

# The WRIT

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**Wednesday, June 12, 2019, Harrah's Convention Center  
12:00 p.m. - 1 Hour CLE**

## WCBA Annual Meeting & 2019 Legislative Update

Join WCBA on Wednesday, June 12, at Harrah's, 12 noon, to hear what happened during the 2019 Nevada Legislative Session. Jesse Wadhams will provide us with a recap and let you know what it means for you and your clients.



Jesse A. Wadhams, is of counsel, with Fennemore Craig. Jesse represents clients before Nevada state agencies including the Division of Insurance, the Department of Health, the Division of Minerals, the Division of Environmental Protection, the Gaming Control Board and the Taxation Commission. He also represents clients before all levels of Nevada government from city councils to the Legislature on administrative, licensing, regulatory and policy matters. Jesse has served as an expert witness for

the Nevada Department of Taxation on liquor licensing and distribution.

Jesse received with B.A. degree from Santa Clara University and his J.D. from Santa Clara University School of Law. Jesse was admitted to the State Bar of Nevada in 2004, and is a member of Washoe County Bar.

Jesse was named *Best Lawyers in America*®, Administrative/Regulatory Law, 2019; "Legal Elite", *Nevada Business Magazine*, 2016-2018; Northern Nevada Top 75 Attorney, *Nevada Business Magazine*, June 2012; and Freshman Lobbyist of the Year, Legislative Session, 2007.

**RSVP** by June 10, 2019. \$25 per person for members, tables of eight with signage \$200 and \$35 for non-members. Register online at [www.wcbar.org](http://www.wcbar.org) or call 786-4494.

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# APPELLATE BRIEFS

By Adam Hosmer-Henner, McDonald Carano

## Administrative Deference in Judicial Review Cases

Briefs submitted to the Nevada Supreme Court must contain a “concise statement of the applicable standard of review.” NRAP 28(a)(10) (B). This requirement is not a memory test for attorneys but a critical part of the argument on appeal. See NRAP 28(a)(10) (including the standard of review within the “argument” section of the brief); see also *Walsh v. Centeio*, 692 F.2d 1239, 1241 (9th Cir. 1982) (“[T]he outcome of the instant case turns on the standard of review . . .”). The applicable standard of review is especially important in an administrative appeal as there is an extra step in the process. In a series of recent decisions involving the termination of classified employees, the Nevada Supreme Court identified a new standard of review to be employed by a hearing officer as well as reaffirmed the standard of review for the district court and the Nevada Supreme Court.

“A hearing officer’s review of an agency’s decision to terminate an employee as a first-time disciplinary measure requires a three-step process.” *Dep’t of Corr. v. Ludwick*, 135 Nev. Adv. Op. 12 (2019). First, the hearing officer uses a de novo standard to determine “whether the employee in fact committed the alleged violation.” *O’Keefe v. State, Department of Motor Vehicles*, 134 Nev. Adv. Op. 92, 431 P.3d 350, 356 (2018). Second, if there is not a specific regulation or policy in place, the hearing officer applies a “deferential standard of review to an agency’s determination that “[t]he seriousness of the offense or condition warrants such dismissal.” *Id.* If an agency’s regulation or policy directly speaks to the matter at hand, then it controls the outcome as a “matter of law,” but the Court seemingly did

not set forth a specific standard of review for these circumstances. *Id.* Third, the hearing officer applies the same “deferential standard of review” to the agency’s determination that termination will serve the “good of the public service.” *Ludwick*, 135 Nev. Adv. Op. 12.

Upon a petition for judicial review of the hearing officer’s determination, the district court and the Nevada Supreme Court are both limited to the familiar administrative law standard of determining whether the hearing officer’s decision was “clearly erroneous, arbitrary or capricious, or affected by an error of law.” *Id.* While the reviewing court, trial or appellate, can review questions of law on a de novo basis, it still must defer to the hearing officer’s interpretation of the agency’s “governing statutes or regulations if the interpretation is within the language of the statute.” *Id.* (quoting *Taylor v. State, Dep’t of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013)).

The trio of recent decisions in this area involve similar factual backgrounds concerning the level of deference that a hearing officer must pay to the government agency’s decision to terminate an employee for serious conduct, even when the conduct is a first-time offense. In *O’Keefe*, an employee at the Nevada Department of Motor Vehicles was terminated based in part on an alleged violation of DMV Prohibition G(1), “Misuse of Information Technology,” which was deemed serious enough to warrant termination for a first offense. The hearing officer overturned the termination and recommended the imposition of a suspension instead. The Nevada Supreme Court affirmed

the district court’s finding that the hearing officer failed to adequately defer to the DMV’s determination of reasonableness with respect to the termination. In *Ludwick*, an employee with no prior discipline record at the Nevada Department of Corrections was terminated after leaving his post without the prior permission of a supervisor. 135 Nev. Adv. Op. 12. The Nevada Supreme Court held that the regulation in question, AR 339, was not valid because it was never formally approved by the State Personnel Commission and so could not form the basis for any part of the hearing officer’s determination as to the reasonableness of the termination. Remand was appropriate based on the clear error of law identified by the Nevada Supreme Court. Finally, *Office of the Military v. Simpson* involved the termination of an employee at the State of Nevada’s Office of the Military. 432 P.3d 195 (Nev. 2018). *Simpson* had an unblemished service record prior to the first-time offense and the hearing officer concluded that “termination was unreasonable and did not serve the good of the public service.” *Id.* at \*2. The Nevada Supreme Court found that the hearing officer abused his discretion when applying de novo review to the Office of the Military’s decision that termination was not reasonable and recommending more lenient discipline.

While the three-step process developed in *O’Keefe* was applied in and adhered to in *Ludwick* and *Simpson*, not everyone on the Nevada Supreme Court agreed with this new approach. Justice Pickering wrote concurring opinions in *O’Keefe* and in *Simpson* to establish her view that an overly deferential standard of review “improvidently reduces the hearing

officer's independent role in ensuring fair and impartial discipline of a state employee to that of a functionary." Simpson, 432 P.3d 195. Justice Pickering critiqued the majority opinions for failing to allow a hearing officer the latitude to distinguish between significant and technical violations of an agency's regulation or policy. By overemphasizing the deference owed by a hearing officer to an agency's determination of reasonableness, the entire appellate process may become a formality except in situations where clear error is identified as in Simpson. The importance of the standard of review was highlighted in Justice Pickering's concurrence in Simpson: "While we as a reviewing court might have decided the matter differently, the hearing officer listened to the witnesses, reviewed the evidence, and decided progressive discipline short of termination was warranted. The hearing officer had authority to make this determination . . . we should review deferentially and uphold." Id. This suggested deference by the Nevada Supreme Court to the hearing officer was trumped by the deference owed by the hearing officer to the government agency.

*Adam Hosmer-Henner is a partner at McDonald Carano and practices primarily in the areas of commercial litigation and appellate law. He regularly handles appeals and writ proceedings at the Nevada Supreme Court and the United States Court of Appeals for the Ninth Circuit.*



# P E O P L E

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## In Memoriam

NOEL E. MANOUKIAN passed away on April 11, 2019. Former Chief Justice Manoukian was appointed to the Supreme Court of Nevada by Governor Michael O'Callahan in 1977. Prior to that, Noel had a very prosperous career beginning with his appointment as the Deputy District Attorney in Douglas County, Nevada, in 1965 followed by his selection to serve as the Douglas District Judge in 1974. After serving on the Supreme Court, he returned to private practice in 1985 until the Supreme Court appointed him to a Senior Judge position in 2003. Noel is survived by his wife Louise; daughter Jacquie Manoukian; daughter-in-law Heather Van Slyke (Brandon); grandchildren Treyton, Hannah Rose, Conor, and Ashlyn; and many nieces and nephews.

