

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHARI KASSEBAUM, AN
INDIVIDUAL,
Appellant,
vs.
THE STATE OF NEVADA
DEPARTMENT OF CORRECTIONS;
AND STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION,
DIVISION OF HUMAN RESOURCE
MANAGEMENT, EMPLOYEE
MANAGEMENT COMMITTEE, AN
AGENCY OF THE STATE OF NEVADA,
Respondents.

No. 69468

FILED

FEB 28 2017

ELIZABETH A. DROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

This is an appeal from a district court order granting a petition for judicial review of an administrative adjustment of employee discipline. First Judicial District Court, Carson City; James E. Wilson, Judge.

Appellant, Sheri Kassebaum, is a classified employee of the State of Nevada Department of Corrections (NDOC), Respondent. Following an altercation at work, NDOC charged Kassebaum with "discourtesy," a "class two" offense. NDOC disciplined Kassebaum with a written reprimand, which was the "minimum" level of discipline for a class two offense. Kassebaum sought review of the discipline before the Employee Management Committee (EMC). Following a hearing, the EMC issued a decision agreeing that there was "discourteous treatment," but changing the level and type of discipline to a "class one" and changing the written reprimand to "verbal counseling." NDOC filed a petition for

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judicial review. The district court granted the petition, holding it could review the EMC's decision, the EMC exceeded its authority, and reinstating the written reprimand.¹

On appeal, Kassebaum argues the EMC's decisions are not judicially reviewable and that the district court erred in holding the Employee Management Committee improperly lowered the class of offense from a written reprimand to an oral one.² We agree with the district court that EMC decisions are reviewable, but disagree that the EMC lacked authority or acted arbitrarily or capriciously in its decision.

A petition for judicial review is proper

Because Kassebaum's issues on appeal concern interpretation of statutes as a matter of law, this court will review de novo. *City of Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006) (holding that statutory interpretation is a question of law which this court reviews de novo.)

NRS 233B.032 defines a contested case as a "proceeding . . . in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in

¹We do not recount the facts except as necessary to our disposition.

²We also address Kassebaum's argument that the Nevada Department of Administration (NDA) "confessed to error" by failing to file an answering brief, but disagree. *See Polk v. State*, 126 Nev. 180, 184, 233 P.3d 357, 359 (2010) ("NRAP 31(d) is a discretionary rule"). A review of the record and motions on appeal reveal that the NDA agreed with Kassebaum both at the district court and on appeal, and thus we are unsure what kind of error Kassebaum is alleging NDA confessed committing. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330, n. 38, 130 P.3d 1280, 1288, n.38 (2006) (holding this court need not consider claims that are not cogently argued.).

which an administrative penalty may be imposed.” Here, the EMC is an agency that provides a hearing for both the employer and employee, and the proceeding was both for the purpose of determining whether an administrative penalty would be imposed on Kassebaum and also whether NDOC had the right, privilege, or duty to discipline Kassebaum the way that it did.

Further, the Nevada Supreme Court has reviewed petitions for judicial review from an EMC decisions before, necessarily indicating that it found a petition for judicial review from an EMC decision was proper. *See Westergard v. Barnes*, 105 Nev. 830, 831, 784 P.2d 944, 945 (1989) (reviewing a petition for judicial review from an EMC decision and determining the EMC did not adequately address the issues before it). Kassebaum attempts to distinguish her case from *Westergard* because that case involved an employee’s property interest in a promotion, whereas no property interest is implicated by her written reprimand. However, she ignores that it is not just her legal rights, duties, or privileges at stake that matters, but any party’s legal rights, duties, or privileges—including NDOC.

Thus, Kassebaum’s efforts to distinguish *Westergard* fail and the district court did not err by holding that the EMC’s decision presented a “contested case” under the meaning of NRS 233B.032. This court therefore affirms the district court’s holding that judicial review was proper.³

³We have also considered Kassebaum’s argument that NRS 284.384’s lack of explicit mention to judicial review means EMC decisions are unreviewable, but reject it. NRS 233B governs the adjudication procedures of the EMC, and NRS 233B defines what a contested case

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The district court erred in holding that the Employee Management Committee improperly lowered the class of offense

We now turn to whether the district court erred by holding that the EMC lacked authority to lower the type and form of Kassebaum's discipline. The district court held that the EMC's reversal of the written reprimand was inconsistent with its finding that Kassebaum committed a "Discourtesy, a class-2 offense." The district court held that, because "Nevada law preserves a great deal of authority to agency heads to manage their affairs including reserving the exclusive power to discipline employees for their own agencies," the EMC had no power to adjust the form of discipline, but did not cite any authority to support this conclusion.

The statute governing the EMC's power, NRS 284.073 gives the EMC the ability to "*make final decisions for the adjustment of grievances as provided by the regulations of the Commission.*" (emphasis added). Based on the plain language of this statute, the EMC has the ability to alter the type and form of employee discipline.⁴

We next consider whether the EMC properly exercised this ability. This court's standard of review for an administrative decision is

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suitable for review is. See NRS 233B.020 ("the Legislature intends to establish minimum procedural requirements for the regulation-making and adjudication procedure of all agencies of the Executive Department of the State Government and for judicial review of both functions").

⁴This court has considered respondent's argument that *Taylor v. Department of Health and Human Services*, 129 Nev. 928, 314 P.3d 949 (2013) is controlling but rejects it because the statutes governing hearing officers and the EMC are markedly different. NDOC's remaining argument that the EMC must mechanically apply its regulations without any room for discretion is unpersuasive, as the EMC is tasked with the final authority to "adjust grievances." NRS 284.073.

identical to the district court. *Williams v. United Parcel Servs.*, 129 Nev. 386, 391, 302 P.3d 1144, 1147 (2013). A reviewing court shall not substitute its judgment for that of an agency in regard to a question of fact, but can reverse if it determines that the agency's decision was arbitrary or capricious. NRS 233B.135(3). An agency acts arbitrarily or capriciously when it takes actions without adequate reason. *City Council of City of Reno v. Irvine*, 102 Nev. 277, 279, 721 P.2d 371, 372 (1986).

Here, the EMC provided adequate reason for adjusting the form of discipline for Kassebaum, such as Kassebaum's acknowledgement of fault, the lack of specificity and/or helpfulness of the written reprimand, and that while the conduct was discourteous, it did not rise to the level of a class 2 offense, requiring a written reprimand. Further, the administrative regulations in question provide for "suggested level[s] of discipline," and caution that the penalty schedules "cannot accurately, fairly, or consistently address every situation." Thus, the EMC did not act in a way inconsistent with the regulations themselves in reducing the discipline in accordance with the facts before it. Because the EMC had both the authority to adjust grievances and was consistent with its regulations, it did not act arbitrarily or capriciously, and the district court erred in reinstating the written reprimand.⁵

Accordingly, we

⁵We have considered Kassebaum's remaining arguments that NDOC's administrative regulations were not properly approved by the Personnel Commission, but conclude they are irrelevant to the ultimate questions on appeal. Even if NDOC's regulations were not properly approved, or even if NDOC did not have any regulations at all, in this case the EMC acted within its authority to adjust grievances and did not do so arbitrarily or capriciously.

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

Silver, C.J.
Silver

Tao, J.
Tao

Gibbons, J.
Gibbons

cc: Hon. James E. Wilson, District Judge
Robert L. Eisenberg, Settlement Judge
Law Office of Daniel Marks
Attorney General/Reno
Attorney General/Carson City
Carson City Clerk