REPORTS OF CASES

DETERMINED BY THE

SUPREME COURT

AND THE

COURT OF APPEALS

OF THE

STATE OF NEVADA

Volume 137

VANCE TAYLOR, APPELLANT, *v.* TRUCKEE MEADOWS FIRE PROTECTION DISTRICT; AND ALTERNATIVE SERVICE CONCEPTS, LLC, RESPONDENTS.

No. 78971

February 4, 2021 479 P.3d 995

Appeal from a district court order denying a petition for judicial review in a workers' compensation case. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Affirmed.

Hutchison & Steffen, PLLC, and *Michael K. Wall*, Las Vegas; *Hutchison & Steffen, PLLC*, and *Jason D. Guinasso*, Reno, for Appellant.

Thorndal Armstrong Delk Balkenbush & Eisinger and *Robert F. Balkenbush* and *Michael Winn*, Reno, for Respondents.

Before the Supreme Court, HARDESTY, C.J., PARRAGUIRRE and CADISH, JJ.

OPINION

By the Court, Hardesty, C.J.:

Under NRS 616C.475(8), an employer may offer temporary, light-duty employment to an injured employee in lieu of paying temporary total disability benefits to that employee. In this appeal, an employee challenges the validity of an employer's offer of temporary, light-duty employment, maintaining that the *location, schedule, wages, and duties* of the offered temporary employment as a secretary are not substantially similar to the employee's preinjury position as a fire captain. But for a temporary, light-duty employment offer to be valid, NRS 616C.475(8) requires only that the offered position be substantially similar to the employee's preinjury position in *location, hours, wages, and benefits*. We conclude that although the term "hours" within the meaning of the statute contemplates "schedule" as well as the number of hours worked, the offered employment was substantially similar to the preinjury position as to both schedule and number of hours, as well as location, wages, and benefits. As a result, the offer of temporary, light-duty employment was valid under NRS 616C.475(8). Accordingly, we affirm the district court's denial of the employee's petition for judicial review.

FACTS AND PROCEDURAL HISTORY

In April 2016, while working as a fire captain for respondent Truckee Meadows Fire Protection District (TMFPD), appellant Vance Taylor severely injured his shoulder during a training exercise. Taylor filed a claim for workers' compensation and received temporary total disability (TTD) benefits through respondent Alternative Service Concepts, LLC (ASC). While he awaited surgery on his shoulder, in lieu of TTD benefit payments, Taylor accepted light-duty work at TMFPD's administrative office, where he worked as a secretary Monday through Friday from 8 a.m. to 5 p.m.[1] This position required Taylor to complete data entry and other filing projects under the supervision of the administrative office's secretary. Three months after his injury, Taylor underwent surgery on his shoulder and began receiving TTD benefits again.

In September 2016, after Taylor's doctors released him to light duty, TMFPD offered Taylor temporary, light-duty employment in the same administrative position he filled prior to surgery. Taylor refused the light-duty employment offer, claiming that the offer did not comply with Nevada law, as it changed his work schedule and required him to perform tasks and duties that are "humiliating and unlawful." Because TMFPD extended a temporary, light-duty em-

[1]We note that this employment offer is not in the record, but Taylor testified to these facts before the appeals officer, and neither TMFPD nor ASC challenged them.

ployment offer to Taylor, ASC terminated Taylor's TTD benefits at that time.

Taylor administratively appealed ASC's decision to terminate his TTD benefits. He argued that the light-duty position was not substantially similar to his preinjury position in respect to location, hours, wage, supervisors, and job duties. The hearing officer upheld ASC's termination of benefits, finding that TMFPD made a valid offer of temporary, light-duty employment, which Taylor rejected. Taylor appealed that decision, and the appeals officer affirmed the hearing officer's decision. Taylor then petitioned the district court for judicial review, claiming that the denial of TTD benefits was erroneous. The district court denied Taylor's petition for judicial review, and this appeal followed.

DISCUSSION

On appeal, Taylor argues that TMFPD's offer of temporary, light-duty employment was not a reasonable and valid offer under Nevada law because it was not "substantially similar" to his preinjury position as a fire captain and thus did not comply with NRS 616C.475(8).

We review an administrative appeals officer's decision in the same manner as the district court. *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011). We review questions of law, including the administrative agency's interpretation of statutes, de novo. *Id.* We review findings of fact "for clear error or an arbitrary abuse of discretion and will only overturn those findings if they are not supported by substantial evidence." *Id*. (internal quotation marks omitted).

Statutorily, an employee who is injured in a work-related accident may receive TTD benefits. Payments for TTD end, however, when "[t]he employer offers the employee light-duty employment or employment that is modified according to the limitations or restrictions imposed by a physician or chiropractor." NRS 616C.475(5)(b). Under NRS 616C.475(8), the temporary, light-duty employment offered by the employer must (1) be "*substantially similar* to the employee's position at the time of his or her injury in relation to the *location* of the employment and the *hours* the employee is required to work"; (2) "[p]rovide[ ] a *gross wage* that is . . . *substantially similar* to the gross wage the employee was earning at the time of his or her injury"; and (3) "[have] the *same employment benefits* as the position of the employee at the time of his or her injury." NRS 616C.475(8)(a)-(c) (emphases added). The purpose of NRS 616C.475(8) is to ensure that the employer makes a legitimate offer of employment, rather than one that imposes an unreasonable burden on the employee. *See EG & G Special Projects, Inc. v. Corselli*, 102 Nev. 116, 119, 715 P.2d 1326, 1328 (1986) (analyzing a similar requirement previously established by regulation).

Taylor contends that the temporary, light-duty employment offer of secretarial work was not "substantially similar" to his preinjury position in location, hours, or benefits and was thus not a reasonable offer in accordance with NRS 616C.475. He further argues that the offer was not reasonable because it involved different job duties and a different chain of command than his preinjury position and because it was humiliating work. We disagree.

TMFPD's offered employment was substantially similar in location to Taylor's preinjury position

The temporary, light-duty employment was located at an administrative office that was six miles away from Taylor's preinjury employment, but closer to his residence. We conclude that although there was a change in location, the new employment location was substantially similar to Taylor's previous work location in proximity and in distance from Taylor's residence, and Taylor fails to explain how this new location imposed an unreasonable burden on him.[2]

TMFPD's offered employment was substantially similar in hours to Taylor's preinjury position

Taylor's preinjury schedule required him to work 48 hours on and 96 hours off each work week. Conversely, the light-duty job required an administrative schedule from 8 a.m. to 5 p.m. Monday through Friday, totaling 40 hours a week. Taylor acknowledges that the light-duty position required fewer hours per week than his preinjury position, but he argues that the word "hours" in the statute refers to an examination of an employee's schedule (i.e., shifts) as well as the actual hours worked. Taylor argues that the administrative schedule was not substantially similar to his preinjury firefighter schedule and, as a result, caused hardship to his family because they had to obtain childcare on days he normally would have had off. In response, TMFPD argues that the working hours of the administrative position were substantially similar to those of Taylor's preinjury position, especially as he would have received the same wages working fewer hours. TMFPD further contends that, although the administrative position involved a different work schedule, Taylor did not provide sufficient evidence that this would result in a financial hardship for him. Thus, the parties provide different interpretations of the term "hours" as used in NRS 616C.475(8)(a).

"[W]hen the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *Nev. Dep't of Corr. v. York Claims Servs., Inc.*, 131 Nev.

[2]Taylor's argument that working as an office secretary is different in function than working at the station house is addressed below under the reasonableness prong.

199, 203, 348 P.3d 1010, 1013 (2015) (alteration in original) (internal quotation marks omitted). "If, however, a statute is subject to more than one reasonable interpretation, it is ambiguous," and this court "look[s] to [its] legislative history to ascertain the Legislature's intent." *Id*. (second alteration in original) (internal quotation marks omitted).

"Hours" is defined as "the amount of time during the day or week that you work." *Hours*, *Cambridge Business English Dictionary* (2011), https://dictionary.cambridge.org/us/dictionary/english/hours (last visited Nov. 10, 2020). However, "hours" is also defined as a period of time one might equate with the term "schedule." *See, e.g.*, *Hour*, *Webster's Third New International Dictionary* (2002) (defining "hours" to include "a fixed, stated, or customary time or period of time <*[hour]s* of business>"); *Hour*, *The American Heritage Dictionary of the English Language* (5th ed. 2011) (defining "hours" to include "[a] set or customary period of time for a specified activity"); *Hour*, *New Oxford American Dictionary* (3d ed. 2010) (defining "hour" to include "a fixed period of time for an activity, such as work"). Furthermore, this court has interchangeably used the terms "hours" and "schedule." *See Garman v. State, Emp't Sec. Dep't*, 102 Nev. 563, 567, 729 P.2d 1335, 1337 (1986) (using the terms "schedule" and "hours" interchangeably when holding the Employment Security Department erroneously terminated the appellant's unemployment benefits). Therefore, the term "hour" is susceptible to more than one plausible interpretation and is ambiguous. *See Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 225, 19 P.3d 245, 247 (2001) (holding that a statute is ambiguous where it "is susceptible to more than one natural or honest interpretation"). Accordingly, we construe it "with what reason and public policy would indicate the Legislature intended." *Id*. at 225, 19 P.3d at 247.

Here, the legislative history demonstrates that the Legislature intended "hours" to carry an expansive meaning. When asked if the State Industrial Insurance System (SIIS) considered babysitter problems "when determining if a claimant could *work a certain shift*, or get to a certain job," SIIS's general counsel responded that "all factors were considered." Hearing on S.B. 316 Before the Senate Commerce & Labor Comm., 67th Leg. (Nev., Feb. 4, 1993) (testimony of Scott Young, General Counsel, SIIS) (emphasis added). Additionally, in clarifying the proposed changes to temporary, light-duty employment, SIIS's general counsel stated that an "injured worker could not refuse" an employer's offer of temporary, light-duty employment if it was reasonable "in terms of those three categories (pay rate, *shift*, hours of employment)." Hearing on S.B. 316 Before the Senate Commerce & Labor Comm., 67th Leg. (Nev., Feb. 25, 1993) (testimony of Scott Young, General Counsel, SIIS) (emphasis added). This testimony clearly shows that the term "hours" in NRS

616C.475(8)(a) contemplates more than just the number of actual hours worked, but instead encompasses the schedule of the work. *See Shift*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2020) (defining "shift" to include "a scheduled period of work or duty").

Reason and public policy also support this construction of the term "hours." As we stated in *Corselli*, an employer's offer of light-duty employment must be reasonable. 102 Nev. at 119, 715 P.2d at 1328. Otherwise, "the employer could make a job offer that is intended only for refusal and conveniently relieve itself of its obligation to the injured worker's rehabilitation." *Id*. Nevada is home to many businesses and industries that are open 24 hours a day, 7 days a week. If an injured employee previously worked 40 hours per week during the day, an offer of temporary, light-duty employment for 40 hours per week only at night likely would be unreasonable and contrary to the concerns we identified in *Corselli*. *Id*. Thus, we conclude that the term "hours" in NRS 616C.475(8)(a) includes a consideration of an employee's preinjury work schedule.

Notwithstanding the requirement to consider a light-duty employment offer's schedule, we conclude that the light-duty job offered to Taylor was substantially similar to his preinjury firefighter job in terms of hours. Taylor's preinjury employment required that he work 48 hours on and 96 hours off. The offered light-duty job required Taylor to work a typical administrative schedule, from 8 a.m. to 5 p.m. Monday through Friday, totaling 40 hours a week. Although the administrative schedule was not identical to Taylor's firefighter schedule, it also did not require him to work unusual hours or an atypical timetable. Both jobs required Taylor to work at least half of his shift during the day. While the light-duty job schedule was entirely during the day as opposed to the firefighter schedule's fifty-fifty split between day and night, the administrative position did not require Taylor to work in the evenings, which some might view as a more onerous burden. This, coupled with the fact that the temporary, light-duty job would have required Taylor to work fewer hours than his preinjury job but at the same rate of pay, suggests that the offer was a legitimate attempt to provide reasonable light-duty employment pending a return to full health. While perhaps not completely burden-free, Taylor has not demonstrated that the light-duty employment offer posed an unreasonable burden, such as that in *Corselli* or in the hypothetical presented above. *See id*. (concluding that a job offer that required an employee to drive across state lines for work five days per week, where his preinjury job provided him with transportation to work a three-day-on-four-day-off schedule, posed an unreasonable burden on the employee).

Common sense also requires us to conclude that these schedules are substantially similar. To say that this administrative schedule is not substantially similar to Taylor's preinjury firefighter schedule would in effect preclude injured firefighters from ever receiving an

offer of temporary, light-duty employment, since such nonfirefighter employment generally is not undertaken on a firefighter schedule. Thus, an offer of light-duty employment to injured firefighters often will naturally include some variation in schedule so as to provide the firefighters with an available job that falls within the physical restrictions placed on them by their treating physicians. Although Taylor argues that there were other jobs available with hours similar to his preinjury work schedule, the record contains no evidence of any alternative position with the same schedule as his preinjury job and that satisfied the physical limitations imposed on him by his doctor. Taylor testified about the possibility of certain tasks that he might assist the Battalion Chief or other firefighters with, but there was no evidence presented by the Chief or any other official indicating that an alternative position was actually available, and none of the tasks identified by Taylor were employment positions as such but rather tasks that other employees complete as part of their own work duties. The statute does not require employers to create new, temporary positions for injured employees based on their preferences when other valid light-duty jobs already exist. Taylor has failed to meet his burden to show that the temporary, light-duty schedule was not substantially similar to his preinjury schedule. Thus, we conclude that TMFPD's offered employment was substantially similar in hours as to Taylor's preinjury position.

TMFPD's offered employment was substantially similar in gross wage and had the same employment benefits as Taylor's preinjury position

The gross wage that Taylor would have received if he had accepted the temporary, light-duty employment offer was an average of his past 12-week wage history and amounted to $10,115 a month. Taylor argues that the light-duty employment offer was invalid because it did not include overtime pay and did not provide an ability to bank holiday compensatory time. The record shows, however, that the 12-week period used to calculate the offered wage included two holidays, as well as a significant amount of overtime pay—189 hours to be exact. We conclude that because holiday time and overtime pay were included in this gross wage, the light-duty position provided a substantially similar wage and the same employment benefits as the preinjury position.

Taylor's offer of light-duty employment was reasonable

Taylor argues that TMFPD's temporary, light-duty employment offer was also unreasonable because it changed his duties, his chain of command, and effectively "demoted" him. He contends that although he was unable to perform "the difficult obligations of a firefighter, such as carrying heavy equipment . . . he was able to per-

form many of the other functions of a firefighter." Yet, he claims, even though other work was "available" to him, TMFPD instead "assigned [him] to be a secretary's assistant and to perform menial tasks," which he characterizes as "humiliating, demoralizing[,] and degrading."

We disagree with Taylor's arguments and hold that TMFPD's offer of temporary, light-duty employment was reasonable because it was substantially similar to Taylor's preinjury position in location, hours, wages, and benefits, as required by NRS 616C.475(8). The statute does not require that an employee's light-duty job have the same duties or chain of command as his or her preinjury position. Rather, as the legislative history of the statute makes clear, NRS 616C.475(8) allows the employer to offer an injured employee work on a temporary basis "which otherwise might not qualify as an acceptable offer if it was made for permanent employment." Hearing on S.B. 316 Before the Senate Comm. of the Whole, 67th Leg. (Nev., Mar. 24, 1993) (statement of Senator Raymond Shaffer). One of the purposes of temporary, light-duty employment is to get employees back to work as soon as possible. *See* Hearing on S.B. 316 Before the Senate Commerce and Labor Comm., 67th Leg. (Nev., Feb. 25, 1993). Thus, given this purpose and the short-term nature of the light-duty employment offer, a light-duty job that is menial or otherwise in a different capacity as the preinjury job is not unreasonable. *See id.* (statement of Scott Young, General Counsel, State Industrial Insurance System) (asserting that "even if the job itself is somewhat menial . . . [employees] should be required to take it [because] it's better than sitting at home and just drawing your [compensation]"); Hearing on S.B. 316 Before the Senate Comm. of the Whole, 67th Leg. (Nev., Mar. 24, 1993) (statement of Senator Raymond Shaffer) (noting that while "a truck driver, with a broken leg, could not drive his truck with a leg in a cast, . . . he might be able to work at a dispatch desk or [do] limited work in the office"). Taylor suffered from a shoulder injury and could not perform the physical requirements of a firefighter. The administrative office position was both available and satisfied Taylor's temporary physical limitations. It was in no way a demotion, as Taylor claims, but rather a temporary position that he was physically capable of doing until he recovered fully from his injury and could return to his job as a fire captain.

We further reject Taylor's contention that the administrative position was demeaning or humiliating to him. Secretaries and their assistants perform the necessary everyday tasks that are required to run organizations and businesses. The mere fact that an employee feels that a position is beneath him or her does not make the offer unreasonable or invalid. *See* NAC 616C.586(2)(a) ("Temporary employment at light duty . . . which is a part of the employer's regular business operations shall not be deemed to be demeaning or degrading or to subject the employee to ridicule or embarrassment.").

CONCLUSION

Because TMFPD's offer of temporary, light-duty employment was reasonable and complied with NRS 616C.475(8), ASC was justified in terminating Taylor's TTD benefits. Accordingly, we affirm the district court's decision to deny Taylor's petition for judicial review.

Parraguirre and Cadish, JJ., concur.

TIM WILSON, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Appellant, *v.* PAHRUMP FAIR WATER, LLC, a Nevada Limited Liability Company; STEVEN PETERSON, an Individual; MICHAEL LACH, an Individual; PAUL PECK, an Individual; BRUCE JABEOUR, an Individual; and GERALD SCHULTE, an Individual, Respondents.

No. 77722

February 25, 2021 481 P.3d 853

Appeal from a district court order granting a petition for judicial review in a water law case. Fifth Judicial District Court, Nye County; Steven Elliott, Senior Judge.

Reversed and remanded with instructions.

Aaron D. Ford, Attorney General, and *James N. Bolotin*, Deputy Attorney General, Carson City, for Appellant.

Taggart & Taggart, Ltd., and *Paul G. Taggart* and *David H. Rigdon*, Carson City, for Respondents.

Parsons Behle & Latimer and *Gregory H. Morrison*, Reno; *Jesse J. Richardson*, Morgantown, West Virginia, for Amici Curiae Nevada Groundwater Association and Water Systems Council.

Before the Supreme Court, En Banc.

OPINION

By the Court, Pickering, J.:

This appeal involves a question of survival for certain rural communities in this, "the driest state in the Nation," *United States v. State Eng'r*, 117 Nev. 585, 592, 27 P.3d 51, 55 (2001) (Becker, J., concurring in part and dissenting in part)—that is, the availability and sustainability of groundwater sourced from domestic wells. Specifically at issue is Order No. 1293A (July 12, 2018) by the appellant State Engineer, which prohibits the drilling of new domestic wells in the over-appropriated Pahrump Artesian Basin (the Basin) unless the applicant identifies and relinquishes 2.0 acre-feet annually from an alternate source (the 2.0 afa requirement). By seeking to enforce the 2.0 afa requirement, the State Engineer raises the interrelated questions of whether (1) Nevada law authorized the requirement in the first instance, given that the State Engineer both designated the Basin as in need of active management and determined that the drilling of new domestic wells would unduly impact existing wells,

and (2) whether notice and hearing is required to impose the same, even in the face of the aforementioned determinations by the State Engineer.

We hold that Nevada law—specifically NRS 534.110(8) (allowing the State Engineer to "restrict the drilling of wells" in a specially designated basin "if the State Engineer determines that additional wells would cause an undue interference with existing wells")—authorized the 2.0 afa requirement under these particular circumstances, the State Engineer's assessment of which is supported by substantial evidence. Moreover, water is a public resource in this state, not private property, *see Mineral Cty. v. Lyon Cty.*, 136 Nev. 503, 513, 473 P.3d 418, 426 (2020), and because Nevada's resulting system of prior appropriation neither envisions nor guarantees that there will be enough water to meet every demand for it, a landowner's unilateral assumptions to the contrary are not the sort of justified reliance that would demand notice and a hearing prior to the State Engineer's imposition of the restriction at issue. Accordingly, we reverse the district court's decision, which invalidated Order No. 1293A as unlawful, and reinstate the same.

I.

Quantified in units of acre-feet (the volume of water it would take to cover an acre to a depth of one foot), the Basin's sustainable yield is 20,000 acre-feet annually (afa). *See* Nye Cty. Water Dist. Staff & Groundwater Mgmt. Plan Comm. Members, *Pahrump Basin 162 Groundwater Management Plan* 6 (Oct. 16, 2015) (2015 GWMP); *id.* app. R at 5 (defining acre-foot). However, there are about 60,000 afa currently allocated for permitted uses in the Basin, and there are additionally 11,280 existing domestic wells operating in the Basin without a permit. *See* Nye Cty. Water Dist., *Pahrump Basin 162 Groundwater Management Plan* 5-10 (Feb. 2018) (2018 GWMP). These domestic wells add up to 22,000 afa (2 afa per domestic well, as allowed by statute) to the allocation imbalance, for a total allocation of, roughly, 82,000 afa. Adding still to the Basin's over-allocation problem are potential future domestic wells, which the 82,000-afa figure does not include. Based on land availability, there is a potential for more than 8,500 additional domestic wells (totaling potential commitments of up to 17,000 afa, at 2 afa per domestic well), *see* 2015 GWMP 7, which, left unchecked, would lead to a possible total commitment of nearly 100,000 afa—an amount five times the Basin's sustainable yield.

Although it remains over-allocated, the Basin is not over-pumped. *See* 2015 GWMP 6 (estimating that actual withdraws totaled 14,348 afa in 2013). For one, not all water-rights owners currently exercise the full allotment of those rights every year, and among the allotted rights are about 8,000 afa that have been permanently relinquished to support new development under Nye County Code. *See*

2018 GWMP 5; *see also* Nye County Code § 16.28.170(H) (2018) (requiring the purchase and relinquishment of existing water allocations before the creation of a new parcel or subdivision intended for residential use). Moreover, the average actual draw per domestic well is estimated to be just 0.5 afa out of the statutorily permitted 2 afa. *See* 2015 GWMP 7. However, problems and uncertainty remain, given the high density of domestic wells in Pahrump, the lingering effects of historical over-pumping, and the prospect of additional growth and associated housing density.

Such concerns are long-standing—the State Engineer first designated a portion of the Basin as an area in need of heightened regulation (now referred to as an "area of active management") 80 years ago. *See* State Engineer Order No. 176 (Mar. 11, 1941). The State Engineer has since expanded that designation to encompass the entire Basin. *See* State Engineer Order No. 1252 (Apr. 29, 2015). And the Basin's water supply is now entirely subject to the State Engineer's "particularly close monitoring and regulation." NRS 534.011; *see* NRS 534.030(1) (providing the procedure for the State Engineer to designate a basin as an area of active management).

Accordingly, the State Engineer and Nye County have coordinated to undertake conservation action in the Basin. To wit, in 2004, Nye County created a Water Resources Plan, outlining strategies for meeting the county's projected water needs over the next 50 years. *See* Thomas S. Buqo, Dep't of Nat. Res. & Fed. Facilities, *Nye County Water Resources Plan* 1 (Aug. 2004). And, in 2014, Nye County formed an advisory committee to address overappropriation in the Basin and created a Groundwater Management Plan, which provided a list of proposed measures, noting a need for more information and recognizing two main concerns: overallocation and the effect of densely clustered domestic wells. *See* 2015 GWMP 4-10. Then, in 2016, the Nye County Water District (NCWD) took action under that plan and requested, as a component of that action, that the State Engineer issue an order requiring relinquishment of existing water rights before new domestic wells could be drilled in the Basin. *See* 2018 GWMP 4 (discussing the letter).

The State Engineer determined that any drilling of new wells in the Basin would unduly interfere with existing wells. Accordingly, and as relevant here, the State Engineer responded to NCWD's request by issuing Order No. 1293 (Dec. 19, 2017), which contained the 2.0 afa requirement:

> [T]he drilling of any new domestic well within the Pahrump Artesian Basin is prohibited, except that . . . [a]ny person proposing to drill a new domestic well must obtain an existing water right . . . of not less than 2.0 [afa] and relinquish the water right to serve the domestic well.

(Emphasis omitted.) The State Engineer issued Order No. 1293 without notice, and it took immediate effect on December 19, 2017. Pursuant to the order, the State Engineer denied 22 notices of intent to drill domestic wells that had been filed between December 15 and December 19, 2017 (i.e., before or on the order's effective date). Respondents, Pahrump Fair Water, LLC and several of its individual members (PFW), challenged Order No. 1293 via a petition for judicial review, and the district court heard testimony in a hearing on the matter.

Before the district court ruled on Order No. 1293, the State Engineer voluntarily revoked the order and issued an amended order, Order No. 1293A, which PFW challenged in a separate petition for judicial review that led to this appeal. Order No. 1293A was almost entirely identical to Order No. 1293—including the 2.0 afa requirement—except that it exempted from the 2.0 afa requirement (1) the 22 notices of intent to drill filed between December 15 and December 19 and (2) any person who had filed either a zoning or building application as of December 19, 2017. After granting PFW's motion to include a supplemental record containing the testimony and pleadings filed in the prior challenge to Order No. 1293,[1] the district court granted PFW's petition and invalidated Order No. 1293A, concluding that the State Engineer violated due process by issuing the order without first providing notice and a public hearing, that the State Engineer lacked authority to issue the 2.0 afa requirement, and that substantial evidence did not support the order. In light of these determinations, the district court declined to reach PFW's claim that Order No. 1293A is an unconstitutional taking.[2] This appeal followed.

II.

A.

"The Legislature has established a comprehensive statutory scheme regulating the procedures for acquiring, changing, and losing water rights in Nevada." *Mineral Cty.*, 136 Nev. at 513, 473 P.3d at 426. The State Engineer's powers thereunder are limited to "only those . . . which the legislature expressly or implicitly delegates."

[1]This was appropriate, despite the State Engineer's argument to the contrary, given the close connection between the proceedings on Order Nos. 1293 and 1293A. *See Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981) (noting that the district court may take judicial notice of closely related proceedings); *see also* NRS 47.150 (authorizing courts to take judicial notice).

[2]As the parties acknowledge, the takings issue is not properly before this court. Because the district court did not reach the issue, the State Engineer did not raise it on direct appeal. PFW asks that, in the event of reversal, the court remand the takings issue for the district court to resolve in the first instance.

Clark Cty. v. State, Equal Rights Comm'n, 107 Nev. 489, 492, 813 P.2d 1006, 1007 (1991); *see Howell v. Ricci*, 124 Nev. 1222, 1230, 197 P.3d 1044, 1050 (2008) (noting that the State Engineer cannot act beyond his or her statutory authority). Accordingly, the scope of the State Engineer's authority here is a question of statutory interpretation, subject to de novo review. *See Town of Eureka v. Office of State Eng'r*, 108 Nev. 163, 165-66, 826 P.2d 948, 949-50 (1992) (noting that the State Engineer's interpretation of his authority may be persuasive but is not controlling and "the reviewing court may undertake independent review" of questions of statutory construction). And the plain meaning of the relevant text guides the answer. *Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm'n*, 117 Nev. 835, 840, 34 P.3d 546, 550 (2001).

As statutory authority for the determination that new domestic wells in the Basin would interfere with existing wells, the State Engineer relies, in part, upon NRS 534.110(8), which provides as follows:

> In any basin or portion thereof in the State designated by the State Engineer, the State Engineer *may restrict drilling of wells in any portion thereof if the State Engineer determines that additional wells would cause an undue interference with existing wells*. Any order or decision of the State Engineer so restricting drilling of such wells may be reviewed by the district court of the county pursuant to NRS 533.450.

(Emphasis added.)[3] A straightforward reading of NRS 534.110(8) supports the State Engineer's 2.0 afa requirement—the section expressly permits the State Engineer to restrict the drilling of "additional wells" under circumstances that the State Engineer found here,[4] and the 2.0 afa requirement restricts the drilling of additional *domestic* wells, which the phrase "additional wells" implicitly includes as a subset. *See, e.g.*, *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 646, 173 P.3d 734, 739 (2007) (holding that "private property" plainly included personal property because the constitutional provision at issue did not include any "language to justify excluding personal property from its scope").

Indeed, there is only a plausible question as to the scope of the State Engineer's power in this instance because of the complicated history of domestic wells in this state's prior appro-

[3]The State Engineer also claimed authority under NRS 534.120(1) (stating that in a designated basin that is "being depleted, the State Engineer in his or her administrative capacity may make such rules, regulations and orders as are deemed essential for the welfare of the area involved"), but because we conclude that the State Engineer has authority under NRS 534.110(8), we need not reach this argument.

[4]The relevant findings are reviewed in Part II(B), *infra*.

priative system. Specifically, when the Legislature initially abrogated Nevada's common-law doctrine of riparian rights, the rudimentary initial system of statutes entirely excluded domestic wells from its restrictions and coverage. *See* 1939 Nev. Stat., ch. 178, § 3, at 274-75 (stating that "[t]his act shall not apply to the develop[ment] and use of underground water for domestic purposes") (now codified as NRS 534.180(1) (stating that "this chapter does not apply in the matter of obtaining permits for the development and use of underground water from a well for domestic purposes where the draught does not exceed 2 [afa]")).

But the Legislature progressively chipped away at, and ultimately eliminated, this once broad exclusion of domestic wells from Nevada's statutory water laws. *See Mineral Cty.*, 136 Nev. at 513 n.5, 473 P.3d at 426 n.5 (noting that the State Engineer has jurisdiction over "all underground waters in the state"). First, by making it plain that even domestic wells are subject to prior appropriation rules and curtailment under NRS Chapter 534 if the basin in which they are located runs dry. *See* NRS 534.110(6); NRS 534.120(3); *see also* 1955 Nev. Stat., ch. 212, § 10.5, at 331-32 (authorizing the State Engineer to restrict the drilling of domestic wells in depleted basins under certain circumstances). Then, by statutorily establishing priority dates for domestic wells, according to the date of their drilling, and the beneficial use of the water thereunder. *See* NRS 534.080(4); *see also* 2007 Nev. Stat., ch. 246, § 2, at 843 (enacting NRS 534.080(4)). And finally, by clarifying that following any curtailment in a designated basin, those with preexisting domestic wells can still draw .5 afa, without regard to priority date. *See* NRS 534.110(9); *see also* 2019 Nev. Stat., ch. 304, § 1, at 1790 (enacting NRS 534.110(9)).

Because these amendments completely brought domestic wells into the prior appropriative system, and NRS Chapter 534 and NRS 534.110 in particular, the general reference to "wells" in NRS 534.110(8) necessarily encompasses such wells. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012) (noting that absent some indication to the contrary "general words . . . are to be accorded their full and fair scope"). Indeed, "[t]he presumed point" of the Legislature's use of the general word "wells" in NRS 534.110(8) was "to produce general coverage," including over domestic wells, which are now undeniably subject to NRS Chapter 534's edicts, "not to leave room for courts to recognize ad hoc exceptions." *See id.* Any remnants of the prior across-the-board exclusion that can arguably be read inappositely—for instance, PFW cites NRS 534.030(4) (stating that "[t]he State Engineer shall supervise all wells . . . , except those wells for domestic purposes")—are as a palimpsest, overwritten by the Legislature and the amendments it has made to NRS Chapter 534 discussed above.

B.

Beyond the question of facial statutory authority addressed above, the State Engineer's decision must be supported by substantial record evidence. *See King v. St. Clair*, 134 Nev. 137, 139, 414 P.3d 314, 316 (2018) (stating that "factual findings of the State Engineer should only be overturned if they are not supported by substantial evidence"). Of specific relevance here is the State Engineer's critical requisite determination that the drilling of any new domestic wells in the Basin would threaten the supply of water to existing wells. The evidence supporting this finding is substantial if a reasonable mind would accept it as adequate support for the conclusion. *See id.*

The thrust of the dispute here is the adequacy of a 2017 study of the Basin by John Klenke (the Klenke study) relied upon by the State Engineer. The Klenke study assumed for methodological purposes that no new domestic wells would be drilled in the Basin and still concluded that well failures would likely result even under then-existing conditions. *See* John Klenke, Nye Cty. Water Dist., *Estimated Effects of Water Level Declines in the Pahrump Valley on Water Well Longevity*, at vi (Jan. 2017). Accordingly, PFW's point that the Klenke study did not expressly examine the effect of new domestic wells is taken, but under the substantial evidence standard, support for the State Engineer's findings is not so limited—the State Engineer has authority to draw reasonable inferences from such evidence. *See* 4 Charles H. Koch, Jr., *Administrative Law and Practice* § 11:24 [4] (3d ed. 2010) (explaining that an agency has "the power to draw inferences from the facts"); *see also id.* § 5:64 [3] (noting that "circumstantial evidence can satisfy the substantial evidence standard"). And here, the State Engineer could reasonably infer that new wells would unduly interfere with existing wells despite the Klenke study's limitations, based on its results: if the Basin's wells are likely to fail even absent new drilling, then it reasonably follows that additional drilling in the Basin would only increase that likelihood.

Moreover, "neither the district court nor this court will substitute its judgment for that of the State Engineer." *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979). And our deference is especially warranted under these circumstances because the factual question under NRS 534.110(8) of "undue interference"—a term left undefined by the Legislature—is technical and scientifically complex. Indeed, "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential" because such conclusions are "within [the agency's] area of special expertise, at the frontiers of science." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). Accordingly, the instant record is of similar substance to that of others that have sufficiently supported a finding and ac-

tion by the State Engineer. *See, e.g.*, *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. 521, 527, 245 P.3d 1145, 1149 (2010) (upholding State Engineer's finding that approval of change use application would not be detrimental to the public interest when State Engineer limited pumping to the available perennial yield based on the State Engineer's findings regarding the perennial yield); *Griffin v. Westergard*, 96 Nev. 627, 630-32, 615 P.2d 235, 236-38 (1980) (concluding that substantial evidence, in the form of studies regarding the amount of available groundwater, supported the finding that the basin at issue was already over-appropriated and affirming the denial of groundwater applications on that basis).

Nor was, as PFW argues, the State Engineer required to hold a hearing or develop a more robust record. True, there are general requirements under Nevada's Administrative Procedure Act (the APA), NRS Chapter 233B, for substantive rulemaking, *see* NRS 233B.0395-.120 (Administrative Regulations), but the State Engineer is "entirely exempted from [the APA's] requirements." NRS 233B.039(1)(i). And, as established above, the State Engineer complied with the relevant statutory authority in issuing Order No. 1293A. *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 547 (1978) (instructing that "the adequacy of the 'record' [supporting an agency decision] is not correlated directly to the type of procedural devices employed, but rather turns on whether the agency has followed the statutory mandate of . . . relevant statutes"); *see also Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949) (observing that it is "settled in this state that the water law and all proceedings thereunder are special in character, and the provisions of such law not only lay down the method of procedure but strictly limits it to that provided"); 1 Charles H. Koch, Jr., *Administrative Law and Practice* § 4:10 [1] (3d ed. 2010) (recognizing that, in the absence of due process requirements, "the statutory procedures do not provide a minimum but rather provide the complete procedural requirement" for administrative acts).

C.

No one "shall be deprived of life, liberty, or property, without due process of law." Nev. Const. art. 1, § 8(2); *see* U.S. Const. amend. XIV, § 1 (prohibiting any state from depriving "any person of life, liberty, or property, without due process of law"). Accordingly, where it attaches, "[p]rocedural due process requires that parties receive 'notice and an opportunity to be heard.'" *Eureka Cty. v. Seventh Judicial Dist. Court (Sadler Ranch)*, 134 Nev. 275, 279, 417 P.3d 1121, 1124 (2018) (quoting *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007)); *see also, e.g.*, *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70 (1972). And the State Engineer acknowledges that he issued Order No. 1293A without

providing notice or a hearing—an omission that, in the context of established water rights, would unquestionably be fatal. *See, e.g.*, *Sadler Ranch*, 134 Nev. at 279, 417 P.3d at 1124 ("In Nevada, water rights are 'regarded and protected as real property.'") (quoting *Filippini*, 66 Nev. at 21-22, 202 P.2d at 537).

However, Order No. 1293A does not limit established water rights, instead only imposing a condition on the drilling of new domestic wells in the designated basin—wells for which permit applications had not even been filed. And, under Nevada's system of prior appropriation, the owner of land does not have an established property right in the untapped groundwater lying thereunder. Ross E. deLipkau & Earl M. Hill, *The Nevada Law of Water Rights* 6-3 to 6-4 (2010) ("The doctrine of absolute ownership of [groundwater] by the owner of the land is plainly a facet of the repudiated doctrine of riparianism, and in conflict with Nevada's current law of statutory appropriation."); John W. Anderson & John L. Davis, *Water and Mineral Development Conflicts*, 32 Rocky Mtn. Min. L. Inst. 9, at § 9.05 (1986) (noting that "[u]nder the [prior] appropriation system, a landowner has no rights to the water underlying his land by virtue of his land ownership"); *see State ex rel. Hinckley v. Sixth Judicial Dist. Court*, 53 Nev. 343, 352, 1 P.2d 105, 107 (1931) (noting that, in Nevada and other prior appropriation states, it is well established that "no title can be acquired to the public waters of the state by capture or otherwise"); *see also, e.g.*, *Town of Chino Valley v. City of Prescott*, 638 P.2d 1324, 1328 (Ariz. 1981) ("[T]here is no right of ownership of groundwater in Arizona . . . and . . . the right of the owner of the overlying land is simply to the [use] of the water."); *City of Santa Maria v. Adam*, 149 Cal. Rptr. 3d 491, 502 (Ct. App. 2012) ("Appropriative rights . . . are not derived from land ownership . . . ."), *cert. denied*, 571 U.S. 940 (2013); *Yeo v. Tweedy*, 286 P. 970, 973 (N.M. 1929) (rejecting the proposition that regulation of property owners' groundwater amounted to a taking of vested rights); *Knight v. Grimes*, 127 N.W.2d 708, 711 (S.D. 1964) ("The notion that this right to take and use [ground]water constitutes an actual ownership of the water prior to withdrawal has been demonstrated to be legally fallacious."); *Stubbs v. Ercanbrack*, 368 P.2d 461, 463 (Utah 1962) (holding that the right to make use of one's land and the right to use the groundwater thereunder are "severable things").

Of course, even in the absence of vested property rights, limited constitutional procedural protections may be available for established expectancy interests, "defined in part by individual expectations and personal reliance interests." Alan Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 Const. Comment. 7, 37 (1996). But a property owner in a basin that has been over-allocated for decades, and where new wells threaten the

supply of existing wells, could not legitimately expect to be able to arbitrarily drill and pump even 2 afa or less without any restrictions, such that formal notice and hearing are plainly required. *See Perry v. Sindermann*, 408 U.S. 593, 600 (1972) (holding that a "mere subjective 'expectancy' [is not] protected by procedural due process"); *see also Fox v. Skagit Cty.*, 372 P.3d 784, 796 (Wash. Ct. App. 2016) ("That some water rights must necessarily acquiesce to senior water rights is a natural consequence of the prior appropriation doctrine."). Indeed, homeowners with vested rights in established domestic wells in the Basin, who already may depend on that water supply to support their household and family, and whose wells the new domestic wells threaten, have much weightier interests in that supply—whether framed in terms of established property rights or reasonable reliance. *See* NRS 533.024(1)(b) (stating that "[i]t is the policy of this State . . . [t]o recognize the importance of domestic wells as appurtenances to private homes, [and] to create a protectable interest in such wells"); NRS 534.080(4) (establishing that the date of priority for domestic use is the date of the domestic well's completion); *see also Mineral Cty.*, 136 Nev. at 513, 473 P.3d at 426 ("Nevada's water statutes embrace prior appropriation as a fundamental principle. Water rights are given subject to existing rights . . . , given dates of priority . . . , and determined based on relative rights . . . .") (internal citations and quotations omitted).

In sum, the State Engineer was not required to provide notice and a hearing regarding the 2.0 afa requirement under the particular circumstances. Accordingly, in light of this and the foregoing sections, the district court improperly invalidated Order No. 1293A. We therefore reverse the district court's order granting PFW's petition for judicial review, reinstate Order No. 1293A, and, at PFW's request, *see* note 2, *supra*, remand with instructions for the district court to consider its takings claim in the first instance. The stay previously ordered by this court is vacated.

Hardesty, C.J., and Parraguirre, Stiglich, Cadish, Silver, and Herndon, JJ., concur.

JANE DOE DANCER I; JANE DOE DANCER II; JANE DOE DANCER III; AND JANE DOE DANCER V, INDIVIDUALLY, AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED INDIVIDUALS, APPELLANTS, *v.* LA FUENTE, INC., AN ACTIVE CORPORATION, RESPONDENT.

No. 78078

February 25, 2021 481 P.3d 860

Appeal from a district court order granting summary judgment in a minimum wage class action. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

Reversed and remanded.

Bighorn Law and *Kimball J. Jones*, Las Vegas; *Rusing Lopez & Lizardi, PLLC*, and *Michael J. Rusing*, Tucson, Arizona, for Appellants.

Hartwell Thalacker, Ltd., and *Doreen Spears Hartwell*, Las Vegas; *Schulten Ward Turner & Weiss, LLP*, and *Dean R. Fuchs*, Atlanta, Georgia, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, PICKERING, J.:

This case is a sequel to *Terry v. Sapphire Gentlemen's Club*, which adopted the federal economic realities test to guide courts in determining whether an employment relationship exists in the context of Nevada's statutory minimum wage laws, NRS Chapter 608. 130 Nev. 879, 888, 336 P.3d 951, 958 (2014). Applying that test to the provisions of NRS Chapter 608 as they then existed, this court held that performers at the Sapphire men's club were employees, not independent contractors, and accordingly entitled to statutory minimum wages under that chapter. The Legislature subsequently enacted NRS 608.0155, which established "for the purposes of [NRS Chapter 608]" a conclusive presumption of independent contractor status for certain workers meeting specified criteria, regardless of whether those workers might otherwise qualify as employees under *Terry* and the economic realities test, thus expanding the ranks of independent contractors and excluding previously qualifying workers from statutory minimum wage protections.

In this appeal, appellants (Doe Dancers) similarly argue they are in fact employees, not independent contractors, but this time within the context of Article 15, Section 16 of the Nevada Constitution,

the Minimum Wage Amendment (MWA), rather than NRS Chapter 608. The extent of the MWA's reach is a question *Terry* left open, *see* 130 Nev. at 883, 336 P.3d at 955, and to which NRS 608.0155's application is less obvious. Accordingly, to resolve Doe Dancers' appeal, we must again interpret the term "employee," this time pursuant to the MWA, apply that interpretation to the circumstances at issue here, and then determine whether NRS 608.0155's statutory expansion of the definition of independent contractor—which is the opposite side of employee on the relational coin, *see, e.g.*, Debra T. Landis, Annotation, *Determination of "Independent Contractor" and "Employee" Status for Purposes of § 3(e)(1) of the Fair Labor Standards Act (29 USCS § 203(e)(1))*, 51 A.L.R. Fed. 702 (1981) (collecting cases)—excludes workers who would otherwise be MWA employees from its protections. We hold that the same economic realities test we applied in the context of statutory minimum wage claims in *Terry* applies to the constitutional MWA claims at issue here; that the Doe Dancers are employees, not independent contractors, under that test; and that NRS 608.0155 does not abrogate the constitutional protections to which they are therefore entitled. Thus, the district court erred by granting summary judgment in favor of the respondent and against the Doe Dancers, and we reverse and remand.

I.

Each of the Doe Dancers has, at some point, performed at Cheetahs Lounge, a men's club owned by respondent La Fuente, Inc. (Cheetahs). Each Doe Dancer performed at the venue for a different period of time and with differing experience. But, according to testimony by Cheetahs' operations manager, Diana Ponterelli, Cheetahs permitted the Doe Dancers to dance there based on certain shared qualifications—specifically, they showed up with a valid sheriff's card, state ID, work license, and costume, were not "trashed," and were "standing up." Cheetahs did not require that any Doe Dancer have prior dance training. Cheetahs did not check any Doe Dancer's references or employment history. Cheetahs did not ask that any Doe Dancer audition—not even "just to turn in circles"—before Cheetahs gave her[1] a shift.

The moment Doe Dancers' respective shifts began, however, Cheetahs' tone changed. The club imposed controls on Doe Dancers beginning at the door—requiring that they pay a "house fee" at entry as well as an "off stage fee," or else check-in with the D.J. for on-stage rotation. Myriad written and posted limitations on the Doe Dancers' costumes and performances met them inside the club—setting a minimum heel height of two-inches, grip strips,

[1]It appears that the Doe Dancers all identify as female; thus, we use feminine pronouns.

mandatory; prohibiting "clog type" shoes, "street clothes," "cotton material," "tears in your stockings or outfits," glitter and body oil; requiring graceful stage exits; and defining appropriate body placement during performances and while interacting with customers. And, the posted rules carried on, addressing dancer manners ("Keep feet off the furniture") and etiquette ("Working together is very important." "PLEASE GIVE [other dancers] THE SAME RESPECT THAT YOU WOULD LIKE THEM TO GIVE YOU."); social interactions ("[D]o not walk up to a customer and just ask him for a dance, talk to them, get to know him a little . . . leave a great and lasting impression. Sit at least one song with them first."); personal hygiene ("A MUST"); wound care ("ALL CUTS TO BE COVERED WITH . . . BAND-AIDS."); transportation ("CABS AND YOUR RIDE WILL PICK YOU UP AT THE DRESSING ROOM DOOR ONLY." "Anyone giving you a ride . . . is not allowed in the club during your shift."); and parking ("ALL NIGHT TIME ENTERTAINERS—AFTER 7PM WILL VALET PARK OR HAND KEYS OVER TO HOUSE MOM."). The posted rules further spiral into the sort of minutia likely familiar to many who have worked in a workplace ("All items [in the refrigerator] out by the end of [the] shift." "You are responsible for all your own things." "No food or drink is to be kept in your locker . . . BUGS!!!"); constraints perhaps somewhat less familiar, but that still may be common in certain service sectors ("NO SMOKING OR GUM CHEWING ON THE FLOOR." "No CELL phones on the floor." "No purses allowed on the floor." "Put all your belongings in [your] locker, not under the counter."); and ultimately singular and seemingly intrusive limitations ("LET MANAGER KNOW OF [YOUR PRESCRIPTION] MEDICATIONS." "NO GLASS in the dressing room. NO PLASTIC CUPS on the dressing room floor." "DO NOT LEAVE YOUR SHIFT WITHOU[T] CHECKING OUT WITH THE MANAGER AND THE DJ." "No boyfriends, husbands, or lovers allowed in the club while you are [w]orking." "Ask if you can put something in [the refrigerator]." "YOU WILL BE CHECKED ON ALL SHIFTS FOR BEING INTOXICATED BY HOUSEMOM." "You MUST NOT refuse a drink or shooter from a customer." "You MUST change costumes at least three times during a shift.").

The record does not allow for misunderstanding—Ponterelli's testimony and the management log book clearly demonstrate that these rules were enforced as posted. Indeed, even above and beyond those posted rules, Cheetahs seems to have set less tangible standards for the Doe Dancers, with the log book indicating that multiple performers were prohibited from dancing at the club or otherwise disciplined for having a "bad attitude," "offend[ing] . . . male customers," being "total ghetto," acting like a "prima donna," being "very disrespectable to [management]," or having a "poor, rude,

nasty attitude toward [staff].” And Ponterelli similarly testified that a central characteristic shared by prospective performers who Cheetahs ultimately did not allow to dance was a perceived “attitude” problem.

Before dancing at Cheetahs, each Doe Dancer was required to sign a “Dancer Performer’s Lease” agreement with Cheetahs. Under these agreements (1) Cheetahs purports to “lease[ ] to Performer and Performer leases from [Cheetahs] the non-exclusive right during normal business hours to use the stage area and certain other portions of [Cheetahs’ premises] . . . for the performing of live nude and/or semi-nude entertainment”; and (2) any employment relationship is “**SPECIFICALLY DISAVOW[ED].**” Nothing in these agreements diminishes the control that Cheetahs reserved the right to exert through its posted rules and commentary. To the contrary, the form of lease agreements the dancers signed specified that Cheetahs “shall have the right to impose . . . rules and regulations upon the use of [Cheetahs] by [a performer] . . . in its *sole and absolute discretion*.” (Emphasis added.)

Despite their having contractually “disavow[ed]” any employment relationship with Cheetahs in the Lease agreement, the Doe Dancers claimed they were, in fact, employees within the legal meaning of the term. They accordingly demanded minimum wages from the club, which Cheetahs refused to pay because it considered them independent contractors. As a result, the Doe Dancers brought the underlying class action, in which the Doe Dancers and Cheetahs filed cross motions for summary judgment. The Doe Dancers sought a ruling that they were employees rather than independent contractors, as a matter of law, and entitled to minimum wages under both NRS Chapter 608 and the MWA; Cheetahs sought a ruling that the Doe Dancers were conclusively presumed to be independent contractors pursuant to NRS 608.0155’s expanded definition of the phrase, and therefore not employees or eligible for the minimum wages demanded. The district court concluded that NRS 608.0155 applied to the Doe Dancers, rendering them independent contractors ineligible for minimum wages under both NRS Chapter 608 and the MWA, and granted the club’s motion for summary judgment while denying the Doe Dancers’ cross motion. This appeal followed.

II.

As noted, in *Terry*, we determined that certain performers—laboring under circumstances largely similar to those of the Doe Dancers—were “employees” within the meaning of NRS Chapter 608 (governing “Compensation, Wages and Hours”), not independent contractors as Sapphire had classified them, such that they were entitled to the state statutory minimum wage. *See* 130 Nev. at 892, 336 P.3d at 960. And in the district court, the Doe Dancers demanded

both statutory minimum wages in accordance with *Terry* and constitutional minimum wages pursuant to the MWA, the proper application of which *Terry* left unanswered. *See* 130 Nev. at 883, 336 P.3d at 955. On appeal, however, the Doe Dancers have abandoned their statute-based claims, instead relying solely on the constitutional protections the MWA extends to "employees." This raises, as a question of first impression, the extent of the MWA's reach. And because the district court denied the Doe Dancers' motion for summary judgment and granted Cheetahs' on the ground that NRS 608.0155, which the Legislature enacted in 2015, applied to negate both categories of the Doe Dancers' claims, the resolution of this appeal likewise involves questions of the constitutional supremacy of the MWA, which was first approved by voters in the 2004 general election. We examine all of these questions de novo. *W. Cab Co. v. Eighth Judicial Dist. Court*, 133 Nev. 65, 73, 390 P.3d 662, 670 (2017) (reviewing questions of constitutional interpretation de novo); *Torres v. Goodyear Tire & Rubber Co.*, 130 Nev. 22, 25, 317 P.3d 828, 830 (2014) (reviewing questions of statutory construction de novo); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (reviewing grant of summary judgment de novo).

A.

If the Doe Dancers do not qualify for MWA protections, the constitutional assessment of NRS 608.0155 in Part III, *infra*, would not need to follow. The threshold question, then, is the proper interpretation of the MWA. The MWA speaks in sweeping terms. It mandates that "[e]ach employer shall pay a wage to each employee." And it defines "employee" broadly, with only the narrowest of exceptions: "'Employee' means *any person who is employed by an employer* . . . but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days." Nev. Const. art. 15, § 16(C) (emphasis added). Though it borders on rote to do so at this point, we note that the definition's text is not alone sufficient to guide our interpretation. *Cf. Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007) (noting that where a law's language is "plain and its meaning clear, the courts will apply that plain language"). Nor does the surrounding language place it in meaningful explanatory context. Nev. Const. art. 15, § 16(C) (defining an employer as any "entity that may employ individuals or enter into contracts of employment"). Indeed, we previously assessed subsection C as "tautological," *Terry*, 130 Nev. at 884, 336 P.3d at 955, which assessment still holds. Accordingly, we must look to external aids of interpretation. *See Orion Portfolio Servs. 2, LLC v. County of Clark*, 126 Nev. 397, 402, 245 P.3d 527, 531 (2010).

This exercise highlights the extent to which *Terry*'s echoes resound here—the definition of employee in *Terry* was similarly ambiguous, *see* NRS 608.010 (defining employees as "persons in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed"), and its relevant context was likewise unhelpful. *See Terry*, 130 Nev. at 883-84, 336 P.3d at 955 (discussing the MWA and finding it not helpful to the statute's textual interpretation). Accordingly, in *Terry*, despite expressly noting the divergence between the language of NRS 608.010 and 29 U.S.C. § 203(e)(1) of the Fair Labor Standards Act (FLSA), we looked to federal case law interpreting the FLSA to understand the former, recognizing that "the Legislature has long relied on the federal minimum wage law to lay a foundation of worker protections that this State could build upon." 130 Nev. at 884, 336 P.3d at 955. But in the context of the MWA, federal FLSA law carries even greater persuasive weight, given that the relevant language of the MWA (defining employee as "any person who is employed by an employer," Nev. Const. art. 15, § 16(C)), so closely mirrors the FLSA 29 U.S.C. § 203(e)(1) (defining employee as "any individual employed by an employer"). *Amazon.com, Inc. v. Integrity Staffing Sols., Inc.*, 905 F.3d 387, 398 (6th Cir. 2018) (stating that as a general proposition, "when interpreting state provisions that have analogous federal counterparts, Nevada courts look to federal law unless the state statutory language is 'materially different' from or inconsistent with federal law" (internal quotations omitted)); *see also Middleton v. State*, 114 Nev. 1089, 1107 n.4, 968 P.2d 296, 309 n.4 (1998) (using federal law to interpret state statute because the two were "largely equivalent").

The FLSA's definition of employment predates the MWA by decades, and courts' applications of the "economic realities test" to that language have been "nearly ubiquitous" during that period. *Campusano v. Lusitano Constr. LLC*, 56 A.3d 303, 308 (Md. Ct. Spec. App. 2012); *see also* Fair Labor Standards Act of 1938, Pub. L. No. 718, § 3, 52 Stat. 1060, 1060 (1938) (enacting the federal definition); *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) (applying the economic realities test). In light of this, the definition of employee found in the FLSA and mirrored by the MWA "has acquired . . . a technical legal sense" that informs its meaning. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 324 (2012); *cf. Nev. Att'y for Injured Workers v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010) (presuming "that the Legislature enacted the statute with full knowledge of existing statutes relating to the same subject" (internal quotations omitted)). This canon of construction promotes legal stability; put differently, the members of the bar practicing in this field of law should be able to "assume that the [same] term bears

the same meaning," absent some clear indicia to the contrary. Scalia & Garner, *supra*, at 324. And, nothing here signals against application of the well-established proposition that "if a word [or phrase] is obviously transplanted from another legal source, . . . it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947); *cf.* Ballots; Labor Comm'r; Wages, 05-04 Op. Nev. Att'y Gen. 18, 18 (2005) (stating that in this context "the voters should be presumed to know the state of the law in existence related to the subject upon which they vote" (citing Bounties for Destruction of Predatory Animals, 34-153 Op. Nev. Att'y Gen. (1934))).

This tracks with what we have previously stated regarding the breadth of the MWA's terms, which establish a protective wage floor for workers in this state. *See, e.g.*, *Terry*, 130 Nev. at 884, 336 P.3d at 955 (noting that the MWA "signal[s] this state's voters' wish that more, not fewer, persons would receive minimum wage protections"); *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 488, 327 P.3d 518, 521 (2014) (noting the MWA's "broad definition of employee and very specific exemptions"). Relatedly, as a practical matter, the MWA can only offer protections equal to or broader than the FLSA's. *See Jane Roe Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 33, 176 P.3d 271, 274 (2008) (citing FLSA savings clause as evidence of congressional intent "to leave room for state law to establish *higher* minimum wages than those set by the FLSA" (emphasis added)); *see also* 123 Am. Jur. Trials 1, § 7 (2012) (noting that "[t]he FLSA sets the *lowest* bar for compliance and permits states and other jurisdictions to enact laws that are more rigorous"). And, as we have previously noted, "a broader or more comprehensive coverage of employees" than that provided under the economic realities test "would be difficult to frame." *Terry*, 130 Nev. at 886, 336 P.3d at 956 (quoting *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945)). Nor would an *ad hoc* judicial conjuring of some test with an identical reach be advisable, particularly given the desirability of stability discussed above and Cheetahs' failure to cogently argue for any such alternative. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 & n.38, 130 P.3d 1280, 1288 & n.38 (2006).

In sum, we hold that the federal economic realities test applies to define the scope of the MWA's constitutional definition of employee.

B.

Because the economic realities test is based on a totality of circumstances, courts have used a range of factors in their analyses of the same. *See Terry*, 130 Nev. at 888-89, 336 P.3d at 958. There are six that "courts nearly universally consider":

1) the degree of the alleged employer's right to control the manner in which the work is to be performed;

> 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
>
> 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
>
> 4) whether the service rendered requires a special skill;
>
> 5) the degree of permanence of the working relationship; and
>
> 6) whether the service rendered is an integral part of the alleged employer's business.

Id. at 888-89, 336 P.3d at 958. Applying these factors to find an employment relationship in *Terry*, we noted that our holding was, at that time, consistent with "the great weight of authority" using the economic realities test, which had "almost 'without exception . . . found an employment relationship and required . . . nightclub[s] to pay [their] dancers a minimum wage.'" *Id.* at 892, 336 P.3d at 960 (quoting *Clincy v. Galardi S. Enters., Inc.*, 808 F. Supp. 2d 1326, 1343 (N.D. Ga. 2011) (collecting cases)). And it remains true that "courts continue to trend . . . to allowing exotic dancers coverage under [the] FLSA" and the corresponding economic realities test as employees, rather than excluding them from minimum wage protections as independent contractors. J. Dalton Person, *Exotic Dancers & FLSA: Are Strippers Employees?*, 69 Ark. L. Rev. 173, 179 (2016) (collecting cases).[2] That said, exotic dancers are not, as a class, categorically employees entitled to constitutional minimum wages under the MWA, as opposed to independent contractors. Instead, that question must be decided case by case, with reference to the particular circumstances of the relationship involved.

Here, the material facts surrounding the Doe Dancers' work for Cheetahs are undisputed. The question of their employment status is therefore one of law, *Terry*, 130 Nev. at 889, 336 P.3d at 958; *see also Purdham v. Fairfax Cty. Sch. Bd.*, 637 F.3d 421, 428 (4th Cir. 2011) (noting that the question of whether a worker is an employee under FLSA is one of law); *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1441 (10th Cir. 1998) (accord); *Donovan v. Tehco, Inc.*,

[2]*See also Verma v. 3001 Castor, Inc.*, 937 F.3d 221, 232 (3d Cir. 2019) (dancers were employees under the economic realities test); *McFeeley v. Jackson St. Entm't, LLC*, 47 F. Supp. 3d 260, 273-75 (D. Md. 2014), *aff'd*, 825 F.3d 235 (4th Cir. 2016) (accord); *Gilbo v. Agment LLC*, No. 1:19-cv-00767, 2020 WL 759548, at *7 (N.D. Ohio Feb. 14, 2020) (accord); *Hurst v. Youngelson*, 354 F. Supp. 3d 1362, 1378 (N.D. Ga. 2019) (accord); *Shaw v. Set Enters., Inc.*, 241 F. Supp. 3d 1318, 1323-27 (S.D. Fla. 2017) (accord); *Mason v. Fantasy, LLC*, No. 13-cv-02020-RM-KLM, 2015 WL 4512327, at *11 (D. Colo. July 27, 2015) (accord); *cf. Embry v. 4745 Second Ave., Ltd.*, No. 419-cv-00305-JAJ-RAW, 2019 WL 8376264, at *2 (S.D. Iowa Nov. 13, 2019) (denying club's motion to dismiss because "the facts pleaded, accepted as true, are such that a finder of fact could reasonably infer that the plaintiff and the other dancers were employees, rather than independent contractors").

642 F.2d 141, 143 n.4 (5th Cir. 1981) (accord), to which de novo review applies. *Terry*, 130 Nev. at 889, 336 P.3d at 958.

With regard to the first factor of the economic realities test, that is, Cheetahs' "right to control the manner in which" the Doe Dancers performed, the record does not evince any meaningful difference between the circumstances here and those in *Terry* that would weigh against a finding of employment. Both here and in *Terry*, the clubs set various rules governing dancers' appearances, performances, and on-shift conduct. *See Terry*, 130 Nev. at 890, 336 P.3d at 959 (discussing control element of economic realities test). If anything, Cheetahs reserved (and seemingly exercised) a more extensive right to control its dancers than the club in *Terry*. For instance, as detailed at the outset, Cheetahs' posted rules apparently required that dancers demonstrate a "respectable" attitude, not just toward customers, but toward staff and fellow performers; make a set number of costume changes; wear a specific number of G-strings; eschew costumes made of certain materials; not approach customers at certain locations in the club; cover cuts with Band-Aids; remove personal items from the refrigerator at the end of each shift; keep their belongings in lockers (secured with a "Cheetah[s'] lock" to be purchased from Cheetahs); and keep cups off the dressing room floor. Indeed, the record supports that Cheetahs' expansive control began at a dancer's entry—where the club apparently required that she relinquish her car keys—and continued until her exit—where, after checking out with the DJ and floor manager, she seems to have needed to take and pass a breathalyzer test in order to have those keys returned.

As to the second factor of the economic realities test, it appears that the Doe Dancers' respective opportunities for profit or loss were not meaningfully tethered to their managerial skills. This is because, markedly similar to the club in *Terry*, Cheetahs has established " 'a framework of false autonomy' that gives performers 'a coercive "choice" between accruing debt to the club or redrawing personal boundaries of consent and bodily integrity.' " 130 Nev. at 889, 336 P.3d at 959 (quoting Sheerine Alemzadeh, *Baring Inequality: Revisiting the Legalization Debate Through the Lens of Strippers' Rights*, 19 Mich. J. Gender & L. 339, 347 (2013)). Like the club in *Terry*, Cheetahs set the prices for both the house fee and dances; required the Doe Dancers to be in rotation for stage dances for a certain number of songs, unless they paid an off-stage fee; demanded a cut from any earned "funny money"; and aggressively "encourage[d]" the Doe Dancers to tip out other employees. And, if a Cheetahs' dancer wished to leave before her six-hour shift expired—if, for example, it was an exceptionally slow night at the club—her house fee was higher. Accordingly, here, as in *Terry*, any boundaries the Doe Dancers set with a customer or the club—by, for instance, refusing to accept "funny money" or requesting permission to leave early—

risked them ultimately "taking a net loss." *Terry*, 130 Nev. at 890, 336 P.3d at 959.

With regard to the third factor, the Doe Dancers' respective investments in "equipment or materials" were, as the performers' in *Terry*, seemingly limited to their appearances and costuming. Cheetahs, not the Doe Dancers, invested in the club's marketing. Cheetahs, not the Doe Dancers, financed club operations and repairs. Cheetahs, not the Doe Dancers, managed payroll. Cheetahs, not the Doe Dancers, obtained (and ran) the club's only credit card machine. Cheetahs, not the Doe Dancers, paid rent. Cheetahs, not the Doe Dancers, invested in the club's "ambiance, layout, [and] decor." And because the Doe Dancers invested nothing, save their physical exertion, makeup, and costumes, any reduction in their earnings—due to their dancing on, say, a holiday like Father's Day (when club attendance is, apparently, light)—is therefore the loss of wages due an employee, "not of [the] investment" of an independent contractor. *Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1536 (7th Cir. 1987).

On the fourth factor of the economic realities test, "whether the service rendered requires a special skill," we tread carefully, having no wish to disparage the Doe Dancers or minimize the physical abilities that their work requires. However, their particular talents and endurance on their heel-clad feet "do not change the nature of their employment relationship with [Cheetahs]." *Id.* at 1537. The question, as noted in *Terry*, is one of the presence and requirement of the sort of specialized skill common to independent contractors; that is, "whether their work requires the initiative demonstrated by one in business for himself or herself." 130 Nev. at 891, 336 P.3d at 959. And witnesses' testimony regarding the near absence of *any* requirements for performing at Cheetahs—aside from, perhaps, a compliant "attitude"—would seem to entirely negate this.

With regard to the fifth factor, there appears little permanency in the relationship between the Doe Dancers and Cheetahs—the manager's log book reflects the relatively frequent cessation of dancers' relationships with the club, sometimes without explanation—and the testimony of Ponterelli and various Doe Dancers suggests that the "length and the regularity" of the Doe Dancers' work was, at least to some degree, of their own choosing. *See Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 147 (2d Cir. 2017) (looking to the length and regularity of certain workers' relationship with a business in ruling on this factor). But even work of relatively short durational periods can qualify as employment rather than independent contracting. *See Lauritzen*, 835 F.2d at 1537-38 (holding that seasonal pickle-harvest pickers were employees not independent contractors). And, while schedule variability may, in some cases, serve as an indicator of employment status, it is not dispositive. *See*

Keller v. Miri Microsystems LLC, 781 F.3d 799, 808 (6th Cir. 2015) (noting that "workers have been deemed employees where the lack of permanence is due to operational characteristics intrinsic to the industry rather than to the workers' own business initiative" (internal quotations omitted)).

Instead, "the ultimate inquiry is the nature of the performers' dependence on the club." *Terry*, 130 Nev. at 891, 336 P.3d at 960. Accordingly, flexibility in scheduling is only of persuasive import where it affords the worker in question with entrepreneurial opportunities—"when an individual is able to draw income through work for others, he is less economically dependent on his putative employer." *Saleem*, 854 F.3d at 141. And here, particularly given Cheetahs' witnesses' testimony generally dismissing the qualifications of the Doe Dancers, we are simply not persuaded that their theoretical scheduling flexibility is in any real sense "the same as [the] true economic independence" that might exist in the case of an independent contractor. *McLaughlin v. Seafood, Inc.*, 861 F.2d 450, 452-53 (5th Cir. 1988).

The sixth and final factor—whether the Doe Dancers' work is "integral" to Cheetahs' business—requires little analysis. As Ponterelli acknowledged, a business such as Cheetahs "can't be a men's club without exotic dancers." Common sense leads us to agree, and Cheetahs' briefing appears to concede the point. Accordingly, the weight of the economic realities test factors support that the Doe Dancers are employees, as opposed to independent contractors, thereunder.

III.

This leaves only the question of whether NRS 608.0155's definition of independent contractor operates to exclude the Doe Dancers from these constitutional base-line protections by narrowing the scope of which workers the MWA would otherwise cover. Enacted in 2015, following *Terry*, NRS 608.0155 states in relevant part,

> [F]or the purposes of this chapter, a person is conclusively presumed to be an independent contractor if:
>
> (a) Unless the person is a foreign national who is legally present in the United States, the person possesses or has applied for an employer identification number or social security number or has filed an income tax return for a business or earnings from self-employment with the Internal Revenue Service in the previous year;
>
> (b) The person is required by the contract with the principal to hold any necessary state business license or local business license and to maintain any necessary occupational license, insurance or bonding in order to operate in this State; and

(c) The person satisfies three or more of [certain additional criteria].

NRS 608.0155.[3]

Cheetahs' argument that its interpretation of NRS 608.0155—that is, its reading the statutory expansion of the class of independent contractors as applicable to the MWA's definition of employee—does not create any conflict therewith is puzzling. Admittedly, NRS 608.0155 is framed in terms of who is an "independent contractor," but it operates to distinguish "independent contractors" from "employees," which concepts are mutually exclusive. *See, e.g.*, Landis, 51 A.L.R. Fed. at 702 (collecting cases). Indeed, to say that NRS 608.0155 does not alter the MWA's definition of employee would likewise be to say that NRS 608.0155 does not affect which workers are employees under the MWA; or, put differently, that NRS 608.0155 does not exclude from the MWA's coverage any worker otherwise covered by the constitutional definition of employee. And this is plainly not Cheetahs' position, all semantics aside. Thus, the following analysis assumes without deciding, that the Doe Dancers fall under this conclusive statutory presumption, which—if it does apply to MWA claims—would negate their constitutional minimum wage entitlement.

Beginning with the text of the statute itself, *see Banks v. Sunrise Hosp.*, 120 Nev. 822, 846, 102 P.3d 52, 68 (2004), and the statutory

[3]The list of potential criteria includes

(1) Notwithstanding the exercise of any control necessary to comply with any statutory, regulatory or contractual obligations, the person has control and discretion over the means and manner of the performance of any work and the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the principal in the contract.

(2) Except for an agreement with the principal relating to the completion schedule, range of work hours or, if the work contracted for is entertainment, the time such entertainment is to be presented, the person has control over the time the work is performed.

(3) The person is not required to work exclusively for one principal unless:

(I) A law, regulation or ordinance prohibits the person from providing services to more than one principal; or

(II) The person has entered into a written contract to provide services to only one principal for a limited period.

(4) The person is free to hire employees to assist with the work.

(5) The person contributes a substantial investment of capital in the business of the person, including, without limitation, the:

(I) Purchase or lease of ordinary tools, material and equipment regardless of source;

(II) Obtaining of a license or other permission from the principal to access any work space of the principal to perform the work for which the person was engaged; and

(III) Lease of any work space from the principal required to perform the work for which the person was engaged.

framework in which it falls, *see Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007), there is merit in Doe Dancers' argument that NRS 608.0155 only purports to apply "for the purposes of [NRS Chapter 608]"; that is, by its terms, the section appears to limit its reach to the statutory chapter in which it sits. Cheetahs, however, points to alternative language from Section 7 of the bill that enacted NRS 608.0155 (S.B. 224), stating that the bill applies "to an action or proceeding to recover unpaid wages pursuant to *[the MWA] or NRS 608.250 to 608.290, inclusive*." 2015 Nev. Stat., ch. 325, § 7, at 1744 (emphasis added).[4] Adding an additional wrinkle, and perhaps supporting Cheetahs' position, the Legislature also implicitly referenced both NRS Chapter 608 and the MWA in NRS 608.255—stating that independent contractors are not entitled to the minimum wage "[f]or the purposes of this chapter and any other statutory or constitutional provision governing the minimum wage paid to an employee." However, these sections are possible to read harmoniously—as its language plainly states, the definition of independent contractor in NRS 608.0155 (or Section 1 of S.B. 224) applies only to NRS Chapter 608 claims, while Section 5 of S.B. 224 and NRS 608.255 merely serve to reaffirm that independent contractors are, generally, not eligible for minimum wages, whatever the source of authority supposedly justifying them. *See Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 200-01, 179 P.3d 556, 560 (2008) (noting that "a statute's provisions should be read as a whole . . . and, when possible, any conflict is harmonized"). Moreover, even if these sections were truly irreconcilable, the general/specific canon—instructing that when two statutes conflict, "the more specific statute will take precedence, and is construed as an exception to the more general statute," *Williams v. State, Dep't of Corr.*, 133 Nev. 594, 601, 402 P.3d 1260, 1265 (2017) (citation omitted)—would counsel the same outcome.

Indeed, the Legislature's reference to *both* NRS Chapter 608 and the MWA in NRS 608.255 and the introductory language of Section 5 of S.B. 224 supports this proffered reading. To wit, the Legislature plainly knew how to word laws to expressly reach claims brought under either NRS Chapter 608 or the MWA, and despite this, NRS 608.0155 states that it applies only "for the purposes of this chapter."[5] We are therefore particularly loath to read-in the sort of express language contained in NRS 608.255 and Section 5 of

[4]Though this language was adopted into our state's official laws but not codified in the NRS, it holds the same persuasive value. *See Halverson v. Sec'y of State*, 124 Nev. 484, 486-87, 186 P.3d 893, 895-96 (2008) (holding that "while not enacted [into the NRS], the [language in question] is law, as it was enacted in the official Statutes of Nevada").

[5]Further confirming this is the introductory language to Section 7 of S.B. 224, which likewise included specific references to both the MWA and NRS Chapter 608. 2015 Nev. Stat., ch. 325, § 5, at 1744.

S.B. 224 to NRS 608.0155—"It is not [a court's] function or within [a court's] power to enlarge or improve or change the law." Elihu Root, *The Importance of an Independent Judiciary*, 72 Independent 704, 704 (1912). A court has only the "right and the duty . . . to interpret the [legislative] document" not "to rewrite the words." Edward H. Levi, *The Nature of Judicial Reasoning*, 32 U. Chi. L. Rev. 395, 404 (1965); *cf. Zenor v. State, Dep't of Transp.*, 134 Nev. 109, 111, 412 P.3d 28, 30 (2018) (reasoning that the Legislature's omission of language was intentional).

Further supporting this reading is the principle that "when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Degraw v. Eighth Judicial Dist. Court*, 134 Nev. 330, 333, 419 P.3d 136, 139 (2018) (internal quotations omitted). Integrally tied into the application of this canon here is that "constitutional supremacy prevents the Nevada Legislature from creating exceptions to the rights and privileges protected by Nevada's Constitution." *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 489, 327 P.3d 518, 522 (2014). Indeed, in interpreting the MWA in *Thomas v. Nevada Yellow Cab Corp.*, we have previously reasoned that "[i]f the Legislature could change the Constitution by ordinary enactment, no longer would the Constitution be superior paramount law, unchangeable by ordinary means. It would be on a level with ordinary legislative acts, and, like other acts . . . alterable when the legislature shall please to alter it." *Id.* at 489, 327 P.3d at 522 (alteration in original) (internal quotations omitted).

Thomas's reasoning is directly on point here—as we have indicated, the MWA provides broader minimum wage coverage than that offered by NRS Chapter 608. *See Thomas*, 130 Nev. at 488, 327 P.3d at 521 (noting that the MWA "expressly and broadly defines employee"); *Terry*, 130 Nev. at 884, 336 P.3d at 955 (noting that the MWA reflects "voters' wish that more, not fewer, persons would receive minimum wage protections"). And rather than, say, lobbying for legislative action, Nevada voters took it upon themselves to propose and adopt an amendment to the "superior paramount law" of this state, via "[extra]ordinary means." *See Thomas*, 130 Nev. at 489, 327 P.3d at 522 (internal quotations omitted); *see also* John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 Penn St. L. Rev. 1007, 1019 (2011) (noting that "where legislatures were not supportive [of increasing the minimum wage beyond the federal level], citizen-initiated statutes could be relied on to secure these policies, as occurred in several states," including Nevada). Given the MWA's supremacy, and the extraordinary measures the people of this state undertook to enact it, it only follows that NRS 608.0155 should be construed to accord with the MWA, not vice versa. *Thomas*, 130 Nev. at 489, 327 P.3d

at 521-22. Indeed, "[a]ccepting [Cheetahs'] position 'would require the untenable ruling . . . that the constitution is presumed to be legal and will be upheld unless in conflict with the provisions of a statute.'" *Thomas*, 130 Nev. at 489, 327 P.3d at 521-22 (quoting *Strickland v. Waymire*, 126 Nev. 230, 241, 235 P.3d 605, 613 (2010)). Such a holding would run afoul of fundamental democratic principles and the people's apparent attempt to "insulate minimum-wage increases from the possibility of future legislative reversal." Dinan, *supra*, at 1019.

Additionally, accepting Cheetahs' reading of NRS 608.0155 would raise potential separation of powers questions—it is "[a] well-established tenet of our legal system . . . that the judiciary is endowed with the duty of constitutional interpretation[,]" not the Legislature. *Nevadans for Nev. v. Beers*, 122 Nev. 930, 943 n.20, 142 P.3d 339, 347 n.20 (2006). Simply put, it is not clear that the Legislature has the constitutional power to impose any particular interpretation of the term employee in the MWA upon this court by legislation—which, as discussed above, Cheetahs' reading of NRS 608.0155 would necessarily do.

Separate and apart from these principles, Cheetahs' understanding of the MWA "as allowing the Legislature to provide for additional exceptions to Nevada's constitutional minimum wage disregards the canon of construction '*expressio unius est exclusio alterius*,' the expression of one thing is the exclusion of another." *Thomas*, 130 Nev. at 488, 327 P.3d at 521 (quoting *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967)). As *Thomas* held, the MWA "expressly and broadly defines employee, exempting only certain groups" not at issue (those under 18, employed by a "nonprofit organization for after school or summer employment or as a trainee" for 90 days or less). 130 Nev. at 488, 327 P.3d at 521. Accordingly, "the text necessarily implies that all employees *not* exempted by the Amendment . . . must be paid the minimum wage set out in the Amendment." *Id.* (emphasis added). Put differently, "the MWA's broad definition of employee and very specific exemptions necessarily and directly conflict with the [purported] legislative exception" Cheetahs proposes here. *Id.*

All this said, in *Thomas* we relied in part on the doctrine of implied repeal—that later-in-time legislation "is controlling over [a] statute that addresses the same issue." 130 Nev. at 489, 327 P.3d at 521 (internal quotations omitted). In theory, this principle could weigh against the Doe Dancers because NRS 608.0155 post-dates the MWA's enactment. But even crediting the doctrine in this context, the Legislature lacked the constitutional power to partially repeal the MWA's broad definition for the weighty reasons discussed above—the Legislature cannot by later-enacted statute abridge a right that the constitution guarantees. *See id.* at 489, 327 P.3d at 522.

Accordingly, NRS 608.0155 does not, and indeed could not, remove from MWA protections employer-employee relationships the constitutional provision protects. And because, as established above, the Doe Dancers are otherwise employees within the MWA's meaning, the district court erred by granting summary judgment in favor of Cheetahs and against the Doe Dancers on that point. We therefore reverse the district court's summary judgment and remand this matter to the district court for proceedings consistent with this opinion.

Hardesty, C.J., and Parraguirre, Cadish, Silver, and Herndon, JJ., concur.

Stiglich, J., concurring:

I agree that the MWA incorporates the economic realities test, which "examines the totality of the circumstances and determines whether, as a matter of economic reality, workers depend upon the business to which they render service for the opportunity to work." *See Terry v. Sapphire Gentlemen's Club*, 130 Nev. 879, 886, 336 P.3d 951, 956 (2014) (emphasis omitted). Nevada's voters enacted the MWA so that "more, not fewer, persons would receive minimum wage protections" and used broad language to that effect which mirrors the language in the Fair Labor Standards Act. *See id.* at 884, 336 P.3d at 955. I also agree that the plaintiffs in this case satisfy the economic realities test and are therefore entitled to the protections of the MWA.[1]

I write separately because I do not agree that "by its terms, [NRS 608.0155] appears to limit its reach to the statutory chapter in which it sits." Majority opinion *ante* at 32. Although NRS 608.0155 applies only "for the purposes of this chapter," that means it applies for the purposes of NRS 608.255(2), which states that independent contractors are not subject to the provisions of the MWA. These two sections were enacted as part of a single, narrowly focused legislative scheme. 2015 Nev. Stat. ch. 325, at 1742-44. I agree that the principle of constitutional avoidance is an important aid when a legislative enactment is "susceptible of multiple interpretations," *Degraw v. Eighth Judicial Dist. Court*, 134 Nev. 330, 333, 419 P.3d 136, 139 (2018), but I do not find these provisions reasonably sus-

[1]Although I agree with the majority that the plaintiffs are employees for MWA purposes, I do not necessarily find all of the same facts persuasive. For example, I do not think the requirements that dancers be "respectable," "cover cuts with Band-Aids," or "keep their belongings in lockers" are particularly strong indicia of the type of control that evidences an employment relationship. Majority opinion *ante* at 28. In my view, Cheetahs' control over prices, the dancers' lack of meaningful entrepreneurial opportunity, and the fact that dancing is obviously "integral" to Cheetahs' business are better indicia of the relevant "economic realities."

ceptible of multiple interpretations. In my view, the Legislature unambiguously decided that workers who satisfy the criteria of NRS 608.0155 should not be entitled to the protections of the MWA. I am concerned that in its effort to avoid creating constitutional problems, the majority distorts the plain meaning of the Legislature's words.

Nevertheless, I agree with the majority that "the Legislature cannot by later-enacted statute abridge a right that the constitution guarantees." Majority opinion *ante* at 34; *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 489, 327 P.3d 518, 522 (2014) (explaining that "the Constitution [is] superior paramount law, unchangeable by ordinary means") (internal quotation marks omitted). Therefore, although I conclude the Legislature intended to limit the scope of the MWA, I would hold that it lacked the power to do so. Because I would reach the same result, albeit by a slightly different path, I concur.

THE STATE OF NEVADA, Petitioner, *v.* THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF ELKO; and THE HONORABLE NANCY L. PORTER, District Judge, Respondents, and ANTHONY CHRIS ROBERT MARTINEZ, Real Party in Interest.

No. 80093

February 25, 2021 481 P.3d 848

Original petition for a writ of mandamus or prohibition challenging a district court order granting a motion to consolidate counts.

Petition denied.

Aaron D. Ford, Attorney General, Carson City; *Tyler J. Ingram*, District Attorney, and *Daniel M. Roche*, Deputy District Attorney, Elko County, for Petitioner.

Matthew Pennell, Public Defender, Elko County, for Real Party in Interest.

Before the Supreme Court, En Banc.

OPINION

By the Court, Pickering, J.:

NRS 202.360(1)(b) makes it illegal for a convicted felon to possess "any firearm." This raises the question whether a felon who possesses five firearms at one time and place commits a single violation of NRS 202.360(1)(b) or five separate violations. The rule of lenity resolves such unit-of-prosecution questions in favor of the defendant where, as here, the statute's text is ambiguous and conventional tools of statutory construction leave the matter in doubt. Consistent with the rule of lenity and the cases construing the similarly ambiguous federal felon-in-possession statute, 18 U.S.C. § 922(g)(1) (2018), we hold that the State properly charges a defendant with only a single violation of NRS 202.360(1)(b) when it alleges, without more, that the defendant is a felon who possessed "any firearm"—that is, one or more firearms—at one time and place.

I.

The police arrested real party in interest Anthony Martinez after he shot at two individuals in West Wendover, Nevada. They recovered five firearms at the scene, four from Martinez's car and the fifth—the gun Martinez allegedly used to fire the shots—from beside the car. The State charged Martinez with 15 felonies, including two

counts of attempted murder. Among the 15 counts the State charged Martinez with were five counts of violating NRS 202.360(1)(b)—possession of a firearm by a person previously convicted of a felony offense—one count per firearm possessed.

Martinez filed a motion to consolidate the five felon-in-possession counts into a single count. Martinez argued that, because the State alleged that he possessed these five firearms at one time and place, he committed, at most, a single violation of NRS 202.360(1)(b). The district court agreed and granted Martinez's motion to consolidate.

II.

The State brings the dispute to this court on a pretrial petition for extraordinary writ relief.[1] A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. *Walker v. Second Judicial Dist. Court*, 136 Nev. 678, 679-80, 476 P.3d 1194, 1196 (2020). A district court manifestly abuses its discretion if it bases its ruling on a clearly erroneous application of law. *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011). But writ relief does not lie when the petitioner has "a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170.

The State's petition qualifies for extraordinary writ review. It challenges as clear legal error the district court's interpretation and application of NRS 202.360(1)(b). While NRS 177.015 gives the State certain rights of appeal in criminal cases, those rights are limited and do not reach a pretrial order consolidating counts. And the unit of prosecution that NRS 202.360(1)(b) allows in felon-in-possession cases presents an unsettled legal issue of statewide significance. For these reasons, although we ultimately deny the petition, we undertake merits-based writ review.

III.

A.

Deciding NRS 202.360(1)(b)'s "unit of prosecution presents an issue of statutory interpretation and substantive law." *Jackson v. State*, 128 Nev. 598, 612, 291 P.3d 1274, 1283 (2012) (internal quotations omitted). "As with other questions of statutory interpretation," unit-of-prosecution analysis "begins with the statute's text." *Castaneda v. State*, 132 Nev. 434, 437, 373 P.3d 108, 110 (2016).

[1]The State styles its petition as one seeking a writ of prohibition or mandamus. "A writ of prohibition arrests the proceedings of a tribunal when such proceedings are without or in excess of the tribunal's jurisdiction." *State v. Justice Court of Las Vegas Twp.*, 112 Nev. 803, 806, 919 P.2d 401, 403 (1996). No such jurisdictional excess appears, so we deny the alternative petition for a writ of prohibition.

When the text leaves the statute's unit of prosecution ambiguous, other interpretive resources come into play, "including related statutes, relevant legislative history, and prior judicial interpretations of related or comparable statutes." *Id*. at 439, 373 P.3d at 111. If, "after all the legitimate tools of interpretation have been applied, a reasonable doubt persists" as to the statute's unit of prosecution, the rule of lenity calls the tie for the defendant. *Id.* (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 299 (2012) (internal quotations omitted)). Under the rule of lenity, "[a]mbiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor." Scalia & Garner, *Reading Law*, *supra*, at 296.

B.

Nevada's felon-in-possession statute, NRS 202.360(1)(b), reads as follows:

> *A person shall not* own or *have in his or her possession* or under his or her custody or control *any firearm* if the person: . . .
>
> (b) Has been convicted of a felony in this State or any other state . . . .
>
> A person who violates the provisions of this subsection is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than $5,000.

(emphasis added); *see* NRS 202.360(3)(b) ("As used in this section: . . . '[f]irearm' includes any firearm that is loaded or unloaded and operable or inoperable.").

By its terms, NRS 202.360(1)(b) states three main elements: (1) a status element (the defendant is a person "convicted of a felony"); (2) a possession element (who "shall not . . . have in his or her possession"); and (3) a firearm element ("any firearm"). *See Hager v. State*, 135 Nev. 246, 249, 447 P.3d 1063, 1066 (2019). So, a defendant who is a convicted felon and possesses one firearm—loaded or working or not—can be charged with and convicted of one count of violating NRS 202.360(1)(b). From this it does not follow, though, that a felon who possesses five such firearms at one time and place can be charged with and convicted of five counts of violating NRS 202.360(1)(b).

The problem stems from NRS 202.360(1)'s use of the word "any" to modify "firearm." A number of criminal statutes use "any" as NRS 202.360(1) does: to help define the prohibition the statute states. *See Castaneda*, 132 Nev. at 438, 373 P.3d at 111. But unless otherwise clarified, this creates ambiguity as to the statute's unit of prosecution. *E.g.*, *Bell v. United States*, 349 U.S. 81 (1955) (holding that the simultaneous transportation of two women across state lines

constituted one, not two, violations of the Mann Act, which made it a crime to knowingly transport "any woman or girl" across state lines for immoral purposes; "any" left the unit of prosecution ambiguous, so the rule of lenity applied). The ambiguity arises because "[t]he word 'any' has multiple, conflicting definitions, including (1) one; (2) one, some, or all regardless of quantity; (3) great, unmeasured, or unlimited in amount; (4) one or more; and (5) all." *Castaneda*, 132 Nev. at 438, 373 P.3d at 111 (internal quotations omitted). Depending on the meaning assigned "any," NRS 202.360(1)(b) can support prosecution either on a per-firearm basis or on the basis of a felon simultaneously possessing one or more firearms at one time and place. Since both readings are reasonable, the statute is ambiguous on its face. *See id.* (noting that "the word 'any' has typically been found ambiguous in connection with the allowable unit of prosecution, for it contemplates the plural, rather than specifying the singular") (internal quotations omitted); *accord Figueroa-Beltran v. United States*, 136 Nev. 386, 391, 467 P.3d 615, 621 (2020); *Andrews v. State*, 134 Nev. 95, 98, 412 P.3d 37, 39 (2018).

C.

Legitimate statutory interpretation tools can resolve textual ambiguities, *see Castaneda*, 132 Nev. at 439, 373 P.3d at 111; Scalia & Garner, *Reading Law*, *supra*, at 299, but none appears to do so here. Citing *Washington v. State*, 132 Nev. 655, 376 P.3d 802 (2016), the State argues that, since NRS 202.360(1) uses the singular "firearm" instead of the plural "firearms," the Legislature must have meant to create a per-firearm unit of prosecution. "Firearms" instead of "firearm" would have made Nevada's felon-in-possession statute clearer, but this does not change the fact that, as written, NRS 202.360(1)(b) can reasonably be read in two different ways. And, while *Washington* held that NRS 202.285(1) authorizes a per-discharge unit of prosecution where a defendant "discharges a firearm at or into any house, room, [or] apartment," 132 Nev. at 657, 376 P.3d at 805, the statute's operative words were the verb "discharges" and its object "a firearm," which made a per-discharge unit of prosecution appropriate.

The State also makes a public policy argument: The Legislature takes possession of firearms by felons very seriously or it would not have passed NRS 202.360(1)(b) criminalizing such possession, and interpreting NRS 202.360(1)(b) to authorize per-firearm prosecutions furthers the Legislature's intent to prevent felons from possessing firearms by making each firearm possessed a separate crime. As support, the State cites *Andrews*, 134 Nev. at 101, 412 P.3d at 41-42, arguing "that everything about the analysis and ruling in *Andrews* is applicable to this case." In fact, the opposite is true. *Andrews* and this case share one similarity: Both concern a criminal

statute made ambiguous by the word "any." *See id.* at 98, 412 P.3d at 39-40 (discussing *Castaneda*, 132 Nev. at 438, 373 P.3d at 111, and the unit-of-prosecution ambiguity "any" creates).

At issue in *Andrews* was NRS 453.3385 (2013), criminalizing possession of "any controlled substance which is listed in Schedule 1, except marijuana." In *Andrews*, a divided panel of this court concluded that, despite the textual ambiguity "any" created, other legitimate tools of statutory interpretation supported prosecuting as separate offenses a defendant's simultaneous possession of several different controlled substances. Those tools included that NRS 453.3385 is part of Nevada's Uniform Controlled Substances Act (UCSA), *Andrews*, 134 Nev. at 99, 412 P.3d at 40; that other statutes within the UCSA supported the per-controlled-substance interpretation, *id.*; that case law interpreting UCSA provisions also supported this interpretation, *id*. at 101, 412 P.3d at 41; and that the legislative history supported the majority's reading of NRS 453.3385, *id*. at 99-100, 412 P.3d at 40-41. In this case, by contrast, the State does not identify or apply any interpretive tools beyond its textual analysis and assertion respecting what it perceives the Legislature intended when it enacted NRS 202.360(1)(b).

"The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008); *accord Castaneda*, 132 Nev. at 443, 373 P.3d at 114. The rule is an ancient one, "founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (per Marshall, C.J.).

The text of NRS 202.360(1)(b) leaves its unit of prosecution ambiguous, and the State has not identified any legitimate statutory interpretation tools to clarify it. To credit the State's argument that the Legislature must have intended to authorize a per-firearm-possessed unit of prosecution or it would not have made possession of any firearm by a felon a crime would turn the venerable "rule of lenity upside down." *Santos*, 553 U.S. at 519. Courts "interpret ambiguous criminal statutes in favor of defendants, not prosecutors." *Id.* We therefore hold that the State properly charges a defendant with only a single violation of NRS 202.360(1)(b) when it alleges, without more, that the defendant is a felon who possessed "any firearm"—that is, one or more firearms—at one time and place.

D.

Our holding comports with the cases construing the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1) (2018). Although the statutes are not identical, section 922(g)(1) is similar to NRS

202.360(1)(b). It has a status element, a possession element, and a firearm element, and it uses "any" to express the prohibition it states:

> (g) It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, *any firearm* or ammunition; or to receive *any firearm* or ammunition which has been shipped or transported in interstate or foreign commerce.

(Emphasis added.) These similarities make it appropriate to look to federal case law in deciding the unit of prosecution question presented by this petition.

The federal courts have achieved rare unanimity on the unit of prosecution 18 U.S.C. § 922(g)(1) authorizes in felon-in-possession cases. Every United States circuit court of appeals has deemed section 922(g)(1) ambiguous as to its unit of prosecution, applied the rule of lenity as stated in *Bell*, 349 U.S. at 83, and held that "when a defendant's possession of multiple firearms is simultaneous and undifferentiated, the government may only charge that defendant with one violation of § 922(g)(1) . . . regardless of the actual quantity of firearms involved." *United States v. Buchmeier*, 255 F.3d 415, 422 (7th Cir. 2001) (citing cases from every United States circuit court of appeals). "[I]t does not matter if [the defendant] has one, two, three, or more firearms"; so long as the defendant possesses the firearms simultaneously, at one time and place, he or she commits a single offense. *United States v. Robinson*, 855 F.3d 265, 270 (4th Cir. 2017). This body of case law supports our holding that a defendant violates NRS 202.360(1)(b) once when he or she possesses at one time and place any firearm. The federal cases follow a different rule when the defendant acquires or stores multiple firearms at different times and places, *see United States v. Cunningham*, 145 F.3d 1385, 1398 (D.C. Cir. 1998), but we leave that issue for another day, since the State does not allege or argue that Martinez did not possess the weapons at one time and place.

The district court was correct and thus did not commit the clear legal error required for writ relief. We therefore deny the petition.

Hardesty, C.J., and Parraguirre, Stiglich, Cadish, Silver, and Herndon, JJ., concur.

HOME WARRANTY ADMINISTRATOR OF NEVADA, INC., DBA CHOICE HOME WARRANTY, A NEVADA CORPORATION, APPELLANT, *v.* STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, DIVISION OF INSURANCE, A NEVADA ADMINISTRATIVE AGENCY, RESPONDENT.

No. 80218

March 4, 2021 481 P.3d 1242

Appeal from a district court order denying a petition for judicial review of and affirming, as modified, an order of the Nevada Division of Insurance. First Judicial District Court, Carson City; James Todd Russell, Judge.

Affirmed in part, reversed in part, and remanded.

Holland & Hart LLP and *Constance L. Akridge, Sydney R. Gambee*, and *Brittany L. Walker*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, *Joanna N. Grigoriev*, Senior Deputy Attorney General, and *Richard P. Yien*, Deputy Attorney General, Carson City, for Respondent.

Before the Supreme Court, HARDESTY, C.J., PARRAGUIRRE and CADISH, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

Under NRS 690C.150, "[a] provider [of home warranty services] shall not issue, sell or offer for sale service contracts in this state unless the provider has been issued a certificate of registration." NRS 690C.070 defines a "provider" as "a person who is obligated to a holder pursuant to the terms of a service contract," i.e., an obligor. In this appeal, we clarify that, under NRS 690C.150, a "provider" is not simply an entity that issues, sells, or offers for sale service contracts but, as NRS 690C.070 plainly defines it, the obligor in those contracts. The seller in this appeal was not an obligor, so it was not a provider and need not have held a certificate of registration. Further, the obligor did not act improperly by selling its contracts through an unregistered entity. Because the hearing officer concluded otherwise, we reverse in part the district court's order denying the obligor's petition for judicial review.

FACTS

Appellant Home Warranty Administrator of Nevada, Inc., dba Choice Home Warranty (HWAN), is a home-warranty service-contract provider. Choice Home Warranty (CHW) markets and sells

HWAN's contracts, in which HWAN is the obligor.[1] After receiving consumer complaints against CHW, respondent the Division investigated and ultimately filed a complaint against HWAN. The original and amended complaints alleged that HWAN, dba CHW, (1) made false entries by answering "no" to a question in several certificate-of-registration (COR) renewal applications asking whether HWAN or any new officers had been fined in other states since its previous application; (2) conducted business in an unsuitable manner, as the consumer complaints against CHW showed; and (3) failed to make records available to the Division.

After a three-day hearing, a hearing officer concluded that HWAN failed to make records available but that the Division could not prove the false-entry or unsuitable-manner allegations. She found that only CHW was ever fined, so the answer "no" was not a false entry, and that HWAN had not conducted business in an unsuitable manner on the basis of the consumer complaints. But she also concluded, on separate factual bases not raised in the Division's complaints, that HWAN *had* made false entries and *had* conducted business in an unsuitable manner. She concluded that HWAN made false entries by (1) leaving the pre-populated "self" answer to questions in the COR renewal applications asking for the applicant's administrator, when in fact CHW was its administrator, and (2) using an unapproved form contract in 2015 that HWAN did not disclose in that year's application. And she concluded that HWAN had conducted business in an unsuitable manner by using CHW as an administrator or sales agent because CHW did not have a COR and NRS 690C.150, as she interpreted it, requires an entity that sells contracts to have a COR. But none of those violations appeared in the original or amended complaints, and the Division never alleged any such violations until its closing argument.

HWAN petitioned the district court for judicial review, arguing that the hearing officer deprived it of due process by ruling that it committed unnoticed violations, and misinterpreted NRS 690C.150, the statute on which she based the unsuitable-manner ruling. The district court affirmed on the due-process and statutory-interpretation grounds and reversed on other grounds.

HWAN now appeals, arguing that (1) the hearing officer misinterpreted NRS 690C.150, (2) the hearing officer deprived it of due

[1]HWAN's name, its relationship with CHW, and its dealings with the Division have created a great deal of confusion that warrants clarification. Despite its name, HWAN is not an administrator. CHW is HWAN's administrator or sales agent. But, as we discuss, CHW may not be an "administrator" as the term is used in NRS Chapter 690C. And, despite its dba, HWAN is not CHW. In 2014, the Division nonetheless required HWAN to register the dba, explaining that "[t]hey thought it was confusing for consumers, having just the name [HWAN]" on contracts despite express provisions therein that CHW was the administrator and HWAN the obligor. The Division may have been correct because of HWAN's confusing name, but the dba appears to have created more confusion than it resolved.

process by ruling that it committed the unnoticed violations, and (3) the hearing officer's failure-to-make-records-available ruling was clearly erroneous.[2] We agree that the hearing officer deprived HWAN of due process and misinterpreted NRS 690C.150, so we reverse the district court's order in part. But the hearing officer's failure-to-make-records-available ruling was not clearly erroneous, so we also affirm in part.

DISCUSSION

We review an "administrative decision in the same manner as the district court." *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 248, 327 P.3d 487, 489 (2014). We may reverse an agency's decision if, among other things, "substantial rights of the petitioner have been prejudiced because the final decision of the agency is . . . [i]n violation of constitutional or statutory provisions," NRS 233B.135(3)(a), "[a]ffected by . . . error of law," NRS 233B.135(3)(d), or "[c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record," NRS 233B.135(3)(e). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423, 424-25 (1993).

The hearing officer's interpretation of NRS 690C.150 was an error of law

HWAN argues that the hearing officer based her unsuitable-manner ruling on a misinterpretation of NRS 690C.150 and disregarded NRS 690C.070. This issue requires us to review an agency's interpretation of its governing statutes. While we ordinarily review statutory interpretation issues de novo, we will "defer to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute." *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008). "When reviewing de novo, we will interpret a statute or regulation by its plain meaning unless the statute or regulation is ambiguous," *Young v. Nev. Gaming Control Bd.*, 136 Nev. 584, 586, 473 P.3d 1034, 1036 (2020), or the plain meaning "would provide an absurd result," *Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 130 Nev. 540, 546, 331 P.3d 850, 854 (2014).

The hearing officer's interpretation is not within the language of the statutes

HWAN argues that the hearing officer's interpretation is not within the language of the statutes, so we should not defer to it. We agree.

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[2]We do not address other issues that HWAN raises because doing so is unnecessary to resolve this appeal.

NRS 690C.150 provides that "[a] provider shall not issue, sell or offer for sale service contracts in this state unless the provider has been issued a certificate of registration." NRS 690C.070 defines a "provider" as "a person who is obligated to a holder pursuant to the terms of a service contract," i.e., an obligor. In contrast, NRS 690C.020 defines an "administrator" as "a person who is responsible for administering a service contract that is issued, sold or offered for sale by a provider."

The hearing officer found that "[b]y definition, an administrator should not be engaged in issuing, selling, or offering to sell service contracts." This much of her interpretation is arguably within NRS 690C.020's language and may be correct but is ultimately irrelevant.[3]

More importantly, the hearing officer also concluded that "CHW Group has engaged in the business of service contracts without a license, which is a violation of NRS 690C.150." This much of the hearing officer's interpretation is not within the language of the statute she cited, NRS 690C.150, or any other statute. Further, it disregards the definition of "provider" in NRS 690C.070. NRS 690C.150 prohibits only a *provider* from selling, issuing, and offering service contracts without a COR, and, under NRS 690C.070, the provider is not merely the contract's seller, but its *obligor*. The hearing officer never found that CHW was a provider, or even addressed the meaning of "provider," but simply reasoned that because NRS 690C.150 requires a provider to have a COR to sell contracts, "engag[ing] in the business of service contracts" without a COR violates NRS 690C.150. Because that much of the hearing officer's interpretation is not within the language of the statutes, we must review the issue de novo.

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[3]Throughout HWAN's briefs and the proceedings below, it has variously referred to CHW as its "administrator" and "sales agent." Like the district court would, the hearing officer found that CHW cannot be an administrator because it is the entity that sold contracts for HWAN. This is arguably true if CHW sold contracts, but whether it did is unclear. The hearing officer and the district court apparently overlooked agency theory, under which HWAN, through its sales agent, CHW, may be said to have sold the contracts that CHW thereafter administered—all seemingly in accordance with NRS 690C.150, NRS 690C.020, and NRS 690C.070. Neither the hearing officer nor the district court addressed the meaning of "sales agent" (HWAN's attorneys never addressed it either, but as HWAN persuasively argues, it lacked an adequate opportunity to prepare its defense without proper notice of this allegation). But, more importantly, neither the hearing officer nor the district court explained why the fact that CHW cannot be an administrator, if that is so, would mean that it is a provider or must have a COR. This reasoning is the crux of the hearing officer's and the district court's conclusions—CHW sold contracts and is not an administrator, so it is a provider and must have a COR—but lacks any support in the statutes and is simply a non sequitur.

The statutes are unambiguous

The first issue for de novo review is whether the statutes are ambiguous. A statute is ambiguous if it "is subject to more than one reasonable interpretation." *Savage v. Pierson*, 123 Nev. 86, 89, 157 P.3d 697, 699 (2007).

HWAN argues that the statutes are unambiguous. It explains that NRS 690C.150, in conjunction with NRS 690C.070's definition of "provider," plainly requires only an obligor to be licensed—not the entity that merely sells the contract. It further argues that NRS Chapter 690C's legislative history supports this plain-meaning interpretation. The Division does not address this issue except by arguing that HWAN misinterprets the legislative history.[4]

The only word at issue in NRS 690C.150 is "provider," and the Division does not argue that it is ambiguous. Like the hearing officer, it simply disregards that part of the statute. But, in any case, "provider" is not subject to more than one reasonable interpretation here because the Legislature expressly defined it in NRS 690C.070. That definition—"a person who is obligated to a holder pursuant to the terms of a service contract"—is likewise unambiguous. The only word therein that is potentially at issue, "obligat[ion]," is not subject to more than one interpretation but is among the most fundamental and commonly understood terms in contract law. So neither statute is ambiguous.

Plain-meaning interpretation would not provide an absurd result

The second issue for de novo review is whether a plain-meaning interpretation of NRS 690C.150 and NRS 690C.070 would provide an absurd result. An absurd result is one "so gross as to shock the general moral or common sense." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930); *see also Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1099 (9th Cir. 2007) (applying the *Crooks* definition).

A plain-meaning interpretation would not provide an absurd result. Even if the Division were correct that, under this interpretation, anyone could sell a contract without a COR, the result would not be "so gross as to shock the general moral or common sense." *Crooks*, 282 U.S. at 60.

CHW was not an obligor, so it was not a "provider"

HWAN argues that it is the provider because it is the obligor in the contracts at issue. HWAN is correct. It is the obligor under the contracts, so it is the provider. NRS 690C.070. As the pro-

[4]We are unpersuaded that we should consult the legislative history or that doing so is necessary to interpret these statutes.

vider, it is the only entity that must hold a COR. NRS 690C.150. Because the hearing officer nonetheless found that CHW must have had a COR, her decision that HWAN conducted business in an unsuitable manner was "[i]n violation of . . . statutory provisions," NRS 233B.135(3)(a), and "affected by . . . error of law," NRS 233B.135(3)(d).

The hearing officer deprived HWAN of due process by ruling that it committed unnoticed violations

HWAN argues that the hearing officer deprived it of due process by ruling that it committed violations that lacked factual bases in the complaints, thereby depriving it of an adequate opportunity to defend itself and develop the record. The Division answers that HWAN had an adequate opportunity to prepare and was not unfairly surprised because the additional, unnoticed false-entry violations arose from HWAN's defense against the noticed false-entry allegations. The Division admits that the unnoticed violations were "supported by different facts" than the noticed allegations.

The United States and Nevada Constitutions proscribe deprivation "of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; Nev. Const. art. 1, § 8(2). Although "[t]he hearing officer shall liberally construe the pleadings and disregard any defects which do not affect the substantial rights of any party," NAC 679B.245(2), and "proceedings before administrative agencies may be subject to more relaxed procedural and evidentiary rules, due process guarantees of fundamental fairness still apply," *Dutchess*, 124 Nev. at 711, 191 P.3d at 1166 (footnote omitted). "Administrative bodies must . . . give notice to the defending party of 'the issues on which decision will turn and . . . the factual material on which the agency relies for decision so that [the defendant] may rebut it.'" *Id.* (footnote omitted) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288-89 n.4 (1974)). "[I]n the context of administrative pleadings, 'due process requirements of notice are satisfied where the parties are sufficiently apprised of the nature of the proceedings so that there is no unfair surprise.'" *Id.* at 712, 191 P.3d at 1167 (quoting *Nev. State Apprenticeship Council v. Joint Apprenticeship & Training Comm. for the Elec. Indus.*, 94 Nev. 763, 765, 587 P.2d 1315, 1317 (1978)).

The allegations at issue here are (1) false entry of material fact, and (2) conducting business in an unsuitable manner. In the amended complaint, the Division alleged that HWAN violated the false-entry statute, NRS 686A.070, by "falsely answer[ing] 'no'" to a question in several of HWAN's COR renewal applications asking whether HWAN or any new officers had been fined in other states since its previous application. It also alleged that "business practices of CHW, as documented by Nevada complaints; the Better Busi-

ness Bureau, news and media outlets; and the findings of fact of the various Courts' actions" constituted a violation of the unsuitable-manner statute, NRS 679B.125(2).

The hearing officer concluded that HWAN did not make the alleged false entries because answering "no" was truthful. As she explained, only CHW had been fined, and, despite HWAN's dba, HWAN is not CHW, so "no" was not a false entry. But she also concluded that HWAN *did* make false entries by answering "self" to the question asking for the applicant's administrator in several applications and by using an unapproved contract in 2015 that it did not disclose in that year's application. She likewise concluded that "the Division's evidence was insufficient to" prove the unsuitable-manner allegation, but nonetheless concluded that HWAN *did* conduct business in an unsuitable manner by using CHW as an administrator or sales agent.

The hearing officer deprived HWAN of due process by ruling that it committed the unnoticed violations. The "factual material on which the agency relie[d]" for the unnoticed violations did not appear in the amended complaint.[5] *Dutchess*, 124 Nev. at 711, 191 P.3d at 1166 (quoting *Bowman*, 419 U.S. at 288-89 n.4). Because the Division did not provide the factual material for those allegations in the amended complaint, HWAN was not "sufficiently apprised of the nature of the proceedings." *Id.* at 712, 191 P.3d at 1167 (quoting *Nev. State Apprenticeship Council*, 94 Nev. at 765, 587 P.2d at 1317). So the unnoticed violations were an "unfair surprise," and the hearing officer deprived HWAN of due process by ruling that it committed them. *Id.* Because the hearing officer deprived HWAN of due process, her false-entry and unsuitable-manner rulings were "[i]n violation of constitutional . . . provisions." NRS 233B.135(3)(a).

The hearing officer's failure-to-make-records-available ruling was not clearly erroneous

HWAN argues that, aside from witness testimony that it was "'uncooperative' and 'nonresponsive,' there is no evidence that [it] received and disregarded requests for information." It argues that the Division presented no evidence that HWAN received the requests. The Division answers that substantial evidence supports the hearing officer's finding that HWAN received the requests, and the fact that the Division requested a subpoena is further evidence.

[5]In fact, the Division first mentioned the unapproved form at the hearing and never again, and did not allege the other unnoticed violations until its closing argument, in which it noted in passing that HWAN made a false entry with the "self" answers and CHW violated NRS 690C.150 by selling contracts without a COR.

The evidence supporting the hearing officer's ruling includes an email to HWAN in which the Division requested records, and testimony confirming that the Division requested information "more than once" without a response and that HWAN responded only after the subpoena. That evidence is substantial, so the hearing officer's decision was not clearly erroneous.

CONCLUSION

Under NRS 690C.150, a "provider" is not simply an entity that issues, sells, or offers for sale service contracts, but, as NRS 690C.070 plainly defines it, the obligor in those contracts. CHW was not an obligor, so it was not a provider and need not have held a COR. Because the hearing officer concluded otherwise, the unsuitable-manner ruling was in violation of statutory provisions and affected by error of law. Further, because HWAN was insufficiently apprised of the allegations, the hearing officer deprived HWAN of due process by ruling on the false-entry and unsuitable-manner violations. But, because substantial evidence supported the failure-to-make-records-available ruling, it was not clearly erroneous. For these reasons, we reverse in part and affirm in part the district court's order denying judicial review of the hearing officer's order. We remand this matter to the district court with the instruction that it grant judicial review in part, reverse the hearing officer's unsuitable-manner and false-entry rulings, and vacate the fines for those rulings.

Hardesty, C.J., and Cadish, J., concur.