IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA EX REL. ITS DEPARTMENT OF CORRECTIONS,
Appellant,
vs.
BRIAN LINSTROM,
Respondent.

No. 55544

FILED

DEC 27 2011

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 a state employment action. First Judicial District Court, Carson City; James Todd Russell, Judge.

After coworkers filed complaints against respondent Brian Linstrom, an investigator with the Nevada Department of Personnel's Sexual Harassment and Discrimination Unit conducted an investigation and drafted a report recommending Linstrom's termination. The report resulted in Linstrom's termination from his employment as a psychologist with appellant Nevada Department of Correction's (NDOC) medical staff.

Linstrom administratively appealed the decision and a hearing date was set. Seven days before the hearing, NDOC filed a motion to continue, as the investigator who recommended Linstrom's termination was unavailable to testify on the scheduled hearing date. The hearing officer denied the motion because it was untimely. At the hearing, the hearing officer stated that he read the investigator's report and noted that it contained no allegations of conduct amounting to sexual harassment but that Linstrom's conduct may have amounted to a security violation. He also noted that the investigator's testimony was not necessary and that better testimony would have come from the witnesses that the investigator

interviewed for the report. This would also allow for cross-examination of those witnesses.

NDOC's counsel indicated that he would only be presenting the testimony of NDOC Deputy Director Don Helling and not the witnesses who complained of Linstrom's conduct. After NDOC failed to present the testimony of any of the witnesses and only presented Deputy Director Helling's testimony, Linstrom's counsel pointed out that NDOC bore the burden of proof and renewed a previous motion for dismissal. The hearing officer ultimately granted the motion to dismiss, finding that NDOC did not meet its burden under NRS 284.385[1] and that Linstrom's termination was without just cause, and ordered reinstatement with full benefits and back pay to the termination date.

NDOC filed a petition for judicial review and a motion to stay the hearing officer's order. The district court denied the motion to stay but held a hearing on the petition for judicial review. At the hearing, the district court repeatedly noted that: the investigator booked her vacation after being subpoenaed, other witnesses could have testified but were not made available, Linstrom's evaluations were all positive and there had never been any prior discipline against him, and NDOC did not follow the proper procedures to terminate Linstrom. Moreover, the district court found that, based on the untimeliness of the motion for a continuance, the hearing officer did not abuse his discretion when he denied the request. The district court admonished the hearing officer for failure to provide the

[1]NRS 284.385 was amended by the Legislature in 2011, however these amendments do not affect the provisions at issue in this case. 2011 Nev. Stat. ch. 272, § 2, at 1495.

requisite findings of fact and conclusions of law. See NRS 233B.125. Ultimately, the district court denied NDOC's petition for judicial review.[2]

On appeal, NDOC argues that: (1) NRS 233B.125's requirement that an administrative decision include findings of fact and conclusions of law was not satisfied in this case; and (2) the hearing officer abused his discretion in refusing to continue the administrative hearing when the investigator was unable to appear or, alternatively, abused his discretion in determining that other witnesses could have been called to testify instead. We conclude that all of NDOC's arguments lack merit. Accordingly, we affirm the district court's decision to deny judicial review.

Standard of review

In an appeal from a district court order denying a petition for judicial review, we, like the district court, examine the administrative decision for clear legal error or arbitrary or capricious abuse of discretion. Construction Indus. v. Chalue, 119 Nev. 348, 352, 74 P.3d 595, 597 (2003); SIIS v. Engel, 114 Nev. 1372, 1374, 971 P.2d 793, 795 (1998); see also NRS 615.280(2); NRS 233B.135. We have held that, "[t]o be arbitrary and capricious, the decision of an administrative agency must be in disregard of the facts and circumstances involved." Meadow v. Civil Service Bd. of LVMPD, 105 Nev. 624, 627, 781 P.2d 772, 774 (1989). We must affirm a hearing officer's decision that is not "'clearly erroneous in light of reliable, probative, and substantial evidence on the whole record.'" Chalue, 119 Nev. at 352, 74 P.3d at 597 (quoting United Exposition Service Co. v. SIIS, 109 Nev. 421, 425, 851 P.2d 423, 425 (1993)); see also NRS 233B.135(3)(e).

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[2]The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

Findings of fact and conclusions of law

NDOC argues that because there are no findings of fact or conclusions of law in the administrative decision, as required by NRS 233B.125, the district court and NDOC are prevented from knowing the true basis of the decision and from evaluating whether substantial evidence supported the hearing officer's conclusion.

NRS 233B.125 unambiguously provides, in pertinent part, that:

> a final decision must include findings of fact and conclusions of law, separately stated. Findings of fact and decisions must be based upon substantial evidence. Findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

However, we have carved out an exception to this rule—the failure to include findings of fact is not fatal if the court may imply the necessary factual findings. See State, Dep't of Commerce v. Soeller, 98 Nev. 579, 586, 656 P.2d 224, 228 (1982) (concluding that when "the conclusion itself gives notice of the facts on which the Commission relied . . . we may imply the necessary factual findings, so long as the record provides substantial evidence to support the Commission's conclusion"). But see Dickinson v. American Medical Response, 124 Nev. 460, 468-69, 186 P.3d 878, 883-84 (2008) (declining to imply the necessary factual findings when the appeals officer failed to indicate the statutory bases for her determination and failed to make factual findings, leaving this court unable to adequately review the issue).

Here, the hearing officer's conclusions give notice of the facts that he relied upon in rendering his decision. It is clear from the record that NDOC failed to support its case for dismissal at the hearing and thus

did not meet its burden under NRS 284.385 to show that "the good of the public service will be served thereby." Consequently, we conclude that the failure of the hearing officer to provide the requisite findings of fact is not fatal to our determination of the case.[3]

Motion to continue

NDOC contends that the motion to continue should have been granted because the investigator was the only witness who could give testimony as to the investigation and the preparation of her report. We disagree.

We conclude that it was within the hearing officer's sound discretion to determine that NDOC had access to another investigator and the numerous witnesses who complained about Linstrom's conduct. See 2 Am. Jur. 2d Administrative Law § 335 (2011) (stating that decisions to grant or deny a continuance are reviewed for abuse of discretion) (citing King v. D.C. Water and Sewer Authority, 803 A.2d 966, 968 (D.C. 2002)); see also In re Discipline Proc. Against Whitney, 120 P.3d 550, 557 (Wash. 2005). NDOC could have provided identical information by having the witnesses testify, but the witnesses were inexplicably not made available. Moreover, the witnesses' testimony would have been relevant and useful, as the statements made by the witnesses were the basis of the report recommending Linstrom's termination.[4] In addition, the hearing officer

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[3]We commend the district court for providing an exemplary written order based on the facts of the record where the hearing officer failed to provide the requisite findings of fact and conclusions of law.

[4]As NDOC points out, "in cases of egregious security breaches" within the prison system, the appointing authority's decision concerning the termination of an employee is given deference. State, Dep't of Prisons

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indicated that the investigator's testimony was not necessary or beneficial, as the investigator would have been reciting the hearsay statements that made up the report.[5] It is also notable that the investigator booked her vacation after being subpoenaed to testify, and that NDOC did not file a motion to continue until seven days prior to the hearing. We conclude that

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. . . continued

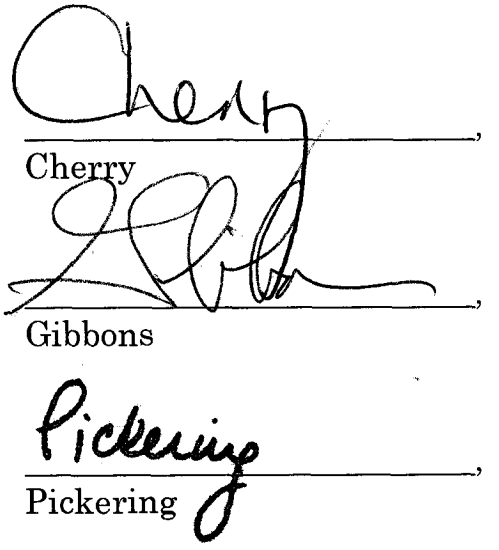
v. Jackson, 111 Nev. 770, 773, 895 P.2d 1296, 1298 (1995); Dredge v. State ex rel. Dep't of Prisons, 105 Nev. 39, 42, 769 P.2d 56, 58 (1989). However, we conclude that this case does not fall within the ambit of an egregious security breach like those in Jackson and Dredge. See Jackson, 111 Nev. at 773, 895 P.2d at 1298 (concluding that a serious breach of security occurred when the prison employee took a visitor to the administration tower and control center in violation of an administrative regulation); Dredge, 105 Nev. at 44, 769 P.2d at 59 (finding a security breach when a prison employee became inebriated with an ex-inmate at a bar, gave the ex-inmate a ride that resulted in the arrest of both men, and placed a second trust deed on his house and co-signed the bail agreement to facilitate the ex-inmate's release from jail). In terminating Linstrom, NDOC provided no evidence of any actual security violation, and an additional level of deference to the appointing agency will not be considered "unless the facts indicate a clear and serious security threat." Jackson, 111 Nev. at 773, 895 P.2d at 1298.

[5]NDOC argues that the hearing officer should have considered the report in rendering his decision because hearsay is not excluded from administrative hearings as a matter of law and hearing officers are required to evaluate the evidence presented based on its relevance and competence. See NRS 233B.123(1) (allowing the admittance of evidence during administrative proceedings "except where precluded by statute, if it is of a type commonly relied upon by reasonable and prudent persons in the conduct of their affairs"). However, a review of the record indicates that the hearing officer considered the investigator's report in rendering his decision. The hearing officer stated that he had read the lengthy report, and he then entered the report into evidence. Accordingly, NDOC's arguments are without merit.

the district court was correct in its decision to affirm the denial of the motion to continue. Therefore, we affirm the decision of the district court to deny judicial review.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry

_____, J.
Gibbons

_____, J.
Pickering

cc: Hon. James Todd Russell, District Judge
Philip A. Olsen, Settlement Judge
Attorney General/Carson City
Kenneth J. McKenna
Carson City Clerk