

IN THE SUPREME COURT OF THE STATE OF NEVADA

IRIS JANE GROSS,

Appellant,

vs.

STATE OF NEVADA EX REL. ITS

DEPARTMENT OF HEALTH AND

HUMAN SERVICES, WELFARE

DIVISION,

Respondent.

No. 50900

FILED

JUL 24 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying a petition for judicial review in an employment matter. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

FACTS AND PROCEDURAL HISTORY

Appellant Iris Gross was terminated from her position as an employee of the respondent Department of Health and Human Services, Welfare Division. On or about February 22, 2002, Gross was served with a "Specificity of Charges" for termination, effective March 11, 2002, based upon eight incidents that allegedly occurred between October 29, 2001, and February 20, 2002. The charges generally alleged that Gross's discourteous and uncooperative behavior had disrupted the work environment for coworkers and supervisors and was not conducive to the Division's mission of serving its clients. Gross subsequently requested a hearing before the Nevada State Personnel Commission regarding her termination.

This appeal stems from the decision entered after the third administrative hearing regarding Gross's termination. In this third proceeding, the hearing officer sustained the charges relating to five of the

eight alleged incidents. Specifically, the hearing officer sustained the charges related to allegations that (1) Gross interrupted a conversation between other coworkers in an extremely agitated and demanding manner; (2) Gross acted in a rude and unprofessional manner towards a community service worker; (3) while a coworker was reporting the previous incident to Gross's supervisor, Gross opened the closed door to the supervisor's office, despite being previously warned that this was improper behavior, and acted in a highly agitated and aggressive manner towards the reporting coworker; (4) Gross violated the Division's policy to not cater to a client's racial preferences by approaching an African American social worker to ask if the social worker could see an African American client, who had stated that she did not like "white people" and who ultimately left without getting assistance because Gross prolonged the situation by failing to follow the proper procedures; and (5) Gross ignored three requests from a client to speak to a supervisor, leading to a heated verbal altercation with the client, which disturbed other coworkers.

Based on the sustained charges, the hearing officer concluded that Gross had violated a number of provisions of the Nevada Administrative Code (NAC) and the Welfare Administrative Manual (WAM). The hearing officer held that Gross violated: (1) NAC 284.650(2) (disgraceful personal conduct which impairs the performance of a job or causes discredit to the agency); (2) NAC 284.650(4) (discourteous treatment of the public or fellow employee while on duty); (3) WAM 1008.3(1) (refusal to comply with a reasonable and proper order or instruction from a supervisor); (4) WAM 1008.3(3) (discourteous treatment of the public or fellow employee); and (5) WAM 1008.3(8) (failure to cooperate with other employees and/or supervisors). The hearing officer

further noted Gross's history of prior progressive discipline. Specifically, between November 1997 and May 7, 2001, Gross received two written reprimands and two suspensions. As a result, the hearing officer held that Gross's termination was for the good of the public service and affirmed the decision to terminate her employment. Gross then filed a petition for judicial review, which the district court denied. This appeal followed.

DISCUSSION

Standard of review

When reviewing an administrative decision, this court's role is identical to that of the district court. Clements v. Airport Authority, 111 Nev. 717, 721, 896 P.2d 458, 460 (1995). This court may not substitute its judgment for that of the administrative tribunal on the weight of evidence on any question of fact, id. at 722, 896 P.2d at 461; NRS 233B.135(3), and will defer to a hearing officer's fact-based legal conclusions that are supported by substantial evidence. Dickinson v. American Medical Response, 124 Nev. ___, ___, 186 P.3d 878, 882 (2008). "Nonetheless, an administrative decision may be set aside in whole or in part, if the final decision is '[c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record,'" Secretary of State v. Tretiak, 117 Nev. 299, 305, 22 P.3d 1134, 1138 (2001) (quoting NRS 233B.135(3)(e)) (emphasis in original), 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 (1971)).

Under NRS 284.385(1)(a), a state agency may dismiss an employee if “the good of the public service will be served thereby.” When considering an appeal from an agency’s termination of an employee, the hearing officer need not defer to the agency’s decision. Knapp v. State, Dep’t of Prisons, 111 Nev. 420, 424, 892 P.2d 575, 577 (1995). “A hearing officer’s task is to determine whether there is evidence showing that a dismissal would serve the good of the public service.” Id.

On appeal, Gross makes three main arguments. First, Gross argues that the Division engaged in prohibited rule making by adopting a set of personnel rules relating to its employees. Second, Gross complains that various improper procedures were used during the hearing before the hearing officer and that those improprieties resulted in violations of her procedural due process rights. Finally, Gross argues that substantial evidence does not support her termination and that she was improperly terminated in retaliation for her complaints of discrimination due to her disability and religion. We address each argument in turn.

The Division did not engage in improper rule-making

Gross argues that the Division engaged in prohibited legislative rule making when the Division adopted its own set of personnel rules specifically relating to conduct expected of its employees.

NRS Chapter 284 establishes the State Personnel Commission and Department of Personnel and provides procedures for the discipline and discharge of state employees. NRS 284.065(2)(d) allows the Personnel Commission to adopt regulations to carry out the provisions of Chapter 284, while NRS 284.384 requires the commission to adopt regulations providing for the adjustment of employee grievances. Under the regulations adopted by the Personnel Commission, state departments,

as “appointing authorities,” are authorized to “determine and describe in writing, subject to the approval of the [personnel] commission, those specific [employee] activities which . . . are considered inconsistent, incompatible or in conflict with [employment] duties,” subject to the Personnel Commission’s approval. NAC 284.742(1).

Here, the Department of Health and Human Services, under which the Division falls, properly promulgated a schedule of incompatible activities and concurrent penalties specifically relating to its employee’s conduct. Thus, we find no merit to Gross’s argument regarding the Division’s authority to enact these rules.

The hearing officer did not apply improper procedures and Gross received procedural due process

Gross contends that the hearing officer employed a number of improper procedures during her hearing and that these improprieties resulted in her being denied procedural due process. Specifically, Gross contends that the hearing officer required the parties to engage in “extensive pre-hearing discovery” by submitting potential exhibits prior to the hearing and allowed two of the Division’s witnesses to testify by telephone, without prior notice to Gross that this telephonic testimony would be permitted. Gross also asserts that the hearing officer improperly considered evidence outside the scope of the charges by allowing the introduction of notes used to refresh the recollection of another witness. Gross further asserts that her supervisor, Louise Bush, improperly participated as the Division’s representative throughout the hearing and subsequently testified as a witness after observing all of the other witnesses’ testimonies and in so doing, acted in the dual capacity of advocate and decision maker. Gross makes a similar argument regarding the Division’s counsel, Joyce E. Ramos.

“An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.” Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985) (quoting Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950)); see Nevada St. Apprenticeship v. Joint Appren., 94 Nev. 763, 765-66, 587 P.2d 1315, 1316-17 (1978). When a public employee is terminated, procedural due process requirements are satisfied when there has been a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by state statute. Loudermill, 470 U.S. at 547-48. The pretermination hearing need not be elaborate and in general, may be “‘something less’ than a full evidentiary hearing” and would be an initial check against mistaken discharge decisions to essentially determine “whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.” Id. at 545-46. An employee is entitled to oral or written notice of the charges against her, an explanation of the employer’s evidence, and an opportunity to present her side of the story. Id. at 546. Thereafter, a post-termination proceeding allowing administrative review of a discharge decision satisfies due process requirements for a hearing “at a meaningful time.” Id. at 546-47

Proceedings before an administrative agency may be subject to more relaxed procedural and evidentiary rules, so long as the department follows its established procedural guidelines and gives notice to the defending party of the issues and factual materials on which the department relies for decision. Dutchess Bus. Servs. v. State, Bd. of Pharm., 124 Nev. ___, ___, 191 P.3d 1159, 1166 (2008). NRS 284.390(4) recognizes the informal nature of administrative hearings and states that

the “[t]echnical rules of evidence do not apply at the hearing.” Moreover, NAC 284.774(2) expressly permits the hearing officer to “modify or alter the hearings procedures . . . if experience and circumstances indicate such action and interested parties have proper notice of any procedural changes or are not prejudiced thereby.”

Based on our review of the record and the parties’ briefs, we conclude that there were no improprieties in the procedures used by the hearing officer at the hearing and no violation of Gross’s procedural due process rights resulting from these proceedings. Gross received the written “Specificity of Charges” before her termination, which she challenged in three post-termination evidentiary hearings before the Personnel Commission. Accordingly, we conclude that Gross’s procedural due process rights were not violated and her arguments to this effect lack merit.

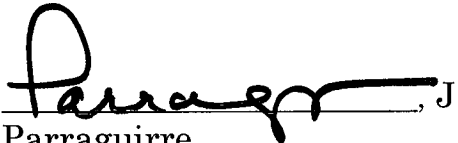
Substantial evidence supports the hearing officer’s decision

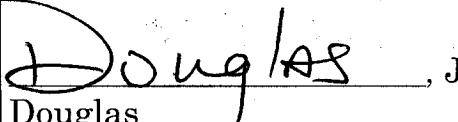
Gross argues that substantial evidence does not support her termination. Gross further contends that she was improperly terminated in retaliation for her complaints of disability and religious discrimination.

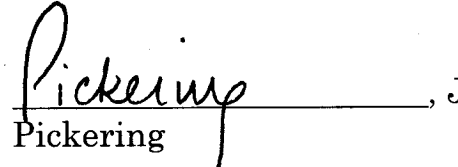
Gross’s retaliatory discharge claims are unsupported, as the record shows that she did not pursue her age and religious discrimination claims filed with the Nevada Equal Rights Commission and the federal Equal Employment Opportunity Commission. Gross also admitted that no discriminatory conduct against her occurred while she worked at her last office of employment, and she agreed that her alleged disability under the Americans with Disabilities Act was not an issue at the third Personnel Commission hearing. Instead, based on the documents before us, we conclude that substantial evidence exists to support the hearing officer’s conclusion that Gross was properly terminated because her termination

was for the public good, and thus, the district court's decision to affirm her termination was warranted. See NRS 284.385(1); State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (defining substantial evidence). Accordingly, because the district court properly denied Gross's petition for judicial review,¹ we

ORDER the judgment of the district court AFFIRMED.²


Parraguirre, J.


Douglas, J.


Pickering, J.

cc: Hon. Timothy C. Williams, District Judge
Iris Jane Gross
Attorney General Catherine Cortez Masto/Carson City
Attorney General Catherine Cortez Masto/Las Vegas
Eighth District Court Clerk

¹Having considered Gross's remaining arguments, including her assertion that her two prior suspensions were improperly considered as part of her prior disciplinary record and that the district court erred in not providing reasons in support of its decision, we conclude that they lack merit.

²We grant Gross's June 15, 2009, unopposed motion for leave to file a statement of supplemental authorities and direct the clerk of this court to file the statement of supplemental authorities provisionally received on that day.