conference call.
13

14 DATED this 23rd day of September, 2019.

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17 CARA BROWN, ESQ.
18 HEARING OFFICER
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KEVIN PICK ESQ
DEPUTY ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
5420 KIETZKE LANE STE 202
RENO NV 89511

Zoe McCough
Zoe McCough, Legal Secretary of
Employee of the State of Nevada

1 BEFORE THE NEVADA STATE PERSONNEL COMMISSION

2 HEARING OFFICER

3 SHARI KASSEBAUM,)

4 Petitioner-Employee,)

5 vs.)

6 DEPARTMENT OF CORRECTIONS,)

7 Respondent-Employer.)

Appeal No: 2001869-CB

FILED

AUG 16 2019

APPEALS OFFICE

9 NOTICE OF EARLY CASE CONFERENCE

10 A telephonic Early Case Conference has been scheduled for August 29, 2019 at 2:00
11 p.m. Please use the following conference call information to participate:

12 **DIAL IN# 702-359-0270**
13 **CONFERENCE ID# 459319**

14
15 I request that counsel be prepared to discuss scheduling, discovery issues and any other
16 matters either side wants to discuss.

17 **Dated** this 16th day of August, 2019.

18
19 

20 CARA BROWN, ESQ.
21 HEARING OFFICER

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ANGELA LIZADA ESQ
LIZADA LAW FIRM LTD
711 S 9TH ST
LAS VEGAS NV 89101-7014
angela@lizardalaw.com

Dated this 16th day of August, 2019.

Zoe McCough
Zoe McCough, Legal Secretary II
Employee of the State of Nevada

Zoe McGough

From: Zoe McGough
Sent: Friday, August 09, 2019 11:57 AM
To: angela@lizardlaw.com; Stephanie A. Charter
Cc: Shari Kassebaum (slredelfs@yahoo.com); James Dzurenda (jedzurenda@doc.nv.gov); Christina Leathers (cleathers@doc.nv.gov); Anela Kaheaku (akaheaku@ag.nv.gov); Lino Jasso (LJasso@admin.nv.gov)
Subject: SHARI KASSEBAUM 2001869-CB
Attachments: Assignment Letter.pdf

Attached is the Assignment Letter regarding the above.

*Zoe McGough, Legal Secretary II
Assistant to Cara Brown, Special Appeals Officer
State of Nevada, Department of Administration, Appeals Division
2200 South Rancho Drive, Suite 220, Las Vegas, Nevada 89102
(702) 486-2532 Direct
(702) 486-2527 Office
(702) 486-2555 Fax*

DOLORO

Steve Sisolak
Governor



Patrick Cates
Director

Michelle Morgando, Esq.
Senior Appeals Officer

Northern Nevada:
Hearing Office
1050 E. Williams St. Ste. 400
Carson City, Nevada 89701
(775) 687-8440 | Fax (775) 687-8441

Appeals Office
1050 E. Williams St. Ste. 450
Carson City, Nevada 89701
(775) 687-8420 | Fax (775) 687-8421

STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION

Hearings Division

<http://hearings.nv.gov/>

Southern Nevada:
Hearing Office
2200 S. Rancho Drive, Ste. 210
Las Vegas, Nevada 89102
(702) 486-2525 | Fax (702) 486-2879

Appeals Office
2200 S. Rancho Drive, Ste. 220
Las Vegas, Nevada 89102
(702) 486-2527 | Fax (702) 486-2555

Angela Lizada Esq
Lizada Law Firm Ltd
711 S 9th St
Las Vegas, NV 89101-7014

Stephanie Charter, Esq.
Deputy Attorney General
555 East Washington Ave. Ste. 3900
Las Vegas, NV 89101

RE: Shari Kassebaum vs Department Of Corrections

Dear Mses. Lizada and Charter:

The State of Nevada Hearings Division has assigned this matter to Cara Brown to serve as the Hearing Officer in this matter.

We will schedule an Early Case Conference to discuss the case and to arrange a mutually convenient time for the hearing. Services for preparation of audio recording of the hearing will be provided. However, court reporters may be used in such proceedings, upon the request of either party and at the party or parties' own expense.

I am the assistant assigned to this file. If you have any questions or concerns, please contact me at 702-486-2532 or zmcgough@admin.nv.gov.

Sincerely,

/s/
Zoe McGough
Judicial Assistant

cc: Shari Kassebaum: slredelfs@yahoo.com
James Dzurenda, Director: jedzurenda@doc.nv.gov
Christina Leathers, Human Resources Manager I: cleathers@doc.nv.gov

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JA00083

Steve Sisolak
Governor



Deonne E. Contine
Director

Michelle Morgando, Esq.
Senior Appeals Officer

Northern Nevada:
Hearing Office
1050 E. Williams St. Ste. 400
Carson City, Nevada 89701
(775) 687-8440 | Fax (775) 687-8441

Appeals Office
1050 E. Williams St. Ste. 450
Carson City, Nevada 89701
(775) 687-8420 | Fax (775) 687-8421

STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION

Hearings Division

<http://hearings.nv.gov/>

Southern Nevada:
Hearing Office
2200 S. Rancho Drive. Ste. 210
Las Vegas, Nevada 89102
(702) 486-2525 | Fax (702) 486-2879

Appeals Office
2200 S. Rancho Drive, Ste. 220
Las Vegas, Nevada 89102
(702) 486-2527 | Fax (702) 486-2555

July 25, 2019

Shari Kassebaum
7644 Splashing River court
Las Vegas, NV 89131

James Dzurenda, Director
Department Of Corrections
3955 West Russell Road
Las Vegas, NV 89118

RE: Shari Kassebaum vs Department Of Corrections, Request for hearing 07-20-19

Dear Ms. Kassebaum and Mr. Dzurenda:

Please be advised that in response to Ms. Kassebaum's request for a hearing received by our office on July 24, 2019, we are providing you a list of potential Hearing Officers, pursuant to NAC 284 and the Personnel Commission's *Hearing Officer Rules of Procedure*.

You may each strike one name from the list of potential Hearing Officers provided below. *We suggest the appellant consult with her representative and the employer consult with the Office of the Attorney General prior to making a strike selection.* Please indicate your strike by drawing a line through the person's name. Once you have made your choice please sign and date the strike list below.

Please return this strike list within 7 working days from receipt of this letter by either email to zmccgough@admin.nv.gov or by faxing to our office at (702) 486-2555. If you do not choose to strike a name, the Hearing Officer will be selected based on our procedures.

Doc 011

00067

JA00084

Strike one name:

Cara Brown, Esq.

Mark Gentile, Esq.

Robert Zentz, Esq.

Please complete the following:

Sign

Date

Print Name

☐ Appellant ☐ Representative ☐ Employer ☐ DAG

Address

Address

Phone Number

Email Address

Thank you,



Zoe McGough
Judicial Assistant

cc: Angela Lizada, Esq.: angela@lizardalaw.com

Cameron Vandenberg, Chief Deputy Attorney General: cvandenberg@ag.nv.gov

Christian Lathers, Human Resources Manager I: cleathers@doc.nv.gov

APPEAL OF
DISMISSAL, SUSPENSION, DEMOTION,
OR INVOLUNTARY TRANSFER

Received:

FILED

JUL 25 2019

APPEALS OFFICE

This form is required for an employee or former employee to request a hearing to determine the reasonableness of his or her dismissal, suspension, demotion, or involuntary transfer.

Name: Shari Kassebaum

Mailing Address: 7644 Splashing River Court, Las Vegas, NV 89131

RECEIVED

JUL 20 2019

Contact Phone: 559-903-3225

Email: slredelfs@yahoo.com

NEVADA DIV. OF HR MANAGEMENT
GRIEVANCES APPEALS
CARSON CITY, NEVADA

Employee I.D. #: 42134

Department/Agency at time of Action: Department of Corrections

I am appealing the action of: ☐ Dismissal ☒ Suspension ☐ Demotion ☐ Involuntary Transfer

The effective date of the action was: 7/11/2019 or 7/12/2019

Note: The appeal will be deemed timely if it is postmarked or received by the Administrator of the Division of Human Resource Management within the first 10 working days after the effective date of the action. This appeal form must be accompanied by the written notification of the appointing authority's decision regarding the proposed action provided to the employee pursuant to subsection 7 of NAC 284.6561.

Immediately prior to the action, were you a permanent, classified, State employee? ☒ Yes ☐ No

Note: Employees who were probationary, unclassified, or not employed by the Executive Branch or the Nevada System of Higher Education are not eligible to appeal the action.

The remedy I seek is:

- ☒ For the dismissal, suspension or demotion to be set aside; and to be reinstated with full pay and benefits for the period the action was in effect.
- ☐ For the involuntary transfer to be set aside; to be returned to my former position; and if entitled, receive a per diem allowance and travel expenses paid for the period the transfer was in effect.
- ☐ Other: _____

Note: "Other" remedies may not be within the jurisdiction of the hearing officer to grant.

Briefly explain why you believe the action taken against you was not reasonable; in the case of an involuntary transfer, please explain how the transfer was made to discipline and/or harass you. Please reference any statute, regulation, policy, or procedure you believe was violated. Attachments may be added.

NDP-54 2/2019

DOC012

00069

JA00086

Section 1: Representation (Required Section)

You may represent yourself or be represented by an attorney or other person of your choosing. A representative may be designated at a later date. I choose to:

☐ Represent myself

☒ Designate the following representative to act on my behalf during the course of this appeal:

Name: Angela J. Lizada, Esq.

Phone: 702-979-4876

Address: 711 S. 9th St., Las Vegas, NV 89101

Fax: 702-979-4121

Email: angela@lizadalaw.com

By signing this form, you are requesting a hearing to determine the reasonableness of the action and affirming that the information you provided is true and correct.

Appellant Signature:

Matthew

Date:

7.15.19

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

The appeal procedures and statements made on this form do not include all of the rights available to an appellant. It is advisable to review NRS 284 and NAC 284 prior to requesting a hearing. Appeal hearings are open to the public and decisions by a hearing officer are public information.

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

Whistleblower Retaliation Appeal: If you believe the action you are appealing was based on retaliation due to your disclosure of information concerning improper governmental action, please submit your appeal on the NPD-53 form, "Appeal of Whistleblower Retaliation Under the Provisions of NRS 281.641."

Where to File an Appeal: The appeal may be submitted by mail, email, fax or hand delivery. Please submit the appeal to:

Administrator, Division of Human Resource Management
c/o Employee and Management Services
100 N. Stewart St., Suite 200
Carson City, Nevada 89701-4204
Fax (775) 684-0118 Phone (775) 684-0135
Email: HearingClerk@admin.nv.gov

NRS 284.390 states, "Hearing to determine reasonableness of dismissal, demotion or suspension; judicial review.

1. Within 10 working days after the effective date of an employee's dismissal, demotion or suspension pursuant to NRS 284.385, the employee who has been dismissed, demoted or suspended may request in writing a hearing before the hearing officer of the Commission to determine the reasonableness of the action. The request may be made by mail and shall be deemed timely if it is postmarked within 10 working days after the effective date of the employee's dismissal, demotion or suspension.

2. The hearing officer shall grant the employee a hearing within 20 working days after receipt of the employee's written request unless the time limitation is waived, in writing, by the employee or there is a conflict with the hearing calendar of the hearing officer, in which case the hearing must be scheduled for the earliest possible date after the expiration of the 20 days.

3. *Upon verification that a request for a hearing has been made pursuant to subsection 1, the appointing authority of the employee who was the subject of the internal administrative investigation shall, within 5 days after receiving a request by the employee or his or her representative, produce and allow the employee or his or her representative to inspect or receive a copy of any document concerning the internal administrative investigation, including, without limitation, any recordings, notes, transcripts of interviews or other documents or evidence related to the internal administrative investigation.*

4. The employee may represent himself or herself at the hearing or be represented by an attorney or other person of the employee's own choosing.

5. Technical rules of evidence do not apply at the hearing.

6. After the hearing and consideration of the evidence, the hearing officer shall render a decision in writing, setting forth the reasons therefor.

7. If the hearing officer determines that the dismissal, demotion or suspension was without just cause as provided in NRS 284.385, the action must be set aside and the employee must be reinstated, with full pay for the period of dismissal, demotion or suspension.

8. The decision of the hearing officer is binding on the parties.

9. Any petition for judicial review of the decision of the hearing officer must be filed in accordance with the provisions of chapter 233B of NRS."

NRS 284.376 states, "Involuntary transfer; hearing; remedies.

1. Within 10 working days after the effective date of a transfer pursuant to the provisions of NRS 284.375, a permanent classified employee who has been transferred without the employee's consent may request in writing a hearing before the hearing officer of the Commission to determine whether the transfer was made for the purpose of harassing the employee. The request may be made by mail and shall be deemed timely if it is postmarked within 10 working days after the effective date of the employee's transfer. The hearing must be conducted in accordance with the procedures set forth in NRS 284.390 to 284.405, inclusive.

2. If the hearing officer determines that the transfer was made for the purpose of harassing the employee, the transfer must be set aside and the employee must be returned to the employee's former position. If the transfer caused the employee to be away from the employee's original headquarters, the employee is entitled to receive the per diem allowance and travel expenses provided for state officers and employees generally for the period the transfer was in effect.

3. The decision of the hearing officer is binding on the parties."

NAC 284.6562 states, "Request for hearing to determine reasonableness of dismissal, demotion or suspension"

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

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

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

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

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

NAC 284.778 states in part, "Request for hearing and other communications."

1. A request for an appeal must be addressed to the Administrator and submitted on the form provided by the Division of Human Resource Management."

On January 4, 2019, Sgt. Kassebaum was sent an email from Associate Warden Gabriela Garcia ("AW Garcia") stating that "You have been selected to attend the Core Correctional Practices MANDATORY Training" scheduled for January 7th and 8th from 8am to 4pm. On January 5, 2019 at 5:18am, Sgt. Kassebaum replied asking why she would need to attend the email because she is an instructor for Core Correctional Practices. Sgt. Kassebaum also emailed Amanda Amacker about the email and voicing her concerns that she was being sent notice to attend a class as a student, since she is an instructor, and that she cannot see that she is needed as an instructor as the class is in two days and Sgt. Kassebaum was never provided approval for teaching the class. Ms. Kassebaum also indicated she had a meeting on January 8th at 2pm that she could not miss. After AW Garcia responded on January 5th at 4:34pm stating that she included Sgt. Kassebaum in the email so that she had information for the class, Sgt. Kassebaum had a telephone conversation with Ms. Amacker, where Ms. Amacker pleaded with Sgt. Kassebaum to help teach the class, because there were 50 students and they needed two instructors, Sgt. Kassebaum agreed, and sent an email on January 6th at 5:26am to AW Garcia and Ms. Amacker stating that she would agree to teaching even though it had been a month since anyone had mentioned a class and no one had confirmed a date. She agreed to be there on Monday January 7th to discuss modifying the schedule, and specifically stating that she would need to leave by 1:15pm on Tuesday to make the appointment where she was representing a fellow employee in her capacity as a union representative for AFSCME Local 4041.

Neither AW Garcia nor Amacker objected to Ms. Kassebaum's stating in writing that she would need to modify the schedule and leave on Tuesday by 1:15pm. In fact, the entire training was rescheduled, and yet the majority of the employees did not modify their time sheets to show the training times instead of their normal schedule. No other employees were disciplined, only Sgt. Kassebaum who was being retaliated against for reporting multiple instances of illegal conduct by NDOC employees and administrators. Sgt. Kassebaum was placed on administrative leave for approximately five months while NDOC conducted "interrogations" in furtherance of its witch hunt against Sgt. Kassebaum. Based on the four different investigations thrown at Sgt. Kassebaum as punishment for speaking against the state, this is the only discipline that has been filed.

It is clear that this discipline is disparate treatment in furtherance of the retaliatory conduct by NDOC, for which there is a current and open whistleblower case. Further, the majority of the reasons used to support the discipline by NDOC comes from AR 339, which has been found by the Nevada Supreme Court to be invalid and cannot be considered.

It is clear that Sgt. Kassebaum was not dishonest, did not neglect her duties, was not insubordinate and did not have an unauthorized absence from duty, and thus the fifteen (15) day suspension is not reasonable and is not in the good of the public.



Lizada Law Firm, Ltd.

711 S. 9th Street
Las Vegas, NV 89101
www.lizadalaw.com

Phone: 702.979.4676
Fax: 702.979.4121
angela@lizadalaw.com

July 20, 2019

SENT VIA FACSIMILE AND EMAIL

Administrator
Division of Human Resource Management
c/o Employee Management Services
100 N Stewart St., Ste. 200
Carson City, NV 89701-4204
Fax: (775) 684-0118

Re: Disciplinary Appeal

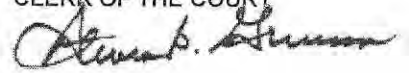
Dear Sir or Madam:

My office has been retained to represent Sgt. Kassebaum with regards to her disciplinary appeal. Please see the attached NPD-54.

Best Regards,

LIZADA LAW FIRM, LTD.

ANGELA J. LIZADA, ESQ.
Managing Partner



PTOB
LAW OFFICE OF DANIEL MARKS-
DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
office@danielmarks.net
ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
alevine@daneilmarks.net
610 South Ninth Street
Las Vegas, Nevada 89101
(702) 386-0536; FAX (702) 386-6812
Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

SHARI KASSEBAUM,

Petitioner,

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

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.

PETITIONER SHARI KASSEBAUM'S OPENING BRIEF

LAW OFFICE OF DANIEL MARKS
DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
610 South Ninth Street
Las Vegas, Nevada 89101
Attorneys for Petitioner

1 DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

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

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

7 Attorneys of Record for Petitioner Shari Kassebaum.
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<i>Zipes v. Trans World Airlines, Inc.</i> , 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982)	7

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Rules

Fed. Rule Bkrcty. Proc. 40047

Regulations

29 CFR §301.56

1 NDOC filed a Motion to Dismiss the Appeal arguing that the failure to attach the written
2 notification from NDOC Deputy Director Harold Wickham as provided for under NAC 284.6562(2)(b)
3 constituted an incurable jurisdictional defect. (ROA at 017-056). The hearing officer agreed and
4 dismissed the appeal on jurisdictional grounds finding the attachment of document language of NAC
5 284.6562(2)(b) "cannot be cured". (ROA at 003-007).

6 STANDARD OF REVIEW

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

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

17 The court reviews issues of law, including questions of statutory construction, de novo. *Public*
18 *Agency Compensation Trust v. Blake*, 127 Nev. —, 265 P.3d 694, 695 (2011).

19 SUMMARY OF ARGUMENT

20 The Hearing Officer erred in determining that attachment of the letter stating the effective date
21 that Kassebaum would be suspended was a jurisdictional requirement. The attachment requirements of
22 NAC 284.6562(2)(b) are not jurisdictional; they are what the law recognizes as a "claims processing"
23 rule which is non-jurisdictional. Regulations such as NAC 284.6562(2)(b) are promulgated by the
24

1 Nevada Personnel Commission. As an administrative agency, the Personnel Commission does not have
2 authority to limit its own jurisdiction; only the Legislature may determine jurisdictional requirements
3 for administrative agencies.

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

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

12 ARGUMENT

13 **I. THE REQUIREMENTS OF NAC 284.6562(2)(b) ARE A NON-JURISDICTIONAL** 14 **CLAIMS PROCESSING RULE.**

15 Appeals of discipline within the classified service of the State of Nevada are governed by NRS
16 284.390 which states in pertinent part:

17 1. Within 10 working days after the effective date of an employee's dismissal,
18 demotion or suspension pursuant to NRS 284.385, the employee who has been
19 dismissed, demoted or suspended may request in writing a hearing before the hearing
20 officer of the Commission to determine the reasonableness of the action. The request
may be made by mail and shall be deemed timely if it is postmarked within 10 working
days after the effective date of the employee's dismissal, demotion or suspension.

21 The only requirement under the statute is that the request be "in writing", and made within "10 working
22 days after the effective date of an employee's dismissal, demotion or suspension".
23
24

1 The Nevada Personnel Commission is a State administrative agency created pursuant to NRS
2 284.030. Under NRS 284.065(d) the Commission may adopt regulations to carry out the provisions of
3 NRS Chapter 284. Among the regulations adopted by the Commission is NAC 284.6562 which states:

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

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

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

9 3. If the appointing authority failed to provide the notification required pursuant to
10 subsection 7 of NAC 284.6561 or the disciplinary action imposed was an immediate
11 suspension or dismissal pursuant to the standards and procedures set forth in NAC
12 284.6563 the written notification of the appointing authority's decision regarding the
13 proposed action need not accompany the request for a hearing.

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

17 **A. An Administrative Agency May Not Limit Its Own Jurisdiction Or Alter The**
18 **Requirements Of A Statute.**

19 *Otto* is simply inapposite. That case involved the Administrative Procedures Act wherein the
20 Legislature provided that a Petition for Judicial Review must name as respondents "the agency and all
21 parties of record to the administrative proceeding". See NRS 233B.130(2)(a).

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

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

3 Thus, the legislature can make the application or operation of a statute complete within
4 itself dependent upon the existence of certain facts or conditions, the ascertainment of
5 which is left to the administrative agency, *Telford v. Gainesville* [208 Ga. 56], 65 S.E.2d
6 246 (1951). In doing so the legislature vests the agency with mere fact finding authority
7 and not the authority to legislate. *Ex rel. Ginocchio v. Shaughnessy*, [47 Nev. 129, 217
8 P. 581 (1923)]. The agency is only authorized to determine the facts which will make the
statute effective. *Montoya v. O’Toole* [94 N.M. 303], 610 P.2d 190 (1980); *State v. King*,
257 N.W.2d 693 (Minn.1977); *People v. Uriel* [76 Mich.App. 102], 255 N.W.2d 788
(1977); *State v. Kellogg* [98 Idaho 541], 568 P.2d 514 (1977); see generally 1 Am.Jur.2d
Administrative Law, § 123 (1962).

9 132 Nev. 551, 556, 375 P.3d 1022, 1025-1026 (2016) quoting *Sheriff v. Luqman*, 101 Nev. 149, 153,
10 697 P.2d 107, 110 (1985).

11 As set forth above, the only jurisdictional requirements imposed by the Legislature under NRS
12 284.390 (1) are that the appeal be in writing, and within 10 days. The Personnel Commission is not
13 authorized, and is constitutionally unable, to alter these jurisdictional requirements.

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

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

22 The Personnel Commission is authorized to adopt regulations “to carry out the provisions” of
23 NRS Chapter 284. See NRS 284.065(d). However, such regulations are not “jurisdictional” and NDOC
24

1 Motion to the Hearing Officer cites no authority for its claim that such regulations are “jurisdictional”.
2 By way of example, NDOC’s Motion cites *Rust v. Clark County School Dist.*, 103 Nev. 686, 688, 747
3 P.2d 1380, 1382 (1987) for the proposition that “the proper and timely filing of a notice of appeal is
4 jurisdictional”. (ROA at 011). However, appeals to the Nevada Supreme Court from the district courts
5 need only be filed in a timely manner in order to establish jurisdiction; any other deficiencies in
6 connection with submission such as may be addressed and remedied after the fact. See NRAP 3(a)(2)
7 and (3).

8 The abuse of the jurisdictional regulation fiction by litigants before administrative agencies has
9 become so prevalent that the United States Supreme Court has been forced to repeatedly address the
10 issue. In *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainman General*
11 *Committee of Adjustments, Central Region*, 558 U.S. 67, 130 S. Ct. 584 (2009) the High Court held that
12 the failure to comply with 29 CFR §301.5 governing submission of disputes to the National Railroad
13 Adjustment Board (“NRAB”) was not jurisdictional but rather a claims processing rule. A unanimous
14 Supreme Court emphasized:

15 Congress authorized the Board to prescribe rules for presenting and processing claims,
16 [45 U.S.C.] §153, but Congress alone controls the Board’s jurisdiction. By refusing to
17 adjudicate the instant cases on the false premise that it lacked “jurisdiction” to hear them,
the NRAB panel failed “to conform, or confine itself, to matters [Congress placed] within
the scope of [NRAB] jurisdiction,” §153.

18 558 U.S. at 69, 130 S. Ct. at 590. That unanimous Opinion further gave multiple examples of similar
19 prior rulings:

20 Recognizing that the word “jurisdiction” has been used by courts, including this Court,
21 to convey “many, too many, meanings,” *Steel Co. v. Citizens for Better Environment*,
22 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (internal quotation marks
23 omitted), we have cautioned, in recent decisions, against profligate use of the term. Not
24 all mandatory “prescriptions, however emphatic, are ... properly typed jurisdictional,”
we explained in *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510, 126 S.Ct. 1235, 163
L.Ed.2d 1097 (2006) (internal quotation marks omitted). Subject-matter jurisdiction
properly comprehended, we emphasized, refers to a tribunal’s “power to hear a case,” a

1 matter that “can never be forfeited or waived.” *Id.*, at 514, 126 S.Ct. 1235 (quoting
2 *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)). In
3 contrast, a “claim-processing rule, . . . even if unalterable on a party’s application,” does
4 not reduce the adjudicatory domain of a tribunal and is ordinarily “forfeited if the party
5 asserting the rule waits too long to raise the point.” *Kontrick v. Ryan*, 540 U.S. 443, 456,
6 124 S.Ct. 906, 157 L.Ed.2d 867 (2004).

7 For example, we have held non-jurisdictional and forfeitable the provision in *Title VII of*
8 *the Civil Rights Act of 1964*, 42 U.S.C. § 2000e et seq., requiring complainants to file a
9 timely charge of discrimination with the Equal Employment Opportunity Commission
10 (EEOC) before proceeding to court. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385,
11 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). We have also held non-jurisdictional and
12 forfeitable the *Title VII* provision exempting employers who engage fewer than 15
13 employees. *Arbaugh*, 546 U.S., at 503, 515–516, 126 S.Ct. 1235. And we have
14 determined that a Chapter 7 trustee’s (or creditor’s) limited time to object to the debtor’s
15 discharge, see Fed. Rule Bkrcty. Proc. 4004, is a claim-processing, not a jurisdictional,
16 matter. *Kontrick*, 540 U.S., at 446–447, 460, 124 S.Ct. 906.

17 558 U.S. at 81-82, 130 S. Ct. at 596-597.

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

24 As noted by the Supreme Court in *Union Pacific Railroad Co.*, violation of claims processing
rules are waived/forfeited if not promptly asserted. In the case of proceedings under NRS 284.390,
every case is scheduled for a Telephonic Early Case Conference. In this matter, that Conference
occurred on August 29, 2019. (ROA at 063). The hearing was set for December 4, 2019. (ROA at 060).
The Hearing Officer issued a scheduling order requiring any “Motions must be filed no later than
October 23, 2019”. The Motion to Dismiss was not filed until December 19, 2019 – a month and a half
after the deadline and after the original hearing date.

1 If the Hearing Officer or NDOC felt that the absence of the Deputy Director's actual disciplinary
2 decision somehow impeded the ability of the Hearing Officer to hold the appeal hearing, there was no
3 reason the Hearing Officer could not adjourn/stay any proceedings and direct Officer Kassebaum to
4 provide the document¹.

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

7 A simple review of the regulatory hertory for the Personnel Commission's adoption establishes
8 that the goal of requiring the appeal to include the termination letter is "to distinguish the hearing that
9 may be requested after disciplinary action has been taken from the hearing that occurs prior to
10 disciplinary action." (See Personnel Commission Meeting Minutes, June 8, 2018, Ms. Michelle
11 Garton's testimony Appendix "A" attached hereto). The goal was not to deny a right to a hearing for an
12 employee. Similarly, the LCB's "Explanation of Proposed Change" does not categorize the change as
13 jurisdictional, only procedural in nature, in its memorandum noticing the public of a hearing on May 4,
14 2018. (Appendix "B" attached hereto).

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

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

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

22
23 ¹ In fact, NDOC already had the document as it was the appointing authority which authored and issued
24 the document, and as evidence by the fact that the document was attached as Exhibit "C" to NDOC's
Motion to Dismiss. (ROA at 042).

1 (Emphasis added). The form provided by the Division of Human Resource Management (hereafter
2 "DHRM") is the NPD-54 entitled "Dismissal, suspension, demotion or Involuntary Transfer. (ROA at
3 069-070).

4 The NPD-54 provided by DHRM comes with a section entitled "Appeal Instructions". (ROA at
5 070). Those "Appeal Instructions" did not require that Officer Kassebaum submit the notice of
6 suspension, much less inform her that such submission of the notice was jurisdictional. Rather, the
7 "Appeal Instructions" stated the following:

8 **Appeal Instructions:**

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

12 The appeal procedures and statements made on this form do not include all of the rights
13 **available** to an appellant. It is advisable to review NRS 284 and NAC 284 prior to
14 requesting a hearing. Appeal hearings are open to the public and decisions by a hearing
15 officer are public information.

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

19 (ROA at 070 **emphasis added in parts**).

20 Nothing within the Appeals Instructions informed Officer Kassebaum that Acting Director
21 Wickham's letter of July 3, 2019 was necessary to attach, much less upon penalty of dismissal. Even if
22 NAC 284.6562 had been jurisdictional, as opposed to a claims processing rule, compliance would only
23 be necessary if the instructions were clear and unambiguous. *See Rust v. Clark Co. School Dist.*, 103
24

1 Nev. 686, 688, 747 P.2d 1380, 1382 (1987) ("Because jurisdictional rules go to the very power of this
2 [Court] to act. They must, accordingly, be *clear and absolute* in order to give all fair notice of what is
3 required to bring a matter properly before this court.").

4 **III. THE DISMISSAL OF PETITIONER'S APPEAL VIOLATES FEDERAL**
5 **CONSTITUTIONAL DUE PROCESS.**

6 Members of the classified service may only be suspended, demoted or dismissed for "just
7 cause". See NRS 284.390 (7). This "just cause" requirement creates a property interest in classified
8 service employment within the meaning of the Due Process Clause of the 14th Amendment to the
9 United States Constitution. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487
10 (1985).

11 In *Loudermill v. United States* Supreme Court held that the minimum requirements of federal
12 due process require an informal pre-termination hearing followed by a more extensive post-termination
13 evidentiary hearing. 470 U.S. at 546-547, 105 S.Ct. at 1495-1496. In *Gilbert v. Homar*, 520 U.S. 924,
14 117 S. Ct. 1807 (1997) the High Court likewise held that the right to a hearing conferred by due process
15 applies to suspensions.

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

18 This process is an informal proceeding between the two parties, the appointing authority
19 and her or her designated representative and the employee, who meet together to discuss
20 the proposed action. The employee will be given an opportunity to rebut the allegations
21 against the employee and provide mitigating information. Witnesses are not allowed to
22 attend, but each party may be accompanied by a person of her or her choice.
23
24

1 Thus this pre-disciplinary review constitutes the type of informal pre-deprivation hearing contemplated
2 by *Loudermill*.²

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

8 *Loudermill* makes clear that state law cannot supersede or impair that which federal
9 constitutional due process requires:

10 In light of these holdings, it is settled that the "bitter with the sweet" approach
11 misconceives the constitutional guarantee. If a clearer holding is needed, we provide it
12 today. The point is straightforward: the Due Process Clause provides that certain
13 substantive rights—life, liberty, and property—cannot be deprived except pursuant to
14 constitutionally adequate procedures. The categories of substance and procedure are
15 distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology.
"Property" cannot be defined by the procedures provided for its deprivation any more
than can life or liberty. The right to due process "is conferred, not by legislative grace,
but by constitutional guarantee. While the legislature may elect not to confer a property
interest in [public] employment, it may not constitutionally authorize the deprivation of
such an interest, once conferred, without appropriate procedural safeguards."

16 470 U.S. at 541, 105 S. Ct. at 1493 citing *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d
17 15 (1974).

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

23 ² Kassebaum elected not to attend the pre-disciplinary hearing which is permissible under the
24 regulation.

1 CONCLUSION

2 For all of the reasons set forth above, the Petition for Judicial Review must be GRANTED and
3 Shari Kassebaum should be reinstated with full back pay and benefits retroactive to his date of
4 termination.

5 DATED this 14th day of December 2020.


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1 CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

2 I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 14th
3 day of December 2020, pursuant to NRCP 5(b) and Administrative Order 14-2, I electronically
4 transmitted a true and correct copy of the above and foregoing PETITIONER SHARI KASSEBAUM'S
5 OPENING BRIEF by way of Notice of Electronic Filing provided by the court mandated E-file &
6 Serve system, to the e-mail address on file for:

7 Kevin Pick, Esq.
8 Deputy Attorney General
9 NEVADA ATTORNEY GENERAL'S OFFICE
10 Email: kpick@ag.nv.gov

11 
12 An employee of the
13 LAW OFFICE OF DANIEL MARKS
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N THE SUPREME COURT OF THE STATE OF NEVADA

Docket No.: 84008

SHARI KASSEBAUM

Appellant,

vs.

THE STATE OF NEVADA DEPARTMENT
OF CORRECTIONS,

Respondents.

Eighth Judicial District Court
Case No.: A-20-810424-P

JOINT APPENDIX
VOLUME I – Part 3 of 4

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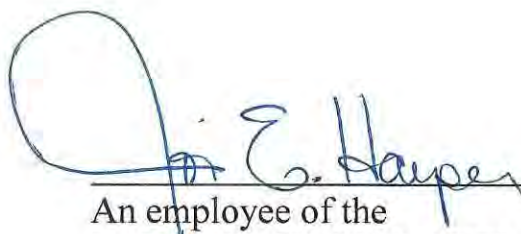
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	<u>Description</u>	<u>Vol(s)</u>	<u>Pg(s)</u>
1.	Petition for Judicial Review (02/13/2020)	I	JA 00001-JA 00013
2.	Statement of Intent to Participate (03/03/2020)	I	JA 00014-JA00016
3.	Transmittal of Record on Appeal (10/16/2020)	I	JA 00017- JA 00091
4.	Petitioner's Opening Brief (12/14/2020)	I	JA 00092- JA 00118
5.	Department of Correction's Answering Brief (01/12/2021)	I	JA 0011- JA 00138
6.	Petitioner Shari Kassebaum's Reply Brief (02/02/2021)	I	JA 00139- JA 00163
7.	Findings of Facts, Conclusions of law, Decision and Order Granting Petition for Judicial Review (03/02/2021)	I	JA 00164-JA 00168
8.	Notice of Entry of Findings of Facts, Conclusions of Law, Decision and Order Granting Petition for Judicial Review (03/03/2021)	I	JA 000169- JA 000176
9.	Decision on Remand (12/09/2021)	I	JA 000177- JA 000180
10.	Case Appeal Statement (12/21/2021)	I	JA 000181-JA 000184
11.	Notice of Appeal (12/21/2021)	I	JA 000185- JA 000194
12.	Transcript of Proceedings (03/01/2022)	I	JA 000195- JA 000223

CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 20th day of April 2022, I did serve the above and foregoing JOINT APPENDIX VOLUME I – Part 3 of 4 by way of Notice of Electronic Filing provided by the court mandated E-Flex filing service, upon the Respondents at the following:

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An employee of the
LAW OFFICE OF DANIEL MARKS

APPENDIX 1

APPENDIX 1

STATE OF NEVADA
PERSONNEL COMMISSION

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

MEETING MINUTES
Friday June 8, 2018
(Subject to Commission Approval)

COMMISSIONERS PRESENT
IN CARSON CITY:

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

COMMISSIONERS PRESENT
IN LAS VEGAS:

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

STAFF PRESENT IN CARSON CITY:

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

STAFF PRESENT IN LAS VEGAS:

Ms. Heather Dapice, Supervisory Personnel Analyst, DHRM

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

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

II. PUBLIC COMMENT

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

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

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

Held March 19, 2018

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

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

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

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

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

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

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

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

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

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

V-D LCB File No. R150-17

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

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

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

Chairperson Fox: Asked if there were questions or comments.

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

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

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

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

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

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

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

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

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

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

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

V-E LCB File No. R151-17

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

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

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

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

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

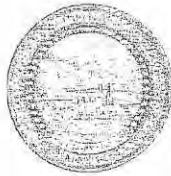
VI DISCUSSION AND APPROVAL OF PROPOSED CLASS SPECIFICATION MAINTENANCE
REVIEW OF CLASSES RECOMMENDED FOR REVISIONS – Action Item

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

APPENDIX 2

APPENDIX 2

Brian Sandoval
Governor



Patrick Cates
Director

Peter Long
Administrator

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

May 4, 2018

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

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

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

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

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

PL:mg

Attachments

JA00117

LCB File No. R150-17

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

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

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

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

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

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

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

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

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

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

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

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



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ex rel. Department of Corrections

DISTRICT COURT
CLARK COUNTY, NEVADA

SHARI KASSEBAUM,

Petitioner,

v.

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

Respondents.

Case No. A-20-810424-P

Dept. No. 31

DEPARTMENT OF CORRECTION'S
ANSWERING BRIEF

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TABLE OF AUTHORITIES

CASES

<i>Bergmann v. Boyce</i> , 109 Nev. 670, 674, 856 P.2d 560, 563 (1993)-----	8, 10, 12
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<i>Hennigh v. City of Shawnee</i> , 155 F.3d 1249, 1256 (10th Cir. 1998) -----	14
<i>Krentz v. Robertson Fire Prot. Dist.</i> , 228 F.3d 897, 904 (8th Cir. 2000) -----	14
<i>L.G. by & through G.G. v. Bd. of Educ. of Fayette Cty., Kentucky</i> , 775 F. App'x 227, 231, fn. 3 (6th Cir. 2019)-----	12
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<i>NDOT v. Bronder</i> , 136 Nev. Advance Op. 76 (Dec. 3, 2020) -----	11
<i>Nevada Dept. of Motor Vehicles v. Turner</i> , 89 Nev. 514, 517, 515 P.2d 1265 (1973) -----	9
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<i>Turk v. Nev. State Prison</i> , 94 Nev. 101, 104, 575 P.3d 599, 601 (1978) -----	8

1	<i>Washoe Cty. v. Otto</i> , 128 Nev. 424, 282 P.3d 719 (2012)-----	3, 4, 10
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1 Respondent, STATE OF NEVADA *ex rel.* its DEPARTMENT OF CORRECTIONS
2 (“NDOC”), by and through counsel, Aaron D. Ford, Attorney General, and Kevin A. Pick, Senior
3 Deputy Attorney General, hereby submits this Answering Brief in response to the Petitioner’s
4 Opening Brief and the Petition for Judicial Review requesting review of the Decision and Order
5 issued by Hearing Officer Cara Brown on January 13, 2020, under Appeal No. 2001869-CB. This
6 Answering Brief is supported by the following points and authorities, the record on appeal, and
7 all other papers and pleadings on file herein.

8 I.

9 STATEMENT OF THE CASE

10 At all times relevant, Petitioner Shari Kassebaum (“Kassebaum”) was a correctional
11 sergeant employed at NDOC. On June 20, 2019, Kassebaum was served with a Specificity of
12 Charges that recommended she be suspended for fifteen (15) days as a result of falsifying her
13 timesheets and leaving her assigned prison post without supervisor authorization. *See* ROA, at
14 25–28.

15 A pre-disciplinary review was scheduled for July 1, 2019, which Kassebaum chose not to
16 attend. *See* ROA, at 39–40. After reviewing the investigation report, the pre-disciplinary review
17 officer, Associate Warden Jeremy Bean, concurred with the recommended suspension. *Id.*

18 On July 3, 2019, Kassebaum received written notification from Deputy Director Harold
19 Wickham, advising that Kassebaum would be suspended for 15 days, effective July 11, 2019. *See*
20 ROA, at 42.

21 Kassebaum then filed an Appeal of Dismissal, Suspension, Demotion, or Involuntary
22 Transfer (Form NPD-54) on July 20, 2019. *See* ROA, at 44–49. All NPD-54 forms conspicuously
23 instruct that “*This appeal form must be accompanied by the written notification of the*
24 *appointing authority’s decision regarding the proposed action provided to the employee*
25 *pursuant to subsection 7 of NAC 284.6561.*” *See* ROA, at 44. This warning is taken directly from
26 NAC 284.6562(2)(b), which mandates that any appeal “must” be “[a]ccompanied by the written
27 notification of the appointing authority’s decision regarding the proposed action provided to the
28 employee pursuant to subsection 7 of NAC 284.6561.” However, Kassebaum failed to attach the

1 written notification to her NPD-54 as required by NAC 284.6562(2)(b). Nor did Kassebaum cure
2 her defective appeal within the 10-day appeal period established by NRS 284.390(1).

3 Accordingly, NDOC moved to dismiss Kassebaum's appeal as jurisdictionally defective
4 because NRS 284.390(1) and NAC 284.6562(2)(b) are mandatory and because the proper and
5 timely filing of a notice of appeal is jurisdictional. *See* ROA, at 17–23.

6 In response, Kassebaum filed a "Limited Opposition to Motion to Dismiss Appeal." Her
7 opposition was "limited" because Kassebaum noted her disagreement with the facts underlying
8 her suspension but "concedes that procedurally, employer will prevail on its Motion to Dismiss."
9 *See* ROA, at 14–15. Kassebaum also conceded that the "NAC states that employee must submit
10 the written notification of the appointing authority's decision." *Id.* Kassebaum did not dispute that
11 the requirements of NRS 284.390(1) and NAC 284.6562(2)(b) were mandatory and jurisdictional.
12 *Id.* Accordingly, Kassebaum wholly conceded that she failed to comply with NAC
13 284.6562(2)(b) and that she failed to submit a complete and proper appeal within the 10-day
14 filing period under NRS 284.390(1). *Id.* In fact, Kassebaum essentially consented to dismissal,
15 choosing instead to "continue her pursuit of her federal lawsuit against NDOC . . ." *Id.*

16 NDOC then filed its Reply in Support of Motion to Dismiss, which specifically
17 acknowledged Kassebaum's non-opposition to the legal basis for dismissal. *See* ROA, at 9–13.

18 Hearing Officer Brown ultimately granted NDOC's motion to dismiss and specifically
19 cited Kassebaum's non-opposition and the fact that Kassebaum had conceded the legal basis for
20 dismissal; furthermore, Hearing Officer Brown also found that "it is undisputed that there was no
21 compliance with the substance or any reasonable objective of NAC 284.6562(2)(b)." *See* ROA, at
22 3–7.

23 Despite her concessions, Kassebaum has filed the present Petition for Judicial Review and
24 Opening Brief, in which she now argues (contrary to her prior positions) that Hearing Officer
25 Brown erred in granting NDOC's unopposed motion to dismiss.

26 * * *

27 * * *

28 * * *

1 II.

2 STATEMENT OF ISSUES

3 1. Whether Hearing Officer Brown's interpretation of NRS 284.390 and NAC
4 284.6562 are entitled to deference as a matter of law.

5 2. Whether Kassebaum is barred by the doctrine of judicial estoppel from taking
6 inconsistent positions on judicial review.

7 3. Whether Kassebaum is barred from raising new legal theories for the first time on
8 judicial review, after she expressly conceded the legal merits of NDOC's motion to dismiss
9 before Hearing Officer Brown.

10 4. Whether Hearing Officer Brown committed legal error when she held Petitioner
11 Kassebaum accountable for not following the mandatory requirements for submitting a proper
12 and timely appeal under NAC 284.6562 and NRS 284.390.

13 III.

14 SUMMARY OF ARGUMENT

15 Kassebaum's main argument challenges the hearing officer's interpretation of NAC
16 284.6562 and, specifically, whether the hearing officer correctly found that Kassebaum failed to
17 invoke the jurisdiction of the hearing officer by not submitting a complete and proper appeal
18 (under NAC 284.6562(2)(b)) within the 10-day appeal period (under NRS 284.390(1)).

19 However, Hearing Officer Brown's interpretation of NRS 284.390 and NAC 284.6562 is
20 entitled to deference as a matter of law and cannot be second-guessed on judicial review.
21 Furthermore, Kassebaum's new arguments are completely inapposite to the concessions she
22 previously made in her "limited opposition" to NDOC's motion to dismiss. As a result,
23 Kassebaum is barred by the doctrine of judicial estoppel from taking these completely contrary
24 and inconsistent positions on judicial review. Furthermore, Kassebaum is also barred from
25 asserting these new legal theories for the first time on judicial review – legal arguments which
26 were never presented to or considered by Hearing Officer Brown.

27 As to her arguments challenging Hearing Officer Brown's decision, Kassebaum first
28 attempts to distinguish *Washoe County v. Otto* and argues that the Personnel Commission may

1 not limit its own jurisdiction. However, *Otto* is analogous to this case and supports Hearing
2 Officer Brown's interpretation of NRS 284.390 and NAC 284.6562; moreover, the Nevada
3 Legislature created the mandatory 10-day time limit for filing administrative appeals and
4 delegated to the Personnel Commission authority to create all regulations to carry out the
5 provisions of NRS Chapter 284.

6 Second, Kassebaum cites inapplicable federal law and argues that NAC 284.6562 is a
7 "claims processing rule." However, no Nevada court has ever found NAC 284.6562 or NRS
8 284.390 to be claims processing rules; Kassebaum provides zero legal analysis for labeling these
9 provisions as claims processing rules; these Nevada provisions are not claims processing rules
10 even under analogous federal law; and, lastly, even if these provisions were claims processing
11 rules, Kassebaum's appeal was still properly dismissed.

12 Third, Kassebaum argues that the NPD-54 form is unconstitutional because it does not
13 provide sufficient notice of the requirements of NAC 284.6562(2)(b); however, the NPD-54
14 quotes *verbatim* the language of NAC 284.6562(2)(b) on the first page of the form and does so in
15 bold and italicized letters. So, no legitimate argument can be made that the NPD-54 is
16 unconstitutionally vague as to the requirements of NAC 284.6562(2)(b).

17 Lastly, Kassebaum argues that she was constitutionally entitled to a post-deprivation
18 hearing and that dismissal violated her due process rights; however, Kassebaum was only entitled
19 to an *opportunity* for a post-deprivation hearing, which she failed to invoke by filing a complete,
20 proper, and timely appeal – which she has previously admitted.

21 IV.

22 LAW AND ARGUMENT

23 A. Hearing Officer Brown's interpretation of NRS 284.390 and NAC 284.6562 are 24 entitled to deference and cannot be second-guessed on judicial review.

25 Before addressing the primary arguments raised in Kassebaum's Opening Brief, NDOC
26 must emphasize that deference is owed to Hearing Officer Brown's interpretation of NRS
27 284.390 and NAC 284.6562. Although statutory construction is generally a question of law
28 reviewed *de novo*, courts must "defer to an agency's interpretation of its governing statutes or

1 regulations if the interpretation is within the language of the statute.” *Taylor v. Dep’t of Health &*
2 *Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013). Accordingly, as long as a hearing
3 officer’s interpretation of NRS Chapter 284 and its associated regulations is “within the language of
4 the statute,” a court must defer to that interpretation.

5 Here, Hearing Officer Brown interpreted NAC 284.6562 as setting forth the mandatory
6 requirements for initiating an administrative appeal under NRS 284.390, which is clearly within the
7 language of the rule. *See* ROA, at 6–7. Indeed, NAC 284.6562 instructs that a request for an
8 administrative hearing under NRS 284.390 “must” be addressed and submitted as required pursuant
9 to NAC 284.778 *and* “accompanied by the written notification of the appointing authority’s decision
10 regarding the proposed action provided to the employee pursuant to subsection 7 of NAC 284.6561.”
11 As such, Hearing Officer Brown’s interpretation of NAC 284.6562 as mandatory and jurisdictional
12 is entitled to deference and Kassebaum’s petition must be denied on this basis.

13 **B. Kassebaum is barred by the doctrine of judicial estoppel from taking completely**
14 **contrary and inconsistent positions on judicial review.**

15 Kassebaum filed a “limited opposition” to NDOC’s motion to dismiss. As Kassebaum
16 explained therein, her opposition was *limited* because she admittedly failed to submit a complete
17 appeal that timely complied with the requirements of NAC 284.6562(2). *See* ROA, at 14. What is
18 more, Kassebaum acknowledged that the requirements of NAC 284.6562 are mandatory and
19 Kassebaum did not dispute that the proper and timely filing of a notice of appeal is jurisdictional. *Id.*
20 at 14–15. In fact, Kassebaum admitted that “procedurally, **employer will prevail in its Motion to**
21 **Dismiss . . .**” *Id.* (Emphasis added.) These concessions by Kassebaum were specifically considered
22 by Hearing Officer Brown, who noted that Kassebaum conceded the merits of NDOC’s legal
23 arguments and that “it is undisputed that there was not compliance with the substance or any
24 reasonable objective of NAC 284.6562(2)(b).” *Id.* at 4–6.

25 Now, contrary to her prior positions, Kassebaum argues that it was legal error for Hearing
26 Officer Brown to grant NDOC’s motion to dismiss, and that it was legal error for Hearing Officer
27 Brown to find that NAC 284.6562(2)(b) was mandatory and jurisdictional. *See generally*, Opening
28 Brief. However, judicial estoppel bars Kassebaum from taking these inconsistent positions. The

1 primary purpose of judicial estoppel is to protect the judiciary's integrity, and a court may invoke the
2 doctrine at its discretion. *NOLM, LLC v. Cty. of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004).
3 The doctrine generally applies “when (1) the same party has taken two positions; (2) the positions
4 were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in
5 asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two
6 positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance,
7 fraud, or mistake.” *NOLM, LLC*, 120 Nev. at 743.

8 Here, Kassebaum has clearly taken two completely inconsistent positions with respect to
9 NDOC’s motion to dismiss and the mandatory and jurisdictional nature of NAC 284.6562(2)(b) and
10 NRS 284.390; furthermore, these inconsistent positions were taken during the administrative
11 proceedings before Hearing Officer Brown and now on judicial review. Hearing Officer Brown also
12 accepted Kassebaum’s former positions and incorporated those concessions in her Decision and
13 Order. *See* ROA, at 3–7. Lastly, there is no evidence that Kassebaum’s former positions were taken
14 as a result of ignorance, fraud, or mistake. Indeed, during the administration proceeding, Kassebaum
15 was represented by an attorney (Angela Lizada, Esq.) who explained that “[t]he language of NAC
16 284.6562 is clear and neither the Hearing Officer nor opposing counsel need a non-controlling
17 authority to be submitted to explain what it means when the NAC states that employee must submit
18 the written notification of the appointing authority’s decision.” *Id.* at 15. Accordingly, judicial
19 estoppel applies and Kassebaum is barred from taking the inconsistent positions now proffered on
20 judicial review.

21 **C. Kassebaum is barred from asserting new legal theories for the first time on judicial**
22 **review.**

23 All of Kassebaum’s legal arguments raised on judicial review are new and were never
24 proffered to Hearing Officer Brown in Kassebaum’s “limited opposition,” which conceded that
25 NDOC’s legal arguments were meritorious. *See* ROA, at 14–15. However, “[p]arties ‘may not
26 raise a new theory for the first time on appeal, which is inconsistent with or different from the one
27 raised below.’” *Dermody v. City of Reno*, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997) (quoting
28 *Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989)). This rule “is not meant to be harsh,

1 overly formalistic, or to punish careless litigators. Rather, the requirement that parties may raise on
2 appeal only issues which have been presented to the district court maintains the efficiency, fairness,
3 and integrity of the judicial system for all parties.” *Schuck v. Signature Flight Support of Nevada,*
4 *Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 544 (2010) (quoting *Boyers v. Texaco Refining and*
5 *Marketing, Inc.*, 848 F.2d 809, 812 (7th Cir. 1988)).

6 Again, none of the legal arguments Kassebaum now asserts on judicial review were
7 presented to Hearing Officer Brown, which directly impacts the efficiency, fairness, and integrity of
8 the administrative appeals process. By previously conceding NDOC’s motion to dismiss and now
9 disputing the same on judicial review, Kassebaum has effectively bypassed the entire administrative
10 appeals process and nullified the authority of Hearing Officer Brown. This type of gamesmanship
11 destroys the integrity of the administrative appeals process and obviates the plain purpose and intent
12 of NRS 284.390 and judicial review under NRS Chapter 233B. Accordingly, NDOC urges the Court
13 to disregard Kassebaum’s new legal arguments and reject her attempts to essentially skip-over the
14 administrative appeal phase before Hearing Officer Brown.

15 **D. Kassebaum’s Appeal was Properly Dismissed, because Kassebaum Failed to File a**
16 **Complete and Proper Appeal under NAC 284.6562 within the 10-day Filing Period**
under NRS 284.390(1).

17 As a general primer, NDOC must explain the legal reasoning underlying its motion to
18 dismiss. The Personnel Commission, pursuant to the authority granted to it by NRS
19 284.065(2)(d), has adopted regulations to carry out the provisions of NRS Chapter 284. In order
20 to successfully invoke a hearing officer’s jurisdiction to consider the reasonableness of
21 disciplinary action, a petitioning employee must submit a timely notice of appeal. *See* NRS
22 284.390(1). NAC 284.6562(1) codifies the timing requirement for filing a notice of appeal, while
23 NAC 284.6562(2) sets forth the content and manner requirements for filing a complete and proper
24 appeal. NAC 284.6562(2)(b) specifically mandates that an appeal “must” be “accompanied by the
25 written notification of the appointing authority’s decision regarding the proposed action . . .”
26 Similarly, the NPD-54 appeal form provided by DHRM expressly instructs that “[t]his appeal
27 form must be accompanied by the written notification of the appointing authority’s decision

28 * * *

1 *regarding the proposed action provided to the employee pursuant to subsection 7 of NAC*
2 *284.6561.” See ROA, at 28.*

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

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

28 * * *

1 Moreover, the intent of the Personnel Commission in adopting NAC 284.6562(2) was
2 plain and the only exception to these mandatory provisions is enumerated in NAC 284.6562(3),
3 which excuses the requirements of NAC 284.6562(2)(b) *only if* the appointing authority failed to
4 provide the notification required or the disciplinary action was immediate. These enumerated
5 exceptions to NAC 284.6562(2), neither of which apply here, are further proof that this provision
6 was intended as a mandatory rule that requires strict compliance. *See Sonia F. v. Eighth Judicial*
7 *Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009) (“the mention of one thing implies the
8 exclusion of another.”) Indeed, to interpret NAC 284.6562(2) as anything other than mandatory
9 would effectively nullify NAC 284.6562(3). *See Nevada Dept. of Motor Vehicles v. Turner*, 89
10 Nev. 514, 517, 515 P.2d 1265 (1973) (it is established law in Nevada that all parts of an act are to
11 be construed harmoniously). Furthermore, the legislative history of NAC 284.6562 does not
12 suggest that substantial compliance is the applicable standard, and regardless, the language of
13 NAC 284.6562 is unambiguous, and it would be clear legal error to even resort to legislative
14 history in interpreting NAC 284.6562. *See State v. Beemer*, 51 Nev. 192, 199, 272 P.2d 656, 657
15 (1928) (“[w]here the language of a statute is plain, the intention of the legislature must be
16 deduced from such language, and the court has no authority to look beyond it, or behind it, or to
17 the proceedings of the legislative body to ascertain its meaning.”)

18 Here, Kassebaum’s appeal was incomplete and omitted the written notification required
19 pursuant to NAC 284.6562(2). *See ROA*, at 44–49. Kassebaum failed to timely cure her
20 incomplete and defective appeal within the 10-day appeal period under NAC 284.6562(1) and
21 NRS 284.390(1). As a result, Kassebaum failed to file a proper, complete, and timely appeal that
22 vested jurisdiction in the hearing officer before the expiration of the 10-day filing deadline.

23 None of these legal arguments or facts were disputed by Kassebaum before Hearing
24 Officer Brown. *Id.* at 14–16. Accordingly, Hearing Officer Brown agreed that Kassebaum had
25 failed to file a complete and proper notice of appeal within the filing deadline and, as such, had
26 failed to meet mandatory jurisdictional requirements for bringing an administrative appeal. *Id.* at
27 6–7. Not only were Hearing Officer Brown’s conclusions correct, but her interpretation of NAC
28 284.6562 are entitled to deference as a matter of law. *See supra*.

1 In response to the foregoing, Kassebaum's Opening Brief raises four legal arguments for
2 the very first time – arguments that were never raised before Hearing Officer Brown because
3 Kassebaum chose not to oppose dismissal. Each of Kassebaum's arguments will be analyzed and
4 debunked below.

5 **1. The 10-day time limit for filing a notice of appeal under NRS 284.390 is**
6 **jurisdictional and the Legislature delegated to the Personnel Commission**
7 **authority to carry out the provisions of NRS Chapter 284, which includes the**
8 **provisions for filing a complete, proper, and timely notice of appeal.**

9 Kassebaum begins by distinguishing *Washoe County v. Otto*, and then arguing that the
10 Personnel Commission may not limit its own jurisdiction but is restricted to merely regulating
11 matters that the Nevada Legislature has expressly or implicitly delegated to the agency. *See* Opening
12 Brief, at 4–5.

13 However, the holding in *Otto* does confirm that (1) a party seeking to invoke special
14 statutory jurisdiction (such as the jurisdiction of an administrative hearing officer) must strictly
15 comply with the procedures prescribed by statute; (2) that when a petition is statutorily defective a
16 court does not obtain jurisdiction over it; and (3) that a defective appeal cannot be cured outside of
17 the statutory filing deadline. *Otto*, 128 Nev. at 432. As in *Otto*, not every agency decision is
18 reviewable under NRS 284.390 and NAC 284.6562, but only the decisions that fall within those
19 provisions and are challenged in accordance with the mandatory requirements set forth therein.
20 Otherwise, a hearing officer would be improperly exercising authority outside the powers set forth
21 by statute/regulation, which is an abuse of discretion. *See Clark Cty. Classroom Teachers Ass'n*, 115
22 Nev. at 102; *see also Bergmann*, 109 Nev. 674. As such, *Otto* is certainly analogous to this case and
23 confirms that the mandatory requirements for filing an appeal under NRS 284.390 and NAC
24 284.6562 are jurisdictional.

25 Additionally, as to whether the Personnel Commission is limited to regulating matters the
26 Nevada Legislature has expressly or implicitly delegated to the agency, the Nevada Legislature
27 enacted NRS 284.390 (which places a 10-day time limit on filing a notice of appeal) and then tasked
28 the Personnel Commission (under NRS 284.065(2)(d)) with adopting “regulations to carry out the
provisions of this chapter.” In turn, the Personnel Commission then adopted NAC 284.6562 to carry

1 out the jurisdictional 10-day time limit for filing appeals. It is notable that the Nevada Legislature did
2 not merely task the Personnel Commission with adopting *procedural* rules, but *all* rules to carry out
3 the provisions of NRS Chapter 284. This is contrary to other statutes, such as NRS 281.641, in which
4 the Nevada Legislature merely tasked the Personnel Commission with adopting procedural (i.e. non-
5 jurisdictional) rules. *See* *NDOT v. Bronder*, 136 Nev. Advance Op. 76 (Dec. 3, 2020) (holding that
6 the Personnel Commission could not adopt jurisdictional rules under NRS 281.641, because it was
7 only authorized by the Legislature to promulgate “procedural rules.”) In other words, the 10-day
8 time limit under NRS 284.390 is clearly a jurisdictional bar on filing an appeal and NAC 284.6562
9 was validly promulgated by the Personnel Division to carry out this jurisdictional bar, which was
10 within the authority granted by NRS 284.065(2)(d). Therefore, the Personnel Commission has not
11 limited its own jurisdiction, but has merely provided rules for carrying out the provisions of NRS
12 284.390 as expressly delegated by the Nevada Legislature.

13 **2. NAC 284.6562 is not a claims processing rule, and even if it was, dismissal was**
14 **still necessary because of Kassebaum’s undisputed failure to submit a complete**
15 **and proper appeal within the 10-day appeal period under NRS 284.390.**

16 Next, Kassebaum cites a host of inapplicable federal cases and argues that NAC 284.6562 is
17 a non-jurisdictional “claims processing rule.” *See* Opening Brief, at 5–7. However, Kassebaum does
18 not cite a single Nevada case in which NRS 284.390 or NAC 284.6562 were deemed claims
19 processing rules. *Id.* In fact, nowhere does Kassebaum even define what constitutes a “claims
20 processing rule” or explain why NRS 284.390 and NAC 284.6562 are non-jurisdictional claims
21 processing rules. Instead, Kassebaum skips this crucial first step and begins by arguing that claims
22 processing rules are non-jurisdictional. *Id.* By doing so, Kassebaum not only concedes that her legal
23 arguments are wholly unsupported, but Kassebaum also concedes that she has failed to carry her
burden on judicial review under NRS 233B.135(2).

24 Furthermore, NRS 284.390 and NAC 284.6562 are not claims processing rules, because
25 rules governing the filing of a notice of appeal are jurisdictional even under analogous federal law. In
26 *Bowles v. Russell*, 551 U.S. 205, 127 S. Ct. 2360 (2007), the Supreme Court held that a time limit
27 governing the filing of a notice of appeal from a district court to a circuit court was jurisdictional. *Id.*
28 at 209–15, 127 S. Ct. 2360. The Supreme Court emphasized that its own repeated interpretation of

1 appeal deadlines as jurisdictional over the course of more than a century was determinative. *Id.*
2 Likewise, the Nevada Supreme Court has expressly found that “[t]he proper and timely filing of a
3 notice of appeal is jurisdictional.” *Rust*, 103 Nev. at 688. Accordingly, the 10-day filing limit for
4 appealing an agency decision to a hearing officer under NRS 284.390 is jurisdictional and not merely
5 a claims processing rule. Similarly, the provisions of NAC 284.6562, which regulate the manner of
6 filing a complete and proper appeal under NRS 284.390, are also not claims processing rules.¹

7 Additionally, Kassebaum’s argument that NRS 284.390 and NAC 284.6562 are claims
8 processing rules is not the silver bullet she thinks it is, because the violation of a mandatory claims
9 processing rule still requires dismissal. Under federal law, the classic example of a claims processing
10 rule is Title VII’s mandatory administrative-exhaustion requirement, which the Supreme Court has
11 deemed a mandatory claims processing rule. *Fort Bend County v. Davis*, — U.S. —, 139 S. Ct.
12 1843, 204 L.Ed.2d 116 (2019). But even if the failure to exhaust administrative remedies under Title
13 VII is not jurisdictional, a plaintiff’s failure to exhaust is still fatal to his/her claim and subject to
14 dismissal under FRCP 12(b)(6). *See L.G. by & through G.G. v. Bd. of Educ. of Fayette Cty.,*
15 *Kentucky*, 775 F. App’x 227, 231, fn. 3 (6th Cir. 2019). Therefore, it makes no difference whether
16 NRS 284.390 and NAC 284.6562 are claims processing rules or jurisdictional rules, because the
17 result (i.e. dismissal) is the same. As such, whether jurisdictional or not, Hearing Officer Brown
18 correctly dismissed this appeal, because Kassebaum irrefutably failed to comply with the mandatory
19 requirements for submitting a complete, proper, and timely appeal under NRS 284.390 and NAC
20 284.6562.

21 Lastly, the Answering Brief also argues that a violation of a claims processing rule is
22 waived/forfeited if not promptly asserted. *See* Opening Brief, at 7. However, Kassebaum provides
23 no Nevada authority (or any authority) to support her position and, regardless, NRS 284.390 and
24 NAC 284.6562 are not claims processing rules. Furthermore, NDOC did not file its motion to

25
26 ¹ As a brief aside, the Opening Brief cites NRAP 3(a)(2) and (3) to argue that even appeals
27 to the Nevada Supreme Court need only be filed in a timely manner and that other deficiencies
28 can be remedied after the fact. *See* Opening Brief, at 5–6. However, Kassebaum’s argument
overlooks the fact that such a provision does not exist in NRS Chapter 284 or NAC Chapter 284,
and that the authority of hearing officers is strictly limited. *See Bergmann*, 109 Nev. at 674.

1 dismiss until December 19, 2019, because the parties engaged in mediation through the hearings
2 division on December 4, 2019. Also, the December 19, 2019, motion was still timely pursuant to
3 the December 19, 2019, Notice of Resetting, which established an April 1, 2020, motions
4 deadline. *See* ROA, at 58. Still further, a lack of subject matter jurisdiction can be raised by the
5 parties at any time. *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990).

6 **3. Neither NAC 284.6562 nor the NPD-54 form are unconstitutionally vague.**

7 In her third argument, Kassebaum complains that the section on the NPD-54 form titled
8 “Appeal Instructions” omits the requirements of NAC 284.6562(2), which (according to Kassebaum)
9 renders the entire NPD-54 form unconstitutional. *See* Opening Brief, at 8–10. However, overlooked
10 by Kassebaum is that the *very first page* of the NPD-54 form includes the language of NAC
11 284.6562(2)(b) in bold and italicized letters: “*This appeal form must be accompanied by the written*
12 *notification of the appointing authority’s decision regarding the proposed action provided to the*
13 *employee pursuant to subsection 7 of NAC 284.6561.*” *See* ROA, at 28. This warning is taken
14 *verbatim* from NAC 284.6562(2)(b), which mandates that an appeal “must” be “[a]ccompanied by
15 the written notification of the appointing authority’s decision regarding the proposed action provided
16 to the employee pursuant to subsection 7 of NAC 284.6561.” As such, the NPD-54 form clearly and
17 unequivocally states (*verbatim*) the mandatory requirements of NAC 284.6562(2)(b). Therefore, no
18 serious argument can be made that the NPD-54 is so vague as to amount to a violation of
19 Kassebaum’s due process rights. Furthermore, even if the NPD-54 did not exactly quote NAC
20 284.6562(2)(b) *verbatim*, Kassebaum is not relieved from complying with Nevada law (which is also
21 clear and unambiguous).

22 **4. Kassebaum was afforded the opportunity to submit a complete, proper, and**
23 **timely appeal of her 15-day suspension, but failed to do so; therefore,**
24 **Kassebaum’s due process rights were satisfied.**

25 Lastly, Kassebaum argues that she was constitutionally entitled to a post-deprivation hearing
26 and that Hearing Officer Brown violated Kassebaum’s due process rights by dismissing her appeal.
27 *See* Opening Brief, at 10–11 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct.
28 1487 (1985)). However, Kassebaum’s argument misstates the holding in *Loudermill*. The law is well-
established that the *opportunity* for a post-deprivation hearing before a neutral decisionmaker is

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

12 Here, it is irrefutable that Kassebaum (like every other classified State employee who is
13 subject to workplace discipline) had an adequate remedy to appeal her suspension under NRS
14 284.390 and NAC 284.6562. However, Kassebaum failed to file a complete and proper appeal in
15 accordance with the mandatory terms of NAC 284.6562, which Kassebaum failed to cure within the
16 10-day appeal period. Kassebaum had notice of the requirements of NAC 284.6562(2)(b), which
17 was on the first page of the NPD-54, and had an opportunity to file a complete and proper appeal
18 with the hearings division. Nevertheless, Kassebaum failed to do so in a timely manner. As such, due
19 process was clearly satisfied because a constitutionally adequate post-deprivation remedy was
20 available to Kassebaum, but Kassebaum simply failed to invoke the administrative appeals process.

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V.

CONCLUSION

Based on the foregoing, NDOC respectfully requests that the Court deny Kassebaum's Petition for Judicial Review and affirm Hearing Officer Brown's Decision and Order in Appeal No. 2001869-CB.

DATED this 12th day of January 2021.

AARON D. FORD
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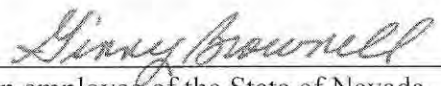
CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 12th day of January 2021, I served a copy of the foregoing **DEPARTMENT OF CORRECTION'S ANSWERING BRIEF** by causing a true copy thereof to be filed with the Clerk of the Court using the eFlex system and/or by email or by depositing a true copy of the same for mailing addressed as follows:

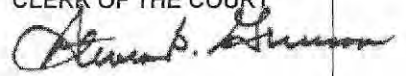
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8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

10 SHARI KASSEBAUM,
11 Petitioners,

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

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.

17 PETITIONER SHARI KASSEBAUM'S REPLY BRIEF
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1 However, even if the court found Kassebaum's position before the Hearing Officer to be
2 contrary to the position asserted in her Petition, NDOC still fails to establish elements three (3) and
3 five (5). Kassebaum was not successful in asserting her position before the Hearing Officer; rather, she
4 was unsuccessful in opposing NDOC's position. Moreover, the position of Kassebaum through her
5 Limited Opposition was the result of ignorance and/or mistake of law by former counsel who was not
6 well versed in the jurisdictional and due process issues raised by Kassebaum's Petition.

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

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

12 In attempting to counter the arguments put forth by Kassebaum in her Petition that NAC
13 284.6562(2)(b) is not jurisdictional, and that her due process rights were violated, NDOC asserts that
14 Kassebaum cannot raise new issues for the first time on judicial review. (Answering Brief at pp. 6-7).

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

23 The second exception is that constitutional issues may be raised for the first time on appeal.
24 *Tam v. Eighth Judicial District Court*, 131 Nev. 792, 358 P.3d 234 (2015). See also *Jones v. State*, 101

1 Nev. 573, 707 P.2d 1128 (1985) (where "fundamental rights are implicated, it is appropriate to hear a
2 constitutional question for first time on appeal"). The right to a hearing before being deprived of a
3 property interest in employment is a fundamental right secured under the 14th Amendment.

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

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

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

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

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

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

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

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

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

18 NDOC's Opening Brief claims "the intent of the Personnel Commission in adopting NAC
19 284.6562(2) was plain". (Answering Br. at p. 9). What is "plain" is that the regulation was not
20 jurisdictional. Kassebaum's Opening Brief attached the Meeting Minutes of the Personnel Commission
21 for June 8, 2018 and the Legislative Counsel Bureau's "Explanation of Proposed Change" to its
22 Opening Brief. Nothing within those materials supports NDOC's claim that the change was intended to
23 be jurisdictional. Rather, the intent of the rule change was to be procedural in nature only, and it was to
24

1 assist the Department of Administration in distinguishing between hearings which occur prior to, and
2 subsequently after the discipline is imposed.

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

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

13 **IV. THE FAILURE TO PROVIDE KASSEBAUM WITH A POST TERMINATION**
14 **HEARING VIOLATED DUE PROCESS.**

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

16 As set forth in Kassebaum's Brief, the provisions of NRS 281.390 (7) create a property interest
17 in Kassebaum's employment within the meaning of the 14th Amendment. Under *Cleveland Board of*
18 *Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985) a more comprehensive post-termination
19 evidentiary hearing is mandatory where, as in Kassebaum's case, she was only provided with an
20 informal pre-deprivation hearing. NDOC does not dispute that as a result of the dismissal of
21 Kassebaum's appeal, she did not receive that more comprehensive post-termination hearing.

22 NDOC cites an Eighth Circuit case, *Krentz v. Robertson Fire Protection District*, 228 F.3d. 897
23 (8th Cir. 2000) to argue that where an employee refuses to participate in a post-termination proceeding,
24

1 the employee has waived their procedural due process rights.¹ However, Kassebaum did not refuse to
2 participate in any post-termination proceedings. To the contrary, Kassebaum filed an appeal seeking a
3 post-termination hearing.

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

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

19 ///

20 ///

21 ///

22 ///

23
24 ¹ NDOC also cites *Dusanek v. Hannon*, 677 F.2d 538 (7th Cir. 1982). However, this case is of little utility as it
predates *Loudermill* which was not decided until 1985.

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

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

8 The NPD-54 contains a section entitled "Appeal Instructions".² Those "Appeal Instructions"
9 make no mention of attachments to the appeal form, and instead states "Attachments to this Board may
10 be provided however, evidence and back up documents need not be provided at this time; prior to the
11 hearing, the clerk will send a request for any supporting material." The next sentence states "If you
12 have received a Specificity of Charges or written notice of involuntary transfer, you must attach it to
13 this appeal. A Specificity of Charges is a different document than the final disciplinary decision. The
14 Specificity is the notice of the charges and the "recommendation" for disciplinary action which is the
15 HR-41 form. [https://hr.nv.gov/uploadedFiles/hrnv.gov/Content/Resources/Forms/Disciplinary/HR-](https://hr.nv.gov/uploadedFiles/hrnv.gov/Content/Resources/Forms/Disciplinary/HR-41%2010_20.pdf)
16 [41%2010_20.pdf](https://hr.nv.gov/uploadedFiles/hrnv.gov/Content/Resources/Forms/Disciplinary/HR-41%2010_20.pdf).³

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

21
22 ² The copy contained within the Record at ROA 070 is a very poor photocopy, but the words "Appeal
23 Instructions" can be made out. The NPD-54 appeal form is available for viewing at the Division of Human
24 Resource Management website at:
25 [https://hr.nv.gov/uploadedFiles/hrnv.gov/Content/Resources/Forms/Hearings/HR-54%20Appeal\(1\).pdf](https://hr.nv.gov/uploadedFiles/hrnv.gov/Content/Resources/Forms/Hearings/HR-54%20Appeal(1).pdf)

26 ³ Prior to November of 2020 it was designated the "NPD-41" form.

1 The failure to place this information in the "Appeal Instructions", coupled with the contrary
2 instructions informing an employee that documents may be provided at a later date, violates due
3 process. As noted in the Opening Brief, the Nevada Supreme Court in *Rust v. Clark County School*
4 *Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987) held that jurisdictional rules must be "clear and
5 absolute" in order to give all fair notice of what is required. The information provided on the NPD-54
6 is anything but "clear and absolute".

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

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

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

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

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

1 VI. CONCLUSION.

2 For all of the reasons set forth above, Kassebaum's Petition for Judicial Review should be
3 GRANTED in this matter remitted back to the hearing officer for a hearing on the merits.

4 DATED this 2nd day of February 2021.

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1 CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

2 I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the ² ~~1~~ day
3 day of February 2021, pursuant to NRCP 5(b) and Administrative Order 14-2, I electronically
4 transmitted a true and correct copy of the above and foregoing PETITIONER SHARI
5 KASSEBAUM'S REPLY BRIEF by way of Notice of Electronic Filing provided by the court
6 mandated E-file & Serve system, to the e-mail address on file for:

7 Kevin Pick, Esq.
8 Deputy Attorney General
9 NEVADA ATTORNEY GENERAL'S OFFICE
 Email: kpick@ag.nv.gov

10
11
12 /s/Joi E. Harper
13 An employee of the
 LAW OFFICE OF DANIEL MARKS
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APPENDIX A

APPENDIX A

STATE OF NEVADA
HEARINGS DIVISION

BEFORE THE APPEALS OFFICER

JUSTUS WENDLAND,

Petitioner-Employee,

vs.

STATE OF NEVADA, ex rel., its
OFFICE OF THE SECRETARY
OF STATE,

Respondent-Employer.

Case No. 2003166-VO

**ORDER DENYING MOTION
TO DISMISS APPEAL FOR
LACK OF JURISDICTION**

Pending before the undersigned Hearing Officer is Respondent State of Nevada, *ex rel* its Office of the Secretary of State's ("the SOS") *Motion to Dismiss Appeal for Lack of Jurisdiction* ("Motion") submitted on April 30, 2020. On May 6, 2020 Petitioner Justus Wendland timely submitted his *Opposition to Office of the Secretary of State's Motion to Dismiss Appeal for Lack of Jurisdiction and Request for Arguments* ("Opposition"). On May 11, 2020, the SOS timely submitted its *Reply in Support of Motion to Dismiss Appeal for Lack of Jurisdiction* ("Reply"). This Hearing Officer hereby makes the following Findings of Fact, Conclusions of Law, and Decision.

FINDINGS OF FACT

On or about February 10, 2020 Mr. Wendland was served with a Specificity of Charges ("SOC") for alleged violations of the Nevada Administrative Code (NAC) and of the SOS Prohibitions and Penalties. *Motion*, Exhibit 2 to Exhibit C. The SOC consisted of form NPD-41, an additional three (3) pages outlining the alleged violations, and the SOS Personal Conduct

1 Guidelines. The SOC notified Mr. Wendland of the proposed decision to dismiss Mr. Wendland
2 from State service effective February 25, 2020. The SOC was subsequently modified to change
3 the proposed effective date of the dismissal to March 16, 2020. *Motion*, Exhibit A.

4
5 The SOC notified Mr. Wendland that he was entitled to a predisciplinary hearing which
6 would be held on March 13, 2020. *Id.* On March 23, 2020, the Chief Deputy of the SOS issued
7 a notification ("Notification") to Mr. Wendland that the proposed disciplinary action of dismissal
8 outlined in the SOC would be carried out effective March 23, 2020.¹ *Motion*, Exhibit B. The
9 notification informed Mr. Wendland of his right to appeal the dismissal. *Id.*

10
11 On March 27, 2020 Mr. Wendland timely appealed his dismissal using form NPD-54,
12 *Appeal of Dismissal, Suspension, Demotion or Involuntary Transfer*, and attached a Position
13 Statement from his attorney, the February 25, 2020 SOC, and a November 22, 2019 Letter of
14 Instruction. *Motion*, Exhibit C. Mr. Wendland did not attach the March 23, 2020 Notification.

15 CONCLUSIONS OF LAW

16 **I. Jurisdiction**

17
18 NRS 284.390 sets forth the absolute right of an employee to a hearing to determine the
19 reasonableness of a dismissal from State service. To invoke the administrative jurisdiction of the
20 Department of Administration the employee must file a written request for a hearing within 10
21 working days after the effective date of the employee's dismissal or suspension. NRS 284.390
22 (1). Once the request is submitted, the hearing officer *shall* grant the employee a hearing within
23 the requisite timeframes, unless otherwise waived. NRS 284.390 (2). Here, it is undisputed Mr.
24
25
26

27
28 ¹ The Notification references, in error, a November 22, 2019 SOC.

1 Wendland timely filed the NPD-54, which served as his appeal and request for hearing, after a
2 final decision was made on the Specificity of Charges.

3 The Nevada Administrative Code sets forth the procedural requirements for requesting a
4 hearing. NAC 284.6562, *Request for hearing to determine reasonableness of dismissal,*
5 *demotion or suspension*, provides, in relevant part:
6

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

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

14 (a) Addressed and submitted as required pursuant to NAC 284.778,² and

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

18 ...

19 NAC 284.6562.

20 The NPD-54 form states that the form must be accompanied by the written notification
21 of the appointing authority's decision regarding the proposed action provided to the employee
22 pursuant to subsection 7 of NAC 284.6561.³ The notification of decision need not accompany

23 ² NAC 284.778 provides:

24 1. A request for a hearing must be addressed to the Administrator and submitted on the form provided by the
25 Division of Human Resource Management.

26 2. A copy of any written communication directed to a hearing officer must be sent to the clerk assigned to the
27 hearing officer.

28 3. A party shall not communicate with a hearing officer regarding the merits of a case:

(a) Except in the presence of all parties to the hearing; or

(b) Unless all parties to the hearing are notified of the communication in advance.

4. Unless otherwise agreed upon in writing by all parties, an offer or demand of settlement made by a party
must not be disclosed to or proposed by a hearing officer before the issuance of a final decision by the hearing
officer.

³ NAC 284.6561 provides, *inter alia*:

1 the request for hearing if the appointing authority *failed to provide the notification*. NAC
2 284.6562 (3) (emphasis added).

3 Respondent argues that if an employee fails to comply with NAC 284.6562 (2) (b) by not
4 attaching the notification of decision then the Department of Administration has no jurisdiction
5 to hear the appeal notwithstanding that an employee has timely filed a request for hearing under
6 NRS 284.390 (2). To the contrary, the Hearing Office has jurisdiction to hear a timely appeal
7 filed pursuant to NRS 284.390 and has jurisdiction to determine whether the appellant has
8 substantially complied with the administrative procedural requirement under NAC 284.6562 (2)
9 (b) addressing what information must accompany the NPD-54.
10

11 There are no Nevada cases specifically addressing whether NAC 284.6562 (2) (b), or a
12 similar regulation setting forth what must accompany a notice of appeal, is jurisdictional. As
13 stated by the U.S. Supreme Court, the term "jurisdictional" refers to a court's adjudicatory
14 authority and properly applies only to prescriptions delineating the classes of cases and matters
15 of personal jurisdiction. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160-161, 130 S.Ct. 1237
16 (2010).
17

18
19
20 ...Except as otherwise provided in NAC 284.6563, if an appointing authority proposes that a permanent
21 employee be dismissed, suspended or demoted, the following procedure for a predisciplinary review before the
22 proposed action must be followed:

23 ...

24 7. The employee must be:

- 25 (a) Given a copy of the finding or recommendation, if any, resulting from the predisciplinary review; and
26 (b) Notified in writing of the appointing authority's decision regarding the proposed action and the reasons
27 therefor on or before the effective date of the action. The effective date of the action is the first day the disciplinary
28 action takes effect.

1 This Hearing Officer is persuaded by the holding in *Kwai Fun Wong v. Beebe*, 732 F.3d
2 1030. (9th Cir. 2013). In *Kwai Fun Wong v. Beebe*, the Ninth Circuit found that only the
3 legislative body of government can establish jurisdictional rules, and unless the legislature gives
4 express and clear authority for an agency to create its own jurisdictional requirements any
5 regulations are merely "claims processing" rules that do not preclude a tribunal's jurisdiction.⁴
6 The Ninth Circuit ruled that the Federal Tort Claims Act's provision governing the applicable
7 time period required by the Act's statute of limitations was not jurisdictional, and therefore the
8 application of the doctrine of equitable tolling to the Plaintiff's late-filed amended complaint was
9 appropriate. *Kwai Fun Wong v. Beebe*, 732 F.3d at 1053.
10

11
12 NAC 284.6562 (2) (b) is akin to a claims processing rule. The regulation was created by
13 the executive branch of government, not the legislative. It is a procedure which sets forth what
14 "must" accompany the request for a hearing.⁵ NAC 284.6562 (2) (b) does not plainly state or
15 imply that a Hearing Officer lacks subject matter jurisdiction to hear an appeal that was timely
16 filed under NRS 284.390 (1) and NAC 284.6562 (1) because the request for a hearing does not
17 attach the notification of dismissal.⁶ Moreover, it is internally inconsistent to conclude that
18 NAC 284.6562 (2) (b) is jurisdictional when NAC 284.6562 (3) permits an appeal to go forward
19 when the agency fails to provide the employee with a notification of discipline. Therefore, NAC
20
21

22
23 ⁴ Claim-processing rules are rules that seek to promote the orderly progress of litigation by requiring that the parties
take certain procedural steps at certain specified times. *Id.* at 1036.

24 ⁵ Use of the word "must" does not create a jurisdictional requirement. *See Union Pacific Railroad Co. v.*
25 *Brotherhood of Locomotive Engineers and Trainman General Committee of Adjustments, Central Region*, 558 U.S.
26 67 (2009) (finding that a petitioner's failure to comply with the regulatory "must" did not remove jurisdiction from
the National Railroad Adjustment Board because the regulatory requirement was a claims processing rule, not a
jurisdictional rule).

27 ⁶ This decision does not address whether the 10-day time filing requirement in the legislative statute, NRS 284.390,
28 is jurisdictional or non-jurisdictional, i.e. subject to equitable tolling, as there is no dispute that Mr. Wendland's
appeal was timely filed.

1 284.6562 (2) (b) is non jurisdictional and does not deprive the Hearing Officer of subject matter
2 jurisdiction to adjudicate Mr. Wendland's appeal. In addition, the Hearing Officer's jurisdiction
3 conferred by Chapter 284 of the Nevada Revised Statutes necessarily includes deciding whether
4 Mr. Wendland substantially complied with the requirements of NAC 284.6562 (2) (b).⁷

6 **II. Substantial Compliance**

7 In *Leven v. Frey*, 123 Nev. 399, 408, 168 P.3d 712, 719 (2007) the Nevada Supreme
8 Court addressed whether strict or substantial compliance was required on the deadlines for filing,
9 recording, and serving an affidavit of judgment renewal under NRS 17.214. In reaching its
10 decision, providing notice of the judgment was a crucial factor to the Nevada Supreme Court.
11 *Id.* at 403-404, 715-716. The court recognized the general tenet that "time and manner"
12 requirements are strictly construed, whereas substantial compliance may be sufficient for "form
13 and content" requirements. *Id.* at 406-409, 717-718, citing *Marsh-McLennan Bldg., Inc. v.*
14 *Clapp*, 96 Wash. App. 636, 980 P.2d 311, 313 n.1 (1999) (explaining that an unlawful detainer
15 statute's time requirements for filing a notice must be complied with strictly, while substantial
16 compliance with the statutes' requirements of the form and content of the notice was sufficient).
17 *See also Saticoy Bay LLC v. Nev. Ass'n Servs.*, 135 Nev. Adv. Op. 23, 444 P.3d 428 (2019)
18 (recognizing that time and manner requirements are strictly construed whereas substantial
19 compliance is permitted for form and content requirements); *Markowitz v. Saxton Special*
20 *Servicing*, 129 Nev. 660, 664-665, 310 P.3d 569, 572 (2013) (form and content provisions of a
21 rule dictate who must take action and what information that party is required to provide; because
22 they do not implicate notice, form and content-based rules are typically directory and may be
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28 ⁷ Respondent has argued that substantial compliance does not excuse Mr. Wendland's failure to attach the
Notification to the NPD-54.

1 satisfied by substantial compliance sufficient to avoid harsh, unfair or absurd consequences).
2 NAC 284.6562 (1) and (2) (a) speak to time and manner: that an employee must request a
3 hearing within 10 working days after the effective date of the dismissal, and that the request for
4 hearing must be addressed to the Administrator and submitted on the form provided by the
5 Division of Human Resources Management, i.e. the NPD-54 (NAC 284.778 (1)). NAC
6 284.6562 (2) (b) speaks to form and content, that is the information which must accompany the
7 NPD-54, i.e. the notification letter.
8

9
10 In determining whether a statute and rule require strict compliance or substantial
11 compliance a court also looks at policy and equity considerations, and in so doing, a court
12 examines whether the purpose of the statute or rule can be adequately served in a manner other
13 than by technical compliance with the statutory or rule language. *Saticoy Bay LLC v. Nev. Ass'n*
14 *Servs.*, 135 Nev. 180, 187, 444 P.3d 428, 434 (2019). The purpose of NAC 284.6562 (2) (b) is
15 not clear from the legislative history. As Respondent suggests, one purpose might be to provide
16 notice that the agency issued a final decision effective on a particular date. It does not appear
17 any other purpose could be served. If notice of the final decision and its effective date is the
18 purpose of NAC 284.6562 (2) (b), Mr. Wendland provided the effective date of his dismissal
19 from State service (the SOS's final decision) on page one of the NPD-54. Therefore, submission
20 of the NPD-54 appeal form in and of itself served the purpose of NAC 284.6562 (2) (b) by
21 providing actual knowledge that Mr. Wendland received a final decision from the SOS to
22 dismiss him effective March 23, 2020.
23

24
25 In addition, the SOS has not suffered prejudice as a result of Mr. Wendland not attaching
26 the Notification to the NPD-54. "[I]mperfections in noticing an appeal should not be fatal where
27 no genuine doubt exists about who is appealing, from what judgment, to which appellate court."
28

1 *Becker v. Montgomery*, 532 U.S. 757, 767, 121 S.Ct. 1801, 1808 (2001). The NPD-54 stated
2 Mr. Wendland was appealing his dismissal from State service effective March 23, 2020 and
3 attached to his appeal the Specificity of Charges which sets forth the alleged grounds for
4 dismissal. The Specificity of Charges clearly put all parties on notice as to the specifics of
5 appointing authority's disciplinary decision from which Mr. Wendland was appealing. In
6 addition, the SOS itself issued the Notification which did not alter the SOC in any manner other
7 than the effective date of the dismissal, all facts of which the SOS was aware of at the time Mr.
8 Wendland filed his appeal.


10
11 As made clear by the Nevada Supreme Court, substantial compliance may be sufficient to
12 avoid harsh, unfair, or absurd consequences. *Leven v. Frey*, 123 Nev. 399, 409, 168 P.3d 712,
13 718 (2007). It would be harsh and unfair to preclude Mr. Wendland from pursuing his appeal
14 when he timely filed a request for hearing and provided adequate documentation to put all on
15 notice of the decision he was appealing from. In addition, NRS and NAC Chapter 284 and
16 public policy would be served by allowing Mr. Wendland to proceed on his appeal and receive a
17 decision on the merits. This is not a case where there has been a blatant disregard of the
18 administrative procedures to be followed when requesting an administrative hearing.⁸

21
22 ⁸ The NPD-54 form and NAC 284.6562 (2) (b), when read with other provision of Chapter 284 of the NAC, is
23 arguably not clear and unambiguous. NAC 284.6562 (2) (b) does not specify the particular form of the "written
24 notification of the appointing authority's decision regarding the proposed action provided to the employee pursuant
25 to subsection 7 of NAC 284.6561" and does not include the word "final." NAC 284.6561(7) adds little insight as to
26 the form of the written notification that must accompany the request for a hearing. However, NAC 274.6561(7)
27 contemplates that the written appointing authority's decision regarding the proposed action [which must be attached
28 to the request for hearing] shall include the *reasons* for the action, e.g. a Specificity of Charges.⁸ In addition, NPD-
54 provides, in the section entitled **Appeal Instructions**, that if an employee received a Specificity of Charges they
must attach it to the appeal. It is certainly reasonable for one to conclude that the Specificity of Charges, which sets
forth the disciplinary decision of the appointing authority, the effective date, and the reasons for the discipline, can
suffice as the written notification under NAC 284.6562(2)(b) that must accompany the request for a hearing. In
addition, this Hearing Officer is aware of several appeals where the appellant attached the SOC to the NPD-54 rather
than the notification letter, indicating that NAC 284.6562 (2) (b) is not clear and unambiguous.

1 Accordingly, based upon the foregoing it is the finding of this Hearing Officer that Mr.
2 Wendland substantially complied with NAC 284.6562 (2) (b).

3 Because the Hearing Officer has jurisdiction over Mr. Wendland's appeal, and Mr.
4
5 Wendland substantially complied with NAC 284.6562 (2) (b), IT IS HEREBY ORDERED that
6 the Motion to Dismiss Appeal for Lack of Jurisdiction is DENIED.

7 DATED this 21st day of May, 2020.

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10 Victoria T. Oldenburg
11 Administrative Hearing Officer
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1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP(5)I hereby certify that I have, on the 21st day of May, 2020, served the
3 foregoing document via electronic mail to:

4 Judy Prutzman, Deputy Attorney General
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7 Reno, NV 89511
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11 500 Damonte Ranch Parkway, Suite 980
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13 jguinasso@hutchlegal.com

14 

15 Victoria T. Oldenburg

IN THE SUPREME COURT OF THE STATE OF NEVADA

Docket No.: 84008

SHARI KASSEBAUM

Appellant,

vs.

THE STATE OF NEVADA DEPARTMENT
OF CORRECTIONS,

Respondents.

Eighth Judicial District Court
Case No.: A-20-810424-P

JOINT APPENDIX
VOLUME I – Part 4 of 4

LAW OFFICE OF DANIEL MARKS-
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Attorneys for Appellant

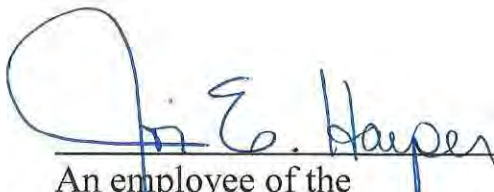
Kevin A. Pick
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Fax: (775) 688-1822
Attorneys for Respondents
State of Nevada Department
of Corrections

	<u>Description</u>	<u>Vol(s)</u>	<u>Pg(s)</u>
1.	Petition for Judicial Review (02/13/2020)	I	JA 00001-JA 00013
2.	Statement of Intent to Participate (03/03/2020)	I	JA 00014-JA00016
3.	Transmittal of Record on Appeal (10/16/2020)	I	JA 00017- JA 00091
4.	Petitioner's Opening Brief (12/14/2020)	I	JA 00092- JA 00118
5.	Department of Correction's Answering Brief (01/12/2021)	I	JA 0011- JA 00138
6.	Petitioner Shari Kassebaum's Reply Brief (02/02/2021)	I	JA 00139- JA 00163
7.	Findings of Facts, Conclusions of law, Decision and Order Granting Petition for Judicial Review (03/02/2021)	I	JA 00164-JA 00168
8.	Notice of Entry of Findings of Facts, Conclusions of Law, Decision and Order Granting Petition for Judicial Review (03/03/2021)	I	JA 000169- JA 000176
9.	Decision on Remand (12/09/2021)	I	JA 000177- JA 000180
10.	Case Appeal Statement (12/21/2021)	I	JA 000181-JA 000184
11.	Notice of Appeal (12/21/2021)	I	JA 000185- JA 000194
12.	Transcript of Proceedings (03/01/2022)	I	JA 000195- JA 000223

CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 20th day of April 2022, I did serve the above and foregoing JOINT APPENDIX VOLUME I – Part 4 of 4 by way of Notice of Electronic Filing provided by the court mandated E-Flex filing service, upon the Respondents at the following:

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(702) 386-0536; FAX (702) 386-6812
Attorneys for

DISTRICT COURT
CLARK COUNTY, NEVADA

SHARI KASSEBAUM,
Petitioners,

v.

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

Respondents.

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

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

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

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

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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 they Hearing Officer's
17 interpretation was not entitled to deference as it is purely a question of statutory construction and other
18 Hearing Officers had reached the opposite conclusion.

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

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

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

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DECISION

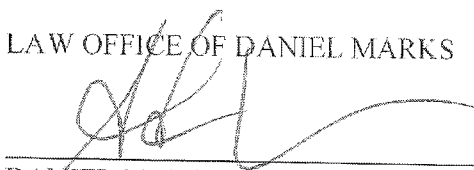
For all the reasons set forth above the Petition for Judicial Review is *granted*. The Order of the Hearing Officer in Case No. 2001869-CB filed January 14, 2020 dismissing Kassebaum's Appeal with prejudice is *reversed* and remanded back to the Department of Administration for assignment of a new Hearing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

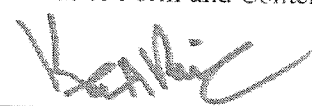

DISTRICT COURT JUDGE


Respectfully submitted by:

LAW OFFICE OF DANIEL MARKS


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Attorneys for Petitioner

Approval as to Form and Content:


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



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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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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

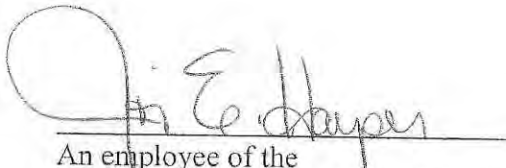
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15 Las Vegas, Nevada 89101
16 Attorneys for Petitioner

1 CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

2 I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 3rd
3 day of March 2021, pursuant to NRCP 5(b) and Administrative Order 14-2, I electronically transmitted
4 a true and correct copy of the above and foregoing NOTICE OF ENTRY OF FINDINGS OF FACT,
5 CONCLUSIONS OF LAW AND ORDER GRANTING PETITION FOR JUDICIAL REVIEW by
6 way of Notice of Electronic Filing provided by the court mandated E-file & Serve system, to the e-mail
7 address on file for:

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

13 
14 An employee of the
15 LAW OFFICE OF DANIEL MARKS
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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 they Hearing Officer's
17 interpretation was not entitled to deference as it is purely a question of statutory construction and other
18 Hearing Officers had reached the opposite conclusion.

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

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

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

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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


DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
office@danielmarks.net
ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
alevine@danielmarks.net
610 South Ninth Street
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
Nevada State Bar No. 011683
kpick@ag.nv.gov
5420 Kietzke Lane, Suite 202
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
8 The right to seek a hearing to determine the reasonableness of disciplinary action before the
9 Hearing Officer of the Commission is limited and to be invoked the employee must present evidence
10 establishing that the requested hearing for determination of reasonableness of discipline is properly
11 before a Hearing Officer.

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

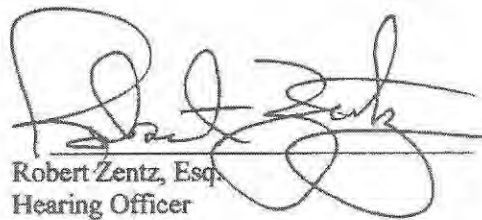
1 discipline and the date the request for hearing is filed. Clearly, this is a regulation was designed to
2 carry out the provisions of NRS 284.383. Further, no challenge was presented to the District Court
3 regarding the requirement found in NAC 284.778(1) that the employee use the form provided by 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.

7
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.

15
16
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:
6

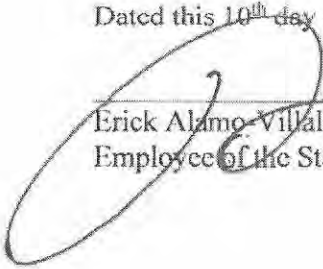
7 SHARI KASSEBAUM
8 7644 SPLASHING RIVER COURT
9 LAS VEGAS NV 89131

10 ADAM LEVINE ESQ
11 LAW OFFICES OF DANIEL MARKS
12 610 S 9TH ST
13 LAS VEGAS NV 89101

14 DEPARTMENT OF CORRECTIONS
15 CHARLES DANIELS, DIRECTOR
16 3955 W RUSSELL RD
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

LAW OFFICE OF DANIEL MARKS
DANIEL MARKS, ESQ.
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Nevada State Bar No. 004673
alevine@danielmarks.net
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Las Vegas, Nevada 89101
(702) 386-0536; FAX (702) 386-6812
Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

SHARI KASSEBAUM,

Petitioner,

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

v.

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

Respondents.

CASE APPEAL STATEMENT

1. Name of appellant filing this case appeal statement:

Shari Kassebaum.

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

District Court Judge Joanna S. Kishner.

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

Shari Kassebaum, Appellant:

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

///

///

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

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

5 Kevin A. Pick, Esq., Senior. Deputy Attorney General, Nevada Bar No. 11683, State of Nevada
6 Office of the Attorney General, 5420 Kietzke Lane, Suite 202, Reno, Nevada 89511;

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

8 Kevin A. Pick, Esq., Senior. Deputy Attorney General, Nevada Bar No. 11683, State of Nevada
9 Office of the Attorney General, 5420 Kietzke Lane, Suite 202, Reno, Nevada 89511;

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

12 Kevin A. Pick, Esq., Senior. Deputy Attorney General, Nevada Bar No. 11683, State of Nevada
13 Office of the Attorney General, 5420 Kietzke Lane, Suite 202, Reno, Nevada 89511.

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

18 n/a.

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

21 Appellant was represented by retained counsel.

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

23 Appellant is being represented by retained counsel.

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

n/a.

///

1 **9. Indicate the date the proceedings commenced in the district court:**

2 The Petition for Judicial Review was filed on February 13, 2020.

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

4 The Petition for Judicial Review was filed by Appellant after her appeal of a 15 day suspension
5 pursuant to NRS 284.390 was dismissed without a hearing by a State Hearing Officer due to the failure
6 to attach the final decision of the employer pursuant to NAC 284.656(2). The district court granted
7 judicial review and remanded the matter back to the Hearing and Officer to ascertain whether NAC
8 284.656(2) was jurisdictional, or only a claims processing rule. On remand from Judicial Review the
9 Hearing Officer issued his decision on December 9, 2021 affirming the dismissal on jurisdictional
10 grounds (and thus rendering the district court's decision to be a final judgment for purposes of NRAP
11 3A).

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

13 No.

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


15 No.

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

17 Yes.

18 DATED this 21st day of December 2021.

19 LAW OFFICE OF DANIEL MARKS

20 
21 DANIEL MARKS, ESQ.
22 Nevada State Bar No. 002003
23 ADAM LEVINE, ESQ.
24 Nevada State Bar No. 004673
25 610 South Ninth Street
Las Vegas, Nevada 89101
(702) 386-0536: FAX (702) 386-6812
Attorneys for Appellant

CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 21st day of December 2021, I did serve the above and forgoing CASE APPEAL STATEMENT, by way of Notice of Electronic Filing provided by the court mandated E-file & Serve service, upon Respondents at the following:

Aaron D. Ford, Esq.
Attorney General
Kevin A. Pick, Esq.,
Sr. Deputy Attorney General
Nevada Bar No. 11683
State of Nevada
Office of the Attorney General
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
Tel: (775) 687-2100
Fax: (775) 688-1822
Email: kpick@ag.nv.gov
Attorneys for Respondent
State of Nevada ex rel its Department of Corrections

J. E. Harper

An employee of the
LAW OFFICE OF DANIEL MARKS



LAW OFFICE OF DANIEL MARKS
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ADAM LEVINE, ESQ.
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(702) 386-0536; FAX (702) 386-6812
Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

SHARI KASSEBAUM,

Petitioner,

v.

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

Respondents.


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

NOTICE OF APPEAL

Respondent Shari Kassebaum hereby appeals the Findings of Fact, Conclusions of Law and Order Granting Petition for Judicial Review filed on March 2, 2021, and the Notice of Entry entered in this action on March 3, 2021. (Exhibit "I" attached hereto).

DATED this 21st day of December 2021.

LAW OFFICE OF DANIEL MARKS

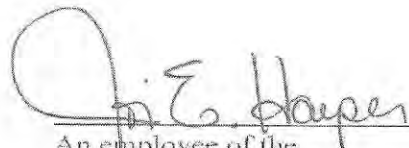


ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
610 South Ninth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

1 CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

2 I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 21st
3 day of December 2021, pursuant to NRCP 5(b) and Administrative Order 14-2, I electronically
4 transmitted a true and correct copy of the above and foregoing NOTICE OF APPEAL, by way of
5 Notice of Electronic Filing provided by the court mandated E-file & Serve system, to the e-mail
6 address on file for:

7 Aaron D. Ford, Esq.
8 Attorney General
9 Kevin A. Pick, Esq.,
10 Sr. Deputy Attorney General
11 Nevada Bar No. 11683
12 State of Nevada
13 Office of the Attorney General
14 5420 Kietzke Lane, Suite 202
15 Reno, Nevada 89511
16 Tel: (775) 687-2100
17 Fax: (775) 688-1822
18 Email: kpick@ag.nv.gov
19 *Attorneys for Respondent*
20 *State of Nevada ex rel its Department of Corrections*

21
22
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An employee of the
LAW OFFICE OF DANIEL MARKS



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3 office@danielmarks.net
ADAM LEVINE, ESQ.
4 Nevada State Bar No. 004673
alevine@danielmarks.net
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Las Vegas, Nevada 89101
6 (702) 386-0536; FAX (702) 386-6812
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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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

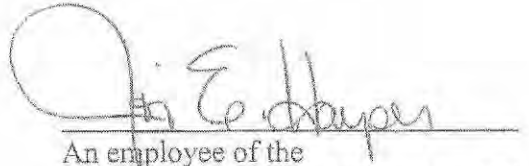
7 
8 DANIEL MARKS, ESQ.
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10 office@danielmarks.net
11 ADAM LEVINE, ESQ.
12 Nevada State Bar No. 004673
13 alevine@danielmarks.net
14 610 South Ninth Street
15 Las Vegas, Nevada 89101
16 Attorneys for Petitioner
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1 CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

2 I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 3rd
3 day of March 2021, pursuant to NRCP 5(b) and Administrative Order 14-2, I electronically transmitted
4 a true and correct copy of the above and foregoing NOTICE OF ENTRY OF FINDINGS OF FACT,
5 CONCLUSIONS OF LAW AND ORDER GRANTING PETITION FOR JUDICIAL REVIEW by
6 way of Notice of Electronic Filing provided by the court mandated E-file & Serve system, to the e-mail
7 address on file for:

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

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An employee of the
LAW OFFICE OF DANIEL MARKS

Steven D. Grierson

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8 alevine@danielmarks.net
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10 Las Vegas, Nevada 89101
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

19 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 Debt(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

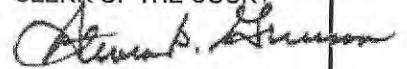


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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

IN THE MATTER OF THE PETITION)
OF SHARI KASSEBAUM,)

CASE NO. A-20-810424-P
DEPT NO. XXXI

**TRANSCRIPT OF
PROCEEDINGS**

Petitioner.)

AND RELATED PARTIES)

BEFORE THE HONORABLE JOANNA S. KISHNER, DISTRICT COURT JUDGE

THURSDAY, FEBRUARY 18, 2021

ORAL ARGUMENT AND/OR DECISION

APPEARANCES:

FOR THE PETITIONER: ADAM LEVINE, ESQ.

FOR DEPT. OF CORRECTIONS: KEVIN A. PICK, ESQ.
Senior Deputy Attorney General

RECORDED BY: LARA CORCORAN, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

1 LAS VEGAS, CLARK COUNTY, NEVADA, FEBRUARY 18, 2021, 10:39 A.M.

2 * * * * *

3 THE COURT: In the matter of the petition of Shari
4 Kassebaum, which is page 8.

5 Counsel for plaintiff, are you on the line?

6 MR. LEVINE: I am, Your Honor.

7 THE COURT: And, Mr. Levine, would you make an
8 appearance of your name?

9 MR. LEVINE: Yes. Adam Levine, Bar Number 4673.

10 I do see that opposing counsel is on the line. My
11 only question is my client wished to listen, and I don't know
12 if she has signed on yet.

13 THE COURT: Okay. Well, let's see. Do we have
14 Ms. Kassebaum? Are you on the line?

15 No. Well, if you want to send somebody a quick text,
16 and we can wait until 9:30. It's, like I said --

17 MR. LEVINE: It's only nine minutes. We can wait.

18 THE COURT: Okay. And then we'll see whichever case
19 I have all parties on first, and we'll call you first, and the
20 other one will just patiently wait.

21 (Proceedings recessed at 9:22 a.m., until 10:39 a.m.)

22 THE COURT: Okay. So we actually are going to page
23 8, and you can see why I tried to get you taken care of earlier
24 before the other case, because that way you wouldn't have as
25 long of a wait.

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1 MR. LEVINE: I was multitasking; it's fine.

2 THE COURT: No worries. Okay. So, Counsel for
3 plaintiff, can we have your appearance please on the Shari
4 Kassebaum, page 8 petition 810424.

5 MR. LEVINE: Adam Levine, Bar Number 4673, for
6 Sergeant Shari Kassebaum.

7 THE COURT: Appreciate it.
8 Counsel for respondent.

9 MR. PICK: Good morning, Your Honor. Senior Deputy
10 Attorney General Kevin Pick, Bar Number 11683, on behalf of the
11 Department of Corrections.

12 THE COURT: I do appreciate it. Okay. Well, thank
13 you for your patience.

14 And for our 10:30 Rule 16, we'll take you after we
15 complete this.

16 So go ahead, Counsel. Feel free to set forth your
17 arguments and then -- go ahead.

18 MR. LEVINE: Thank you. Thank you, Your Honor. It
19 will not take as long as the preceding matter.

20 Basically, this is a petition for judicial review of
21 an administrative decision which deprived Sergeant Kassebaum of
22 her appeal hearing based upon the failure to attach a piece of
23 paper to the State's appeal form.

24 As I pointed out in the reply brief, both arguments
25 going to jurisdiction and constitutional arguments may be

1 raised for the first time on appeal. In the proceedings before
2 the department of administration below, Sergeant Kassebaum was
3 represented by another attorney who was not as well versed in
4 these matters as I am, but again, jurisdiction can never be
5 waived or stipulated away by the parties and may be raised at
6 any time, even *sua sponte* by a Court, likewise, constitutional
7 issues are raised. And this petition implicates both.

8 The hearing officer dismissed the appeal based upon
9 an erroneous belief that a regulation adopted by the personnel
10 commission which states that the final decision of the
11 appointing authority shall be -- shall accompany the appeal was
12 jurisdictional in nature and therefore could not be cured after
13 the 10 days to file an appeal provided for under NRS 284.390
14 had expired. The hearing officer was incorrect and, of course,
15 issues of law are reviewed *de novo* by this Court. It is not
16 jurisdictional. It is what is called a claims processing rule.

17 It is a fundamental principal of administrative law
18 that an agency may not enlarge or restrict its own
19 jurisdiction. In other words, the personnel commission lacks
20 the authority to set jurisdictional limits. The only entity
21 that is authorized to do so is the Nevada Legislature, and it
22 has done so in NRS 284.390, which provides for the appeal, and
23 that statute provides both a time and manner provision. The
24 time is 10 days. The manner is in writing. Anything beyond
25 that is, by definition, a claims processing rule, which has

1 been defined by the U.S. Supreme Court in the *Union Pacific*
2 *Railroad Company* as a regulation for presenting and processing
3 claims. Saying that a piece of paper must accompany the appeal
4 form is, by definition, a regulation for presenting the claim.

5 I have cited the case law from the U.S. Supreme Court
6 criticizing quite strongly the abuse of the term jurisdictional
7 in connection with these sorts of rules.

8 Simply put, the State has not cited a single
9 authority that stands for the proposition that the personnel
10 commission may enact regulations of a jurisdictional nature,
11 particularly those of a jurisdictional nature that are in
12 variance with the jurisdictional requirements provided by the
13 legislature, which is 10 days and in writing. That's it.

14 I have addressed in my reply brief the State's
15 arguments regarding judicial estoppel. Again, prior counsel
16 was not well versed and therefore filed a limited opposition;
17 however, judicial estoppel doesn't apply because, at a bare
18 minimum, elements 3 and 5 are not provided. In other words,
19 that judicial estoppel in a lower -- in another proceeding, you
20 must assert a position and assert it successfully. That didn't
21 happen. Ms. Kassebaum did not assert a position successfully
22 in connection with the State's motion to dismiss for lack of
23 jurisdiction.

24 Likewise, the position taken cannot be as a result of
25 mistake or ignorance, and this was an issue of mistake or

1 ignorance of law by former counsel.

2 And finally, of course, judicial estoppel requires an
3 intentional wrongdoing or an attempt to obtain an unfair
4 advantage. None of that is present in this case.

5 Simply put, the notion that the rule is
6 jurisdictional has no support whatsoever, and in fact, we
7 supplied the regulatory history of the rule amendment at issue
8 in this case.

9 The purpose of the rule change was one, to assist the
10 Department to determine the type of hearing that is being
11 requested and, likewise, if you take a look at the discussion,
12 as part of that rule change, it made clear that the effective
13 date for purposes of triggering appeal rights of a suspension
14 is the first day of a suspension, not the last day, such that
15 in this case, since Sergeant Kassebaum received a 15-day
16 suspension without pay, the time limit to appeal would begin on
17 the first day of that suspension not the 15th.

18 Well, what does the decision of the appointing
19 authority add? It tells you the effective date of your
20 suspension and obviously would allow the Department of
21 Administration to determine is this timely or not, but it's not
22 jurisdictional, and there is no support in the regulatory
23 history that is intended to be jurisdictional because, as the
24 personnel commission I'm sure understands, it cannot adopt
25 regulations of a jurisdictional nature.

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1 Separate and apart from the fact that this is a
2 claims processing rule, there's the constitutional
3 implications. The 14th amendment says the State may not
4 deprive a person of life, liberty or property without due
5 process of law. The State took away from Sergeant Kassebaum
6 several thousand dollars in the form of a suspension, and it
7 did not provide her a postdeprivation hearing of the sort that
8 has been required by *Loudermill*, *Gilbert versus Homar*, and all
9 of their progeny.

10 Simply put, as articulated very clearly by the
11 Supreme Court in *Loudermill*, due process exists not by
12 legislative grace, but by constitutional guarantee. While the
13 State may choose not to create a property interest in
14 employment to protect a paycheck for the job itself, once it
15 has done so, it may not deprive the employee without adequate
16 constitutional safeguards which exist separate and apart from
17 the statutes that create the property interests.

18 In other words, the State has to give her a hearing.
19 It cannot deprive her of that hearing.

20 Yes, a State may apply reasonable time, place and
21 manner restrictions on any constitutional right, be it 1st
22 Amendment, 14th Amendment, and the legislature has done so with
23 its requirement that it be filed in writing and within 10 days.
24 But because those requirements were met, and it is undisputed
25 that the appeal was timely within 10 days, and it's undisputed

1 that it was in writing, because those requirements have been
2 met, the State simply cannot deprive Sergeant Kassebaum of her
3 right to a hearing, and the decision to dismiss the appeal
4 needs to be reversed.

5 And with that, unless the Court has any questions of
6 me, I'll turn it over to Mr. Pick to make his argument.

7 THE COURT: Although you mentioned it in your brief,
8 just for point of clarification, can you just state what is the
9 relief you are requesting on behalf of petitioner?

10 MR. LEVINE: That the petition for judicial review be
11 granted and the matter be remanded back to -- it's going to
12 have to be a new hearing officer because Hearing Officer Cara
13 Brown just recently retired.

14 THE COURT: Retired.

15 MR. LEVINE: But that it be remanded back to the
16 appeals division board to be assigned a new hearing officer for
17 a hearing on the merits.

18 THE COURT: Okay. Thank you so very much.

19 Counsel for the State, would you like to respond?

20 MR. PICK: Yes, Your Honor. Thank you very much.

21 And, Your Honor, I'd like to just start with the
22 basic legal argument that Hearing Officer Brown agreed with,
23 and frankly, the petitioner agreed with that resulted in the
24 decision and order now on appeal.

25 And the place I'd like to start with at the very

beginning here is NRS 284390, Subsection 1, which establishes the mandatory 10-day filing deadline for employee disciplinary appeals.

Now, under NRS 284.0652(d), the Nevada Legislature delegated to the personnel commission authority to adopt regulations to carry out all provisions of NRS 284. And it's important to emphasize, Your Honor, that those are not just authority to adopt procedural rules but all rules to carry out the provisions of Chapter 284.

Recently in *NDOT versus Bronder*, the Nevada Supreme Court found the personnel commission could not adopt jurisdictional rules under Chapter 281 because Chapter 281 only allowed the adoption of procedural rules. No similar limitation exists under Chapter 284. The ability there is to adopt all rules to carry out the provisions of Chapter 284.

Now, with that delegated power, Your Honor, the personnel commission adopted 284 -- NAC 284.6562, which is what needs to be done to satisfy the 10-day-filing requirements under NRS 284.390. Subsection 1 has to be filed within 10 days. Subsection (2)(a), it has to be addressed and submitted to the hearings division. (2)(b), it must be, quote, accompanied by written notification of the appointing authority's decision regarding the proposed disciplinary action, and that's the last section that -- it's undisputed that Ms. Kassebaum in her appeal form did not comply with,

1 completely undisputed. And it's still undisputed on judicial
2 review here today.

3 So not only does NRS-- excuse me, NAC 284.6562
4 explain what needs to happen to satisfy the 10-day, mandatory
5 10-day deadline for filing an appeal, but under the *Turk*
6 decision, the Nevada Supreme Court has found that regulations
7 adopted by the personnel commission had the full force and
8 effect of law.

9 So what we have here is a mandatory rule to enforce a
10 10-day filing requirements and that has the full force and
11 effect of law.

12 So again, it's undisputed here that Ms. Kassebaum did
13 not comply with that and did not essentially file a complete
14 appeal within the 10-day filing deadline, did not cure it
15 within the 10-day filing deadline, and has never cured it.

16 And so -- and that, Your Honor, was despite the fact
17 that NAC 284.6562 2b is very clear on what's required. That's
18 despite the fact that the appeal form, the NPD-54 what's
19 called, quotes the NAC provision verbatim in bold and
20 italicized letters and instructs what is exactly required, and
21 it must be accompanied by the final disciplinary letter.

22 So the petitioner, before Hearing Officer Brown
23 didn't disagree with anything I just said. In fact, the
24 petitioner agreed with every single bit of the legal analysis I
25 just provided this Court with, but the petitioner through new

1 counsel has now changed her mind, is now asking the Court to
2 consider new legal arguments that Hearing Officer Brown never
3 had an opportunity to consider.

4 And before getting to some of petitioner's legal
5 arguments, we have emphasized three things in our answer and
6 brief, and the first is that the Supreme Court has held that
7 Courts must defer to an agency's interpretation of its own
8 statutes and governing regulations.

9 Petitioner argues that no deference is owed because
10 questions of law are reviewed *de novo* on judicial review;
11 however, this is apparently an exception to the rule, and
12 that's in the *Taylor versus DHHS* case, 129 Nevada 928, which
13 states very clearly that although statutory construction is
14 generally a question of law reviewed *de novo*, this Court defers
15 to an agency's interpretation of its governing statutes and
16 regulations. That's just what the law says. That's Taylor.
17 And it's contrary to counsel's arguments.

18 Second, the petitioner is judicially estopped from
19 taking these contrary positions on judicial review. Petitioner
20 argues that not all of the elements of judicial estoppel has
21 been satisfied, and she points out through counsel the third
22 elements of judicial estoppel has not been satisfied. That's
23 whether the party was successful in asserting a first position.

24 Well, frankly she was successful, but she agreed that
25 the case should be dismissed. And it very well was dismissed.

1 So she was successful in -- and Hearing Officer Brown adopted
2 the legal conclusions that she did not contest and that
3 Ms. Kassebaum through her counsel agreed with before the
4 hearing officer.

5 The fifth element is the first position was not taken
6 as a result of ignorance, fraud or mistake.

7 Again, Ms. Kassebaum was represented by counsel, and
8 counsel herself even agreed and analyzed the requirements and
9 found that it indeed the defendant's motion was legally sound
10 and would be granted.

11 The last one counsel argued is that there is no
12 unfair advantage. Well, the unfair advantage here, Your Honor,
13 is that counsel, through agreeing and then changing her mind,
14 has completely nullified the entire administrative procedure
15 appeal process and hearing officer review in general.

16 And, you know, Your Honor, this is an appeal process
17 where they agreed with something, and now they completely
18 changed their mind. And again that completely nullifies the
19 entire purpose of hearing officer review. It completely
20 nullifies the entire purpose of review under NRS 284.390.

21 Third, Your Honor, we've argued that parties cannot
22 take inconsistent positions on appeal. And the petitioner
23 argues that she can raise subject matter jurisdiction at any
24 time. That's not the rule, Your Honor. The rule is that you
25 can raise a lack of subject matter jurisdiction at any time,

1 and that's very clear in the *Landreth versus Malik* case,
2 127 Nevada 175, where the Court, and I quote, whether a Court
3 lacks subject matter jurisdiction can be raised at any time.
4 Here that's not what the petitioner is arguing. Petitioner is
5 arguing the opposite of that. She is arguing that Hearing
6 Officer Brown actually had jurisdiction, but then it ruled
7 incorrectly that she had -- that she did not have jurisdiction.

8 So petitioners are not arguing the lack of
9 jurisdiction. So this rule that you can raise subject matter
10 jurisdiction is completely inapplicable. And, you know, Your
11 Honor, think about the -- I think about the basis of this rule
12 is that if a Court is acting outside its jurisdiction, then the
13 party should be able to raise that at any time. This is not
14 what's happening in this case, and the rule is generally not
15 applicable in the way that counsel is applying it here.

16 Lastly, whether petitioner argues that they can raise
17 constitutional issues at any time, jurisdiction of a hearing
18 officer is a jurisdictional argument. It's not a
19 constitutional argument.

20 And otherwise, you know, Your Honor, every time a
21 Court says it doesn't have jurisdiction, you'll be opening up a
22 due process lawsuit. That's just not the case here. It's a
23 jurisdictional argument.

24 Perhaps some of the other arguments that counsel now
25 raises for the very first time could be considered

1 constitutional arguments, whether it was -- whether the NPD-54
2 form was constitutionally vague. You know, perhaps that's a
3 constitutional argument, but whether jurisdiction exists is a
4 jurisdictional argument, not a constitutional argument.

5 And, Your Honor, briefly I'd like to follow up with
6 three arguments in the petitioner's opening brief.

7 The first is whether this whole thing is a claims
8 processing rule.

9 And, Your Honor, NDOC has emphasized in its answering
10 brief and that petitioner has not cited a single Nevada case
11 that this is indeed a claims processing rule, and they had an
12 opportunity in the reply brief. They didn't even address the
13 claims process rule issue in their reply brief, and so they
14 have not provided this Court with a single ounce of authority
15 from Nevada law instructing that this is a claims processing
16 rule.

17 And, Your Honor, even if you look to analogous
18 federal cases, they say the rules regarding the filing of a
19 notice of appeal are jurisdictional and are not claims
20 processing rules, and that's in the U.S. Supreme Court case of
21 *Bowles v. Russell*, 551 U.S. 205.

22 And, Your Honor, even if it is a claims processing
23 rule, it still results in dismissal. Your Honor, the
24 exhaustion requirement under Title VII is the classic claims
25 processing rule that people deal with in federal court and has

1 been recently, in recent years clarified as a claims processing
2 rule and not a jurisdictional rule.

3 But Your Honor, cases are dismissed under Title VII
4 all the time for failure to exhaust administrative remedies,
5 and I've had two this year that were exhausted, that failed to
6 exhaust and that we obtained a dismissal on.

7 And so just because it's a claims processing rule,
8 which we don't agree with is not the silver bullet that counsel
9 frankly thinks it is because even a claims processing rule
10 still results in dismissal.

11 Your Honor, just quickly finishing up, whether the
12 petition -- petitioner also argues that the 14th amendment
13 mandates a posttermination hearing.

14 Your Honor, that's not exactly correct. It mandates
15 the opportunity for a posttermination hearing, and that's very
16 clear under federal law. The Seventh Circuit in the *Dusanek*
17 *versus Hannon* case, which is cited by the respondents, clearly
18 instructs that the availability of recourse to a
19 constitutionally sufficient procedure satisfies due process.

20 And, Your Honor, Ms. Kassebaum here clearly had the
21 opportunity to file something. And, Your Honor, dozens and
22 potentially even up until the hundreds of employees file these
23 appeals every year. So they can do it successfully and so
24 clearly, you know, this is not a new process. Clearly a
25 constitutionally sufficient administrative process does exist,

1 but Ms. Kassebaum in this context failed to take advantage of
2 that administrative process by not filing a full and proper
3 complete appeal within the 10-day deadline and not curing it
4 within the 10-day deadline, and she didn't even cure it
5 afterwards.

6 And that's a Seventh Circuit case, Your Honor, was --
7 certiorari was denied by the United States Supreme Court in
8 that case as well, which, you know, I would suggest that that
9 is still good law and is the binding precedent here with
10 respect to that.

11 Lastly, Your Honor, petitioner argues that the NPD-54
12 form is constitutionally vague. It's written in the law, Your
13 Honor, and it's, regardless of what the form says, it's the
14 law. The law is not constitutionally vague, and I have not
15 heard anywhere from counsel arguing that NAC 284.6562 (2) (b) as
16 written into the law is unconstitutionally vague. And so, you
17 know, it's -- ignorance of the law, Your Honor, is no excuse.
18 That's what's required, and it clearly was not satisfied in
19 this case. That's undisputed, and so in a certain respect,
20 Your Honor, it's not really relevant what the NPD-54 form says.

21 But if you look at the NPD-54 form, Your Honor, it
22 quotes verbatim the NAC. And in bold letters on the very first
23 page and highlighted in bold letters, and then on page 72 of
24 the record on appeal, attached to the NPD-54 form, is actually
25 quoted verbatim entire NAC provision which requires it.

1 So, you know, clearly this is not constitutionally --
2 unconstitutionally vague. Clearly the NAC is clear, and
3 Ms. Kassebaum knew or should have known about the existence of
4 these requirements and the, you know, based on the deference of
5 the hearing officer, based on the clear outline of Nevada law,
6 based on the delegated authority that the personnel
7 commissioners had to adopt NAC 284.6562, including
8 Subsection (2) (b), that this clearly is a jurisdictional issue
9 because it goes to the 10-day filing deadline of what needs to
10 be done to satisfy the 10-day filing deadline.

11 And so based on that, Your Honor, we'd ask that you
12 deny the petition and uphold Hearing Officer Brown's decision
13 and order.

14 THE COURT: Okay. I've got a quick question for you.

15 MR. PICK: Yes, Your Honor.

16 THE COURT: The distinction between the filing
17 deadline that's required in the code and the completeness of
18 what is filed by the 10 days, is it your assertion on behalf of
19 respondent that -- the requirement, the 10-day requirement is
20 only as to fully complete documents, not partial documents?

21 MR. PICK: It is, Your Honor, exactly. And I think
22 that goes to the, you know, the *Rusk* case, which instructs and
23 talks about the proper and timely filing of a notice of appeal
24 is jurisdictional.

25 And so it's -- and, you know, I didn't bring it up in

1 my argument, and neither did counsel, but it's also analogous
2 to the whole line of precedent on *Washoe County v. Otto* is that
3 it has to be a complete and proper petition for judicial review
4 because it's a special statutory provision that creates a
5 vehicle for judicial review.

6 Well, hearing officer review is no different, Your
7 Honor, and so strict compliance is required with those
8 provisions. And as we pointed out in our brief, Your Honor,
9 this is a time and manner requirement. NAC 284.6562 is a time
10 and manner requirement, and the Nevada Supreme Court in the
11 *Markowitz versus Saxon Special Servicing* case, 129 Nevada 660,
12 does instruct that time and manner requirements in statutes
13 require strict compliance, and clearly this was not strict
14 compliance. It wasn't even substantial compliance, Your Honor.
15 She just didn't file it.

16 And so I'm not even sure how an argument could be
17 made that substantial compliance was even found here. And so,
18 yes, Your Honor, I think that is exactly our argument that
19 strict compliance with these requirements is required, and a
20 full and complete proper appeal that is timely, that is filed
21 within the 10-day-filing deadline is exactly what is required.

22 THE COURT: Okay. Thank you so much.

23 Counsel for petitioner, you get last word. Go ahead,
24 please.

25 MR. LEVINE: Thank you. A couple things -- well,

1 actually a number of things.

2 First, just because something is mandatory under
3 (video interference) does not render it jurisdictional in
4 nature. Let me give you a good example. When I file an appeal
5 from a District Court decision to the Nevada Supreme Court, I
6 have to do it in writing, and I have to file it with the
7 District Court and I have to do it within the 30 days for the
8 appeal. That is the jurisdictional requirement, but there's a
9 rule that says I have to file a case appeal statement. Here's
10 a rule that says I have to file I believe it's a \$500 appeal
11 bond. If I don't file those with the notice of appeal within
12 the 30 days, the case is not dismissed for lack of
13 jurisdiction. I get a deficiency notice. So just because a
14 rule is phrased in mandatory terms does not render it of a
15 jurisdictional nature.

16 Jurisdiction goes to the power of the tribunal to
17 hear a case.

18 Second, Mr. Pick's argument regarding raising
19 jurisdiction on appeal for the first time is limited only to
20 lack of jurisdiction, is not accurate, and that is not what the
21 case law says. I have cited, let's see, *Old Aztec Mine Inc.*
22 *versus Brown*, a point not urged in the trial court unless it
23 goes to the jurisdiction of that Court is deemed to have been
24 waived and will not be considered. It doesn't limit it to
25 lack, it says unless it goes to the jurisdiction.

1 Likewise, *Garmong versus Lyon County Board of*
2 *Commissioners*, quote, issues of jurisdiction may be considered
3 for the first time on appeal. It doesn't state only lack, and
4 then it says issues. Well, whether there is or is not
5 jurisdiction is an issue.

6 Finally, *Wallace versus Smith* (2018), questions of
7 jurisdiction can never be waived or stipulated away by the
8 parties. So even if the parties say we're stipulating there's
9 no jurisdiction, it cannot be stipulated away, okay.

10 So jurisdiction can be raised at any point on appeal.

11 Mr. Pick indicated that petitioner's counsel changed
12 her mind. No, petitioner's counsel did not change her mind.
13 Ms. Kassebaum had the hearing officer's decision reviewed by
14 me, who was much more experienced and well versed in these
15 matters, and I quickly concluded that the hearing officer was
16 wrong.

17 This is a minor point. When he says oh,
18 Ms. Kassebaum agreed there was no jurisdiction, that's not
19 actually what is written, whether that was intended or not,
20 what Ms. Lizada former counsel wrote was Kassebaum concedes
21 that procedurally, employer will prevail on this mission to
22 dismiss.

23 Conceding that a hearing -- predicting or conceding
24 that a particular hearing officer is going to rule a particular
25 way is a little bit different, but it doesn't really matter

1 again because jurisdiction cannot be stipulated to or away.

2 Mr. Pick is incorrect that I did not raise the claims
3 processing rule issue in my reply brief.

4 If you actually take a look at -- just let me find
5 it -- I actually argued -- it's in my reply brief. Sorry. I
6 think.

7 Subsection 3 argues that their brief, their answering
8 brief fails to cite any relevant authorities establish that the
9 regulation is jurisdictional, and then I point out, which of
10 course goes to the issue of if it's not jurisdictional it is by
11 definition a claims processing rule. And then on page 5, as
12 part of that section, lines 8 through 12, I point out the fact
13 that the proceedings may be suspended under claims processing
14 rules in order to bring the parties into compliance, citing the
15 Supreme Court's decision in *Union Pacific Railroad*. So the
16 notion that I didn't address the issue in the reply brief is
17 just not accurate.

18 Mr. Pick argues, well, gosh, things could be
19 dismissed anyway even under a claims processing rule. It
20 happens in Title VII all the time anyway. Well, that's not
21 what -- that was not considered though in this particular case
22 whether it should be by the hearing officer because she
23 erroneously found that it was jurisdictional. And as based
24 upon the case law for claims processing rules, if it's not
25 timely asserted, it's deemed waived.

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1 As I pointed out in the opening brief, there was a
2 scheduling order issued by the hearing officer that required
3 all motions to be filed by a particular date, and the motion to
4 dismiss for lack of jurisdiction was not filed within that
5 time.

6 So the bottom line is, even if a hearing officer
7 could find a nonjurisdictional basis for a dismissal, it
8 would've been waived on the time in this issue anyway. But
9 again, that was something that was never considered because the
10 hearing officer made a mistake considering it to be
11 jurisdictional.

12 With regard to the appeals form, as I pointed out, in
13 one section it says you need to attach this, but in another
14 section of that same form, and I bolded it in my opening brief,
15 it basically says that additional documents can be provided
16 later. It is fundamentally contradictory.

17 To waive a constitutional right, it must be knowing
18 and voluntary. So the failure -- the mistake and failure to
19 attach a document, which the appeals form says can be provided
20 later, does not constitute a waiver of a constitutional right.
21 Mr. Pick is accurate that due process requires an opportunity
22 for a hearing, but it must be a meaningful opportunity and the
23 failure -- the mistaken failure to attach a piece of paper does
24 not mean that the party is knowingly and voluntarily waiving
25 their right to a hearing.

1 Imagine for a moment, Your Honor, you received a copy
2 of the final decision of the agency. You put it in your home
3 office. Fire breaks out, and the document is destroyed. The
4 Department of Corrections could take the position we're not
5 obligated to give you another copy, and then all of a sudden
6 the employee's right to due process guaranteed under the
7 federal constitution is lost? It doesn't work that way.

8 Let me make sure I've hit all of the points I want to
9 hit.

10 Yes. Rules of the personnel commission do have the
11 force and effect of law under *Turk*; however, if the Nevada
12 legislature which has the actual stronger force and effect of
13 law, is an actual statute. If they can't eliminate your right
14 to due process, the personnel commissioner can't.

15 The long and short is there is nothing in the
16 adoption or in the statute that gives the personnel commission
17 the right to adopt regulations to carry out its business that
18 suggests that the legislature was giving away its exclusive
19 right to set jurisdictional bounds, and again, those
20 jurisdictional bounds set by the legislature is simply 10
21 working days to file and in writing. Anything else beyond that
22 is, by definition, a claims processing rule because it is a
23 rule for the presentation and processing.

24 With that, Your Honor, unless you have any additional
25 questions.

1 THE COURT: The Court does not. Thank you so much,
2 and thank you everyone for the excellent briefing and the oral
3 argument.

4 The Court is going to find as follows: As you all
5 are aware, NRS 238B.135, Judicial Review, the matter of
6 conducting the burden of proof standard of review. The Court
7 shall not substitute its judgment for that of the agency as to
8 the weight of evidence on a question of fact.

9 The Court may remand or affirm the final decision or
10 set it aside in whole or in part if substantial rights of
11 petitioner have been prejudiced because the final decision of
12 the agency is, A, in violation of constitutional statutory
13 provisions, which is argued here; B, in excess of statutory
14 authority; C, made upon unlawful procedure; D, affected by
15 other error of law, which is argued here; E, clearly erroneous
16 in view of the reliable probative and substantial evidence on
17 the record; or, F, arbitrary, capricious or characterized by
18 abuse of discretion.

19 The Court is going to find the petition for judicial
20 review shall be granted because the Court does find that the
21 lower decision of the hearing officer was affected by other
22 error of law.

23 The Court finds that there was not a determination
24 made as to whether or not this process -- whether it was a
25 processing rule that was violated and could have been

1 amended -- could have been allowed extra time, et cetera, but
2 instead it stated that it was jurisdictional, but did not give
3 an analysis on how the provision cited was a jurisdictional
4 requirement.

5 In the absence of setting that analysis set
6 therefore, the Court needs to find that the decision needs to
7 be reversed and remanded back to -- well, now it will be a new
8 hearing officer, for a determination as to, A, whether or not
9 the claim should be heard. If it can't be heard, it needs to
10 have an analysis of how it is determined that this is a
11 jurisdictional versus a processing rule, and if it's a
12 processing rule, whether it's a processing rule that is
13 resulting in a denial or substantively what the other bases
14 are. Those were not set forth in the decision.

15 The Court finds that on the record before it, it
16 finds that there was an error of law because the Court doesn't
17 see how this is a jurisdictional based on the record that has
18 been presented to it, and so therefore that's why the Court is
19 granting the petition for judicial review and remanding the
20 matter back to the agency to be assigned to a new hearing
21 officer to hear the matter.

22 The Court is going to ask counsel for petitioner,
23 since I'm granting it, to please prepare a detailed findings of
24 fact, conclusions of law, submit it to respondent and then
25 submit it to the Court's DC 31 inbox in accordance with EDCR

1 7.21.

2 As you may have heard when you were hearing the other
3 matter, a quick reminder that EDCR 7.21 is alive and well;
4 however, the Court does appreciate usually in petitions for
5 judicial review they take longer for the orders to come
6 forward. So if you think you need more than the 10 days,
7 please ask the Court now, and if you don't, then we'll give you
8 10 days under the EDCR.

9 MR. LEVINE: I'm going to ask the Court now because I
10 start a major labor arbitration for one of my unions on
11 Tuesday, and between now and that case I am going to be
12 100 percent of my time is going to be (video interference).

13 THE COURT: How much time do you think you need so
14 that we ensure that this matter does get properly back before
15 the agency in a timely and efficient manner?

16 MR. LEVINE: Can I have -- I will endeavor to have it
17 much sooner than this, but can I have 30 days? In other words,
18 the agency just started setting hearings again after a almost
19 one-year hiatus due to COVID, at least down here in Southern
20 Nevada. So they're facing quite a backlog right now because
21 all of the Southern Nevada cases -- Mr. Pick knows this --
22 haven't had a hearing yet.

23 So could I have up to 30 days, and I will endeavor to
24 get it done much sooner?

25 THE COURT: Is that 30 days including the 10 days

1 under the EDCR or 30 additional?

2 MR. LEVINE: Yeah. No. No. Within -- in other
3 words, 30 total, not 40.

4 THE COURT: Counsel for the State, are you amenable?
5 So it would be an additional 20 days requested?

6 MR. PICK: Certainly, Your Honor. We have no problem
7 with that.

8 THE COURT: No worries. And usually these people do
9 request because they are rather lengthy.

10 Okay. So the request is granted.

11 Once again, Madame Clerk, if you don't mind, Natalie,
12 to please put in the minutes that there was a request to extend
13 the time under EDCR 7.21 due to the breadth and nature of the
14 order and the timing of counsel, and the Court granted it for
15 an additional 20 days for a total of 30 days to get the order
16 in.

17 And anything else -- oh, sorry. Counsel?

18 MR. LEVINE: Since I have to draft it, I need a
19 clarification on your ruling. You did not mention the
20 constitutional issue, which is fine. Should I place in there
21 in the order that the Court is not getting to the due process
22 constitutional issue because there is case law that says that
23 if a Court can grant relief on a nonconstitutional it doesn't
24 need to reach the constitutional issue --

25 THE COURT: Right.

1 MR. LEVINE: -- should I have that expressly in there
2 since what in my paper, scribbling of notes I didn't hear
3 anything about the *Loudermill* issue?

4 THE COURT: Right. That was intentional because of
5 the case law that basically states if the Court does it on a
6 nonconstitutional basis the Court need not address the
7 constitutionality. And really at this juncture the Court
8 wouldn't have been able to fully address the constitutionality
9 because there really isn't a clear enough record for the Court
10 to make that determination.

11 MR. LEVINE: All right. So I will make that explicit
12 then in the findings.

13 THE COURT: Yeah. Okay. So I do appreciate it.
14 Thank you so very much.

15 Any other clarifications? If not, I'm going to wish
16 you all well, best of luck in your future matters, health and
17 happiness, and we're going to move on to our last case of the
18 day.

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25 MR. LEVINE: Thank you very much, Your Honor. I am

1 signing off. It's nice to be back in front of Department 31.

2 MR. PICK: Thank you, Your Honor.

3 THE COURT: I do appreciate it.

4 (Proceedings concluded at 11:16 p.m.)

5 -oOo-

6 ATTEST: I do hereby certify that I have truly and correctly
7 transcribed the audio/video proceedings in the above-entitled
8 case to the best of my ability.

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Dana L. Williams
Transcriber

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