IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICIA PETRO,
Appellant,
vs.
THE STATE OF NEVADA, DEPARTMENT OF HEALTH AND HUMAN SERVICES, MENTAL HEALTH AND DEVELOPMENTAL SERVICES DIVISION,
Respondent.

No. 56999

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting a petition for judicial review in an employment action. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

An administrative hearing officer entered a decision regarding appellant Patricia Petro's challenge to the termination of her employment as a registered nurse with respondent State of Nevada, Department of Health and Human Services, Mental Health and Developmental Services Division (Department) for excessive use of physical force on a patient. As found by the hearing officer, Petro, who had no prior record of discipline, was terminated after an incident occurring on November 30, 2008. Briefly summarized, on that date, an altercation broke out between two patients. Petro intervened, and, in deescalating the situation, placed her hands on the arms of one of the patients. After Petro eventually let go, there were visible skin tears, bleeding, and fingerprints on the patient's right arm in particular. The hearing officer also noted testimony from Petro that she had been physically abused during her first marriage and that her use of her hands on the patient was in response to being shaken by the patient

and that this shaking triggered a flashback to her own prior abuse, causing Petro to momentarily black out while maintaining her grip on the patient's arms.

The hearing officer determined that while Petro's conduct fell below Department standards, and that therefore some form of discipline was warranted, the evidence presented had not sufficiently established that termination was warranted. In particular, the hearing officer concluded that the harm caused to the patient was relatively minor and that Petro's use of excessive force did not appear willful. Accordingly, the hearing officer reversed and remanded the matter to the Department for an imposition of discipline short of termination.

The Department petitioned the district court for judicial review. The district court granted the petition, although its order was summary and only set forth that the hearing officer's decision "was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." During a September 21, 2010, hearing, however, the district court expressed concern over placing Petro back in a position of authority within the Department when she may not be able to entirely control herself in difficult situations. Petro has appealed.

On appeal, Petro argues that the district court erroneously substituted its view of the evidence for that of the hearing officer. The Department, however, argues that the district court's grant of the petition for judicial review was proper, as the hearing officer's decision was not supported by substantial evidence since Petro's actions violated various Department prohibitions and penalties.

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. 355, 362, 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.

We first note that the absence of analysis in the district court's written order, explaining its views of the deficiency in the hearing officer's decision, makes appellate review more difficult. Nevertheless, from the hearing transcript, it appears that the district court improperly expanded the analysis from the reasons set forth by the Department for terminating

Petro's employment, and the hearing officer's views of those reasons, to its own concerns about Petro and the potential for civil liability her continued employment might present for the Department. In its specificity of charges, the Department focused on its contention that it viewed the November 30 incident as constituting patient abuse. No mention was specifically made regarding concern for similar incidents in the future.[1] The hearing officer disagreed that the incident constituted patient abuse, concluding that there was no willful or reckless violation of agency policy, due to the unanticipated flashback, and that, while the duration of the physical restraint Petro imposed on the client was excessive, the incident was relatively minor overall. The district court, however, at its hearing, focused on a new issue, that Petro could act out again in the future, and the Department's potential liability now that it has been placed on notice of the possibility of future misconduct. This concern for future incidents was beyond the scope of the case, as it was not one of the expressed bases for the Department terminating Petro's employment. See NRS 233B.135(1)(b) (providing that judicial review of an administrative decision must be confined to the administrative record). We thus turn our review to the hearing officer's decision to reinstate Petro's employment.

Having reviewed the parties' briefs and the record on appeal, we conclude that the hearing officer's decision was supported by substantial evidence and that the district court erred in substituting its

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[1]A psychological exam, entered into evidence, did address the likelihood to repeat issue and concluded that the November 30 incident could have triggered a flashback but that Petro did not have any psychological or medical conditions likely to prevent her from safely performing her job functions.

judgment for that of the hearing officer. Specifically, the hearing officer's rejection of this incident as constituting willful or reckless patient abuse was not an abuse of discretion and was based on substantial evidence, given the circumstances that led Petro to restrain the patient—which were adequately supported by testimony at the administrative hearing—and the hearing officer's reasonable acceptance of the assertion that Petro suffered a flashback due to being shaken by the patient, which was supported by a psychologist's report. Dredge, 195 Nev. at 43, 769 P.2d at 58-59. Discipline short of termination was a reasonable response to the facts of this case. See Knapp, 111 Nev. at 425, 892 P.2d at 578 (reviewing the severity of employment discipline for clear error or an abuse of discretion). Accordingly, we

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

_____, C.J.
Douglas

_____, J.
Saitta

_____, J.
Hardesty

cc: Hon. David B. Barker, District Judge
Janet Trost, Settlement Judge
Angela J. Lizada
Attorney General/Las Vegas
Eighth District Court Clerk