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Daniel Marks
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June 14, 2019

Nevada Personnel Commission
209 E. Musser Street, Suite 101
Carson City, Nevada 89701

RE: AR 339

To the State of Nevada Personnel Commission:

I regret that due to a commitment to my family for a summer vacation, I cannot appear in person to provide testimony regarding the request by The Nevada Department Corrections ("NDOC") to approve the Penalties and Prohibitions through Administrative Regulation ("AR") 339. Accordingly, I am submitting my testimony in written form and requesting that the Commission NOT APPROVE the Penalties and Prohibitions in its current form.

By way of background, I am an attorney whose practice consists primarily of representation of unions and employee organizations. Among those organizations that I represent is the Las Vegas Peace Officers Association which is the bargaining unit for the corrections officers and sergeants employed by the City of Las Vegas, and the Las Vegas Peace Officers Supervisors Association which is the bargaining unit for the corrections lieutenants employed by the City of Las Vegas. I further represent numerous employees in the classified service of the State of Nevada as one of the panel attorneys for the legal defense funds provided by the Fraternal Order of Police ("FOP"), Police Officers Research Association of California ("PORAC"), and the Professional Law Enforcement Association ("PLEA"). Finally, I was the attorney for Brian Ludwick whose case, *NDOC v. Ludwick*, resulted in the Nevada Supreme Court invalidating AR 339 based upon NDOC's failure to have that regulation approved by this Commission.

The reason I urge the Commission not to approve the Penalties and Prohibitions is both substantive and procedural. Substantively, the Penalties and Prohibitions in their current form are deeply flawed and contrary to some of the regulations promulgated by this Commission under NAC 284.650. Recently, and prior to the Supreme Court's decision in *NDOC v. Ludwick,* a district judge ruled that NDOC through its internal regulations such as AR 339 cannot overrule this Commission's lawfully enacted regulations such as NAC 284.650. (See *Cristilli v. NDOC* attached hereto as Exhibit "1").

Due to time constraints, the substantive problems identified below are intended to be illustrative and not exhaustive.

AR 339.07(5) CRIMINAL MISCONDUCT (page 42 of the Agenda)

Subsection C purports to permit the Department to suspend or discharge for a first offense by any employee who enters *any type* of guilty plea, even to a simple misdemeanor. This was at the heart of the dispute in *Cristilli* where the Department terminated an employee because he pled *nolo contendere* to off-duty disorderly conduct. Subsection C is contrary to NAC 284.650(13) which permits discipline for a "Conviction of any criminal act involving moral turpitude". Disorderly conduct, along with many other simple misdemeanors, is not a crime of moral turpitude. Subsection C is overbroad and would permit the Department, as it did in *Cristilli*, to terminate an officer for activities with no real and substantial nexus to the workplace based upon the spurious allegation that a mere arrest makes the Department look bad. The entire subsection is unnecessary in light of NAC 284.650(13) because if a corrections officer is convicted of a criminal act involving moral turpitude, by definition it has the requisite nexus to the workplace. Corrections officers are peace officers under NRS Chapter 289, and regulations promulgated by the Nevada Commission on Peace Officer Standards and Training ("POST") prohibit appointment as a peace officer if a person is convicted of a crime of moral turpitude. See NAC 289.110(4)(b).

The biggest problem with subsection C is the fact that it forces an employee charged with a crime to go to trial because the entry of any plea itself is the basis for discipline. As astutely recognized by the district judge during oral argument in the *Cristilli* case, people plead *nolo contendere*, or enter a plea under *North Carolina v. Alford*, 400 U.S. 25 (1970), for reasons other than guilt. As the AR is currently written, corrections officers will be forced to undergo the added expense and risk of taking a case to trial if they wishes to avoid discipline.

Subsection D of this section would mandate termination for a conviction of domestic violence. It utilizes as justification 18 U.S.C. § 917 and 922. It should first be pointed out that 18 U.S.C. § 917 has nothing to do with domestic violence or firearms; it criminalizes falsely holding oneself out to be an agent of the American National Red Cross.

While 18 U.S.C. §922(g) does prohibit private firearm ownership by person convicted of domestic violence, that prohibition does not apply to firearms provided by NDOC. 18 U.S.C. §925(a)(1) provides that the prohibitions under §922 "*shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof* ***or any State or any department, agency, or political subdivision thereof***." It is for that reason that officers employed by other law enforcement agencies who have been convicted of domestic violence check out a firearm from their employer when they report for duty, and check that firearm back in at the end of their shift.

Domestic violence is a simple misdemeanor, and not a crime of moral turpitude.

AR 339.07(12) INSUBORDINATION (Page 45 of Agenda)

This subsection is unnecessary as NAC 284.650 (6) already authorizes an appointing authority to discipline for "Insubordination or willful disobedience". Apart from being unnecessary, the problem with this subsection is it defines insubordination far too broadly. The Nevada Supreme Court in *Rust v. Clark County School District*, 100 Nev. 372, 683 P.2d 23 (1984) has already defined "Insubordination" as follows:

> In this case, the district has predicated its action upon a charge of "insubordination." We have defined this term as "a willful disregard of express or implied directions, or such a defiant attitude as to be equivalent thereto. 'Rebellious,' 'mutinous,' and 'disobedient' are often quoted as definitions or synonyms of 'insubordinate.' "*Richardson v. Bd. Regents*, supra, 70 Nev. at 367, 269 P.2d at 276. We suggested that the authority of the superior to promulgate the order, or the "reasonableness of the order in question" might also be considered in an appropriate case. Id.
> "Insubordination" has elsewhere been defined as " 'constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority.' " *Board of Trustees v. Holso*, 584 P.2d 1009, 1015 (Wyo.1978); quoting *Ray v. Minneapolis Board of Education, Special School District No. 1*, 295 Minn. 13, 202 N.W.2d 375, 378 (1972). The Wyoming court also noted that "[t]he better-reasoned decisions place emphasis on the presence of a persistent course of willful defiance." 584 P.2d at 1016.

Subsection (C) authorizes significant suspensions for anyone who argues "about the wisdom or propriety of a lawful order or decision" or "back talking". The danger with this is it may be used to punish an officer who articulates a belief that an order may not be lawful. Just last week I sat in an investigatory interview for a corrections officer who is being charged with "Insubordination" because he sought to inquire as to whether an order he was given was in fact unlawful.

Particularly problematic is subsection (J) "Refusal to work mandatory overtime." Nevada Department Corrections, and in particular High Desert State Prison, is notorious for its deliberate and flagrant violation of NAC 284.242(1) which requires that an employee receives "at least 4 hours" advance notice before being mandated to work overtime unless there is an "unpredictable emergency". NDOC routinely mandates officers to work additional shifts up to 8 hours on 30 minutes notice or less. This does not afford the officers adequate time to make alternative arrangements for child care and other commitments. Attached to this Testimony as Exhibit "2" is both the Investigatory Report from the Office of Inspector General, and the decision of a State Hearing Officer, in the case of Johnny Bilavarn. Officer Bilavarn was terminated when he left the prison after being given 30 minutes notice that he was being forced to stay an additional 8 hours. I would direct the Commission's attention to Investigator Note Number 3 on page 8 wherein

Investigator Nick Roble questioned two (2) Associate Wardens, and Warden Dwight Neven, as to why officers were not receiving four (4) hour notice. The answer given by Warden Neven was "because I don't fucking want to".

Following the Hearing Officer's decision to reinstate Bilavarn, NDOC sought to subvert the decision by telling officers that they were on an "overtime list" when they reported for their shift, but not informing the officers that they were in fact going to have to perform the mandatory overtime until approximately 30 minutes before the end of their shift. The Employee Management Committee ("EMC") recently invalidated written reprimands given to officers who refused to work the overtime under such circumstances. Following that decision by the EMC, NDOC has now resorted to telling officers that they are working mandatory overtime at the beginning of their shift, and then after they disrupt their lives by making other arrangements for children, and with spouses, at the end of the shift the officers are told they don't really need to work the overtime.

NAC 284.218 provides for employees in the classified service to receive standby pay. What NDOC should be doing is placing officers who did not work on standby status to be called in the event that they have a staffing shortage. Fortunately, the passage of SB 135 extending collective bargaining to State employees should remedy these types of abuses.

AR 339.07(17) UNAUTHORIZED USE OF FORCE (Page 52 of Agenda)

The problem with this subsection is the penalty for even a first offense (major suspension or termination) is grossly excessive. Corrections officers work in close proximity to some very dangerous inmates. They are often forced to make split-second decisions to protect themselves or other inmates from serious injury or death. In *Graham v. Connor*, 490 U.S. 386 (1989) the Supreme Court cautioned "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers" is excessive, and use of force should not be judged "with the 20/20 vision of hindsight".

However, that is exactly how use of force is judged at NDOC. Decisions regarding the reasonableness of force are made in the peace of the Warden's office, and frequently by Wardens who have never been corrections officers and do not understand use of force or how officers react when attacked. Attached hereto as Exhibit "3" are the Hearing Officer's Decisions in the cases of Morris Guice and Jose Navarette. NDOC fired Officer Guice for "unnecessary" force when he used non-lethal OC Spray to prevent an extremely dangerous inmate with hepatitis C from spitting on him. NDOC fired Officer Navarette claiming it was "unnecessary" and/or "excessive" force when he kept a noncompliant inmate in a position with his hands on a wall for what NDOC claimed was "too long". Through negotiations, I recently secured the reinstatement of a corrections officer named Evans Almona who was terminated because he drew an expandable baton and used it in self-defense after he was sucker punched by an inmate on the side of his head.

By giving these examples, I do not seek to condone unnecessary or excessive force. However, where such force is unnecessarily or excessively applied, the hard-working and

undercompensated corrections officers at NDOC should receive the same benefit of progressive discipline as other law enforcement agencies. Attached hereto as Exhibit "4" are the Disciplinary Decision Guides negotiated with the Las Vegas Metropolitan Police Department by the Police Managers and Supervisors Association ("PMSA"), and the Police Protective Association ("PPA"). (By way of disclosure I serve as outside counsel for the PMSA). I would direct the Commission's attention to Line Item 4 for the PMSA's Guide which provides for a Written Reprimand or a Minor Suspension for a first offense "Inappropriate use of force". Under the PPA Guide "Inappropriate use of force" is a "Category B" whereby a first offense is presumptively a written reprimand, and may be as little as a Supervisory Intervention ("SI") where mitigating circumstances are present.

In addition to such substantive problems in AR 339 as it is currently written, it should be rejected on procedural grounds. As set forth above SB 135 is now the law in the State of Nevada and State employees have the right to collectively bargain. One of the subjects of mandatory collective bargaining is "Discharge and disciplinary procedure". Accordingly, the contents of the Regulation addressing the investigatory process, as well as the Penalties and Prohibitions, need to be negotiated with whichever employee organization is recognized by the State as the exclusive bargaining representative for the corrections officers (be it AFSCME, Nevada Corrections Association, or some other employee organization). This process has served LVMPD well as evidenced by the Disciplinary Decision Guides. Approving Administrative Regulation 339 as requested by NDOC in advance of bargaining will have the effect of undermining the bargaining process which now must take place.

For all the reasons set forth above I would urge the Commission to reject approval of the Penalties and Prohibitions in AR 339.

Very truly yours

LAW OFFICE OF DANIEL MARKS

ADAM LEVINE

AL/gg

EXHIBIT “1”

EXHIBIT “1”

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Steven D. Grierson
CLERK OF THE COURT

FFCL
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DISTRICT COURT

CLARK COUNTY, NEVADA

TAHAM CRISTILLI,

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,

Respondents.
_____/

Case No.: A-18-768903-J
Dept. No.: XIII

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 15th day of November at the hour of 9:00 a.m. with Petitioner Taham Cristilli being represented by and through Adam Levine, Esq. of the Law Office of Daniel Marks and Respondents Nevada Department of Corrections being represented by Katlyn M. Brady, Deputy Attorney General and Department of

DISTRICT COURT DEPT# 13
DEC 2 (2018
RECEIVED

Case Number: A-18-768903-J

Administration Personnel Commission, Hearing Officer 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:

FINDINGS OF FACT

The stipulated facts and/or undisputed testimony from the administrative hearing, and the administrative record filed with the District Court, establish the following:

1. Taham Cristilli (hereafter "Cristilli") was a post-probationary member of the classified service of the State of Nevada employed as a corrections officer with the Nevada Department of Corrections ("NDOC") for eleven (11) years.

2. Cristilli had an adult son named Timothy who lived with Cristilli, Cristilli's wife and minor daughter. Cristilli contends that he had been forced to evict Timothy because of Timothy's drug use and violence. Timothy had broken his father's nose and almost bitten his finger off as a result of an altercation in connection with that eviction.

3. Cristelli contends that: Approximately one (1) week after Cristilli forced Timothy to leave the home, on July 23, 2016 Timothy returned to the home with a friend named Kevin in order to collect his personal belongings. While at the house, Timothy again became belligerent such that Cristilli had to ask him to leave. Timothy knocked Cristilli to the floor and attempted bite him. In order to prevent being bit, Cristilli placed his hands against Timothy's face and neck. Timothy continued to press down on Cristilli and told him "go ahead, choke me". Cristilli responded that he was not trying to choke Timothy and that he just wanted Timothy to leave. At that point Timothy backed off which allowed Cristilli to shove Timothy off of him.

4. After finally leaving the home, ~~the~~ Timothy and/or Kevin called the Las Vegas Metropolitan Police Department. Cristilli invoked his constitutional right to remain silent and declined to speak with the police. Because Timothy had made an allegation of domestic violence/strangulation

against Cristilli, and because Cristilli would not give the officers a statement, the officers arrested Cristilli for felony battery which constitutes domestic violence involving strangulation in violation NRS 200.485(2).

5. Despite the charge utilized by LVMPD for the arrest, Cristilli was not charged with a felony battery. Rather, the criminal complaint filed was battery which constitutes domestic violence in violation of NRS 200.485(1) which is a simple misdemeanor for a first offense.

6. By the time trial was approaching, Timothy's life had improved and he had found gainful employment. Cristilli did not want Timothy to have to miss work in his new job to testify at trial. Accordingly, on October 3, 2016 he entered into a plea deal whereby he would plead *nolo contendere* to the charge of misdemeanor domestic battery in violation of NRS 200.485(1). However, under the terms of the plea deal the adjudication of the plea was withheld, and if Cristilli completed 48 hours of community service and otherwise stayed out of trouble the charge would be reduced to disorderly conduct and the judgment of conviction entered upon that reduced charge.

7. Disorderly conduct is a simple misdemeanor. Under NRS 200.485(8) prosecutors are prohibited from plea bargaining domestic violence cases utilizing *nolo contendere* to a lesser charge unless the prosecuting attorney knows, or it is obvious, that the charge is not supported by probable cause or cannot be proved at the time of trial.

8. On June 12, 2017 Cristilli was served with a NPD-41 Specificity of Charges recommending his dismissal from NDOC on a charge of "conduct unbecoming" and "criminal misconduct" based solely upon his plea of *nolo contendere* to a simple misdemeanor. He was terminated on June 30, 2017 by NDOC.

9. Cristilli timely appealed his dismissal pursuant to NRS 284.390 and the case proceeded before a State of Nevada Department of Administration hearing officer. He was represented at that hearing by another corrections officer.

10. At the administrative hearing NDOC did not present any evidence to contest Cristilli's testimony that he acted in self-defense, or evidence to dispute his reasons for accepting the plea deal. Rather, NDOC sought to rely upon its own internal Administrative Regulation 339 which purports to permit termination for "conduct unbecoming" and/or entry of any type of plea, whether it be *nolo contendere* or an *Alford* plea, in any criminal case.

11. On December 13, 2017, the hearing officer issued his Findings of Fact, Conclusions of Law Decision and Order affirming the dismissal based upon the representation of NDOC at the hearing that other officers had been terminated following conviction for misdemeanor offenses, and that the mere arrest itself on the felony allegation, which was never actually charged, is sufficient to terminate because it shined "a bad light on all of the NDOC employees". The hearing officer further found in his "Findings of Fact" that a mere arrest "brings into question the credibility of a Correction Officer and limits that officer's ability to perform all of their duties, which includes the ability to testify in a court of law."

12. The hearing officer's Conclusions of Law cited to NDOC's own Administrative Regulation ("AR") 339 as authority for the termination.

13. Cristilli promptly retained counsel who filed a timely Petition for Reconsideration pursuant to NRS 233B.130(4). In that Petition counsel for Cristilli asserted numerous errors by the hearing officer including the fact that the ruling violated the Nevada Supreme Court's precedent regarding off-duty conduct from *Stevens v. Hocker*, 91 Nev. 392, 536 P.2d 88 (1975) and violated the provisions of NAC 289.650(13) and (21).

14. On January 5, 2018, the hearing officer issued his Decision and Order *granting* the Petition for Reconsideration specifically noting that dismissal for conviction of a misdemeanor offense "is extreme" and referencing testimony from the Associate Warden that there were also corrections officers who were not dismissed following conviction for misdemeanor offenses. The hearing officer

therefore remanded the matter back to NDOC with a recommendation of imposing a lesser level of discipline such as suspension.

15. When NDOC would not reconsider its position on dismissal, Cristilli filed a Motion for Clarification of Order seeking to have the hearing officer clarify that he was in fact reversing the dismissal pursuant to NRS 284.390(6).[1]

16. On February 2, 2018 the hearing officer issued his Decision and Order Regarding The Petitioner's Motion for Clarification denying the requested clarification and stating that a hearing officer is not authorized to accept a motion for reconsideration or enter a decision on such a motion by Chapter 233B or Chapter 284, and that the prior order granting the Petition for Reconsideration was only a re-examination of the record as a courtesy.

17. Thereafter, Cristilli filed a timely Petition for Judicial Review with this court pursuant to NRS 233B.130.

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

CONCLUSIONS OF LAW

19. Subsection (7) of NRS 284.390, as the statute is currently configured, states "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."

20. In *Stevens v. Hocker*, 91 Nev. 392, 536 P.2d 88 (1975) the Nevada Supreme Court held that an off-duty arrest for disorderly conduct in a public place was not grounds to terminate a state corrections officer because the actions of the officer constituted "personal, private conduct" which "did

[1] That statute is now found at NRS 284.390(7) as a result of statutory amendments in the 2017 legislative session.

not have any bearing at all upon his performance as an employee of the Nevada State Prison". 91 Nev. at 395, 536 P.2d at 90. The Supreme Court's ruling in *Stevens v. Hocker* is likewise in conformance the industrial common law developed in the private sector that just cause to discipline for off-duty misconduct requires a demonstration of a nexus to the workplace which is "reasonable and discernible and not merely speculative." Elkouri & Elkouri *How Arbitration Works* Chapter 15.3.A.i at pp. 938-939 (6th Ed.).

21. NRS 284.150(2) states "Except as otherwise provided in NRS 193.105, 209.161 and 416.070, a person must not be appointed, transferred, promoted, demoted or discharged in the classified service in any manner or by any means other than those prescribed in this chapter and the regulations adopted in accordance therewith."

22. The Nevada Personnel Commission has adopted regulations identifying cause for discipline at NAC 284.650. That regulation has the "force and effect of law" because the rules are the result of legislation and "adopted in accordance with statutory procedures". *Turk v. Nevada State Prison*, 94 Nev. 101, 104, 575 P.2d 599, 601 (1978).

23. NAC 284.650(13) provides that appropriate disciplinary or corrective action may be taken for "Conviction of any criminal act involving moral turpitude". Disorderly conduct is not a crime of moral turpitude.

24. NAC 284.650(21) provides that appropriate disciplinary or corrective action may be taken for "Any act of violence which arises out of or in the course of the performance of the employee's duties, including, without limitation, stalking, conduct that is threatening or intimidating, assault or battery."

25. The actions giving rise to the judgment of conviction for disorderly conduct did not arise "out of or in the course of the performance of" Cristilli's duties.

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26. Nevada follows the maxim *Expressio Unius Est Exclusio Alterius*, "the expression of one thing is the exclusion of another". *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). Where, as here, the Nevada Personnel Commission has expressly addressed when criminal conduct or acts of violence will rise to the level of cause for discipline, these specific provisions cannot be circumvented by reliance upon more general provisions such as "Activity which is incompatible with an employee's conditions of employment established by law" under subsection (1) or "disgraceful personal conduct which impairs the performance of a job or causes discredit to the agency" under (2).

27. NDOC cannot by adoption of internal regulations such as AR 339 overrule *Stevens v. Hocker*, supra or NAC 284.650(13) and (21). AR 339 has not even been submitted to the Personnel Commission for review or approval.

28. State hearing officers are to review the issue of whether an employee committed a disciplinary offense under a *de novo* standard and only gives deference to the agency in connection with the issue of whether such a dismissal is for the good of the public service. *O'Keefe v. Department of Motor Vehicles*, 134 Nev. Adv. Op. 92 (December 6, 2018).

29. As post-probationary members of the classified service may only be dismissed for just cause and for the good of the public service under NRS 284.385 and NRS 284.390(7), this creates a property interest in their employment within the meaning of the Fourteenth Amendment's Due Process Clause. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985).

30. Due process requires the State to bear the burden of proving the violations alleged against Cristilli.

31. Because the State failed to prove that Cristilli had been convicted of a crime of moral turpitude, or that the altercation with his son arose out of or in the course of the performance of his duties, the hearing officer's decision was affected by error of law, clearly erroneous in view of the

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reliable, probative and substantial evidence on the whole record, and arbitrary and capricious and an abuse of discretion within the meaning of NRS 233B.135(3)(d) – (f).

32. The hearing officer's conclusion that he was not authorized to grant relief through the Petition for Reconsideration, despite his belief that the dismissal for a conviction of a simple misdemeanor offense was "extreme", was an error of law and an abuse of discretion. Both NRS 233B.130(4) and Nevada Personnel Commission Hearing Officer Rule of Procedure 11.7 specifically authorize the filing and granting of such Petitions.

33. The hearing officer's finding that a mere arrests brings into question the credibility of a correction officer and limits that officer's ability to perform all of their duties, which includes the ability to testify in a court of law, was arbitrary and capricious, and further an error of law. Neither an arrest nor conviction of a misdemeanor by themselves are even admissible in court. Rather, to be admissible for purposes of impeachment any conviction must be for a felony within the past ten (10) years. NRS 50.095 and F.R.E. 609.

34. 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*. This matter is remanded to the hearing officer with instructions to *reverse* the dismissal of Taham Cristilli from the classified service and order Cristilli to be reinstated to his position of corrections officer with full pay for the period of his dismissal as required by NRS 284.390(7).

DATED this 9th day of December, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

LAW OFFICE OF DANIEL MARKS

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Attorneys for Petitioner

EXHIBIT “2”

EXHIBIT “2”

STATE OF NEVADA
DEPARTMENT OF CORRECTIONS
OFFICE OF THE INSPECTOR GENERAL

DATE: 07/18/2016

TO: Dwight Neven, Warden, High Desert State Prison

VIA: Office of the Inspector General

FROM: Nick Roble, Criminal Investigator III, Office of the Inspector General

SUBJECT: **REPORT OF PERSONNEL COMPLAINT INVESTIGATION**
IA-2016-0015

COMPLAINT:

Department complaint alleging 1 count of **INSUBORDINATION** and 1 count of **NEGLECT OF DUTY**, against John Bilavarn, High Desert State Prison.

ACCUSED STAFF:

John Bilavarn
Correctional Officer
High Desert State Prison
Employee ID #39292

Investigator
Office of the Inspector General

APPROVED

Pamela Del Porto
Inspector General

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Exhibit A

SUMMARY:

On February 14th, 2016 a report was entered in the Nevada Offender Tracking Information System (NOTIS) by Correctional Sergeant (Sgt) under IR-2016-HDSP-000528. The report was entered in reference to actions by Correctional Officer John Bilavarn at High Desert State Prison. Due to this information, an internal affairs investigation was initiated by the Office of the Inspector General (OIG).

Allegation 1

It is alleged that John Bilavarn, Correctional Officer assigned to High Desert State Prison, engaged in **INSUBORIDNATION**, when on or about February 14th, 2016, you failed to work mandatory overtime as required at High Desert State Prison.

Allegation 2

It is alleged that John Bilavarn, Correctional Officer assigned to High Desert State Prison, engaged in **NEGLECT OF DUTY**, when on or about February 14th, 2016, you abandoned your post without being properly relieved and without the approval of a supervisor.

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INTERVIEW LIST

PERSONS INTERVIEWED	DATE/TIME INTERVIEWED	AUDIO FILE NAME	PAGE NUMBER
John Baranowski Senior Correctional Officer HDSP Employee #89	4/4/2016 @ 10:56 A.M.	IA-2016-0015 Baranowski	3
Jeremy Bean Correctional Lieutenant HDSP Employee #24141	4/4/2016 @ 10:15 A.M.	IA-2016-0015 Bean	4
John Bilavarn **Correctional Officer** **HDSP** **Employee #39292**	**5/9/2016 @ 8:21 A.M.**	**IA-2016-0015 Bilavarn**	**5**
Benjamin Estill Correctional Officer HDSP Employee #48309	04/25/2016 @ 11:21 A.M.	IA-2016-0015 Estill	6

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INVESTIGATION

John Baranowski, Senior Correctional Officer, High Desert State Prison

Senior Correctional Officer (S/CO) John Baranowski was provided with a State of Nevada Department of Corrections Notice of Administrative Witness Interview. S/CO Baranowski was provided with an Admonition of Confidentiality on 4/4/2016 prior to the interview. S/CO Baranowski stated that he understood the forms and signed them. S/CO Baranowski waived his right to 48 hours of notice and the right to have an employee representative present. A digitally recorded interview was conducted at High Desert State Prison with S/CO Baranowski's knowledge and consent.

S/CO Baranowski was provided with a copy of the statement that he entered into NOTIS under IR-2016-HDSP-000528.

Allegation 1
Allegation 2

S/CO Baranowski stated that while working the tower above the sallyport, he observed C/O Bilavarn exit the institution at approximately 8:00 a.m. S/CO Baranowski stated that he believed that the officers were exiting to conduct a trash detail. S/CO Baranowski stated that C/O Lai stated to him that C/O Bilavarn asked for a ride to the parking lot and then went home. S/CO Baranowski stated that he found the situation "odd" and that officers typically do not exit through the sallyport.

S/CO Baranowski had no additional information to add and the interview was concluded.

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INVESTIGATION

Jeremy Bean, Correctional Lieutenant, High Desert State Prison

Correctional Lieutenant (Lt.) Jeremy Bean was provided with a State of Nevada Department of Corrections Notice of Administrative Witness Interview. Lt. Bean was provided with an Admonition of Confidentiality on 4/4/2016 prior to the interview. Lt. Bean stated that he understood the forms and signed them. Lt. Bean waived his right to 48 hours of notice and the right to have an employee representative present. A digitally recorded interview was conducted at High Desert State Prison with Lt. Bean's knowledge and consent.

Lt. Bean was provided with a copy of the statement that he entered into NOTIS under IR-2016-HDSP-000528.

Allegation 1
Allegation 2

Lt. Bean stated that it was reported to him by Sgt. Tansey that there were multiple callouts for shift. Lt. Bean stated that Sgt. Tansey advised him that C/O Bilavarn stated that he would only stay for three hours. Lt. Bean stated that he advised Sgt. Tansey that C/O Bilavarn would have to stay for the full eight hours.

Lt. Bean stated that at approximately 7:50-7:55 a.m., he received a phone call from C/O Estill who advised that his unit needed an additional staff member. Lt. Bean stated that C/O Estill advised him that C/O Bilavarn had left the unit. Lt. Bean stated that he began calling around to the posts in an attempt to locate C/O Bilavarn. Lt. Bean stated that he was concerned about the inability to locate C/O Bilavarn. Lt. Bean stated that he broadcasted an "all call" in an attempt to locate C/O Bilavarn. Lt. Bean stated CO/T T. Lai then entered the infirmary and stated that C/O Bilavarn exited through the sallyport. Lt. Bean stated that he then had the HDSP CERT team conduct a search of HDSP to ascertain the status of staff members.

Lt. Bean stated that he left C/O Bilavarn a voicemail but never received a phone call back.

Lt. Bean stated that the mandatory overtime list was used to assign mandatory overtime. Lt. Bean stated, "We used the list that was provided to us by the graveyard supervisor."

Lt. Bean stated that due to C/O Bilavarn leaving his post, the unit had to lockdown and suspend activities. Lt. Bean stated that he believed that the unit ran on modified operations until 1:00 p.m. that day.

Lt. Bean stated that it is very uncommon for people to enter/exit through the sallyport. Lt. Bean stated that he believed that C/O Bilavarn exited through the sallyport in order to not be stopped.

Lt. Bean had no additional information to add and the interview was concluded.

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INVESTIGATION

John Bilavarn, Correctional Officer, High Desert State Prison

Correctional Officer John Bilavarn was provided with a State of Nevada Department of Corrections Notice of Interrogation/Interview Administrative Investigation on 5/4/2016 by CI III N. Roble. C/O Bilavarn was provided with an Admonition of Confidentiality and Admonition of Rights on 5/9/2016 prior to the interview. C/O Bilavarn stated that he understood the forms and signed them. Paul Lunkwitz was present during the interview as an employee representative. A digitally recorded interview was conducted at Casa Grande Transitional Housing with C/O Bilavarn's knowledge and consent.

C/O Bilavarn was provided with a copy of the statement that he entered into NOTIS under IR-2016-HDSP-000528.

Allegation 1
Allegation 2

C/O Bilavarn stated that at approximately 0430 hours, Sgt. Tansey called him and stated that he was being mandated for overtime at HDSP. C/O Bilavarn stated that he stayed for approximately three hours and then went home. C/O Bilavarn stated that he left the facility at approximately 0800 hours. C/O Bilavarn stated that he only stayed three hours because he had to go home for a prior engagement.

C/O Bilavarn stated that he was not relieved by another officer when he departed his assigned post. C/O Bilavarn was asked if he had the approval of a sergeant to leave his post. C/O Bilavarn stated that when he talked to Sgt. Tansey at 0430 hours, Sgt. Tansey stated that he was "going to take care of the relief." C/O Bilavarn stated that he believed that Sgt. Tansey was sending someone so he left. C/O Bilavarn stated he did not stay until relieved. C/O Bilavarn stated that he did not call control before he left. C/O Bilavarn was asked what exit he used to depart the facility. C/O Bilavarn stated, "The back exit." C/O Bilavarn stated that he does not normally exit the facility through the back exit but did it because he wanted to get a ride with the perimeter patrol to the parking lot.

C/O Bilavarn was asked if that was the normal procedure for exiting from HDSP. C/O Bilavarn replied, "Not really."

Representative Lunkwitz stated that he believes that due to NAC/OP/AR, C/O Bilavarn was issued an unlawful order in regards to the mandatory overtime. Lunkwitz stated that C/O Bilavarn believed that Sgt. Tansey was going to take care of the staffing issue.

C/O Bilavarn and Lunkwitz were given an opportunity to add any information that they believed would be helpful. They had no additional information to add and the interview was concluded.

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INVESTIGATION

Benjamin Estill, Correctional Officer, High Desert State Prison

Correctional Officer (C/O) Benjamin Estill was provided with a State of Nevada Department of Corrections Notice of Administrative Witness Interview. C/O Estill was provided with an Admonition of Confidentiality on 4/25/2016 prior to the interview. C/O Estill stated that he understood the forms and signed them. C/O Estill waived his right to 48 hours of notice and the right to have an employee representative present. A digitally recorded interview was conducted at High Desert State Prison with C/O Estill's knowledge and consent.

C/O Estill was provided with a copy of the statement that he entered into NOTIS under IR-2016-HDSP-000528.

Allegation 1
Allegation 2

C/O Estill stated that he was assigned to Unit 2 C/D with C/O Bilavarn. C/O Estill stated that C/O Bilavarn was ordered to stay and work overtime. C/O Estill stated that C/O Bilavarn told him that he had informed Sgt. Tansey that he was unable to work past 8:00 AM. C/O Estill stated that he asked C/O Bilavarn if a replacement officer was being sent. C/O Estill stated that C/O Bilavarn replied that he better because he had told Sgt. Tansey that he was leaving.

C/O Estill stated that no relief was assigned to replace C/O Bilavarn. C/O Estill stated that the unit became short staffed due to C/O Bilavarn's actions. C/O Estill stated that the unit then went into "lockdown" due to staffing. C/O Estill stated that unit 2 C/D was in "lockdown" status until approximately 1:00 PM.

C/O Estill was given an opportunity to add any additional information to the investigation. C/O Estill had no additional information to add and the interview was concluded.

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A-16

INVESTIGATOR NOTES

1. A review of the HDSP Daily Folder revealed that 22 correctional officers were assigned and present for RDO Relief/Sick & Annual posting. Out of those 22 officers, only 1 was used to cover a post that was vacant due to sick leave. The remaining 21 officers were used to cover vacant post caused by annual leave (2), workers comp (1), community hospital (2), and regular days off (16). Due to this, HDSP had no available officers to cover vacant posts caused by sick leave being used. It appears that this regularly happens at HDSP due lack of scheduling of mandatory overtime for known events, such as regular days off, annual leave, and community hospital coverage.

2. During the investigation, it was discovered that HDSP had five inmates assigned to community hospital. The following is a list of inmates and their admit date:

Linzy #71883	01/26/2016
Hutchinson #1153119	01/27/2016
Loper #1024942	02/10/2016
Belton #1037017	02/10/2016
Garcia #1033234	02/13/2016

3. On 5/25/2016 I, CI III N. Roble, contacted AW J. Nash in order to ascertain information for IA-2016-0015. I asked AW Nash why HDSP does not schedule mandatory overtime in advance, due to knowing that RDOs and annual leave are going to occur well in advance. AW Nash stated that she did not know why, but suggested that I ask AW B. Stroud. I then asked AW Stroud why HDSP does not schedule mandatory overtime in advance. AW Stroud stated that it had been suggested multiple times but that I would have to speak with Warden D. Neven for a definitive answer. I advised Warden Neven that I had questions in reference to the Bilavarn IA case. I then asked Warden Neven why mandatory overtime was not scheduled in advance in order to cover known vacancies, such as annual leave and RDOs. Warden Neven replied, "because I don't fucking want to." Warden Neven then went on to say that if I am not going to do the case that I should give it to another investigator. Warden Neven then said it is my job to report the facts and to "not go looking for evidence, let him do that." I interpreted this statement to mean that Warden Neven expected me to simply report that C/O Bilavarn abandoned his post, without investigating why it occurred. I also interpreted this statement to mean that it was up to C/O Bilavarn to provide mitigating facts, and not the job of the investigator.

4. On 06/03/2016, Sgt. Tansey was contacted via telephone in an attempt to schedule an interview. Sgt. Tansey stated that he was willing to participate. Sgt. Tansey requested that an email be sent with a list of dates and times that were available. As of 7/18/2016, Sgt. Tansey has not opened or responded to this investigator's request to conduct an interview. Sgt. Tansey is currently on medical leave.

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5. NAC 284.242 (1) states, "*If a nonexempt employee is required to work overtime, the overtime must be authorized pursuant to subsection 10 of NRS 284.180 and communicated to the employee at least 4 hours in advance by the responsible supervisor before being worked, unless an unpredictable emergency prevents prior approval and communication.*" Based on the written statement of Sgt. Tansey and the statement of C/O Bilarvarn, it appears that C/O Bilavarn was only given an hour of notice. This appears to be a violation of NAC 284.242 (1). A NOTIS review was conducted for events related to High Desert State Prison on 02/13/2016 through 02/14/2016. I did not observe any events that would qualify as an "unpredictable emergency."

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ADDENDUM

1. NDOC Administrative Regulation 339 Effective Date 1/14/2016 (23 Pages)
2. HDSP Operational Procedure 032 Effective Date 05/27/2014 (15 Pages)
3. HDSP Daily Roster 02/14/2016 (7 Pages)
4. Notice of Administrative Witness Interview, Admonition of Confidentiality, NOTIS Statement of John Baronowski (3 Pages)
5. Notice of Administrative Witness Interview, Admonition of Confidentiality, NOTIS Statement of Jeremy Bean (4 Pages)
6. Notice of Interrogation/Interview Administrative Investigation, Admonition of Confidentiality, Admonition of Rights, NOTIS Statement of John Bilavarn (5 Pages)
7. Notice of Administrative Witness Interview, Admonition of Confidentiality, NOTIS Statement of Benjamin Estill (3 Pages)
8. Notice of Administrative Witness Interview, Admonition of Confidentiality, NOTIS Statement of Tony Lai (3 Pages)
9. 06/03/2016 Email to Sgt. Tansey (1 Page)
10. RDO Relief/Sick & Annual Officer Chart Usage (1 Page)
11. HDSP Overtime Scheduling Sheet 04/13/2016 (1 Page)
12. Statement of Mark Tansey – IR-2016-HDSP-000528 (1 Page)
13. NAC 284.242 Overtime: Authorization (1 Page)

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FILED
SEP 26 2017
HEARINGS DIVISION

BEFORE THE NEVADA STATE PERSONNEL COMMISSION

HEARING OFFICER

JOHNNY BILAVARN,
Petitioner-Employee,
vs.
DEPARTMENT OF CORRECTIONS
Respondent-Employer

Appeal No. 1705452-MG

DECISION AND ORDER

This matter came on for the completion of an administrative hearing before the undersigned Hearing Officer for the Nevada Department of Administration, Hearings Division on August 1, 2017. The hearing was held pursuant to Petitioner-Employee Johnny Bilavarn's appeal of his dismissal from State Service in October of 2016.

1. PROCEDURAL AND FACTUAL OVERVIEW

Petitioner-Employee Johnny Bilavarn was employed as a Correctional Officer with the Department of Corrections some nine years and three months before he was discharged on October 21, 2016. On February 13/14, 2016, Officer Bilavarn was scheduled to work at the High Desert State Prison, Unit 2, A-B Floor, graveyard shift from 9:00 p.m. to 5:00 a.m. Between 4:00 a.m. and 4:30 a.m., shortly before his shift was completed, Sergeant Mark Tansey, Administrative Sergeant on that date, notified Officer Bilavarn, by phone, that he would be mandated to work overtime in Unit 2 C-D for the following eight hour shift beginning at 5:00 a.m.

NAC 284.242 requires at least four (4) hours advance notice for mandatory overtime unless "an unpredictable emergency prevents prior approval and communication."

When notified that he was being called upon to work eight hours of mandatory overtime, he advised Sergeant Tansey that he had prior commitments and was only able to work for three overtime hours.

The testimony about this conversation was conflicting, but it appears as though Sergeant Tansey said he would see what he could do, but if he left before eight hours, he would be abandoning his post. There were no further communications between Sergeant Tansey and Officer Bilavarn.

Three hours into the overtime shift, at approximately 8:00 a.m., Officer Bilavarn left his post without notifying his chain of command. Officer Bilavarn admitted that he exited the facility through the "sally port." The Department of Corrections noted that exiting through the sally port was extremely unusual and inferred that Officer Bilavarn was leaving through that exit in order to avoid detection. Officer Bilavarn testified otherwise - he was leaving through the sally port because of some foot issues and because it was more convenient.

The evidence was that after Officer Bilavarn abandoned his post without notifying his immediate supervisor, or the chain of command, and he caused the institution to fall below minimum staffing levels. Unit 2, C-D was required to cease all operations and was on lock down for at least five hours; the evidence also was that a search was conducted for Officer Bilavarn as there was a concern he could have been in danger and still on the premises.

Officer Bilavarn's defense to these charges and allegations was that the order that he remain at High Desert State Prison and work an additional eight hour shift was, in itself, unlawful in that it was contrary to NAC 284.242. Much testimony was developed with respect to whether or not the mandatory overtime situation that occurred on February 14, 2016, was, in fact, an unpredictable emergency situation. Of particular significance was the testimony of Investigator Nicholas Roble of the Office of Inspector General who performed an investigation of the allegations against Officer Bilavarn. Investigator Roble did a comprehensive evaluation of the employee schedule at High Desert State Prison, at the relevant time frame, and concluded that the staffing was insufficient due to known factors and that there was no unpredictable emergency accounting for less than four (4) hours notification for mandatory overtime to Officer Bilavarn.

Investigator Roble questioned Associate Warden Nash and Associate Warden Stroud as to why mandatory overtime was not scheduled in advance. Officer Stroud indicated that the concept was discussed in the past, but never adapted. Investigator Roble was referred to Warden Nevin for a definitive answer as to why mandatory overtime was not scheduled in advance. According to Investigator Roble's report, the definitive answer provided by the Warden was "because I don't fucking want to." Warden Nevin did not testify at the underlying hearing.

Lastly, of import was the testimony and documentation that two other corrections officers

(Hendley and Peterson) were asked to complete the mandatory overtime shift on the date in question and they refused. Only after they refused was Officer Bilavarn advised he would have to work the mandatory overtime shift in question.

A specificity of charges against Officer Bilavarn was prepared, consisting of the following allegations:

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.

NAC 284.650(3) The employee of any institution administering a security program, in the considered judgment of appointing authority, violates or endangers the security of the institution.

NAC 284.650(6) Insubordination of willful disobedience.

NAC 284.650(7) Inexcusable neglect of duty.

B. AR 339.07 CLASS OF OFFENSE GUIDELINES

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

The essence of the charges are that he was insubordinate for failing to follow a lawful order to work mandatory overtime and that he acted in neglect of duty for leaving an assigned post without authorization of a supervisor.

2. LEGAL AUTHORITY

Officer Bilavarn's appeal to the undersigned Administrative Hearing Officer of the Nevada State Department of Administration was timely filed and the determination of the merits of the appeal is properly within the jurisdiction of the Department.

Chapter 284 of the Nevada Revised Statutes addresses the State Personnel System. NRS

284.385 authorizes the dismissal, demotion, and suspension of a permanent classified State Employee and states as follows:

> 1. An appointing authority may:
>
> (a) Dismiss or demote any permanent classified Employee when the appointing authority considers that the good of the public service will be served thereby.
>
> (b) Except as otherwise provided in NRS 284.148, suspend without pay, for disciplinary purposes, a permanent Employee for a period not to exceed 30 days.
>
> 2. A dismissal, involuntary demotion or suspension does not become effective until the Employee is notified in writing of the dismissal, involuntary demotion or suspension and the reasons therefor. The notice may be delivered personally to the Employee or mailed to the Employee at the Employee's last known address by registered or certified mail, return receipt requested. If the notice is mailed, the effective date of the dismissal, involuntary demotion or suspension shall be deemed to be the date of delivery or if the letter is returned to the sender, 3 days after mailing.
>
> 3. No Employee in the classified service may be dismissed for religious or racial reasons.

NRS 284.383 authorizes the Personnel Commission to adopt a regulation system for the discipline of State Employees stating:

> 1. The Commission shall adopt by regulation a system for administering disciplinary measures against a state Employee in which, except in cases of serious violations of law or regulations, less severe measures are applied at first, after which more severe measures are applied only if less severe measures have failed to correct the Employee's deficiencies.
>
> 2. The system adopted pursuant to subsection 1 must provide that a state Employee is entitled to receive a copy of any findings or recommendations made by an appointing authority or the representative of the appointing authority, if any, regarding proposed disciplinary action.

NRS 284.390 establishes a State employee's right to a hearing if the State employee disagrees with the disciplinary action taken by an appointing authority.

Pursuant to NRS 284.390(1), the hearing officer is to determine the reasonableness of the disciplinary action. Further, pursuant to NRS 284.390(6), the hearing officer is to determine if the dismissal, demotion or suspension was without just cause as provided in NRS 284.385.

The Nevada Supreme Court recently held hearing officers may determine the reasonableness of disciplinary actions and recommend appropriate levels of discipline, but only appointing

authorities have the power to prescribe the actual discipline imposed on permanent classified state employee. *Taylor v. The State Department of Health and Human Services*, 129 Nev. Adv. Op. 99, at 6 (December 26, 2013).

The Personnel Commission/Department of Administration has promulgated regulations at NAC 284.638, et al. pursuant to the authority granted it under NRS 284.383, which set forth the specific causes for disciplining the employee. Those regulations have the full force and effect of law. *Turk v. Nevada State Prison*, 94 Nev. 101 (1978), (holding that the regulations prescribed by the Department of Personnel have the "force and effect of law"). *Id.* at 104.

NAC 284.650 sets forth causes for which disciplinary action can be taken against a person legally holding a position in the public service.

NAC 284.642 sets forth the basis for suspending and demoting a person legally holding a position in public service.

NAC 284.794 sets forth the evidence a hearing officer is to consider in determining the validity of a disciplinary action.

NAC 284.656(b)(3) sets forth the following notice requirements to an Employee being dismissed, demoted or suspended: "Specify the charges, the reasons for them and the cause of action contained in NAC 284.650 on which the proposed action is based."

NAC 284.794 sets forth the evidence a hearing officer is to consider in determining the validity of a disciplinary action stating in paragraph 1:

> The hearing officer shall determine the evidence upon the charges and specifications as set forth by the appointing authority in the appropriate documents, and shall not consider any additional evidence beyond the scope of charges.

In reviewing the actions taken by the employer against the employee, it is the duty of the Administrative Hearing Officer to make an independent determination as to whether there is evidence showing the discipline would serve the good of the public service. *Knapp v. State Dep't of Prisons*, 111 Nev. 420 (1995).

In discussing the evidence that a hearing officer can consider, the Nevada Supreme Court, in *Dredge v. State ex tel. Dep't of Prisons*, 105 Nev. 39, 43 (1989), held details not contained in the specification of charges should be considered as long as they support the grounds charged. The

Nevada Supreme Court stated:

> Dredge was specifically charged with unauthorized association with an ex-inmate. Details in support of the charge that were presented at the hearing but not included within the specification of charges were not properly excluded under Schall. We therefor agree with the district court that the hearing officer erroneously failed to consider substantive evidence in reaching his decision.

In discussing cause for discipline, the Nevada Supreme Court held that a showing of "legal cause" was cause "specifically and substantially relating to and affecting the qualifications for, or the performance of, the position." *Whalen v. Wellivet*, 60 Nev. 154, 159 (1940).

The employer has the burden of proof to present evidence and argument to prove the allegations presented in the specificity of charges and whether there is "just cause" to discipline the employee.

The Nevada Supreme Court recently issued a decision addressing the standard of proof in these type of hearings. In *Nassiri and Johnson v. Chiropractic Physicians' Board of Nevada*, 130 Nev. Adv. Op. 27 (April 3, 2014), the court held that the standard of proof is the degree or level of proof demanded to prove a specific allegation and that the preponderance of the evidence is the standard of proof for an agency to take disciplinary action against an employee. The preponderance of evidence standard is described as "more probable than not."

In order to act arbitrarily and capriciously, an administrative agency must act in disregard of the facts and circumstances involved. *Meadow v. Civil Service Bd. Of Las Vegas Metro. Police Dept.*, 105 Nev. 624, 627 (1989).

As previously noted, the authority granted the hearing officer, pursuant to NRS 384.390(6), is to determine whether the agency had just cause for the discipline "as provided in NRS 284.385." NRS Chapter 284 is the enabling legislation granting authority for the executive department of state government to establish conditions of service and uniform job classifications for all state employees. NRS 284.383, et seq. is the statutory scheme enabling the establishment of a system of disciplinary proceedings against state employees.

The case of *State Ex Re Dept. of Prisons v. Jackson* 111Nev.770,895 P 2d 1296 (1995) reflects that deference to the appointing authority's determination is appropriate where the facts of a case indicate or involve a clear and serious security threat.

3. **FINDINGS OF FACT**

A. Corrections Officer Johnny Bilavarn had been employed with the Nevada Department of Corrections for approximately nine years and three months as of October 21, 2016, when he was discharged. On February 13 and 14, 2016, he was assigned to the graveyard shift at the Unit 2, A-B Floor of the High Desert Correctional Facility. His scheduled work hours were from 9:00 p.m. on February 13, 2016, through 5:00 a.m. on February 14, 2016.

B. At approximately 4:00 a.m. to 4:30 a.m. on February 14, 2016, Officer Bilavarn was called by Administrative Sergeant Mark Tansey and was notified that he was being scheduled for mandatory overtime for the following eight hour shift commencing at 5:00 a.m. to 1:00 p.m. on February 14, 2016.

C. Officer Bilavarn communicated to the Administrative Sergeant Tansey that he had prior commitments and he was unable to work a complete eight hour overtime shift. He stated he was available to remain three hours only - until 8:00 a.m. Sergeant Tansey appears to have indicated that he would try to get Officer Bilavarn relief at that time. No further communication occurred between Officer Bilavarn and Sgt. Tansey that day.

D. At approximately 8:00 a.m. on February 14, 2016, Officer Bilavarn left his post at Unit C-D at the High Desert Correctional Facility without notifying the Administrative Sergeant on duty, or anyone else in the chain of command.

E. Because of Officer Bilavarn's abandonment of his post, the Unit was placed in lock down and an emergency search was initiated in order to determine whether or not Officer Bilavarn was still at the facility and in trouble, or if he had, in fact, left.

F. The actions of Officer Bilavarn of leaving his post without notifying his direct supervisor at 8:00 a.m. on February 14, 2016, created a serious safety situation for the facility and caused it to fall below minimum staffing requirements.

G. The direction given to Officer Bilavarn between 4:00 a.m. and 4:30 a.m. that he was mandated to work another eight hour overtime shift was unlawful and contrary to NAC 284.242, as there was no unpredictable emergency preventing prior approval and communication.

H. The evidence strongly suggests that Officer Bilavarn was treated in a disparate fashion

with respect to the overtime assignment the morning of February 14, 2016. Two other correctional officers were ahead of Officer Bilavarn on the list for mandatory overtime and, yet, the documentation and testimony reflects that they simply refused to work the mandatory overtime shift. It seems unfair to me that two separate employees can refuse mandatory overtime with impunity while another officer who explained his position was dismissed for his transgressions.

I. Officer Bilavarn does have a disciplinary history. My view is that none of the prior violations was particularly serious and none involved significant safety or security implications. The most recent infraction was on June 29, 2010. Officer Bilavarn was attending the second day of a refresher training and appeared to be sleeping during the training class. In 2009, he was imposing military type discipline and required an inmate to exercise to the point of vomiting. In 2009, he inadvertently brought his cell phone into the institution. When he, himself, discovered the fact that he had a cell phone in his possession, he immediately notified his supervisor and asked to take the phone out of the institution immediately.

4. DISCUSSION AND CONCLUSIONS OF LAW

After carefully reviewing this case and the testimony of all involved, I must conclude that the decision to terminate Officer Bilavarn from State service, under the circumstances underlying this case, does not serve the good of the public service.

The order given to him at 4:00 a.m. on February 14, 2016, to work an additional eight hour mandatory overtime shift, was not a lawful order as it was inconsistent with NAC 284.242. I find that, quite clearly, there was no unpredictable emergency at the time mandating proper prior approval and communication to the employee. Moreover, it seems as though Officer Bilavarn was treated unfairly when other officers simply refused to work the overtime shift - they were, apparently, allowed to leave the facility without repercussions; when Officer Bilavarn expressed that he was unable to work the shift, as directed, he received no such accommodation.

To me, it is a fundamental tenet of State service that all employees must be treated fairly, equitably, and consistently. NRS 284.010 states as follows:

1. The Legislature declares that the purpose of this chapter is:

(a) To provide all citizens a fair and equal opportunity for public service;

(b) To establish conditions of service which will attract officers and employees of character and ability;

(c) To establish uniform job and salary classifications; and

(d) To increase the efficiency and economy of the agencies in the Executive Department of the State Government by the improvement of methods of personnel administration.

The fact that Officer Bilavarn was treated much differently than the two other officers ahead of him on the overtime list is particularly disturbing. The statements attributed to Warden Nevin that he refused to consider implementing a mandatory overtime system where the employees would get proper notification because "he didn't fucking want to" (if true) is, to me, rather indefensible. Even if this statement was made in an offhand manner, it still reflects an unsettling concept of the proper administration of a State agency. My limited understanding of the job of a corrections officer is that it is a high pressure job with difficult hours, demanding working conditions, and tremendous stress and responsibility. To me, it seems the obligation of the administration would be to institute systems and processes whereby corrections officers can get as much notice as possible as to whether or not they would be selected for mandatory overtime. This also seems consistent with the mandate of the Nevada legislature in implementing and refining NRS Chapter 284.

I admit quite freely that I do not condone the method in which Officer Bilavarn left his post the morning of February 14, 2016. He certainly should have alerted his supervisor and/or the Administrative Sergeant that he was leaving instead of just walking off. I believe that his conduct may warrant some discipline, but under the circumstances of this particular case, the discipline of removing him from State service is inequitable and improper.

I specifically find that Officer Bilavarn was not insubordinate because the order that he work mandatory overtime was not a lawful order. Likewise, his leaving his post at 8:00 a.m. on February 14, 2016, while a violation has to be seen in light of the totality of the circumstances, and considered that the fact he was on the post to begin with was only as consequence of an unlawful order. I am convinced that the good of the public service will not be served and is not served by the termination of Officer Bilavarn from State employment. While I understand the implications of State of Nevada v. Jackson, 111 Nev. 770, 895 P 2d 1296 (1995), I do not believe that deference to

the appointing authority is mandated when the underlying premise of the discipline is based upon an unlawful order and disparate treatment.

ORDER

Based on the foregoing findings of fact and conclusions of law and good cause appearing therefor, it is hereby ordered, adjudged and decreed that the action of Respondent-Employer Nevada Department of Corrections in terminating Petitioner-Employee Johnny Bilavarn from service of the State of Nevada has not been established by the reliable, substantial, and probative evidence to be for the good of the public service and the same shall be and herein is reversed. The matter is hereby remanded to the Respondent-Employer Nevada Department of Corrections to consider appropriate discipline in keeping with the findings set forth herein.

Petitioner-Employee Johnny Bilavarn shall be restored to his prior position with full back pay and benefits from his date of discharge (October 27, 2016).

DATED this 29th day of September, 2017.

MARK L. GENTILE
Hearing Officer

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

CERTIFICATE OF SERVICE

I hereby certify that, on the 26th day of September, 2017, service of a true and correct copy of the foregoing **Decision and Order** was made by first class mail, postage prepaid, to:

Johnny Bilavarn
5604 Mare Way
Las Vegas, Nevada 89108

and by first class mail, postage prepaid, and email to:

Adam Levine, Esquire
Law Office of Daniel Marks
610 South 9th Street
Las Vegas Nevada 89101
Email: alevine@danielmarks.net

and by interdepartmental mail to:

James Dzurenda, Director
Department of Corrections
3955 West Russell Road
Las Vegas, Nevada 89118

Sharlet Gabriel, HR Administrator
Department of Corrections
3955 West Russell Road
Las Vegas, Nevada 89118

and by interdepartmental mail and email to:

Cameron P. Vandenberg, Chief Deputy Attorney General
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D. Giambelluca, Legal Secretary II
Employee of the State of Nevada

EXHIBIT “3”

EXHIBIT “3”

BEFORE THE NEVADA STATE PERSONNEL COMMISSION

HEARING OFFICER

FILED
MAR 12 2018
HEARINGS DIVISION

Morris Guice, Petitioner, vs. STATE OF NEVADA ex. rel. its DEPARTMENT OF CORRECTIONS, Respondent.	Case No.: 1801361-RZ **FINDINGS OF FACT CONCLUSIONS OF LAW DECISION AND ORDER**

MAR 13 2018

THIS MATTER came before the undersigned Hearing Officer on behalf the Nevada State Personnel Commission on the 20th day of February 2018 in Las Vegas, pursuant to an appeal by Morris Guice of his dismissal from employment with the State of Nevada, Department of Corrections.

Mr. Guice (Petitioner) appeared with representation by his attorney, Adam Levine, Esq. of the Law Office of Daniel Marks. The Department of Corrections (Respondent) appeared with representation by Chief Deputy Attorney General Linda Anderson, Esq.

The undersigned Hearing Officer, having heard testimony of the witnesses, the arguments of counsel and reviewed the pre-hearing brief's and exhibits does hereby makes the following Findings of Fact, Conclusions of Law and Decision.

WITNESSES

1. Morris Guice, Petitioner
2. Kurt Krohn, Correctional Officer, High Desert State Prison

3. Terry Long, Correctional Officer, High Desert State Prison

4. Victor Daniel, Criminal Investigator, Nevada Department of Corrections

5. Robert Ashcraft, Correctional Officer, High Desert State Prison

6. Aaron Dicus, Correctional Officer, High Desert State Prison

7. Brian E. Williams, Warden, High Desert State Prison

NARRATIVE

On February 17, 2017 the Petitioner was assigned to Housing Unit 3 at High Desert State Prison[1]. The Petitioner was working with a trainee Correctional Officer named Terry Long, escorting and monitoring inmates to secure shower stalls with a port in the door through which officers may handcuff inmates before they are released from the shower stall.[2] Inmate Sellers admitted using racist language toward the Petitioner.[3] Inmate Sellers stated that the Petitioner told him he was going "to 'gas' him" before attempting to remove him from the shower stall. Inmate Sellers admitted attempting to "making a move like he was going to attack"[4] trainee Officer Long as Long was removing the inmate from the neighboring shower stall. Inmate Sellers stated that his impression was that the Petitioner had "gassed" him do to racism toward Inmate Sellers.[5] Trainee Officer Long testified and in his statement to Investigator Victor Daniel that Inmate Sellers was verbally abusive and that Inmate Sellers had attempted to strike him

[1] Statement of Inmate Ronald Sellers dated February 17, 2017. See Page 000013 of Exhibit 1.

[2] The secure stalls were referred to as a "cage" in the statements to NDOC Investigators.

[3] See Page 000013 of Exhibit 1.

[4] See Page 000013 of Exhibit 1.

[5] See Page 000013 of Exhibit 1.

through the port. In his testimony Officer Long testified that he did not see Inmate Sellers grab the Petitioner. However, in his statement to Investigator Daniel on March 17, 2017 he stated that he say he saw "Sellers reach out of the port to attempt to strike or grab" the Petitioner.[6] Officer Long testified that the Petitioner had made efforts to defuse the situation by repeated directors to Inmate Sellers to clam down, however those efforts were in vain. Officer Long heard Inmate Sellers tell the Petitioner that he would "f" him up and that the Petitioner should "not come near the cage because he was going to hurt him if he grabbed him".[7] Officer Long testified and stated that the Petitioner asked for his oleoresin capsicum (OC) spray canister and showed it to Inmate Sellers while Officer Long removed the inmate from the adjacent shower stall. Officer Long was not in the shower area when the Petitioner deployed the OC spray, but at the time Inmate Sellers was sprayed he was in the secured shower stall.

Investigator Daniel testified that he was assigned on March 17, 2017 a report that while an inmate had been in a secure shower stall when he was sprayed with OC. Investigator Daniel testified that based on his investigation he concluded that Inmate Sellers was secure and did not pose a threat to the Petitioner at the time he was sprayed with OC. Consequently, in his opinion there was a regulation and/or policy violation committed by the Petitioner. Investigator Daniel further testified that he was not present at the time of the incident and that there was no video footage showing the incident. Video surveillance was captured following the incident showing the shower stall area.[8]

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[6] See Page 000015 of Exhibit 1.

[7] See Page 000015 of Exhibit 1.

[8] The video was not offered into evidence during the hearing.

Correctional Officer Kurt Krohn appeared as the training officer in charge with instructing correctional officers in the use of force and more particularly the use of OC spray. Officer Krohn testified that the PowerPoint slides attached to the Specificity of Charges is used when training correctional officers in the use of OC spray. The slide entitled "Stream Delivery" states that the officer should spray from "ear to ear across the eyes."

Warden Brian Williams testified that upon assuming command of High Desert State Prison he initiated changes to the Use of Force policy. Warden Williams testified that pursuant to policy only officers who have been trained are authorized to use OC. Warden Williams testified that the Petitioner had not been issued OC and took the canister from Officer Long. Warden Williams testified that based upon his review of the investigative report the Petitioner had sufficient time to call for a supervisor and prepare for a planned use of force rather than initiating a spontaneous use of force. Warden Williams further testified that deploying OC spray is a less than lethal use of force. Less that lethal uses of force may be utilized to prevent the commission of a felony and that pursuant to the Nevada Revised Statutes spitting on a correctional Officer is a felony.[9] Warden Williams also testified that he has reviewed the curriculum of the NDOC Training Academy and knows that it includes training in the use of OC. Based upon his review of the report in this matter he concluded that the Petitioner was not justified in using force against Inmate Sellers.

Correctional Officer Robert Ashcraft testified that he is familiar with Inmate Sellers. Inmate Sellers is a "high risk inmate" and is considered dangerous. He knows that Inmate Sellers is a member of the "Aryan Warriors" gang, has Hepatitis C and constitutes a threat to correctional officers. Officer Ashcraft further testified that Correctional Officers must take any

[9] NRS 212.189.

threat of violence from Inmate Sellers as a serious matter. Officer Ashcraft testified that the Use of Force policies permit the use of force to prevent the destruction of property.[10]

The Petitioner was interviewed during the investigation by Investigator Daniel and testified during the hearing. The Petitioner testified that he had been trained in the use of force while attending the NDOC Training Academy in accordance with the provisions of NAC 289.160. The Petitioner testified that he did not carry OC in the performance of his regular duties. OC had been reintroduced as a less than lethal use of force following the appointment of Warden Williams to High Desert State Prison. The Petitioner testified that he received the use of force training following this incident.

The Petitioner testified that Inmate Sellers was uncooperative and using racial slurs directed toward him. The Petitioner testified that he unsuccessfully attempted for five to ten minutes to calm Inmate Sellers. At about that time Inmate Sellers spit on him and reached out and said that he would have the Petitioner stabbed and he attempted to unlock the shower stall. The Petitioner ordered Inmate Sellers to step to the back of the shower stall, but Inmate Sellers refused to comply with those orders. The Petitioner directed Officer Long to remove from the adjacent shower stall another inmate. The Petitioner testified that Inmate Sellers told Officer Long that he would allow him to pass but that he wanted to attack the Petitioner. The Petitioner testified that Inmate Sellers was attempting to unlock the shower stall door at that time. The Petitioner concluded that Inmate Sellers needed to be isolated and he displayed the OC canister to him. Inmate Sellers then covered his mouth and nose with a towel. Inmate Sellers continued to refuse to comply with his orders.

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[10] Administrative Regulation 405.03.5

The Petitioner testified that he observed Inmate Sellers was about to spit a second time so he sprayed Inmate Sellers one time across the eyes, which was in accordance with the training he received at the NDOC Training Academy. Informed Investigator Daniel that he could not move further back from the shower stall because of the presence of mobile food warmers and that in his opinion there was no reasonable position from which he could have maintained view of the inmate and been out of reach. The Petitioner stated to Investigator Daniel and testified that he was afraid for his own health, as he knew Inmate Sellers was infected with Hepatitis C. The Petitioner testified that he needed to maintain visual observation of Inmate Sellers. No reasonable, reliable or probative evidence was presented showing the size of the space in which the incident occurred, nor the elapsed time between the time Inmate Sellers first spit on the Petitioner and when the Petitioner sprayed Inmate Sellers with OC. Furthermore, there was no reasonable, reliable and probative evidence that the Petitioner could have safely removed himself from the area or called for assistance quickly enough to protect himself from Inmate Sellers.

Finally, had the Respondent concluded that the Petitioner's conduct was serious or grave the Petitioner should have been removed from service involving regular contact with inmates during the 152 days following the incident prior to the date of his dismissal from State service.

FINDINGS OF FACT

The Parties stipulated to the introduction of all Exhibits offered. Exhibit 1 is the Specificity of Charges, with its exhibits. The Specificity of Charges is dated June 29, 2017, alleges that the Petitioner violated NAC 284.650 (1); NAC 284.650 (21); AR 229.05; and, AR 339.07.17(A).

1. The Petitioner was hired by the Respondent to be a Correctional Officer on April 28, 2014.

2. The Petitioner attended and completed the Nevada Department of Corrections basic academy and received training on the use of OC spray.
3. On February 17, 2017 the Petitioner was employed and on duty as a Correctional Officer at High Desert State Prison.
4. On February 17, 2017 Inmate Ronald Sellers was housed at High Desert State Prison serving life in prison and based upon the terms of his sentence Inmate Sellers will never be released from prison alive.
5. Inmate Sellers is a member of the "Aryan Warriors" prison gang and known to be a racist.
6. The Petitioner knew that Inmate Sellers was a dangerous high-risk inmate.
7. On February 17, 2017 the Petitioner and a trainee Correction Officer, Terry Long, were assigned to escort inmates from their cells to secured shower stalls.
8. The secure shower stalls have "ports" openings in the door to permit handcuffing of inmates.
9. At about 1415 hours on February 17, 2017, Inmate Sellers was in a locked shower stall.
10. At about that same time a second, unidentified, inmate was in a shower stall immediately adjacent.
11. Inmate Sellers was aggressive, verbally disruptive and making racist statements toward the Petitioner, who is African-American.
12. Inmate Sellers attempted to grab or strike trainee Correction Officer Terry Long by reaching through the port in the shower stall door.
13. The Petitioner attempted to resolve the situation by talking with Inmate Sellers for 5-10 minutes.

14. Inmate Sellers continued to be verbally combative, attempted to grab the Petitioner and then spit on the Petitioner.

15. Inmate Sellers told the Petitioner that he would have him stabbed.

16. The Petitioner instructed Inmate Sellers to move to the back of the shower stall three times and Inmate Sellers refused.

17. Inmate Sellers repeatedly kicked the shower door and attempted to open the lock.

18. The Petitioner displayed the OC canister to Inmate Sellers.

19. Inmate Sellers wrapped a towel around his mouth and nose.

20. Inmate Sellers then began to act as if he was going to spit a second time on the Petitioner.

21. The Petitioner deployed the OC spray one time across Inmate Sellers' eyes.

22. The Petitioner was unable to position his body sufficiently out of the reach of Inmate Sellers while maintaining observation of him.

23. The Petitioner did not have sufficient time to call for assistance between being spit upon and deploying the OC spray.

24. On or about March 17, 2017, the Petitioner was notified that his actions in this incident were under investigation.

25. On or about March 22, 2017 Investigator Daniel regarding interviewed the Petitioner regarding his use of force in this incident.

26. On or about March 29, 2017 Warden Williams was notified that an investigation was being conducted into the allegation that the Petitioner had engaged in the Unauthorized Use of Force. The notice indicates that the use of force was unnecessary.

27. On or about March 31, 2017 Warden Williams notified Deputy Director Quentin Byrne that the allegation of misconduct by the Petitioner had been sustained. The notification included the recommendation that the Petitioner be terminated from State service.

28. On or about March 31, 2017 Warden Williams notified the Petitioner that the allegation of misconduct had been sustained and that the recommended discipline was that the Petitioner be terminated from State service.

29. On or about May 10, 2017 the Petitioner was notified that the allegation had been sustained and that a specification of charges had been generated and the recommendation is subject to final review by Human Resources and/or the Attorney General's Office.

30. On June 29, 2017 the Petitioner was advised of the Conclusion of the Investigation and the proposed disciplinary action.

31. On June 29, 2017 the Petitioner waived his right to a pre-disciplinary hearing.

32. On July 18, 2017 the Petitioner was served with notice that his employment with the State of Nevada was being terminated effective July 19, 2017.

33. The Petitioner was dismissed from public service on July 19, 2017.

34. The Petitioner had not received training in the use of OC spray, following his completion of the DOC Post Category 3 Academy and his qualifications with respect to the policy for use of OC spray were not up-to-date.

35. The Petitioner deployed the OC spray consistent with the directions found in the in-service training.

36. Based upon the Petitioner's knowledge of the situation and inmate at the time of his use of OC spray in this incident this use of force was not unreasonable.

37. The Petitioner had not been subjected to any prior disciplinary action.

38. The Petitioner was not removed from duty involving contact with inmates during the pendency of the investigation and/or decision making process.

APPLICABLE LAW AND POLICIES

NRS 200.481

1. As used in this section:

(a) "Battery" means any willful and unlawful use of force or violence upon the person of another.

NRS 284.383

Except in cases of serious violations of law or regulations, less severe measures are applied at first, after which more severe measures are applied only if less severe measures have failed to correct the employee's deficiencies.

NRS 284.385

1. An appointing authority may:

(a) Dismiss or demote any permanent classified employee when the appointing authority considers that the good of the public service will be served thereby.

NRS 284.390

6. 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.

NRS 289.010

"Peace officer" means any person upon whom some or all of the powers of a peace officer are conferred pursuant to NRS 289.150 to 289.360, inclusive.

...

NRS 289.220

2. A person appointed pursuant to NRS 211.115 to administer detention facilities or a jail, and his or her subordinate jailers, corrections officers and other employees whose duties involve law enforcement have the powers of a peace officer.

NAC 289.160

The minimum standard of training for officers in training category III is successful completion of a basic course that includes 160 hours of training in:

1. Legal subjects, specifically:

(e) Use of force.

AR 339.06.1

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 discipline, from less serious to more serious, for the Class of Offense and for first, second and third offenses.

AR 339.06.2

Penalties for prohibited activities should be assessed based upon criteria established in the Chart of Corrective/Disciplinary Sanctions.

AR 339.06.4

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.

AR 339.06.9.1

Employee performance issues should be addressed at the lowest appropriate level of supervision beginning with verbal counseling and through Specificity of Charges.

AR 339.06

Chart of Corrective/Disciplinary Sanctions

	First Offense	
Class	Minimum	Maximum
4	Suspension Demotion	Dismissal
5	Dismissal	Dismissal

AR 339.07.17

"A. Willfully employing or permitting the use of unnecessary, unauthorized, or excessive force. **CLASS 4-5**"

AR 405

Authorized Personnel - A person who has received the prescribed NDOC training in the in the application of Use of Force equipment or tactics, and whose qualifications are up-to-date.

CONCLUSIONS OF LAW

Spitting on another person is the willful and unlawful use of force or violence upon the person of another. *Hobbs v. State*, 127 Nev. 234, 251 P.3d 177 (2011). The willful use of force

or violence upon the person of another is a battery.[11] If a prisoner spits on a correctional officer knowing that the spittle contains a communicable disease, whether or not the communicable disease is transmitted as a result of the offense, the prisoner is guilty of a category A felony.[12] Peace officers may use "reasonable force" to protect themselves and others from a battery. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation. *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865 (1989).

Based upon the Petitioner's knowledge of Inmate Sellers' racist attitudes, propensity for violence, infection with a communicable disease, contemporaneous actions, as well as the physical layout of the area and his ability to escape safely this use of force was reasonable.

AR 339.07.17 clearly contemplates that the analysis of uses of force that are "unnecessary, unauthorized, or excessive" that are not serious or grave and therefore may not require termination of the employee. AR 339.07.17 classifies a first offense violation as either a Class 4 violation or a Class 5 violation. If the use of force is a Class 4 violation the minimum penalty could be a suspension.

The Petitioner should not have personally used the OC spray due to the fact that he had not been trained in the most recent Use of Force Policy (AR 405) and receoived specific training on the use of OC spray.

...

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[11] NRS 200.485

[12] NRS 212.189

DECISION and ORDER

Based upon the foregoing findings of fact, conclusions of law and good cause appearing therefore,

The Petitioner's use of force violated AR policy in that he had not received in service training in the administration of OC spray and had not been issued OC spray prior to this incident.

Petitioner's use of force in this instance was consistent with the training he would later receive and was not a grave violation of policy.

The Petitioner's actions did not constitute a serious violation of law or grave violation of policy.

The Petitioner's dismissal lacked just cause in accordance with NRS 284.385.

The Petitioner was denied the opportunity to receive progressive discipline in accordance with NRS 284.383 and AR 339.06.4

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

THAT the Respondent's decision to dismiss the Petitioner is hereby set aside.

THAT the Petitioner shall be reinstated and receive full pay for the period of dismissal.

DATED this 12th day of March, 2018

Robert Zentz, Esq.
Hearing Officer

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

CERTIFICATE OF SERVICE

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

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Dated this 12th day of March, 2018.

D Giambelluca, Legal Secretary II
Employee of the State of Nevada

BEFORE THE NEVADA STATE PERSONNEL COMMISSION

HEARING OFFICER

JOSE MIGUEL NAVARETTE, Petitioner-Employee, v. DEPARTMENT OF CORRECTIONS, Respondent-Employer.	)	Case No. 1713379-MG

FILED

MAY 30 2019

APPEALS OFFICE

DECISION AND ORDER

This matter came on for administrative hearing before the undersigned Hearing Officer for the Nevada Department of Administration, Hearings Division on April 2, 2019 and April 16, 2019. The hearing was held pursuant to Petitioner-Employee Jose Miguel Navarette's appeal of his dismissal from State Service, effective April 21, 2017, for an incident that occurred at Southern Nevada Correctional Center on October 9, 2016, and for alleged irregularities in the subsequent reporting of that incident.

1. PROCEDURAL AND FACTUAL OVERVIEW

Petitioner-Employee Jose Miguel Navarette began his employment for the Nevada Department of Corrections in May of 2008. It was established that he had no prior disciplinary record.

The conduct at issue occurred during breakfast service at Southern Nevada Correctional Center on October 9, 2016. Senior Officer, Jose Navarrete, along with Correctional Officer, Paul Valdez, were randomly searching inmates leaving culinary for contraband. This activity was a common occurrence at the prison.

This matter is somewhat unique in that there was a video camera mounted outside the entrance of the culinary and the incident of October 9, 2016 was recorded on videotape. Unfortunately, there is no audio and we are limited to a single perspective. The timeline of what occurred is clearly demonstrated on the video. While certainly not perfect, the essence of what occurred is reflected in the video. Audio of the encounter would certainly have helped put this in a better context.

The video begins as Officer Valdez and Senior Officer Navarrete had a number of inmates leaving culinary place their hands on a wall, so that they could be searched. The testimony reflected that the usual procedure is for inmates to be pulled out of line at random as they were leaving, placed with their hands against a wall, and submitted to a brief pat down search. The entire process, typically, is completed in a minute or so, although, there is no set time frame for each specific encounter.

Every inmate pulled out of line on October 9, 2016 was subjected to this process and every inmate, aside from one, was searched and released in a matter of a minute or so. The exception to this was inmate Rickie Norelus. The video evidence reflected he was on the wall for approximately ten (10) minutes before he was contacted physically by Officer Valdez, taken to the ground, and then restrained by both officers. During this hearing, I was afforded enhanced video and slow motion video of crucial moments of this encounter, which were not part of evidence at the Valdez hearing. I also was provided an after-the-fact video of inmate Norelus as he was leaving the area and making disparaging comments to the correction officers, which I had not considered before. I also, for the first time, considered the testimony of Mr. Navarette, whom I found to be credible.

I have repeatedly reviewed the tape of inmate Norelus' actions as he was placed on the wall. Petitioner's Exhibit 8 provides key snippets of video from the ten (10) minutes. Mr. Navarette testified comprehensively as to what was occurring during each stage of the encounter. It does appear, without question, that Mr. Norelus was acting differently than the other inmates when placed on the wall for a pat down. He was clearly agitated and his hands were not in the proper position. He appears to be continually looking around anxiously. There is, unfortunately, no audio and one cannot determine what is being said by the officers or the inmates - yet, the head and body movements of all involved reflect, without a doubt, that there was continual chatter by inmate Norelus. The testimony by Mr. Navarette was that Mr. Norelus was being uncooperative and verbally abusive throughout the encounter.

At the 1:50 minute mark of the tape, he was searched by senior Officer Navarrete and no apparent contraband was found. The tape again shows that after this search was completed, he, again, took his hands off the wall and was not complying. Arguably, the decision to keep him on

the wall at this point was related to his failure to comply with procedures and the direction of the officers. There was no sign of physical resistance by the inmate or of any physical threat to the officers, the testimony was that he continued to be verbally abusive and agitated. Although equivocal, this is supported by the tape.

Between minutes 2 and 3 of the tape, inmate Norelus is the only inmate at the wall. His hands were raised and you can detect that he and Officer Navarrete were communicating. There is no sign of any physical threat to the officers. The testimony was that he continued to be verbally abusive and agitated.

Between minutes 3 and 6 on the tape, inmate Norelus is the only inmate on the wall. There is a lot of movement by inmate Norelus and what appears to be a lot of communication between the inmate and the officers. The testimony was that he was verbally abusive and agitated.

Between minutes 6 and 9 on the tape, this situation remains, essentially, the same. It appears that the talking continues. Officer Navarette positions himself alongside the inmate and it does appear he is trying to de-escalate the situation, which is what he described. Inmate Norelus does appear to be less agitated, although, there is still a lot of head movements and animated conversation.

At minute 10:40 on the tape, inmate Norelus takes his hand off the wall and looks at his wrist. He appears to be continually talking. Shortly thereafter, Officer Valdez approaches the inmate from behind. Unfortunately, there is no audio. The testimony was that Officer Valdez verbally told the inmate he was going to cuff him and take him to the sergeant, yet, there was no signs that Officer Valdez actually had his handcuffs in hand. As Officer Valdez abruptly approaches the inmate from behind, the inmate does move backward slightly off the wall and looks over his left shoulder. You can see the inmate's left arm and shoulders slightly moving backwards, but the hands remain on the wall. Officer Valdez then pushes the inmate into the wall, grabs the inmate's neck with his right arm, and wrestles him to the ground.

The physical aspects of this are rather shocking and appear unexpected. All of this occurred in a matter of a few seconds. Once on the ground, he was immediately handcuffed by Officer Valdez and Senior Officer Navarrete, who came over to assist. Officer Valdez' conduct seems abrupt and unanticipated and, upon close review of the enhanced video, continues to appear unjustified.

The video of inmate Norelus leaving the area in a cart to head to the infirmary has him laughing at the officers and claiming that they will "put his kids through college." He does not appear injured and his conduct makes it seem as if he may have been baiting the officers to some extent, which according to the testimony, is a common occurrence in this environment.

Following the incident, Officer Navarette authored an informational report (Petitioner's Exhibit 1). This report reads, in pertinent part, as follows:

> On October 9, 2016 I, Senior Correctional Officer Navarette was assigned to Search and Escort at Southern Desert Correctional Center. At approximately 06:45 hours, inmate Norelus #1104257 came off the Culinary wall while C/O Valdez was attempting to restrain him resulting in a spontaneous use of force. When inmate Norelus came off the wall he was resisting and both he and C/O Valdez went to the ground. I then assisted in holding he inmates upper body down so that C/O Valdez could restrain him. I notified supervisors and called medical so that they could respond to the scene. Medical responded and inmate Norelus was escorted to the infirmary to be further evaluated.

On March 16, 2017, Officer Navarette was served with a specificity of charges. He was cited for the following violations:

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 284.738 to 284.771, inclusive.

10. Dishonesty.

21. Any act of violence which arises out of or in the course of the performance of the employees duties, including without limitation stalking, conduct that is intimidating, assault or battery.

He was also charged with the following:

AR 339.07.9 False or Misleading Statements

A. Knowingly providing false or misleading statements, including omissions, either verbally or in written reports or other documents, concerning actions related to the performance of official duties. Or knowingly providing false or misleading statements, including omissions, in response to any question or request for information in any official investigation, interview, hearing or judicial process. (Class 5)

AR 339.07.17 Unauthorized Use of Force

Wilfully employing or permitting the use of unnecessary, unauthorized or excessive force. (Class 4-5)

A pre-disciplinary hearing took place on April 17, 2017. The pre-disciplinary hearing officer

determined it was in the best interest of the State for the Employee to be dismissed because he allowed the use of excessive force as a Senior Officer and wrote a report that did not accurately depict what occurred.

On April 19, 2017, Director James Dzurenda notified Mr. Navarette of NDOC's decision to terminate his employment effective April 21,2017. Mr. Navarette appealed this determination on May 8, 2017.

2. LEGAL AUTHORITY

Mr. Navarette's appeal to the undersigned Administrative Hearing Officer of the Nevada State Department of Administration was timely filed and the determination of the merits of the appeal is properly within the jurisdiction of the Department.

In *O'Keefe v. Department of Motor Vehicles*, 134 Nev Adv. Op. 92, 431 P.3d 350 (2018), the Nevada Supreme Court clarified the nature and scope of a hearing officer's review. *O'Keefe* expressed the standard of review as follows:

> When a classified employee requests a hearing to challenge an agency's decision to terminate her as a first time disciplinary measure, the hearing officer "determines the reasonableness" of the agency's decision by conducting a three step review process. NRS 284.390 (1).
>
> First the hearing officer reviews de novo whether the employee in fact committed the alleged violation. See NAC 284.798.
>
> Second, the hearing officer determines whether that violation is a "serious violation" of law or regulations such that the "severe measure of termination is available as a first time disciplinary action. NRS 294.383(1). If the agency's published regulations prescribe termination as an appropriate level of discipline for a first time offense, then that violation is serious as a matter of law. NRS 284.383(1); NAC 284.646(1).
>
> Third and last, the hearing officer applies a deferential standard of review to the agency's determination that termination will serve the good of the public service.

Pursuant to NRS 284.390(1), the hearing officer is to determine the reasonableness of the disciplinary action. Further, pursuant to NRS 284.390(6), the hearing officer is to determine if the dismissal, demotion, or suspension was without just cause, as provided in NRS 284.385.

The Nevada Supreme Court recently held hearing officers may determine the reasonableness of disciplinary actions and recommend appropriate levels of discipline, but only appointing authorities have the power to prescribe the actual discipline imposed on permanent classified state

employee. *Taylor v. The State Department of Health and Human Services*, 129 Nev. Adv. Op. 99, at 6 (December 26, 2013).

The employer has the burden of proof to present evidence and argument to prove the allegations presented in the specificity of charges and whether there is "just cause" to discipline the employee.

The Nevada Supreme Court recently issued a decision addressing the standard of proof in these type of hearings. In *Nassiri and Johnson v. Chiropractic Physicians' Board of Nevada*, 130 Nev. Adv. Op. 27 (April 3, 2014), the Court held that the standard of proof is the degree or level of proof demanded to prove a specific allegation and that the preponderance of the evidence is the standard of proof for an agency to take disciplinary action against an employee. The preponderance of evidence standard is described as "more probable than not."

In order to act arbitrarily and capriciously, an administrative agency must act in disregard of the facts and circumstances involved. *Meadow v. Civil Service Bd. Of Las Vegas Metro. Police Dept.*, 105 Nev. 624, 627, 781 P.2d 772 (1989).

3. **DISCUSSION**

I do not believe that the NDOC has established, factually by a preponderance of the evidence, that Mr. Navarette wilfully employed or permitted the use of unauthorized or excessive force. There is absolutely no evidence to reflect that he personally utilized excessive force. Rather, the charge is that as a senior corrections officer that day, he should have acted differently, not allowed inmate Norelus to be on the wall as long as he was, and prevented officer Valdez from using excessive force.

A close review of the enhanced videotape does provide support for Mr. Navarette's testimony that inmate Norelus, which not acting violently or constituting a physical threat, was not complying with the protocol and directions of the officers. While the inmate's conduct was not egregious, it was not in compliance, either. Inmate Norelus was, rather, on the edge of compliance and non-compliance, almost as if he were intentionally attempting to create the situation. The conduct was not bad enough to take him immediately to a sergeant, but it was enough that it could not be ignored. The testimony established that there were staffing issues and that taking inmates to the sergeant for

every infraction was not a feasible alternative.

Mr. Navarette's testimony was that he attempted to de-escalate the situation at the scene. The video does support his testimony of what his intentions were. He is repeatedly seen talking to the inmate in a relaxed manner, in a relaxed position, seemingly trying to calm the inmate and gain compliance.

A close review does reflect that while the inmate did not appear to be a physical threat, he was continually talking, looking around, and not complying with directions. It appears that the behavior of inmate Norelus is, rather, on the cusp - insufficient to immediately take him to the sergeant, but such that to maintain order could not be ignored.

Whether it was appropriate to maintain inmate Norelus on the wall for over ten (10) minutes is unclear. We had testimony and argument that the search and escort process was to perform random relatively quick searches of inmates as they leave culinary. Most are completed in a matter of minutes. However, assuming that inmate Norelus was agitated and not strictly complying with procedures, as it appears here, the fact is that a senior correctional officer has discretion to act as he did in this case. There is no regulation or rule as to the length of time an inmate can be kept on the wall. Mr. Navarette testified that the unit was short staffed and that bringing him immediately to a sergeant would have left the area undermanned. His plan was to keep him on the wall and talk to him until he calmed down. It appears he tried this tactic for ten (10) minutes. There is no rule that a correctional officer must immediately bring a non-compliant inmate to the sergeant - an officer has discretion to attempt to de-escalate the situation.

While one, in hindsight, could question Mr. Navarette's discretion in the manner in which he handled the situation as he did that day, and the length of time he allowed the situation to develop, I believe it is unreasonable to conclude, on the evidence presented, that he willfully employed or permitted the use of unauthorized force.

The use of force by Officer Valdez occurred was quite sudden and was over in a matter of a few seconds. I do not believe, from the evidence, that this use of force was anticipated or could have been anticipated by Mr. Navarette, or that it could have been prevented by Mr. Navarette once it began.

The assertions that Mr. Navarette knowingly provided false or misleading statements in his informational report are more difficult. We had some witnesses from NDOC testifying that the report was false and misleading, that inmate Norelus never came off the wall, and when he did come off the wall, he was not resisting. Officer Navarette's immediate supervisor, who reviewed the report and the incident tape, felt it was accurate and appropriate.

It is a natural inclination to read the report and then repeatedly review the video, enhanced and in slow motion, to see if what Mr. Navarette reported was precisely accurate. I feel that such scrutiny is a mistake, as Mr. Navarette wrote the report without the benefit of reviewing any video - he was trying to assimilate and explain this unexpected event he saw occur literally in a matter of seconds. The reality is Mr. Navarette saw this event (the physical use of force by Officer Valdez) take place in a matter of 2-3 seconds, from a side perspective. He saw it only one time.

As Officer Valdez approached, inmate Norelus did rock back and turn his head, but his hands did not leave the wall. Officer Valdez pushes the inmate into the wall and his right arm goes around the inmate's neck, which is the opposite side from Mr. Navarette's perspective, and which he may or may not have been able to clearly see. The two came off the wall and struggled. Mr. Navarette sees them going backwards and struggling, and he goes over to assist. Inmate Norelus comes to rest on the ground some 15 feet or so from the wall. Is he reporting what he honestly believes he perceived, or is he intentionally trying to cover up the situation?

My conclusion, after much soul searching and many reviews of the video and the statement, is that Mr. Navarette's report is brief and, essentially, factually accurate given what he reasonably could be expected to have perceived at the time. From his testimony, and even in his pre-hearing interviews, it is clear that he believed, initially, Officer Valdez was intending to restrain the inmate. While this was happening, a spontaneous use of force situation occurred. Norelus did come off the wall as Officer Valdez was either properly or improperly attempting to restrain him, but I do not think Mr. Navarette could be fairly called up to conclude from his 2-3 second perception whether Officer Valdez' actions were appropriate or not, or whether the take down was initiated by the wrongful conduct of the inmate or of Officer Valdez. The inmate did rock backwards just prior to physical contact. I do not believe that Mr. Navarette was in the position to know what Officer

Valdez perceived or why this ended as it did. Mr. Navarette's report is a bland statement of events which are, essentially, true. "When he came off the wall he was resisting." They did end up about 15 feet away - inmate Norelus just didn't just flop to the ground. Both officers, ultimately, had to restrain the inmate. Once again, this appears, to me, to be a plain statement that appears, essentially, true.

The testimony was that Mr. Navarette was taught to write clear and concise reports without a lot of extraneous information. If his supervisor wanted more detail, they would ask and he would supplement. I just do not believe, on the evidence presented, that NDOC has met the burden of proving that Mr. Navarette knowingly and intentionally submitted a report with false or misleading information.

4. FACTUAL FINDINGS

The evidence, documents, and testimony presented reflect as follows:

A. NDOC has not met its burden of proving, by a preponderance of the evidence, that Mr. Navarette willfully employed or permitted the use of unauthorized force.

B. NDOC has not met its burden of proving, by a preponderance of the evidence, that Mr. Navarette knowingly and intentionally submitted a report with false or misleading information.

ORDER

The decision of NDOC to dismiss Employee Jose Navarette from State Service is hereby REVERSED, and

Employee Jose Navarette shall be restored to his prior position with back pay and benefits in accord with the prior agreement of the parties.

DATED this 28 day of May, 2019.

MARK L. GENTILE
Hearing Officer

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

CERTIFICATE OF MAILING

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

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N LAS VEGAS NV 89081

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LAW OFFICE OF DANIEL MARKS
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DEPUTY ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
555 E WASHINGTON AV #3900
LAS VEGAS NV 89101

Dated this 30th day of May, 2019.

Zoe McGough

Zoe McGough Legal Secretary II
Employee of the State of Nevada

EXHIBIT “4”

EXHIBIT “4”

Disciplinary Decision Guide

	CONDUCT	FIRST	SECOND	THIRD	FOURTH+
	Minor performance or conduct issues may be dealt with by counseling employees and documenting these counselings on Contact Reports. A Contact Report is not discipline and is only used to retain written documentation of important events.				
1	Any conduct or performance issues not listed below, where the supervisor believes a written record of discipline is necessary in the personnel file to correct the behavior with or without prior counseling.	Written Reprimand	Minor	Major	Major/ Termination
2	Any conduct or performance issues not listed below, where the employee has received a prior counseling for a similar or dissimilar problem.	Written Reprimand	Minor	Major	Major/Termination
3	Alcohol related incidents, not related to DUI.	Written Reprimand/ Minor	Major	Major/ Termination	Termination
4	Inappropriate use of force.	Written Reprimand/ Minor	Minor/Major	Major/ Termination	Termination
5	All other conduct or performance problems where an employee has received one or more written reprimand(s) for a similar or dissimilar offense (except for traffic accidents, unless there is a clear connection to the conduct).	Minor	Major	Major/ Termination	Termination
6	Any other act or omission undertaken by the employee that is detrimental to the Department in achieving its goals and living up to its mission and values statement.	Minor	Major	Major/ Termination	Termination
7	Insubordination — Direct refusal to comply with a lawful order and employee continues to disobey after a warning of discipline is given Employee directs abusive language or comments toward a superior or exhibits manifest disrespect	Minor	Major	Major/ Termination	Termination
8	The accessing of any information system(s) which contains or may contain criminal history or personal information for reasons not related to official purposes	Minor	Major	Major/ Termination	Termination
9	4/101.06 DISPUTES/ARRESTS/INVESTIGATIONS WHERE PERSONALLY INVOLVED	Written Reprimand/ Minor	Major	Major/ Termination	Termination
10	5/102 27 OBSERVERS IN POLICE UNITS	Written Reprimand/ Minor	Major	Termination	
11	4/101 02 ASSOCIATING WITH PERSONS OF ILL REPUTE	Minor	Major	Termination	
12	4/103.22 UNAUTHORIZED WEAPONS AND AMMUNITION	Minor	Major	Termination	
13	5/103.05 USE OF DEPARTMENT VEHICLE FOR TRAVEL OUTSIDE OF NEVADA (relating only to taking vehicle out-of -state without permission)	Minor	Major	Termination	
14	5/103.29 REPORTING DEPARTMENT VEHICLE ACCIDENTS	Minor	Major	Termination	

Disciplinary Decision Guide

	CONDUCT	FIRST	SECOND	THIRD	FOURTH+
15	4/105.09 POLICE BUSINESS CONFIDENTIAL	Written Reprimand/ Minor	Major/ Termination	Termination	
16	4/106.02 AIDING, SUPPORTING, AND PROTECTING FELLOW OFFICERS	Minor	Major/ Termination	Termination	
17	4/109.08 MISAPPROPRIATION OF PROPERTY	Minor	Major/ Termination	Termination	
18	4/110.05 RELEASE OF 9-1-1 TELEPHONE NUMBER AND ADDRESS INFORMATION	Minor	Major/ Termination	Termination	
19	5/109.05 CIVILIAN FIREARMS & AEROSOL DEFENSIVE SPRAY (applies if you carry a weapon that is contrary to this policy)	Minor	Major	Termination	
20	DUI VIOLATIONS BY EMPLOYEES	Major	Termination	Foundational evidence for DUI violations by employees will be determined through Field Sobriety Tests, Preliminary Breath Tests, Blood Tests, Breathalyzer Test, or admission of impairment by the employee	
21	The accessing of any information system(s) which contains or may contain criminal history or personal information for reasons not related to official purposes and then disseminates the information to another party.	Major	Major/ Termination	Termination	
22	4/101.19 TRUTHFULNESS REQUIRED AT ALL TIMES (see row 30 for other considerations)	Major	Major/ Termination	Termination	
23	4/101.03 FRATERNIZATION PROHIBITED	Major/ Termination	Termination	Members shall not fraternize with , engage the services of, accept services from, or do any favors for, any person in the custody of the department except as set forth in writing by the unit commander. **Termination** will apply if a member associates socially with or fraternizes with the spouse of any person in the custody of the department, as it applies to a sexual encounter and the member has knowledge of the custody status.	
24	DUI VIOLATIONS BY EMPLOYEES IN A DEPARTMENT VEHICLE	Major/ Termination	Termination	Foundational evidence for DUI violations by employees will be determined through Field Sobriety Tests, Preliminary Breath Tests, Blood Tests, Breathalyzer Test, or admission of impairment by the employee.	
25	Criminal conduct classified as something less than a felony (other than traffic and not otherwise defined herein).	Major/ Termination	Termination	Issuance of a check or draft without sufficient money or credit can be considered a civil matter if the employee, upon notification that the bank refused the check, pays the holder of the check the full amount due plus any fees, within five days of such notice, regardless of the method of notification. If the employee fails to make this timely restitution, the conduct will be considered a criminal act.	

Disciplinary Decision Guide

	CONDUCT	FIRST	SECOND	THIRD	FOURTH+
26	4/108.10 USE OF POSITION IN CIVIL CASES WHERE PERSONALLY INVOLVED	Major/ Termination	Termination		
27	DOMESTIC ABUSE VIOLATIONS BY EMPLOYEES	Major/ Termination	Termination		
28	5/110.24 DRUG FREE WORKPLACE; USE OF CONTROLLED SUBSTANCES, DANGEROUS DRUGS AND MEDICATIONS (Prescription)	Major/ Termination	Termination		
29	Any act or omission of such an egregious nature that the employee is rendered ineffective in his position and/or the act or omission would tend to bring the Department into public discredit.	Major/ Termination	Termination		
30	4/101.19 TRUTHFULNESS REQUIRED AT ALL TIMES - Employees formally noticed of official investigations conducted by the department who are found to be untruthful during the investigations or who are found to be untruthful in completing official department documents.	Termination			
31	Criminal conduct classified as a felony in Nevada, other State, or by federal statute.	Termination	Issuance of a check or draft without sufficient money or credit can be considered a civil matter if the employee, upon notification that the bank refused the check, pays the holder of the check the full amount due plus any fees, within five days of such notice, regardless of the method of notification. If the employee fails to make this timely restitution, the conduct will be considered a criminal act.		
32	Gross Insubordination — Battery on a superior, refusal to obey order where such refusal puts the public or fellow employees at risk. Also, where appropriate warning is given, the employee will be terminated if he does not comply with a lawful order	Termination			
33	Any act of violence by an employee against another employee in the workplace.	Termination	Violence is defined as an act of aggression that occurs in a work setting and causes physical harm to another employee		
34	Gross inappropriate use of force.	Termination			
35	Theft	Termination			
36	4/101.14 REFUSAL TO TESTIFY	Termination			
37	4/101.18 CHEATING ON EMPLOYMENT/PROMOTIONAL EXAMS	Termination			
38	4/102 06 GIVING ASSISTANCE TO SUSPECTS	Termination			
39	4/106.07 PROTECTION OF IDENTITY OF UNDERCOVER OPERATIVES	Termination			
40	5/110.24 DRUG FREE WORKPLACE; USE OF CONTROLLED SUBSTANCES, DANGEROUS DRUGS AND MEDICATIONS - Illegal drugs as defined by NRS 453 and/or policy.	Termination			

Disciplinary Decision Guide
(Sorted by Policy Number)

MANUAL REFERENCES	REFERENCE GUIDE SECTION
4/101.02 ASSOCIATING WITH PERSONS OF ILL REPUTE	11
4/101.03 FRATERNIZATION PROHIBITED	23
4/101.06 DISPUTES/ARRESTS/INVESTIGATIONS WHERE PERSONALLY INVOLVED	9
4/101.14 REFUSAL TO TESTIFY	36
4/101 18 CHEATING ON EMPLOYMENT/PROMOTIONAL EXAMS	37
4/102 06 GIVING ASSISTANCE TO SUSPECTS	38
4/103.22 UNAUTHORIZED WEAPONS AND AMMUNITION	12
4/105.09 POLICE BUSINESS CONFIDENTIAL	15
4/106.02 AIDING, SUPPORTING, AND PROTECTING FELLOW OFFICERS	16
4/106.07 PROTECTION OF IDENTITY OF UNDERCOVER OPERATIVES	39
4/101 19 TRUTHFULNESS REQUIRED AT ALL TIMES	22
4/101.19 TRUTHFULNESS REQUIRED AT ALL TIMES Internal Investigations and official department documents	30
4/108.10 USE OF POSITION IN CIVIL CASES WHERE PERSONALLY INVOLVED	26
4/109.08 MISAPPROPRIATION OF PROPERTY	17
4/110.05 RELEASE OF 9-1-1 TELEPHONE NUMBER AND ADDRESS INFORMATION	18
5/102.27 OBSERVERS IN POLICE UNITS	10
5/103.05 USE OF DEPARTMENT VEHICLE FOR TRAVEL OUTSIDE OF NEVADA (relating only to taking vehicle out-of-state without permission)	13
5/103.29 REPORTING DEPARTMENT VEHICLE ACCIDENTS	14
5/105 18 DISSEMINATION OF CRIMINAL HISTORY INFORMATION (CHI)	8 & 21
5/105.20 ADMINISTERING AND ACCESSING SCOPE (as it relates to an inappropriate release of information)	8 & 21
5/109.05 CIVILIAN FIREARMS & AEROSOL DEFENSIVE SPRAY (applies if you carry a weapon that is contrary to this policy)	19
5/110.24 DRUGFREE WORKPLACE; USE OF CONTROLLED SUBSTANCES, DANGEROUS DRUGS AND MEDICATIONS (Prescription)	28
5/110.24 DRUGFREE WORKPLACES, USE OF CONTROLLED SUBSTANCES, DANGEROUS DRUGS AND MEDICATIONS - Illegal drugs as defined by NRS 453 and/or policy	40
6/002.00 USE OF FORCE — Inappropriate use of force	4
6/002.00 USE OF FORCE — Gross inappropriate use of force	34

PPA/PPACE

Aggravated/Mitigated Disciplinary Decision Guide

Category	Conduct Dates added to reflect last revision.	Offense	Mitigated	Presumptive	Aggravated
A	➢ Any minor conduct or performance issues not listed below, where the employee has received at least two prior counselings for a similar problem or the supervisor believes a written record of discipline is necessary to correct the behavior with only one prior counseling or no prior counseling. (2017)	1st	SI	WR	Minor
		2nd	WR	Minor	Minor
		3rd	Minor	Minor	Major
		4th	Major	Major	Term
		5th	Major	Term	
		6th	Term		
B	➢ All conduct or performance problems where an employee has received prior discipline for a similar or dissimilar offense (except for traffic accidents, unless there is a clear connection to the conduct). (2017) ➢ Alcohol related incidents, not related to DUI. (2002) ➢ Inappropriate use of force. Only applies to the actual application of force itself; however, tactics, decision making, de-escalation, or any other violation of policy could result in discipline pursuant to another category. (2017) ➢ Disputes/Arrests/Investigations where personally involved. This applies to employees using their law enforcement position to take action that a citizen could not do. Mere knowledge of employee being a LE employee is not itself a violation. (2017) ➢ Observers in police units, as defined by policy. (2017)	1st	SI	WR	Minor
		2nd	WR	Minor	Major
		3rd	Minor	Major	Term
		4th	Major	Term	
		5th	Term		
C	➢ Insubordination – Direct refusal to comply with a lawful order and employee continues to disobey after a warning of discipline is given; or employee directs abusive language or comments toward a superior; or exhibits manifest disrespect. (2017) ➢ The accessing of any information system(s) which contains or may contain criminal history or personal information for reasons not related to official purposes. (2002)	1st	WR	Minor	Major
		2nd	Minor	Minor	Major
		3rd	Minor	Major	Term
		4th	Major	Term	
		5th	Term		

Category	Conduct Dates added to reflect last revision.	Offense	Mitigated	Presumptive	Aggravated
D	➢ Association with persons of ill repute, as defined by policy. (2017) ➢ 4/103.22 Unauthorized Weapons and Ammunition. (2002) ➢ 5/207.00 Use of Department Vehicle for Travel Outside of Nevada (relating only to taking vehicle out-of-state without permission). (2017) ➢ Failure to report a Department Vehicle Accident and/or Incident to Supervisor. (2017) ➢ 4/105.09 Police Business Confidential. (2002) ➢ Aiding, supporting, and protecting fellow officers, as defined by policy. (2017) ➢ 4/109.08 Misappropriate of property. (2002) ➢ 4/110.05 Release of 911 Telephone Number and Address Information. (2002) ➢ Civilian firearms and aerosol defensive spray (applies if you carry a weapon that is contrary to this policy). (2017) ➢ The dissemination of information obtained by accessing any information system which contains or may contain criminal history or personal information to an unauthorized person for reasons not related to official purposes within the Department. (2017)	1st	WR	Minor	Major
		2nd	Minor	Major	Term
		3rd	Major	Term	
		4th	Term		
E	➢ The dissemination of information obtained by accessing any information system which contains or may contain criminal history or personal information to an unauthorized person for reasons not related to official purposes outside the Department. (2017) ➢ 4/101.19 Truthfulness required at all times (see row 30 for other considerations). (2002)	1st	Minor	Major	Term
		2nd	Minor	Major	Term
		3rd	Major	Term	
		4th	Term		
F	➢ Criminal conduct classified as something less than a felony (other than traffic and not otherwise defined herein). (2002) ➢ Impaired, as defined by 5/110.01, while on duty (from either alcohol or a legally prescribed prescription). (2017)	1st	Minor	Major	Term
		2nd	Major	Term	
		3rd	Term		
		Issuance of a check or draft without sufficient money or credit can be considered a civil matter if the employee, upon notification that the bank refused the check, pays the holder of the check the full amount due plus any fees, within five days of such notice, regardless of the method of notification. If the employee fails to make this timely restitution, the conduct will be considered a criminal act.			

Category	Conduct Dates added to reflect last revision.	Offense	Mitigated	Presumptive	Aggravated
G	➢ Any act or omission of such an egregious nature that the employee is rendered ineffective in his position and/or the act or omission would tend to bring the Department into public discredit. (2002) ➢ DUI violations by employees. (2012) ➢ 4/101.03 Fraternization prohibited. (2012) ➢ 4/108.10 Use of position in civil cases where personally involved. (2002) ➢ Domestic Abuse Violations by Employees. (2002)	1st	N/A	Major	Term
		2nd	Term		
		Foundational evidence for DUI violations by employees will be determined through Field Sobriety Tests, Preliminary Breath Tests, Blood Tests, Breathalyzer Test, or admission of impairment by the employee. Termination will be automatic if a member associates socially with or fraternizes with the spouse of any person in the custody of the department, as it applies to a sexual encounter and the member has knowledge of the custody status.			
H	➢ 4/101.19 Truthfulness requires at all times – employees formally noticed of official investigations conducted by the department who are found to be untruthful during the investigations or who are found to be untruthful in completing official department documents. (2002) ➢ Criminal conduct classified as a felony in Nevada, other state, or by federal statute. (2002) ➢ Gross Insubordination – Battery on a superior, refusal to obey order where such refusal puts the public or fellow employees at risk. Also, where appropriate warning is given, the employee will be terminated if he does not comply with a lawful order. (2002) ➢ Any act of violence by an employee against another employee in the workplace. (2012) ➢ Gross inappropriate use of force. (2002) ➢ Theft. (2002) ➢ 4/101.14 Refusal to testify. (2002) ➢ 4/101.18 Cheating on employment/ promotional exams. (2002) ➢ 4/102.06 Giving assistance to suspects. (2002) ➢ 4/106.07 Protection of identity of undercover operatives. (2002) ➢ Use, possession, or sale or illicit drugs as defined by NRS 453 and/or policy. (2017)	1st	N/A	Term	
		Issuance of a check or draft without sufficient money or credit can be considered a civil matter if the employee, upon notification that the bank refused the check, pays the holder of the check the full amount due plus any fees, within five days of such notice, regardless of the method of notification. If the employee fails to make this timely restitution, the conduct will be considered a criminal act. Violence, as it relates to the workplace, is defined as an act of aggression that occurs in a work setting and causes physical harm to another employee.			

Additional Information

1. SI – Supervisory Intervention. Supervisory Intervention is not considered discipline.
2. WR – Written Reprimand.
3. Minor – Minor discipline, which can include a suspension ranging from 8-32 hours or a disciplinary transfer (NOTE: a disciplinary transfer has a purge date of 2 years).
4. Major – Major discipline, which can include a suspension of 40 hours or a demotion.
5. Any prior sustained violation, in the same category, may be considered as a prior violation, and thus progresses the discipline to the next offense.
6. Any prior sustained violation involving the same or similar misconduct, in a category greater than the current violation, may be considered as one prior violation.
7. Any prior sustained violation, may be considered as an aggravating factor.
8. In cases involving multiple concurrent sustained violations, the presumptive discipline level will be set at the category of the most serious sustained violation. The additional violations may be considered as aggravating factors. But only one level of discipline may be applied.
9. Aggravating/mitigating factors should be considered as outlined in the Disciplinary Decision Guide.
10. Prior discipline can be used to progress the offense or aggravate the discipline, but not both.