BEFORE THE COMMISSION OF APPRAISERS OF REAL ESTATE

STATE OF NEVADA

SHARATH CHANDRA , Administrator, REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS AND INDUSTRY, STATE OF NEVADA, Petitioner, vs. MICHAEL L. BRUNSON (License No. A.0207222-CG), Respondent.	Case No. 2016-4146 & AP 17.020.S OPPOSITION TO RESPONDENT MICHAEL BRUNSON'S PETITION FOR REHEARING PURSUANT TO NAC 645C.505

FILED

APR 24 2019

NEVADA COMMISSION OF APPRAISERS

Petitioner, Sharath Chandra, Administrator of the Real Estate Division, Department of Business & Industry, State of Nevada ("Division"), by and through its counsel, Aaron D. Ford, Nevada Attorney General, and Peter K. Keegan, Deputy Attorney General, hereby file the instant Opposition to Respondent Michael Brunson's Petition for Rehearing Pursuant to NAC 645C.505 ("Petition for Rehearing").

MEMORANDUM OF POINTS AND AUTHORITIES

I. LEGAL STANDARD

NAC 645C.505, sets for the standard for the Commission to evaluate a petition for rehearing and reads as follows:

> The following procedures will be used for a rehearing in a case where a ruling or decision of the Commission is against a licensee or holder of a certificate:
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> 1. The licensee or holder of a certificate may, within 15 calendar days after receipt of the decision, petition the Commission for a rehearing.
> 2. The petition does not stay any decision of the Commission unless the Commission so orders.
> 3. The petition must state with particularity the point of law or fact which, in the opinion of the licensee or holder of a certificate, the Commission has overlooked or misconstrued and

must contain every argument in support of the application that the licensee or holder of a certificate desires to present.

4. Oral argument in support of the petition is not permitted.

5. The Division may file and serve an answer to a petition for a rehearing within 10 calendar days after it has received service of the petition.

6. If a petition for rehearing is filed and the Commission is not scheduled to meet before the effective date of the penalty, the Division may stay enforcement of the decision being appealed. When determining whether a stay is to be granted, the Division shall determine whether the petition was filed in a timely manner and whether it alleges a cause or ground which may entitle the licensee or holder of a certificate to a rehearing.

7. A rehearing may be granted by the Commission for any of the following causes or grounds:

(a) Irregularity in the proceedings in the original hearing.

(b) Accident or surprise which ordinary prudence could not have guarded against.

(c) Newly discovered evidence of a material nature which the applicant could not with reasonable diligence have discovered and produced at the original hearing.

(d) Error in law occurring at the hearing and objected to by the applicant during the earlier hearing.

8. A petition for a rehearing may not exceed 10 pages of standard printing.

II. ARGUMENT

A. The Record Belies Respondent's Contention that He was Not Allotted Sufficient Time to Present His Case.

As the Commission recalls, this hearing lasted two days from October 10-11, 2018, and then was resumed for another two (2) days on January 29-30, 2019. Nevertheless, Section B of Respondent's Petition for Rehearing argues, pursuant to NAC 645C.505(7)(a), that there were irregularities in the proceedings and that he was not afforded an adequate opportunity to present his case to the Commission.[1] This argument is refuted by the hours of direct testimony offered by the Respondent contained in the record on October 11, 2018 and January 29, 2019.[2] Similarly, the record of the October 11, 2018, hearing clearly

[1] *Petition for Rehearing,* p. 3-4, ln. 21-28; 1-2.

[2] Exhibit 1*: Transcript of October 11, 2018, Nevada Appraisal Commission Hearing in Case Nos. 2016-4145 & 2016-4146*, p. 167 – 254; Exhibit 2: *Morning transcript of January 29, 2019, Nevada Appraisal Commission Hearing in Case No. 2016-415- & 2016-4146*, p. 100-118; Exhibit 3: *Afternoon transcript of January 29, 2019, Nevada Appraisal Commission Hearing in Case No. 2016-415- & 2016-4146*, p. 25-42.

reflects Respondent resting his principal case without being rushed No irregularities regarding the presentation of Respondent's case exist in this matter to justify a rehearing.

B. Respondent's Petition for Rehearing Fails to Identify Any Error of Law Objected to by Respondent During the Hearing pursuant to NAC 645C.505(7)(d).

Section B of Respondent's Petition for Rehearing also argues, pursuant to NAC 645C.505(7)(d), that the "multiple errors of law" occurred during the hearing that now justify a rehearing.[3] However, the bulk of Respondent's Petition for Rehearing attacks the decision of the Commission for failing to include citations to the record and the exhibits contained therein. These arguments do not qualify for any of the enumerated basis to grant a rehearing pursuant to NAC 645C.505(7). In fact, the provision cited to by Respondent, NAC 645C.505(7)(d), only allows the Commission to grant a hearing for an "error of law occurring at the hearing and objected to by the applicant during the earlier hearing."

Section E of Respondent's Petition for Rehearing does argue that the Commission committed an error of law by "taking over a function of the judiciary[,]" when it allowed Mr. Lubawy to testify.[4] Respondent appears claims that Mr. Lubawy's involvement in outside, but related litigation involving the Respondent biased his testimony and opened a flood-gate to expert testimony appraisers filing complaints against on one another in an attempt to "knock out their competition."[5] The Respondent's arguments in his Petition for Rehearing makes no transcript reference to any objection lodged against Mr. Lubawy's testimony during the hearing and further fails to identify how the Commission allowing Mr. Lubawy to testify constitutes an error or law.[6] Pursuant to NRS 233B.123 Mr. Lubawy's testimony and report were properly admitted into the record because Mr. Lubawy was a sworn witness, testified to the authenticity of his expert report, and Respondent was

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[3] Petition for Rehearing, p. 3-4, ln. 21-28; 1-2.
[4] Petition for Rehearing, p. 8-10.
[5] Petition for Rehearing, p. 8-10.
[6] Respondent did object to Mr. Lubawy's testimony on October 10, 2018, stating that "the Division's position is lacking an independent analysis."

provided an opportunity for cross-examination.[7] Therefore, Respondent's Petition for Rehearing fails to demonstrate any basis to conduct a rehearing, pursuant to NAC 645C.505(7)(d), based upon an error in law.

C. The Record in this Case Demonstrates that the Commission Applied the Correct Preponderance of Evidence Standard of Proof and the Record also Contains Substantial Evidence Supporting the Findings of the Commission.

Section C of Respondent's Petition for Rehearing attacks the written decision of the Commission on various grounds, essentially arguing that the decision offer no citations to the record, exhibits, or the defenses of the Respondent.[8]

NRS 233B.125 sets forth the requirement that a decision or order adverse to a party in contested administrative case contain both findings of fact and conclusions of law and that they be separately.[9] NRS 233B.125 also sets forth the standard of proof in a contested

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[7] **NRS 233B.123 Evidence.** In contested cases:

1. Irrelevant, immaterial or unduly repetitious evidence must be excluded. Evidence may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonable and prudent persons in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and must be noted in the record. Subject to the requirements of this subsection, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.
2. Documentary evidence may be received in the form of authenticated copies or excerpts. Upon request, parties must be given an opportunity to compare the copy with the original.
3. Every witness shall declare, by oath or affirmation, that he or she will testify truthfully.
4. Each party may call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in the direct examination, impeach any witness, regardless of which party first called the witness to testify, and rebut the evidence against him or her.
5. Notice may be taken of judicially cognizable facts and of generally recognized technical or scientific facts within the specialized knowledge of the agency. Parties must be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they must be afforded an opportunity to contest the material so noticed. The experience, technical competence and specialized knowledge of the agency may be utilized in the evaluation of the evidence.

(Added to NRS by 1967, 808; A 1977, 57; 1997, 1603; 2015, 707)

[8] *See* Petition for Rehearing, p. 4, ln. 16-21; p. 4- 7.

[9] **NRS 233B.125 adverse decision or order required to be in writing or stated on record; contents of final decision; standard of proof; notice and copies of decisions and orders.** A decision or order adverse to a party in a contested case must be in writing or stated in the record. Except as provided in subsection 5 of NRS 233B.121, a final decision must include findings of fact and conclusions of law, separately stated. Findings of fact and decisions must be based upon a preponderance of the evidence. Findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency regulations, a party submitted proposed findings of fact before the commencement of the hearing, the decision must include a ruling upon each proposed finding. Parties must be notified either personally or by certified mail of any decision or order.

case, requiring that findings of fact be based upon a preponderance of the evidence. NRS 233B.125 requires that findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

Here, the Decision of the Commission plainly sets for the findings of fact in a concise and explicit manner and does so separately from the statutorily stated conclusions of law.[10] The Commission's findings and conclusions are plainly set out using the applicable preponderance of evidence standard.[11] Respondent's argument seeks to impose a requirement upon the Commission to prepare what amounts to an argumentative decision/order with citations to the record and exhibits supporting its conclusions; however, no such requirement exists. Rather, when a contested administrative case is appealed to the district courts, on a petition for judicial review, the district courts perform a review using the "substantial evidence" standard of review.[12] The substantial evidence standard

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Upon request a copy of the decision or order must be delivered or mailed forthwith to each party and to the party's attorney of record.

(Added to NRS by 1967, 809; A 1985, 351; 2015, 708)

[10] *See* Commission's Findings of Fact and Conclusions of Law, filed Feb. 8 ,2019; *Compare Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 312 P.3d 479 (2013) (where the Court reversed and remanded the decision of the hearing officer for failing to include separately stated findings of fact and conclusions of law supporting the hearing officer's determination and facilitating judicial review).

[11] *See* Commission's Findings of Fact and Conclusions of Law, filed Feb. 8, 2019, p. 3, ln. 21-22.

[12] **NRS 233B.135 judicial review: Manner of conducting; burden of proof; standard for review.**

1. Judicial review of a final decision of an agency must be:

(a) Conducted by the court without a jury; and

(b) Confined to the record.

Ê In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities.

2. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3.

3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:

(a) In violation of constitutional or statutory provisions;

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

(c) Made upon unlawful procedure;

(d) Affected by other error of law;

(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(f) Arbitrary or capricious or characterized by abuse of discretion.

4. As used in this section, "substantial evidence" means evidence which a reasonable mind might accept as adequate to support a conclusion.

of review requires the reviewing Court to review the record and to determine whether the "facts found by the administrative factfinder are reasonably supported by sufficient, worth evidence in the record."[13] There is simply no requirement that the decision of an administrative factfinder make citations to the record. Indeed, when a petition for judicial review is filed with a district court, the parties to the appeal are required to transmit a certified copy of the transcript along with the entire record of exhibits and filings to the district court so that the court can perform a review of the record an determine if the factual findings of the administrative factfinder are adequately supported by substantial evidence in the record.[14]

D. The Record Reflects Unbiased Deliberation by the Commission.

Section D of Respondent's Petition for Rehearing argues that the Commission was biased against Respondent in favor of Mr. Lubawy and failed to cite any basis in its decision for accepting Mr. Lubawy's testimony over the Respondent's testimony.[15] Respondent's Petition for Rehearing cites to a non-binding Alaska case, *State v. Wold*, 278 P.3d 266 (AK 2012) in support of this proposition.

(Added to NRS by 1989, 1650; A 2015, 710)

[13] *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 249–50, 327 P.3d 487, 490 (2014).

[14] **NRS 233B.131 Transmittal of record of proceedings to reviewing court by party and agency; shortening of or corrections or additions to record; additional evidence; modification of findings and decision by agency based on additional evidence.**

1. Within 45 days after the service of the petition for judicial review or such time as is allowed by the court:

(a) The party who filed the petition for judicial review shall transmit to the reviewing court an original or certified copy of the transcript of the evidence resulting in the final decision of the agency.

(b) The agency that rendered the decision which is the subject of the petition shall transmit to the reviewing court the original or a certified copy of the remainder of the record of the proceeding under review. Ê The record may be shortened by stipulation of the parties to the proceedings. A party unreasonably refusing to stipulate to limit the record, as determined by the court, may be assessed by the court any additional costs. The court may require or permit subsequent corrections or additions to the record.

2. If, before submission to the court, an application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence and any rebuttal evidence be taken before the agency upon such conditions as the court determines.

3. After receipt of any additional evidence, the agency:

(a) May modify its findings and decision; and

(b) Shall file the evidence and any modifications, new findings or decisions with the reviewing court.

(Added to NRS by 1989, 1649; A 2015, 710)

[15] Petition for Rehearing, p. 7-8.

However, in Nevada, the law is clear, NRS 233B.135(3) specifically states that a reviewing "court shall not substitute its judgement for that of the agency as to the weight of evidence on a question of fact."[16] That is to say, so long as the Commission's decision to accept Mr. Lubawy's testimony over the Respondent's on any issue of fact, is supported by sound reasoning and substantial evidence in the record, a reviewing district court will not disturb the Commission's decision. As such, Respondent's claim that the Commission's Findings of Fact and Conclusions of Law are biased simply fails to provide any basis under NAC 645.505(7) for a rehearing.

III. CONCLUSION

Accordingly, the Division respectfully requests that Respondent's Petition for Rehearing be denied.

DATED this 18th day of April, 2019.

AARON D. FORD
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By: _____

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[16] *Barrick Goldstrike Mine v. Peterson*, 116 Nev. 541, 547, 2 P.3d 850, 853-4 (2000).

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on April 18, 2019, I sent a copy of the foregoing, **OPPOSITION TO RESPONDENT MICHAEL BRUNSON'S PETITION FOR REHEARING PURSUANT TO NAC 645C.505,** via regular U.S. Mail, and electronic mail to the following:

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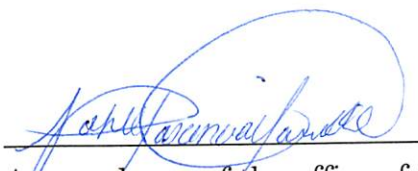

An employee of the office of the Nevada Attorney General