

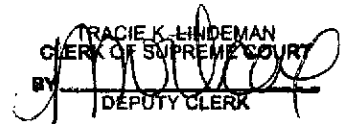
IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, DEPARTMENT  
OF BUSINESS AND  
INDUSTRY/TAXICAB AUTHORITY,  
Appellant,  
vs.  
AMERICO COSTANTINO, AN  
INDIVIDUAL,  
Respondent.

No. 65611

**FILED**

MAY 31 2016

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER DENYING PETITION FOR REVIEW*

This is a petition for review, pursuant to NRAP 40B, challenging an order of affirmance entered by the Nevada Court of Appeals on an appeal from a district court's denial of a petition for judicial review in an employment dispute.<sup>1</sup>

Appellant Nevada Department of Business and Industry Taxicab Authority employed respondent Americo Costantino as a senior investigator. Costantino was injured in an incident unrelated to his employment, and he was assigned to a light duty status at work. During this time, he participated in a wrestling event at a local gym, in which he demonstrated physical abilities beyond those he claimed in documentation submitted to the Taxicab Authority. As a result, the Taxicab Authority conducted an internal investigation and concluded that termination was

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<sup>1</sup>The Honorable Robert E. Rose, Senior Justice, was appointed by the court to sit in place of the Honorable Mark Gibbons, Justice, who voluntarily recused himself from participation in the decision of this matter. Nev. Const. art. 6, § 19; SCR 10.

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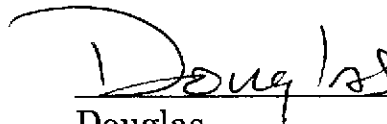
appropriate because of Costantino's perceived dishonesty regarding his ability to work. After this, Commissioner Westrin, from the Mortgage Division in the Nevada Department of Business and Industry, conducted a pre-disciplinary hearing, affirming the decision to terminate Costantino. Then, Costantino appealed this decision to a Department of Personnel hearing officer, who reversed the termination on the grounds that there was a lack of factual basis demonstrating just cause to support the termination. The Taxicab Authority filed a petition for judicial review in the Eighth Judicial District Court. The district court denied the petition, and the Taxicab Authority appealed. On August 31, 2015, the Nevada Court of Appeals affirmed the district court's decision. This petition for review follows.

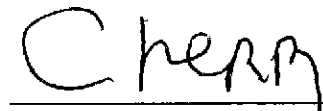
A petition for review is a matter of judicial discretion, and this court considers various factors in exercise of that discretion, including: 1) whether the petition raises a question of first impression of general statewide significance; 2) whether the decision of the Nevada Court of Appeals is in conflict with another Nevada Court of Appeals decision or decisions of this court or the United States Supreme Court; and 3) whether the case involves fundamental issues of statewide public importance. NRAP 40B(a).


In its petition, the Taxicab Authority presents three contentions. First, the Taxicab Authority argues that the Nevada Court of Appeals erred in concluding that the hearing officer applied the correct standard of review in reaching his decision. Second, the Taxicab Authority argues that the Nevada Court of Appeals erred in determining that the Taxicab Authority did not establish just cause for terminating Costantino. Third, the Taxicab Authority argues that this court should


review the decision of the Nevada Court of Appeals because this case involves fundamental issues of statewide public importance. We conclude that these contentions lack merit, and we decline to exercise our judicial discretion in this matter. Accordingly, we

ORDER the petition DENIED.<sup>2</sup>

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

  
\_\_\_\_\_, J.  
Cherry

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

  
\_\_\_\_\_, Sr.J.  
Rose

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<sup>2</sup>The Honorable Justice Hardesty, with whom the Honorable Chief Justice Parraguirre and the Honorable Justice Pickering agree, argues, in dissent, that the hearing officer applied the wrong standard of review. Thus, they conclude that the district court and the Nevada Court of Appeals erred in determining that the hearing officer's decision is entitled to deference. However, a hearing officer generally "does not defer to the appointing authority's decision," as a hearing officer's duty "is to determine whether there is evidence showing that a dismissal would serve the good of the public service." *Knapp v. State ex rel. Dep't of Prisons*, 111 Nev. 420, 424, 892 P.2d 575, 577 (1995). Further, "[t]he hearing officer shall make no assumptions of innocence or guilt but shall be guided in his or her decision by the weight of the evidence as it appears to him or her at the hearing." *Id.* (citing NAC 284.798). This is the standard that was applied in this case, which we conclude is the correct standard.

cc: Hon. Mark R. Denton, District Judge  
Lansford W. Levitt, Settlement Judge  
Attorney General/Las Vegas  
Morris Polich & Purdy, LLP/Las Vegas  
Eighth District Court Clerk

HARDESTY, J., with whom PARRAGUIRRE, C.J., and PICKERING, J., agree, dissenting:

I dissent because the hearing officer applied the wrong standard of review.

NRS 284.385(1)(a) provides that “[a]n appointing authority may . . . [d]ismiss or demote any permanent classified employee when the appointing authority considers that the good of the public service will be served thereby.” One of the causes for “disciplinary or corrective action” set forth in NAC 284.650 is dishonesty. NAC 284.650(10). NAC 284.646(1)(b) provides that “[a]n appointing authority may dismiss an employee for any cause set forth in NAC 284.650 if . . . [t]he seriousness of the offense or condition warrants such dismissal.” If an employee contests a dismissal, a hearing officer reviews the case to determine whether there was just cause for the dismissal. NRS 284.390(6).

On review, the only issue before the hearing officer was whether substantial evidence existed to support the finding of dishonesty.<sup>1</sup> *See Lapinski v. City of Reno*, 95 Nev. 898, 901, 603 P.2d 1088, 1090 (1979). Evidence is substantial if “a reasonable person could accept [it] as adequate to support a conclusion.” *Nev. Serv. Emps. Union/SEIU Local 1107 v. Orr*, 121 Nev. 675, 679, 119 P.3d 1259, 1262 (2005) (internal quotation marks omitted). Here, the Taxicab Authority was compensating Costantino for supervisory duties when he was not acting in that capacity and was postponing Costantino’s return to work until he was ready. In

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<sup>1</sup>Whether the Taxicab Authority is “a security program” pursuant to NAC 284.650(3) is irrelevant, so *Dredge v. State ex rel. Department of Prisons*, 105 Nev. 39, 769 P.2d 56 (1989), is also irrelevant.

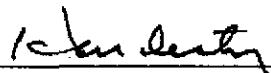
return, Costantino failed to disclose his wrestling activities to his physician and the Taxicab Authority through his Ability to Work forms. Indeed, on November 9, 2012, Costantino provided the Taxicab Authority with an Ability to Work form that stated he was “restricted from combat/altercation activities.” That same day he participated in the wrestling event. Not only was there video footage of Costantino wrestling at a public event, he also admitted that he failed to disclose this fact to the Taxicab Authority. The Taxicab Authority terminated Costantino based on this omission.

Because an omission is a form of dishonesty and the omission undermined the Taxicab Authority’s trust in Costantino, there was just cause for the dismissal. *See* NAC 284.646(1)(b); NAC 284.650(10).

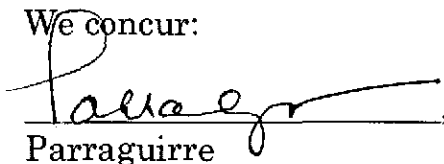
The hearing officer accepted Costantino’s explanation that he participated in the wrestling event for charitable purposes, but he also found that Costantino did not inform his physician or the Taxicab Authority of his participation in the event. The hearing officer then recites numerous alternative standards of review before determining that its “duty is [to] consider the matter anew as in de novo fashion, not as a deferential appellate review.” The hearing officer ultimately determined that “Costantino was not terminated with required consideration of progressive discipline or with cause to sustain his termination on any other basis.” Similarly, the district court and the court of appeals determined that the hearing officer’s decision—not the employer’s decision—is entitled to deference. These determinations by the hearing officer, district court, and court of appeals are contrary to *Lapinski*, which

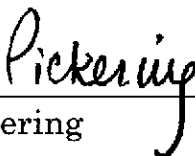
only requires the hearing officer to find substantial evidence in order to support an employer's decision to dismiss.<sup>2</sup> 95 Nev. at 901, 603 P.2d at 1090. Thus, pursuant to our authority to review decisions of the court of appeals under NRAP 40B(a), I conclude that the court of appeals abused its discretion, and the Taxicab Authority's decision to dismiss Costantino should have been affirmed.

Accordingly, because the hearing officer applied the wrong standard of review, I would reverse the judgment of the court of appeals and remand this case to the district court to reverse the decision of the hearing officer.<sup>3</sup>

  
\_\_\_\_\_, J.  
Hardesty

We concur:

  
\_\_\_\_\_, C.J.  
Parraguirre

  
\_\_\_\_\_, J.  
Pickering

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<sup>2</sup>These determinations impact more than just this case. They inhibit an employer's ability to rely on the documents its employees submit, and they set a precedent that a hearing officer is able to second guess the decisions of the executive branch. It is not the duty of the hearing officer to substitute its judgment for the employing agency's judgment. See *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005) (stating that the review of agency action "involves deferential consideration of matters within an agency's expertise").

<sup>3</sup>I also note that this is not a case requiring progressive discipline. Less severe sanctions are not required if a violation is serious. See NRS 284.383(1). Because this omission effectively damaged the trust relationship between the Taxicab Authority and Costantino, I believe the omission was serious and less severe sanctions were not required.