IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD COSGROVE,
Appellant,
vs.
THE STATE OF NEVADA,
DEPARTMENT OF CORRECTIONS,
Respondent.

No. 50109

FILED

APR 08 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in an employment matter. First Judicial District Court, Carson City; William A. Maddox, Judge.

BACKGROUND

Appellant Richard Cosgrove was formerly employed as a classified correctional officer for respondent State of Nevada, Department of Corrections. On December 5, 2005, Cosgrove was working in a guard tower at Nevada State Prison. Guards working in these towers are armed and are responsible for maintaining security in the prison. At one point that day, a phone in Cosgrove's tower was off its hook for a certain period of time, which triggered a security signal indicating there might be a problem in the tower. A responsive search was conducted by Senior Correctional Officer Terry Wingfield, and although the phone issue proved to be a false alarm, Wingfield reported to his superiors that he spotted DVDs in Cosgrove's tower. A subsequent search by Lieutenants William Shaw and Kathy Etchart uncovered three DVDs from the fifth season of the Sopranos television series in Cosgrove's backpack, as well as a

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television and DVD player hidden in an air duct of the tower's air conditioning system. Cosgrove was ultimately terminated from his employment with the Department of Corrections on June 4, 2006, ostensibly for threatening the security of the prison, although he was apparently allowed to keep working in Nevada State Prison guard towers for six months after this incident. Cosgrove administratively appealed his termination and a hearing officer affirmed the decision to terminate Cosgrove's state employment. Cosgrove then filed a petition for judicial review in the district court, which was denied. Cosgrove now appeals to this court.

DISCUSSION

Under NAC 284.646(1)(b), an appointing authority may dismiss an employee for any cause set forth in NAC 284.650, if the seriousness of the offense or condition warrants such dismissal. The causes set forth in NAC 284.650 include, among others, "[t]he employee of any institution administering a security program, in the considered judgment of the appointing authority, violates or endangers the security of the institution," NAC 284.650(3), and "[i]nexcusable neglect of duty." NAC 284.650(7); see also NRS 284.385(10(a) (permitting the dismissal of any permanent classified employee when the appointing authority determines that "the good of the public service will be served thereby"). Within the prison system, the appointing authority's decision is given deference whenever security concerns are implicated in terminating an employee. Dredge v. State ex rel. Dep't Prisons, 105 Nev. 39, 42, 769 P.2d 56, 58 (1989); see also State, Dep't of Prisons v. Jackson, 111 Nev. 770, 895 P.2d 1296 (1995). In reviewing an administrative decision, this court may not substitute its judgment for that of the administrative tribunal on the

weight of evidence on any question of fact. NRS 233B.135(3). Nonetheless, an administrative decision may be set aside if it is "affected by error of law [or] clear error in view of the reliable, probative, and substantial evidence of record," Dredge, 105 Nev. at 43, 769 P.2d at 58-59, or if the decision is arbitrary or capricious or constitutes an abuse of discretion. NRS 233B.135(3)(f). Substantial evidence is "that which 'a reasonable mind might accept as adequate to support a conclusion.'" State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).

The parties' arguments

On appeal, Cosgrove argues that the hearing officer's conclusion that Cosgrove's actions implicated security concerns, and thus, triggered the deference granted the appointing authority's decision in the prison context, is not supported by substantial evidence. Cosgrove contends that he only planned to watch DVDs during "lock-down" periods—when prisoners are not permitted in the prison yard—and asserts that security concerns could not have truly existed if he was allowed to keep working in the tower for approximately six months after the alleged security breach. Cosgrove also argues that other officers caught with reading materials in a tower had been given, at worst, a written reprimand, and that because reading requires greater concentration than watching a DVD, termination of his employment was too severe a punishment.[1]

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[1]Having considered Cosgrove's additional argument that the hearing officer misapplied Dredge by focusing on Cosgrove's position rather than his particular conduct, we reject this argument as without merit.

The Department of Corrections, however, argues (1) that watching DVDs during "lock-down" is a clear security violation, (2) that Cosgrove failed to sufficiently develop below his argument that the decision to not immediately remove Cosgrove from his post in guard towers casts doubt on the legitimacy of the security breach, and (3) that the appeals officer's decision is supported by substantial evidence and was not arbitrary or capricious or an abuse of discretion.

The hearing officer's decision is supported by substantial evidence

Having reviewed the briefs, the appendix, and the other filings provided to this court, we conclude that the hearing officer properly applied deference to the appointing authority's decision here, and that the hearing officer's decision affirming Cosgrove's termination is supported by substantial evidence. Dredge, 105 Nev. at 42, 769 P.2d at 58. At the September 13, 2006, proceedings before the hearing officer, Officers Wingfield, Shaw, Etchart, and Lieutenant Robert Bianchi all testified that watching television while stationed in the towers constitutes a serious security violation. Wingfield testified that, "I rely on the towers to watch me in the population and to make sure that I'm not getting jumped or stabbed or anything" and that it was necessary for those stationed in the towers to remain alert even when the prison was in lockdown mode. Bianchi also testified that "most of the time when we've had escapes from the institution [with] these type of security breaches, they have occurred when the institution is on lock down."

Although the decision to keep Cosgrove in the guard towers after the incident at issue here may call some of this testimony into question, that contention goes to the weight of the evidence and we will not substitute our judgment for that of the administrative officer on the weight of evidence on any question of fact. NRS 233B.135(3). As a

reasonable mind could conclude from the testimony contained in the record that Cosgrove's actions constituted a security threat, even in light of the decision to keep him in the towers well after this incident and the testimony that officers have not been terminated for improperly bringing radios and reading materials into the guard towers, we conclude that the hearing officer's conclusion that Cosgrove's conduct implicated security concerns is supported by substantial evidence and properly granted deference to the appointing authority in affirming the decision to terminate Cosgrove's employment.

Cosgrove's request for an NRS 233B.131(2) remand

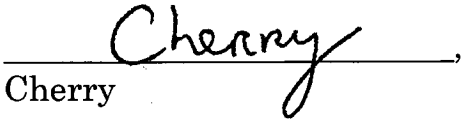
Finally, Cosgrove argues that evidence discovered since the administrative hearing demonstrates that the termination of his employment was too severe a punishment. Cosgrove states in his reply brief that during a federal jury trial of a 42 U.S.C. § 1983 claim he brought, the warden for the Nevada State Prison stated during cross-examination that Cosgrove's DVD infraction would not be terminable as a first offense. Cosgrove asserts that this is newly discovered evidence and thus requests that this matter be remanded to the hearing officer under NRS 233B.131(2). While the parties did not have the benefit of our recent decision in Garcia v. Scolari's Food & Drug, 125 Nev. ___, 200 P.3d 514 (2009), for the purposes of briefing this issue, we nonetheless find that opinion controlling here. In Garcia, we explained that good cause for not presenting evidence during an administrative hearing is generally not established when the evidence was available at the time of the hearing and a party seeks to remand the matter for reconsideration with that evidence after receiving an adverse decision. Id. at ___, 200 P.3d at 517. Here, Cosgrove did not demonstrate any attempt to call the warden as a

witness during the administrative proceedings, but rather simply states that the warden was not brought to the hearing by the employer, who had the burden of proof. As NRS 233B.131(2)'s good reasons requirement has not been satisfied, we reject Cosgrove's request for a remand. Id.; see also NRS 284.391(1) (providing a hearing officer with authority to issue a subpoena requiring the attendance and testimony of a witness upon application by any party).

CONCLUSION

Accordingly, as the appeals officer's decision to affirm the termination of Cosgrove's state employment is supported by substantial evidence and was not arbitrary or capricious or an abuse of discretion, we affirm the district court's order denying the petition for judicial review.

It is so ORDERED.



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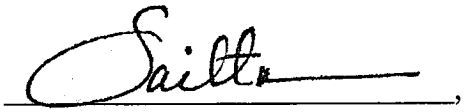

_____, J.
Saitta

_____, J.
Gibbons

cc: First Judicial District Court Dept. 2, District Judge
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