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## Summary of David Abarra v. The State of Nevada, 131 Nev. Adv. Op. 5

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## ADMINISTRATIVE LAW: REMEDIES

### **Summary**

The Court determined that (1) the appellant exhausted administrative remedies for his improper finding of guilt claim; (2) the appellant exhausted administrative remedies for his improper filing, failure to correct, and First Amendment claims; and (3) the appellant failed to state a due process claim.

### **Background**

In February 2011, the Northern Nevada Correctional Center (NNCC) charged appellant David Abarra with unauthorized trading or bartering and providing legal services for a fee; a correctional officer found Abarra with twenty-one pills, a pornographic magazine with a note stating that an unspecified item or service would be “the usual price,” and another inmate’s completed W-2 form. Abarra pled guilty to bartering and not guilty to providing legal services for a fee—a MJ29 violation. Abarra argued that “the usual price” note was not referring to the W-2, but rather to the magazine; Abarra was instead returning the W-2 to another inmate as part of his prison law clerk work. The NNCC convicted Abarra of the MJ29 violation and removed him from his law clerk position.

Abarra challenged his MJ29 conviction by an informal grievance, and then by a first-level formal grievance. In the first-level formal grievance, Abarra disagreed with the finding of guilt and argued there was no showing of legal work or proof of fees charged; Abarra also disagreed with the level of punishment. The NNCC’s associate warden replied to Abarra and stated that Abarra “exhausted the grievance process on this issue, therefore [his grievance] is moot and no further response is forth coming.” Abarra then filed a complaint in district court stating five claims: (1) improper filing of the MJ29 disciplinary charge, (2) refusal to correct the improper charge at a disciplinary hearing, (3) improper conviction of violating MJ29, (4) his due process rights were violated by refusing to hear his grievance appeals, and (5) retaliation for exercising First Amendment rights.

The district court dismissed the case by concluding that Abarra failed to exhaust the grievance process. The district court held that Abarra did not exhaust claims one, two, four, and five because his grievance only addressed claim three, the actual finding of guilt. Moreover, Abarra did not exhaust claim three because he did not file a second-level grievance. The district court also dismissed Abarra’s fourth claim because he had no liberty interest in a disciplinary appeals process. Abarra appealed.

### **Discussion**

*Abarra exhausted the administrative remedies for claim three*

A prisoner must exhaust administrative remedies prior to filing an action for damages against the Department of Corrections.<sup>2</sup> This exhaustion doctrine applies only to available

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<sup>1</sup> By Amber Lilienthal.

administrative remedies.<sup>3</sup> Exhaustion is not required “when a resort to administrative remedies would be futile.”<sup>4</sup> The NNCC’s associate warden’s response to Abarra’s first-level grievance stated that further efforts by Abarra would have been futile; this means that he fulfilled the exhaustion requirement set forth in NRS 41.0322(1) for claim three and any other claims asserted in his first-level grievance.

*Abarra exhausted the administrative remedies for claims one, two, four, and five*

The federal Prison Litigation Reform Act (PLRA) requires prisoners to exhaust administrative remedies before filing suit—like NRS 41.0322(1).<sup>5</sup> A prison’s grievance process defines the level of detail a grievance needs to comply with the grievance procedures.<sup>6</sup> If the grievance procedures do not inform prisoners of the precise facts that must be alleged in a grievance, then a grievance will suffice if it alerts the prison of the nature of the wrong for which a remedy is sought.<sup>7</sup> Grievances do not need to include legal terminology or legal theories, nor do they need to contain every fact necessary to prove every element of a claim.<sup>8</sup> This conforms with Nevada’s jurisprudence, where “[a] plaintiff who fails to use the precise legalese in describing his grievance but who sets forth the facts which support his complaint thus satisfies the requisites of notice pleading.”<sup>9</sup>

The prison regulations in this case required a first-level grievance to have a “a signed, sworn declaration of facts that form the basis for a claim.”<sup>10</sup> The grievance procedures did not require more than the underlying facts, nor did they require a separate grievance for every legal theory. Abarra’s grievance contained the facts that formed the basis for his claim. All of Abarra’s claims revolved around his argument that he was improperly found guilty of and punished for an MJ29 violation, and his grievance sets forth those facts. The prison had sufficient notice for claims one, two, four, and five. Therefore, Abarra fulfilled the exhaustion requirement for claims one, two, four, and five.

*Abarra failed to state a due process claim*

At a minimum, due process requires that “some evidence” supporting disciplinary findings.<sup>11</sup> Abarra did not state a due process claim because some evidence supports the disciplinary findings. Though the conclusion that the note and the W-2 form were related is feeble, those facts still constitute some evidence. Thus, the district court properly dismissed claim four because some evidence supports the disciplinary findings.

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<sup>2</sup> NEV. REV. STAT. § 41.0322(1) (2013).

<sup>3</sup> State, Dep’t of Taxation v. Masco Builder Cabinet Grp., 129 Nev. Adv. Op. 83, 312 P.3d 475, 478 (2013).

<sup>4</sup> Malecon Tobacco, LLC v. State, Dep’t of Taxation, 118 Nev. 837, 839, 59 P.3d 474, 476 (2002).

<sup>5</sup> 42 U.S.C. § 1997e(a) (2012)

<sup>6</sup> Akhtar v. Mesa, 698 F.3d 1202, 1211 (9th Cir. 2012).

<sup>7</sup> *Id.*

<sup>8</sup> Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009).

<sup>9</sup> Liston v. LVMPD, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995).

<sup>10</sup> NDOC AR 740.06 § 2.

<sup>11</sup> Burnsworth v. Gunderson, 179 F.3d 771,775 (9th Cir. 1999).

## **Conclusion**

The appellant exhausted the administrative remedies for claims one, two, four, and five. However, the appellant failed to state a due process claim. Therefore, the Court reversed the district court's order dismissing the Appellants complaint in part and affirmed in part. The Court remanded the case for further proceedings.