

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRIEX FINANCIAL SERVICES, INC.,
Appellant,
vs.
THE STATE OF NEVADA
DEPARTMENT OF BUSINESS AND
INDUSTRY, FINANCIAL
INSTITUTIONS DIVISION,
Respondent.

No. 53206

FILED

JUN 23 2010

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a petition for judicial review in a licensing action. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant Triex Financial Services, Inc. applied for a trust company license with respondent State of Nevada Department of Business and Industry, Financial Institutions Division (FID). The FID denied the application, and Triex filed a timely application for hearing before a hearing officer. The hearing officer reversed, ordering the FID to grant Triex a trust license. In so doing, the hearing officer applied de novo review, yet did not allow the FID to introduce any additional evidence. The FID filed a petition for judicial review of the hearing officer's decision in district court. The district court determined that the hearing officer applied the incorrect standard of review and that there was substantial evidence supporting the FID's decision to deny Triex's application for a trust license. This appeal followed.¹

¹After filing this appeal, Triex filed a motion for rehearing with the district court. Because the motion was resolved after the notice of appeal
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On appeal, Triex concedes that the hearing officer likely used the incorrect standard of review. It asserts, however, that regardless of the standard of review, the FID did not provide substantial evidence to support its denial of Triex's trust license application.

We conclude that the district court properly determined that the hearing officer applied the incorrect standard of review and that there was substantial evidence in the record to support the FID's decision to deny Triex a trust license. We therefore affirm the district court's order. In so doing, we first discuss the threshold matter of the standard of review that the hearing officer should have used when reviewing the FID's ruling and then consider the issue of whether substantial evidence supported the FID's decision. The parties are familiar with the facts, and we do not recount them here except as necessary to our disposition.

The hearing officer did not apply the correct standard of review

This case presents a threshold issue involving a hearing officer's scope of review. This court must first determine whether the hearing officer applied the correct standard of review when she used de novo review and declared that she had original jurisdiction. The hearing officer stated that based upon her review of the legislative history of NRS

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was filed, pursuant to Arnold v. Kip, 123 Nev. 410, 416-17, 168 P.3d 1050, 1054 (2007), the motion and order are not properly part of the record on appeal and this court will not consider arguments made for the first time in the rehearing motion. Accordingly, Triex's argument that the district court lacked authority to find that the FID had substantial evidence to deny Triex its license is not properly before this court.

669.160,² she determined that she had de novo review. For the following reasons, we determine that the hearing officer misapprehended the law and should have applied a more deferential standard of review.

This court applies de novo review to issues involving statutory construction. Dutchess Bus. Servs. v. State, Bd. of Pharm., 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008). As with any statutory interpretation, this court begins with the plain language of the statute, giving effect to the Legislature's intent. John v. Douglas County School District, 125 Nev. ___, ___, 219 P.3d 1276, 1286 (2009). In its review of the statute, this court avoids any interpretation that would lead to absurd results or go against the spirit of the law. Flamingo Paradise Gaming v. Att'y General, 125 Nev. ___, ___, 217 P.3d 546, 551 (2009). It nevertheless gives deference to an agency's interpretation of its statutes and regulations "if the interpretation is within the language of the statute." Dutchess, 124 Nev. at 709, 191 P.3d at 1165.

NRS 669.160 is silent as to the standard of review a hearing officer should apply when reviewing the FID's order denying a trust application. The legislative history shows that the intent of the bill that led to changes in the language of former NRS 669.160 was to modernize Nevada's provisions governing trust companies. Hearing on S.B. 465 Before the Senate Commerce and Labor Comm., 70th Leg. (Nev., March

²From the onset, we note that our holding today is limited to the application of the former NRS 669.160. This statute was amended in 2009, see 2009 Nev. Stat., ch. 374, § 29, at 1958-59, eliminating the provision for a hearing before a hearing officer and replacing it with a provision for a hearing before the commissioner. Thus, it appears that the standard of review discussed today is applicable to the underlying case only, as the statute now makes no reference to a hearing officer.

23, 1999).³ It, for example, was designed to give the FID powers to close down failing and broke trust companies. Hearing on S.B. 465 Before the Assembly Commerce and Labor Comm., 70th Leg. (Nev., April 30, 1999). There is no mention of what standard of review a hearing officer should afford a FID decision. Accordingly, we conclude that the hearing officer had no basis to decide that she had original jurisdiction.

More importantly, to read NRS 669.160 in a manner consistent with the hearing officer's interpretation would lead to absurd results because it would mean that the FID's commissioner was subordinate to a hearing officer. In other words, the head of Nevada's financial institutions division, a person with expertise in business, trust laws, and regulations, would be subordinate to a hearing officer, a person from another department (in this case, the state's transportation authority), who was appointed as a neutral party to settle a dispute but with no expertise in trust laws and regulations. Notwithstanding this absurd result in which the balance of power is shifted to someone with less expertise, the hearing officer's interpretation of NRS 669.160 adds language that is not in the plain language of the statute and therefore goes against this court's long-standing jurisprudence against such interpretations. See, e.g., Schuster v. Dist. Ct., 123 Nev. 187, 191-92, 160 P.3d 873, 876-77 (2007) (if a statute is silent and a party is advocating an interpretation that adds language or a duty, then the party must point to a source, such as legislative intent/history or another statutory provision as the source, for its interpretation).

³We note that NRS 669.160 was amended in 1999 to include the provision allowing for a hearing before a hearing officer.

Because the plain language of former NRS 669.160 empowers the FID, specifically the commissioner, to “investigate the facts of the application and the other requirements of [the] chapter” and issue an order refusing or granting a license to a trust company, we conclude that the FID’s decisions should be afforded deference by a hearing officer. Any other interpretation would strip power from the FID and would therefore be against the spirit of the law. In sum, the hearing officer should have applied a deferential abuse of discretion standard and therefore committed legal error by applying de novo review. Accordingly, we conclude that the district court was correct in determining that the hearing officer applied the wrong standard of review. With that basic legal principle in mind, we now turn to the administrative agency decision before us.

The FID acted within its discretion when it denied the trust application

We review an administrative agency decision for an abuse of discretion. City Plan Dev. v. State, Labor Comm’r, 121 Nev. 419, 426, 117 P.3d 182, 186-87 (2005). We have stated that

[a]n abuse of discretion occurs when the record does not contain substantial evidence supporting the administrative decision. Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. While this court reviews purely legal questions de novo, a hearing officer’s conclusions of law, which will necessarily be closely tied to the hearing officer’s view of the facts, are entitled to deference on appeal.

Id. at 426, 117 P.3d at 187 (citations omitted).

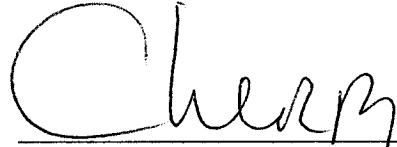
Because the hearing officer refused to admit any new evidence, the testimony and evidence she based her opinion on was essentially the same information contained in Triex’s voluminous trust application. Therefore, looking at the same information that the FID had, and applying de novo review, the hearing officer erroneously substituted


her opinion regarding the trustworthiness of Triex's president and treasurer, Gary Bertacchi, in place of the FID. Furthermore, the following undisputed facts contained in the record provide substantial evidence that the FID acted well within its discretion when it denied Triex a trust application: (1) from 1994 to 1999, as president, CEO, and one of three board of directors of Intrust, Bertacchi knew the company was commingling client trust funds and therefore violating Illinois trust laws; (2) from 1994 to 1999, as president, CEO, and one of three board of directors of Intrust, Bertacchi told Illinois state regulators that the commingled accounts would be segregated, but they never were; (3) from 1994 to 1999, as president, CEO, and one of three board of directors of Intrust, Bertacchi did not report the illegal activity to the regulating agency but, rather, sent memorandums and letters; (4) Bertacchi was the president, CEO, and one of three board of directors of Intrust, a company that lost \$68 million of clients' money.


We agree with the FID's initial determination that those uncontroverted facts show a tremendous lack of competency on behalf of Bertacchi. While he was never criminally charged for the Intrust debacle, Bertacchi's actions demonstrate a lack of control, oversight, responsibility, and leadership. Looking at this evidence, a reasonable mind would accept that it supports the FID's conclusion that Bertacchi broke his fiduciary responsibility to his trust clients and lacked competence and trustworthiness to operate a trust business. If the hearing officer applied the correct deferential abuse of discretion standard, she would have affirmed the FID's order denying Triex a trust license. Accordingly, we conclude that the hearing officer abused her discretion when she reversed the FID's order denying Triex a trust license because her decision was not supported by substantial evidence.

We agree with the district court that a deferential review of FID's decision shows that its decision was supported by substantial evidence. We therefore

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Michael Villani, District Judge
Robert F. Saint-Aubin, Settlement Judge
Kolesar & Leatham, Chtd.
Attorney General/Las Vegas
Eighth District Court Clerk