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(Name) *In Proper Person*

(Address)

(Address)

(Phone)

(email address)

DISTRICT COURT
_____ **COUNTY, NEVADA**

_____ ,

Petitioner,

Case No.
Dept. No.

-vs-

NEVADA EMPLOYMENT SECURITY
DIVISION, STATE OF NEVADA,
LYNDA PARVEN, in her capacity
as ADMINISTRATOR of the
NEVADA EMPLOYMENT SECURITY
DIVISION, J. THOMAS SUSICH, in
his capacity as Chair of the NEVADA
EMPLOYMENT SECURITY DIVISION
BOARD OF REVIEW, and
_____ as the Employer,

Respondents.

_____ /

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

1 Petitioner, _____, in proper person, submits the
2 following Memorandum of Points and Authority in support of Petition for Judicial Review.

3 DATED: _____

4 Respectfully submitted,

6 By: _____
 (Signature)

8 _____
 (Name) In Proper Person

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 (Address)

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JURISDICTIONAL STATEMENT

NRS 612.530(1) vests this Court with jurisdiction over the instant petition. Petitioner filed the petition within 11 days of the final decision of the Board of Review for the Nevada Employment Security Division (ESD).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

[Does ESD’s decision lack substantial evidence or is it otherwise wrong as a matter of law?]

STATEMENT OF THE CASE

A. Nature of the Case

Pursuant to NRS 612.530(1), Petitioner, _____ [“Petitioner”] filed a petition for judicial review with this Court after ESD denied petitioner’s claim for unemployment insurance benefits.

B. Course of Proceedings and Disposition Below

Petitioner was employed at _____ from _____, until _____. Petitioner filed for unemployment benefits with ESD and on _____, Petitioner was awarded/ denied benefits. (Record, p. ____).

Petitioner/ Employer timely appealed this denial by letter dated _____. (Record, p. ____). On _____, a hearing was held before the appeals referee. (Record, p. ____).

1 In a written decision dated _____, the appeals referee found Petitioner
2 ineligible for unemployment benefits pursuant to NRS Chapter 612. (Record, p._____).

3 Petitioner appealed the Referee’s decision to the Board of Review (hereinafter “Board”).

4 On _____, the Board entered its decision affirming the decision of the
5 appeals referee. (Record, p._____). On _____, Petitioner filed the instant Petition for
6 Judicial Review.

7 **Statement of Facts**

8 Petitioner was employed at _____ from _____,
9 until _____. At the time of Petitioner’s termination, Petitioner was employed as a
10 _____ (Record, p._____). Petitioner resigned/was terminated on _____,
11 allegedly for _____. (Record,
12 p._____).

13 The Notice of Determination from the claims representative denied/ granted
14 Petitioner’s claim for unemployment benefits because
15 _____. (Record, p._____).

16 At the hearing, Petitioner testified that: (See Record, p. _____)

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The Referee determined that: (See Record, p. _____)

1 ARGUMENT

2 NRS 612.530(4) confines the court to questions of law and ESD's factual findings are
3 conclusive if supported by evidence and without fraud. This Court must defer to ESD's
4 misconduct determination if it is supported by substantial evidence. *Garman v. State*
5 *Employment Sec. Dept.*, 102 Nev. 563, 567, 729 P.2d 1335, 1337 (1986).

6 NRS 612.385 allows ESD to deny unemployment benefits if Petitioner was discharged
7 from either the last or next to last employment "for misconduct connected with the person's work.
8 . . ." *Id.* "Misconduct" has been defined as

9 a deliberate violation or disregard on the part of the employee of standards of
10 behavior which the employer has the right to expect. Carelessness or negligence on
11 the part of the employee of such a degree as to show a substantial disregard of the
12 employer's interests or [of] the employee's duties and obligations to his employer.
13 . . . Mere inefficiency or failure of performance because of inability or incapacity,
14 ordinary negligence in isolated instances, or good faith errors in judgment or
15 discretion are excluded in the definition of misconduct.

16 *Barnum v. Williams*, 84 Nev. 37, 41, 436 P.2d 219, 222 (1968).

17 Misconduct also requires "an element of wrongfulness." *Kolnik v. State, Emp. Sec. Dep't*,
18 112 Nev. 11, 16, 908 P.2d 726, 729 (1996). A misconduct determination is a "fact-based
19 question of law . . . entitled to deference." *Clark County Sch. Dist. v. Bundley*, 122 Nev. 1440,
20 1445, 148 P.3d 750, 754 (2006). If supported by substantial evidence, ESD's misconduct
21 determination should not be disturbed. *Kolnik*, 112 Nev. at 16, 908 P.2d at 729. "Substantial
22 evidence" is that which a reasonable mind could find adequate to support a conclusion. *Id.*
23 "Substantial evidence is more than a mere scintilla but less than a preponderance." *Bayliss v.*
24 *Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (internal quotes and citation omitted).

25 This Court must reverse an ESD misconduct determination that lacks substantial
26 evidence. *State, Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 124-25, 676 P.2d 1318, 1320 (1984);

1 *Lellis v. Archie*, 89 Nev. 550, 554, 516 P.2d 469, 471 (1973). This Court may also “set aside the
2 agency's final decision . . . because it is, among other things, affected by error of law. . . .”

3 *Father & Sons v. Transp. Servs. Auth.*, 124 Nev. 254, 259, 182 P.3d 100, 104 (2008). This Court
4 reviews errors of law *de novo*. *Bundley*, 122 Nev. at 1445, 148 P.3d at 754.

5 ESD’s decision to deny unemployment benefits is not supported by substantial evidence
6 and is otherwise wrong as a matter of law because:

7 (Choose at least one of the following four)

8 1. Petitioner’s actions lack an element of wrongfulness that a misconduct
9 determination requires. In *Lellis v. Archie*, the Nevada Supreme Court held that misconduct
10 requires “wrong behavior . . . any improper or wrong conduct . . . a transgression of some
11 established and definite rule of action, where no discretion is left. . . .” *Lellis*, 89 Nev. at 553, 516
12 P.2d at 471.

13 Specifically, Petitioner’s behavior is not wrongful because:

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1 2. Petitioner’s actions demonstrate: a good-faith error in judgment; an isolated
2 instance of ordinary negligence; or mere inefficiency, inability or incapacity. In *Barnum v.*
3 *Williams*, the Nevada Supreme Court held that “[m]ere inefficiency or failure of performance
4 because of inability or incapacity, ordinary negligence in isolated instances, or good faith errors in
5 judgment or discretion are excluded in the definition of misconduct.” *Barnum*, 84 Nev. at 41, 436
6 P.2d at 222.

7 Specifically, Petitioner’s actions demonstrate either a good-faith error in judgment, or an
8 isolated instance of ordinary negligence, or inefficiency, inability or incapacity because:

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3. Petitioner’s actions do not demonstrate carelessness or recklessness of such a degree as to demonstrate a substantial disregard of the interests of the employer or an obligation to the employer. In *Barnum v. Williams*, the Nevada Supreme Court held that “[c]arelessness or negligence on the part of the employee of such a degree as to show a substantial disregard of the employer’s interests or the employee's duties and obligations to his employer are also considered misconduct connected with the work.” *Barnum*, 84 Nev. at 41, 436 P.2d at 222. Yet, violating employer duties is not misconduct if the duties violate an agreement or understanding regarding the terms of work between the employer and employee. *Garman*, 102 Nev. at 566-567, 729 P.2d at 1337(where refusing to change work hours not misconduct if work hours previous condition of employment); *Lellis*, 89 Nev. 553, 516 P.2d at 471(where refusing to change to less desirable work station not misconduct if the change violated “management-labor plan”).

1 Specifically, the actions of Petitioner here do not demonstrate carelessness or recklessness
2 that violate a substantial interest or obligation to the employer because:

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4. ESD’s determination is wrong as a matter of law because

 The appeals referee did not allow Petitioner to speak or to
adequately present Petitioner’s case.

 The appeals referee relied on hearsay and wrongfully discounted
Petitioner’s testimony on record at the hearing.

 An interpreter was not provided and Petitioner has limited
proficiency with English.

 ESD used the wrong legal standard in its determination.

Specifically:

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CONCLUSION

For these reasons, the Court should reverse ESD's decision and grant Petitioner unemployment benefits.

DATED: _____

By: _____
(Signature)

(Name) In Proper Person

(Address)

(Address)

(Phone)

CERTIFICATE OF MAILING

I hereby certify that on _____(date), I served the foregoing
Petitioner’s Memorandum of Points and Authorities In Support Of Petition For Judicial Review,
upon the following person(s), by depositing a copy of same in a sealed envelope in the United
States Mail, postage pre-paid, to the following:

Troy Jordan
Counsel for Respondent, Employment Security Division
500 E. 3rd St.
Carson City, NV 89713

Employer: _____

DATED: _____

Signature of Person Mailing Document

(Printed Name)