

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANYA S. DUKE,
Appellant,

vs.

THE STATE OF NEVADA,
EMPLOYMENT SECURITY DIVISION,
DEPARTMENT OF EMPLOYMENT,
TRAINING AND REHABILITATION,
VOCATIONAL REHABILITATION
BUREAU,
Respondent.

No. 46196

FILED

MAY 11 2007

JANE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This proper person appeal challenges a district court order denying a petition for judicial review in a vocational rehabilitation matter. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Relevant Facts

Appellant Anya S. Duke is eligible for rehabilitation services through respondent, the Nevada Department of Employment, Training and Rehabilitation's Bureau of Vocational Rehabilitation (BVR).¹

¹Although respondent refers to itself, and several legal documents also refer to respondent, as the Nevada Department of Employment, Training and Rehabilitation's Bureau of Vocational Rehabilitation (BVR), appellant points out, and it appears from other documents in the record, that the proper respondent is another Nevada Department of Employment, Training and Rehabilitation entity—the Bureau of Services to the Blind and Visually Impaired (BSB&VI). Nevertheless, as the
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Accordingly, the BVR is required to ensure that an Individualized Plan for Employment (IPE) is developed for Duke, under the guidelines provided in the BVR's Client Services Policy and Procedures Manual (2001).² In working to develop her IPE, Duke expressed interest in becoming self-employed, desiring to own and operate a grant-writing business.

Under the manual, before the BVR will approve a self-employment IPE, several items must be presented, including a formal business plan that meets certain specified requirements.³ To complete these business plan requirements, Duke worked with counselors and professionals in rewriting her business plan several times. She first submitted a business plan to a BVR panel in May 2002. After that plan was rejected, Duke was provided with extensive suggestions and recommendations to help improve her business plan.

Duke submitted a revised plan in February 2003. Thereafter, Duke learned that her plan was rejected, and she received an April 17, 2003 letter from the then-programs chief explaining that the panel needed Duke's responses to the eleven questions included therein before it could

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Bureaus are apparently related and the parties' briefs refer to the BVR, this order likewise refers to the BVR.

²See 29 U.S.C. § 721(a)(9)(A) (2000); 34 C.F.R. § 361.45(a); Manual § 14. The policy and procedures manual applies likewise to BSB&VI vocational rehabilitation. See *supra* n.1.

³See Manual § 16(B)(4).

complete its review of her plan.⁴ Duke responded in an April 22, 2003 letter, noting her disagreement with the panel's need for additional information. Then, in a May 5, 2003 letter, the former BVR programs chief again noted the eleven questions that were posed in the April 17 letter. Duke responded on May 19, 2003. In September 2003, despite receiving further assistance in the meantime, Duke again requested, in light of the information provided in her April 17 and May 19 letters, that her plan be approved without further modification. Duke indicated that she would not rewrite her plan. When the BVR responded by stating that the plan would not be accepted as-is and that Duke's case would be closed if no further rewrite was forthcoming, Duke requested a fair hearing.

After hearing argument and considering the parties' evidence, a hearing officer determined that the BVR had properly held Duke's services in abeyance pending any rewrite to her plan. In particular, the hearing officer noted that Duke was understandably frustrated with the rewriting process, especially given the BVR's failure to fully explain how the self-employment and business plan approval processes worked. Nevertheless, the hearing officer, relying in part on the purpose behind requiring business plans and on an established grant writer's comments with respect to Duke's business plan, made the following factual findings:

⁴Feedback regarding the May 2002 plan indicated, among other things, that many of Duke's assertions lacked proper details and supporting references. As the hearing officer noted, Duke's 2003 business plan "has evolved significantly" from its original form. Nevertheless, feedback regarding the February 2003 plan noted concerns in some of the previously-mentioned areas.

(1) although Duke had addressed some of the BVR's concerns in her letters, she had not formally revised her business plan to address all noted concerns; (2) Duke's business plan did not sufficiently demonstrate the proposed business's viability; (3) additional research and development was required with respect to the market analysis and marketing plan sections; (4) the BVR's requested changes were not unreasonable, except with respect to the GeniePro CCTV; and (5) given Duke's refusal to submit a revised plan addressing the noted issues, the BVR properly held her case in abeyance.

Duke subsequently petitioned for judicial review, and the BVR moved to dismiss the matter for procedural deficiencies. The district court granted the motion to dismiss, but then, in the same order, the court explained that it had reviewed all of the parties' filings and decided the case on its merits, denying judicial review. Accordingly, the district court did not actually dismiss Duke's case,⁵ but rather, the court denied the petition for judicial review on the merits. Duke appeals.

⁵We note, however, although NRS 233B.133(5) requires that memoranda of points and authorities comply with NRAP 28, and NRAP 28(a)(6) provides that such filings must contain an NRAP 28A attorney's certificate, NRAP 28A does not apply to non-attorneys proceeding in proper person. See NRAP 46(b); cf. Barnes v. Eighth Judicial District Court, 103 Nev. 679, 684, 748 P.2d 483, 487 (1987) (concluding that limiting the court access of persons who are without ability to obtain an attorney's certificate violates the Nevada and United States Constitutions' equal protection guarantees). Moreover, those provisions, cited by BVR, do not apply broadly to all documents filed by a petitioner, but rather, they specifically pertain to memoranda of points and authorities and briefs.

Discussion

On appeal, Duke contends that the district court improperly denied judicial review because the hearing officer's decision violated the Americans with Disabilities Act,⁶ the 14th Amendment to the U.S. Constitution (requiring due process of law), the Nevada Constitution, article 1, § 1, and as a result, NRS 233B.135(3)(a). She asserts that the hearing officer ignored that the BVR's "nit-picky" questions demonstrate its intent to perpetually deny any plan that she submits.

In an appeal from a district court order denying a petition for judicial review, this court, like the district court, examines the administrative decision for clear legal error or arbitrary or capricious abuse of discretion.⁷ This court will not substitute its judgment for that of the hearing officer as to the weight of the evidence or on issues of credibility, and we must affirm a hearing officer's decision that is not "clearly erroneous in light of reliable, probative, and substantial evidence on the whole record,"⁸ or in violation of a party's constitutional rights.⁹ Substantial evidence is "that 'which a reasonable person might accept as

⁶42 U.S.C. §§ 12101-12213 (2000).

⁷Construction Indus. v. Chalue, 119 Nev. 348, 352, 74 P.3d 595, 597 (2003); SIIS v. Engel, 114 Nev. 1372, 1374, 971 P.2d 793, 795 (1998); see also NRS 615.280(2); NRS 233B.135.

⁸Chalue, 119 Nev. at 352, 74 P.3d at 597 (quoting United Exposition Service Co. v. SIIS, 109 Nev. 421, 425, 851 P.2d 423, 425 (1993)); see also Engel, 114 Nev. at 1374, 971 P.2d at 795.

⁹See NRS 233B.135(3)(a).

adequate to support a conclusion.”¹⁰ Our review of the administrative decision is limited to the record before the agency.¹¹

After reviewing the record transmitted to this court on May 3, 2006, including Duke’s Exhibit 3, in light of the BVR manual’s business plan provisions, we conclude that the hearing officer’s decision is based on substantial evidence and does not violate Duke’s rights under the Americans with Disabilities Act, the 14th Amendment to the U.S. Constitution, the Nevada Constitution, or NRS 233B.135(3)(a).¹² Accordingly, we affirm the district court’s order denying judicial review.

¹⁰Ayala v. Caesars Palace, 119 Nev. 232, 235, 71 P.3d 490, 491-92 (2003) (quoting SIIS v. Montoya, 109 Nev. 1029, 1032, 862 P.2d 1197, 1199 (1993)).

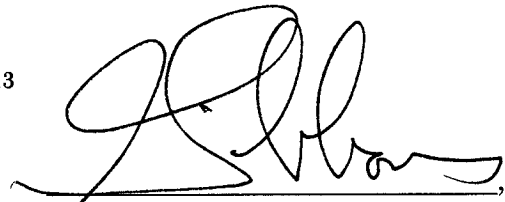
¹¹Id. at 235, 71 P.3d at 491.

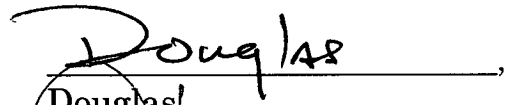
¹²We have considered all of Duke’s other arguments and requests for relief, and we conclude that they are without merit or improperly raised in the context of this appeal from the hearing officer’s decision.

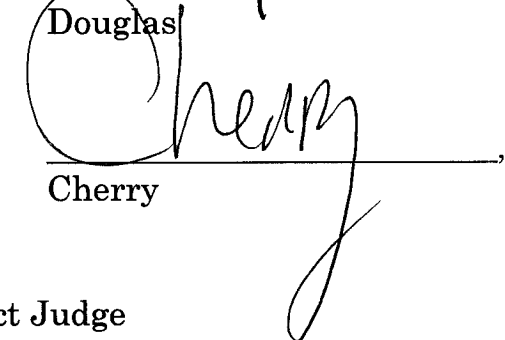
With respect to Duke’s assertion that the hearing officer improperly deferred to the BVR’s findings, we disagree. The hearing officer might have incorrectly stated that he was legally required to defer to an agency’s findings, *see, e.g.*, 34 C.F.R. § 361.57(e)(3)(1) (requiring the impartial hearing officer to make a decision based on the applicable law, the approved state plan, and state regulations and policies); Lawson v. PA Dept. of Public Welfare, 744 A.2d 804, 806 (Pa. Commw. Ct. 2000) (concluding, in an attendant care services matter, that due process requires a hearing officer to examine legal and factual issues de novo); *cf.* NRS 233B.123(5) (allowing a hearing officer to consider an agency’s experience, technical competence, and specialized knowledge when evaluating the evidence). Nevertheless, we do not further address this issue here because the hearing officer in this matter appears to have made

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It is so ORDERED.¹³


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. Valorie Vega, District Judge
Anya S. Duke
Attorney General Catherine Cortez Masto/Las Vegas
Eighth District Court Clerk

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his own findings and, thus, did not automatically defer to the BVR's findings. Cf. Lawson, 744 A.2d at 807 (remanding because the hearing officer did not make any factual findings, instead applying an appellate-type of deferential review).

Further, we note that any documentation containing Duke's social security number was submitted before 2007 and is part of the record. The documents that Duke asserts are protected confidential information were also included in the administrative record, and there is no indication that Duke previously sought to have this information removed. See Manual § 24 (governing the confidentiality of personal information submitted to the vocational rehabilitation agencies). In any case, Duke has not demonstrated how, even if the BVR has improperly submitted confidential or protected information to this court, this action impacts her appeal.

¹³In light of this order, all pending motions and requests for relief are denied. We decline any requests to impose sanctions.