

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
DEPARTMENT OF HUMAN
RESOURCES, DIVISION OF CHILD
AND FAMILY SERVICES, CALIENTE
YOUTH CENTER,
Appellant/Cross-Respondent,
vs.
BRUCE BURGESS,
Respondent/Cross-Appellant.

No. 46378

FILED

MAY 30 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Bloom*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART AND VACATING IN PART

This is an appeal and cross-appeal from a district court order denying a petition for judicial review in an employment matter. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

Respondent Bruce Burgess was employed, in a probationary period, as Head Group Supervisor¹ at the Caliente Youth Correctional Facility, a State facility for troubled juveniles. Burgess was terminated by the State as a result of his taking ten or eleven hydrocodone pills from the nurse's office for personal use, allegedly without authorization.

Burgess appealed his termination to the appropriate administrative body, but prior to the administrative hearing, the Nevada

¹Burgess had worked his way up the ranks at the youth facility, and he held the position of Assistant Head Group Supervisor before he was promoted to Head Group Supervisor.

Attorney General's office charged him with unlawful taking of a controlled substance, which is a category C felony under NRS 453.291 and NRS 453.421. Burgess entered into a plea agreement with the Attorney General's office, wherein he agreed to plead guilty in exchange for postponing the filing of his conviction and sentencing until he completed a three year drug treatment program. Upon completion of the three year treatment program, Burgess's conviction was to be set aside.

Burgess's administrative appeal was ultimately heard by a personnel hearing officer, over the course of a three day hearing. The hearing officer overturned Burgess's dismissal, and ordered that Burgess be reinstated to the same classified position and awarded back pay and retroactive benefits.

The State sought judicial review of the hearing officer's decision and filed a motion for stay. The State placed Burgess on paid administrative leave when he reported back to work, instead of immediately reinstating him to his position as Head Group Supervisor.

Burgess consequently filed a petition for a writ of mandamus in the district court to compel the State to comply with the hearing officer's decision, and to immediately reinstate him to the position of Head Group Supervisor. Burgess's petition for a writ of mandamus was subsequently consolidated with the State's petition for judicial review.

The district court ordered the issuance of the writ of mandamus, and later awarded Burgess \$4,060.50 in attorney fees pursuant to NRS 18.010(2)(b) for the State's "frivolous" opposition to the writ of mandamus. The district court also upheld the decision of the hearing officer and denied the State's petition for judicial review.

Subsequently, instead of restoring Burgess to the position of Head Group Supervisor, the State restored Burgess to the position of Assistant Head Group Supervisor pursuant to NAC 284.458. As a result, the district court ordered the State to pay Burgess the pay differential between the positions of Head Group Supervisor and Assistant Head Group Supervisor until the district court could determine whether Burgess should be reinstated to the position of Head Group Supervisor. The district court ultimately found that Burgess's restoration to Assistant Head Group Supervisor (instead of Head Group Supervisor) was proper.

The State now appeals, challenging (1) the denial of its petition for judicial review, (2) the award of attorney fees, and (3) the district court's refusal to force Burgess to repay the pay differential between Assistant Head Group Supervisor and Head Group Supervisor that he received during the time the district court was addressing the merits of the parties' arguments.

Burgess cross-appeals, challenging the district court's conclusions that (1) the State's petition for judicial review was timely filed, (2) the State was not required to file a petition for reconsideration under NRS 233B.130, and (3) he was still in a probationary period as Head Group Supervisor when he was terminated, and that accordingly, the State properly restored him to the position of Assistant Head Group Supervisor because he had not completed his probationary period.

The State's petition for judicial review was timely filed

As a preliminary matter, we conclude that the State's petition was timely filed insofar as necessary to invoke the jurisdiction of the district court. NRS 233B.130 provides the minimum jurisdictional requirements for a petition for judicial review, since administrative

pétitions for judicial review arise out of NRS Chapter 233B. The State's notice of petition was filed within thirty days of the hearing officer's decision, and the notice complied with the requirements of NRS 233B.130.

As to the notice's technical deficiencies under NRCP 8(a), this court has held that the district court has discretion to dismiss or accept a petition for judicial review that substantially complies with NRS 233B.130, and that the district court is not required to dismiss a technically deficient petition so long as it is timely filed.² The district court exercised its discretionary authority and allowed the State to amend the petition to comply with NRCP 8(a), and we will not disturb that discretion here.³

Hearing officer's decision

This court, like the district court, reviews administrative hearing decisions for clear legal error or manifest abuse of discretion.⁴ While we “decide pure legal questions without deference to an agency

²Civil Serv. Comm'n v. Dist. Ct., 118 Nev. 186, 190, 42 P.3d 268, 271 (2002) (where petition for judicial review is timely filed but technically deficient, “the district court was not required to dismiss the petition for lack of subject matter jurisdiction,” but instead, “the district court had the discretion to dismiss [the] petition for failure to comply with the procedural requirements of NRS 233B.130”).

³In light of our holding today, Burgess's arguments as to the exhaustion of administrative remedies is moot because the district court decided the issues on the merits in favor of Burgess, and Burgess was not aggrieved by the district court's order. Therefore, we will not address those arguments here.

⁴See SIIS v. Christensen, 106 Nev. 85, 88, 787 P.2d 408, 410 (1990); see also United Exposition Service Co. v. SIIS, 109 Nev. 421, 425, 851 P.2d 423, 425 (1993).

determination,” and, “[the] agency’s conclusions of law which are closely related to the agency’s view of the facts are entitled to deference and should not be disturbed if they are supported by substantial evidence.”⁵ Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion.⁶ We may not substitute our judgment for that of the agency as to the weight of evidence on a question of fact.⁷

When examining an employee’s termination, “a hearing officer does not defer to the appointing authority’s decision,” rather “[a] hearing officer’s task is to determine whether there is evidence showing that [the] dismissal would serve the good of the public service.”⁸ Pursuant to NRS 284.390(1), it is the hearing officer’s duty to “determine the reasonableness” of a dismissal, demotion, or suspension. “The hearing officer shall make no assumptions of innocence or guilt but shall be guided in his decision by the weight of the evidence as it appears to him at the hearing.”⁹

After reviewing the record and the appellate briefs, we conclude that the district court did not err in denying the State’s petition for judicial review. The hearing officer concluded that Burgess’s dismissal

⁵Knapp v. State ex rel. Dep’t of Prisons, 111 Nev. 420, 423, 892 P.2d 575, 577 (1995) (quoting SIIS v. Khweiss, 108 Nev. 123, 126, 825 P.2d 218, 220 (1992)).

⁶Bopp v. Lino, 110 Nev. 1246, 1249, 885 P.2d 559, 561 (1994).

⁷Christensen, 106 Nev. at 88, 787 P.2d at 410.

⁸Id. at 424, 892 P.2d at 577 (citing Dredge v. State ex rel. Dep’t Prisons, 105 Nev. 39, 42, 769 P.2d 56, 58 (1989)) (emphasis added).

⁹Id. at 424, 892 P.2d at 577 (quoting NAC 284.798).

after several years of solid performance was too harsh a penalty for his act of stealing or “borrowing” hydrocodone pills, and dismissal was thus unreasonable. The hearing officer also determined that Burgess’s dismissal was not in the best interests of the public. The hearing officer heard numerous witnesses and reviewed a substantial amount of evidence before he rendered his decision. Thus, we conclude that the hearing officer’s decision was not an arbitrary or capricious abuse of discretion and it was supported by substantial evidence.

Therefore, we affirm the district court’s denial of the State’s petition for judicial review.

District court’s award of attorney fees

The district court may not award attorney fees unless such an award is authorized under statute, rule, or contract.¹⁰ When fees are authorized, this court reviews an award of attorney fees for an abuse of discretion.¹¹

This court has held that attorney fees may be awarded under NRS 18.010(2)(b) only in the context of an action for monetary damages.¹² Burgess’s petition for a writ of mandamus requested that he be reinstated

¹⁰Albios v. Horizon Communities, Inc., 122 Nev. 409, ___, 32 P.3d 1022, 1028 (2006).

¹¹Mack-Manley v. Manley, 122 Nev. ___, ___, 138 P.3d 525, 533 (2006).

¹²State, Dep’t of Human Resources v. Fowler, 109 Nev. 782, 786, 858 P.2d 375, 377 (1993) (an award of attorney fees is not appropriate where money damages are not requested, and because the employee did not request money damages in judicial review proceedings, the district court did not have any authority to award attorney fees under NRS 18.010).

to his position of Head Group Supervisor. Nowhere in the petition does Burgess ask for monetary damages of any kind; he simply asks for reinstatement to his former position of employment.


Further, neither NRS Chapter 233B nor NRS Chapter 284 authorize awards of attorney fees in employment termination cases. Because attorney fees are not authorized in a petition for a writ of mandamus under NRS 18.010(2)(b) unless monetary damages are requested, and because no monetary damages were requested here, we conclude that the award of attorney fees was erroneous as a matter of law. Consequently, the award of attorney fees is hereby vacated.

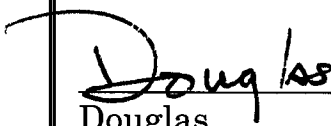
Burgess's restoration to Assistant Head Group Supervisor

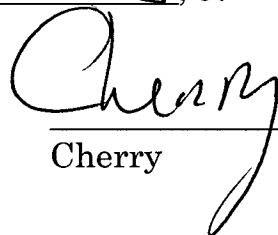
As to Burgess's restoration to the position of Assistant Head Group Supervisor, we conclude that the district court properly determined that Burgess be restored to the position of Assistant Head Group Supervisor pursuant to NAC 284.442, NAC 284.446, NAC 284.458, and NAC 284.462(2). We conclude that the district court did not abuse its discretion when it denied the State's request that Burgess repay the grade differential between Head Group Supervisor and Assistant Head Group Supervisor.

As to any remaining issues raised by the parties on appeal, we conclude that they are without merit. Accordingly, we affirm the district court's order denying judicial review and vacate the district court's award of attorney fees.

It is so ORDERED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. Kenneth C. Cory, District Judge
William F. Buchanan, Settlement Judge
Attorney General Catherine Cortez Masto/Las Vegas
Law Office of Daniel Marks
Eighth District Court Clerk