

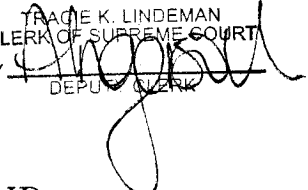
IN THE SUPREME COURT OF THE STATE OF NEVADA

GRANT PERKINS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
DEPARTMENT OF PUBLIC SAFETY,  
HIGHWAY PATROL DIVISION; AND  
THE STATE OF NEVADA  
DEPARTMENT OF PERSONNEL,  
STATE PERSONNEL COMMISSION,  
Respondents.

No. 58672

**FILED**

NOV 14 2013

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

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

*FACTUAL AND PROCEDURAL HISTORY*

Appellant was employed by respondent State of Nevada, Department of Public Safety as a Nevada Highway Patrol (NHP) trooper. In 2007, appellant was placed on a development plan to improve his enforcement levels and subsequently received a written reprimand for failing to meet the terms of that plan. His employment was later terminated in February 2009 following two separate investigations into his conduct. The first investigation related to an incident in December 2007 in which appellant, while he was on-duty and in uniform, attended and partially coached his nephew's wrestling tournament without authorization. A five-day suspension was recommended as discipline for this incident. The second investigation related to appellant's misuse of NHP computers from January to May 2008, wherein appellant viewed an extensive number of websites, including pictures of nude and partially-clothed women and adult-content advertisements, at an NHP substation while he was on-duty. Termination was recommended as discipline for

this violation, and the NHP subsequently terminated appellant's employment. Appellant administratively appealed from both disciplinary decisions, and these matters were consolidated before a Department of Personnel hearing officer. While the second investigation was pending and before the imposition of the five-day suspension for the wrestling incident, appellant was placed on administrative leave. Appellant remained on leave until his termination, which meant that he never returned to work after the decision was made to impose the five-day suspension.

Respondents presented, before the hearing officer, several grounds on which appellant's termination might be sustained, including a finding that the discipline imposed constituted appropriate progressive discipline along with three other statutory bases for immediate dismissal outside of the progressive discipline system. The hearing officer affirmed the NHP's decisions to suspend and dismiss appellant solely on the ground that these disciplinary decisions constituted appropriate applications of progressive discipline for the specified violations of incompetency and inefficiency, and inexcusable neglect of duty. The hearing officer made this finding, despite the fact that the consolidation of appellant's appeals meant that appellant's five-day suspension, stemming from the wrestling tournament incident, and the termination, resulting from the computer-use incidents, would occur simultaneously, without appellant ever returning to work following the suspension. The appeals officer also did not address any of the statutory bases for immediate termination presented by respondents. Appellant subsequently filed a petition for judicial review, which the district court denied, and this appeal followed.

## DISCUSSION

On appeal, appellant asserts that because of the way the investigations and discipline proceeded, he did not have an opportunity to correct his behavior after the suspension was imposed, as he was placed on leave and then terminated before he could ever return to work. He maintains that this is inconsistent with the progressive discipline system requirements. Appellant also presents arguments regarding the discipline's severity,<sup>1</sup> and whether the discipline was imposed based on allegations that appellant had not been charged with.


As detailed above, the hearing officer sustained appellant's suspension and dismissal on the basis that they were appropriate measures of progressive discipline, even though appellant did not return to work after his suspension and before he was dismissed. And while appellant argues that this was an improper determination in light of the concurrent nature of his suspension and termination, *see* NRS 284.383(1) (explaining that severe discipline, such as dismissal, is applied "only if less severe measures have failed to correct the employee's deficiencies"), respondents do not address this argument. Instead, respondents argue that the hearing officer's decision was supported by substantial evidence and that progressive discipline was not required because appellant's dismissal was appropriate under the administrative codes that allow for immediate dismissal when the misconduct's severity warrants such action

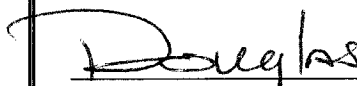
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<sup>1</sup>We note that, as appellant points out, the hearing officer appears to have erroneously concluded that she did not have the authority to determine whether the websites viewed by appellant constituted pornographic materials under NAC 284.646(2)(a), for which immediate dismissal is permitted. This error, however, does not affect the grounds for our resolution of this matter.

or when the agency's policies—in this case the NHP's computer policies—allow. But because the hearing officer did not analyze appellant's dismissal under any of these alternative grounds for immediate dismissal presented at the administrative level, *see* NAC 284.646(1) and (2), addressing respondents' arguments would require this court to make factual determinations that are not within this court's authority on judicial review. *See Knapp v. State ex rel. Dep't of Prisons*, 111 Nev. 420, 423, 892 P.2d 575, 577 (1995) (explaining that this court will not substitute its judgment for that of the agency concerning the weight of the evidence on questions of fact). Moreover, by not addressing appellant's argument that his dismissal constituted improper progressive discipline, respondents have effectively conceded that point. *See Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to dispute an argument as conceding the point). Accordingly, we necessarily reverse the district court's order denying appellant's petition for judicial review and direct the district court to reverse and remand this matter to the hearing officer for further proceedings in accordance with this order.<sup>2</sup>

It is so ORDERED.

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Saitta

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<sup>2</sup>Nothing in our decision of this matter prohibits or otherwise comments on the merits of the alternative grounds advanced by respondents during the administrative process for terminating appellant.

cc: Hon. Michelle Leavitt, District Judge  
Thomas J. Tanksley, Settlement Judge  
Law Office of Daniel Marks  
Attorney General/Transportation Division/Las Vegas  
Attorney General/Carson City  
Eighth District Court Clerk