IN THE SUPREME COURT OF THE STATE OF NEVADA

EVAN CARNEY,
Appellant,
vs.
STATE OF NEVADA, EX REL. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, ON BEHALF OF THE UNIVERSITY OF NEVADA LAS VEGAS,
Respondent.

No. 53404

ORDER OF REVERSAL AND REMAND

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

BACKGROUND

The hearing officer's decision sets forth the following factual findings, which our review of the record reveals are supported by substantial evidence.

Around midnight on September 16, 2006, appellant Evan Carney, then employed as a police officer for respondent (hereinafter "UNLV"), spoke on the phone with his wife, Angela. Angela, who had just finished work, told Evan that she planned to go out that night to gamble with a female coworker. The Carneys were struggling through marital difficulties at this time, and Evan, suspecting that Angela might, in fact, be cheating on him with Christopher Chalker, a man with whom she had previously had an extramarital affair, drove with his brother, Erick Carney, to a restaurant where he believed Angela and Chalker might be found. Although the search of the restaurant initially proved fruitless, on

their way home, Evan and Erick spotted Angela and Chalker driving in the opposite direction. Evan, distraught to find Angela and Chalker apparently again involved in an affair, and driving his (Evan's) own car while doing so, made a U-turn and followed Angela and Chalker into a Walmart parking lot. Evan then parked his car in a manner that blocked Angela and Chalker into their parking space. Extremely agitated, Evan got out of his car and approached Chalker demanding that Chalker return his car keys. Although Evan subsequently testified that he had no recollection of what exactly happened next, he remembered that Chalker wound up on the ground. Evan and Erick then quickly left the scene.

Amid all this, a 9-1-1 emergency call was placed to the Las Vegas Metropolitan Police Department (LVMPD) reporting people fighting in the Walmart parking lot and that the man who started the fight had left the scene with another man. A LVMPD officer, Dana Pickerel, arrived on the scene and noticed that Chalker was out of breath and had a small cut on his forehead. Chalker told Pickerel that Evan had grabbed him, threw him onto the ground with force, and struck him with closed fists. Chalker also stated that Erick struck him as well, and that the Carney brothers drove off once Chalker was able to break free. Officer Pickerel also took voluntary written statements from Chalker, Angela, and a Walmart security officer. LVMPD then notified UNLV that one of its employees was possibly involved in a criminal incident. Thereafter, a LVMPD Lieutenant, Chris Jones, reached Evan by telephone and Evan agreed to meet with Jones and a UNLV Police Department Sergeant, Richard Dohme. At the meeting, Evan told Dohme that he threw the first punch. When Pickerel subsequently called Chalker to tell him that they had located Evan, Chalker told Pickerel that he had decided not to press

charges against Evan. Evan was then released and a few days later placed on administrative leave with pay. After an internal investigation, Evan was dismissed from his state employment as a police officer for UNLV. Evan administratively appealed, and, after conducting a hearing, a hearing officer entered a decision affirming Evan's dismissal. Evan then filed a petition for judicial review in district court, which was denied. Evan has now appealed.

On appeal, Evan argues that termination was too severe a disciplinary action here and that, under NRS Chapter 289, the evidence produced by Dohme should have been excluded by the hearing officer. In response, UNLV argues that the hearing officer's decision affirming Evan's termination is supported by substantial evidence and not otherwise arbitrary or capricious, and that NRS Chapter 289 does not exclude evidence acquired during criminal investigations.

DISCUSSION

In reviewing an administrative decision, this court, like the district 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); Law Offices of Barry Levinson v. Milko, 124 Nev. ___, ___, 184 P.3d 378, 383-84 (2008) (noting that this court's level of review of administrative decisions mirrors that of the district court). 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 v. State ex rel. Dep't Prisons, 105 Nev. 39, 43, 769 P.2d 56, 58-59 (1989), 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)).

This court has recognized that NRS 284.383 "provides for adoption of a system of progressive discipline of state employees in which severe discipline is imposed only for 'serious violations of law or regulations, or if less severe measures have failed." Knapp v. State, Dep't of Prisons, 111 Nev. 420, 424, 892 P.2d 575, 578 (1995) (quoting NRS 284.383). Additionally, in most instances, the hearing officer must not defer to the appointing authority's decision, but instead must take a new and impartial view of the evidence and assess, among other things, the reasonableness of a dismissal. Id. at 424, 892 P.2d at 577-78.

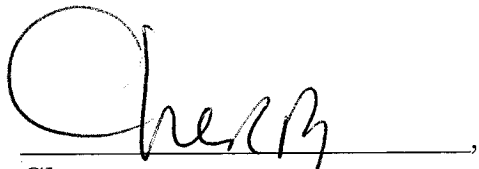
Here, the hearing officer's factual findings set forth that Evan had no prior record of discipline, he had not received any negative or below standard work performance evaluations, and his chief of police testified that Evan was a good police officer who had earned commendations. In light of the circumstances under which the incident between Evan and Chalker occurred, and given that the incident occurred while Evan was off-duty, no criminal charges were filed, and the only injury suffered by Chalker was a minor cut on his forehead, we conclude that the hearing officer's decision to uphold Evan's termination was arbitrary and capricious. See Hilton Hotels, 102 Nev. at 607, 729 P.2d at 498 (noting that an administrative decision may be set aside when it is arbitrary or capricious); Knapp, 111 Nev. at 425, 892 P.2d at 578 (reviewing the severity of employment discipline for clear error or an abuse of discretion). Our conclusion is not a mere disagreement with a reasonable decision of the hearing officer, cf. NRS 233B.135(3), as no reasonable mind could

conclude that termination was warranted here. Hilton Hotels, 102 Nev. at 608, 729 P.2d at 498. Other courts have reached similar conclusions. See, e.g., Blake v. State Personnel Board, 102 Cal. Rptr. 50, 58 (Ct. App. 1972) (explaining that while the propriety of a particular penalty rests within the discretion of the administrative agency, a penalty of dismissal was clearly excessive and warranted reversal when the employee had an exemplary employment history with no record of discipline and proper consideration was not given to, among other things, the circumstances surrounding the misbehavior); Batley v. Kendall Cty. Sheriff's Dept., Etc., 425 N.E.2d 1201, 1206-07 (Ill. App. Ct. 1981) (concluding that it was arbitrary and unreasonable to neglect the totality of the circumstances in upholding termination of a county deputy sheriff for remarking that "my friends come first, f___ the Department"); see also Georgia Dept. of Labor v. Sims, 298 S.E.2d 562, 564 (Ga. Ct. App. 1982) (noting that the courts had authority to reverse an administrative decision on the ground that the agency abused its discretion in not imposing progressive discipline).

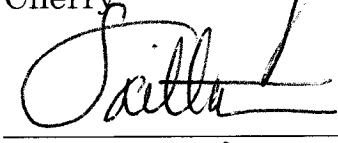
CONCLUSION

Consequently, discipline short of termination is warranted in this matter, and because this court is not a fact-finding tribunal, Zugel v. Miller, 99 Nev. 100, 659 P.2d 296 (1983), we conclude that this case should be remanded to the district court with instructions to remand this matter to a hearing officer so that Evan's employment can be reinstated and an appropriate level of discipline, short of termination, can be determined. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[1]



_____, J.
Cherry



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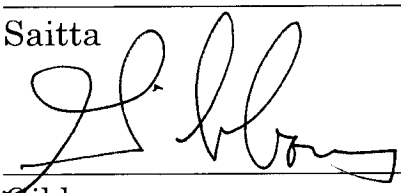

_____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Evan Carney
Richard C. Linstrom
Susan Carrasco O'Brien
Eighth District Court Clerk

[1]In light of this order, we need not reach Carney's NRS Chapter 289 argument.