IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VRANTEVAZ GARCIA, AN INDIVIDUAL,
Appellant,
vs.
THE STATE OF NEVADA DEPARTMENT OF CORRECTIONS,
Respondent.

No. 76585-COA

FILED
DEC 18 2019
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting a petition for judicial review. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Vrantevaz Garcia worked for the Nevada Department of Corrections (NDOC) as a correctional officer at Florence McClure Women's Correctional Center.[1] In April 2015, she was one of two officers assigned to work in Unit 5, a general population unit that houses pregnant inmates. Under NDOC operating procedures, to be relieved from her shift, Garcia needed to be "properly relieved," although the operating procedures provide no further guidance.

Shortly before Garcia's shift ended around 5:00 a.m., Garcia looked down the hallway to see the relieving officer walking towards Unit 5. Garcia removed her keys and equipment before exiting the control room roughly one-minute early, leaving the other officer alone in the control room. As Garcia walked down the hallway, she passed the relieving officer, but neither officer spoke to one another. Later that day, Garcia's supervisor

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

filed a report prompting NDOC to conduct an initial informal investigation into Garcia's early departure.

Nine months later, NDOC notified Garcia that it would begin a formal administrative investigation of the incident by issuing a Notice of Interrogation/Interview (Formal Interrogation Notice) as required by NRS 289.060 and NRS 284.387. After conducting the formal administrative investigation four months later, NDOC found that Garcia abandoned her post roughly a minute early during her swing shift in violation of Nevada Administrative Code (NAC) 284.650(1), (3), and (7), as well as Nevada Department of Corrections Administrative Regulation (AR) 339.07(15)(TT) and 339.07(15)(LL).[2]

When determining whether these violations are "serious violations of law and regulations" that warrant termination, NRS 284.383(1), the agency relied on its authority provided in AR 339.06. AR 339.06 provides the Chart of Corrective/Disciplinary Sanctions, which outlines "the suggested level of discipline, from less serious to more serious, for the Class of Offense and for first, second, and third offenses." AR 339.06(1). NDOC terminated Garcia for abandoning her post as allowed by

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[2]NDOC charged Garcia with violating various statutory and regulatory provisions, including NAC 284.650(1) ("Activity which is incompatible with an employee's conditions of employment established by law or which violates a provision of NAC 284.653 or 284.738 to 284.771, inclusive."); NAC 284.650(3) ("The employee of any institution administering a security program . . . violates or endangers the security of the institution."); NAC 284.650(7) ("Inexcusable neglect of duty."); AR 339.07(15)(LL) ("Failure to perform security functions, violation of any safety rule, or violating or endangering the security of an institution.); and AR 339.07(15)(TT) ("Leaving an assigned post while on duty without authorization of a supervisor.").

AR 339.07(15)(TT) (a violation of a "Class 5" offense may warrant dismissal for a first-time offense).

Garcia appealed the NDOC's findings, prompting an administrative hearing. Applying the deference analysis provided in *Jackson*, *Knapp*, and *Dredge*, a hearing officer determined that, although Garcia left her post without supervisor approval, NDOC failed to present substantial evidence that this action was a clear and serious security threat or an egregious security breach warranting Garcia's termination. *See generally State, Dep't of Prisons v. Jackson*, 111 Nev. 770, 895 P.2d 1296 (1995); *Knapp v. State, Dep't of Prisons*, 111 Nev. 420, 892 P.2d 575 (1995); *Dredge v. State, Dep't of Prisons*, 105 Nev. 39, 769 P.2d 56 (1989).[3]

The hearing officer emphasized various contradictory evidence, including how NDOC permits the minimum staffing to fall below two when an officer uses the restroom or escorts inmates to the dining hall. The hearing officer further noted that NDOC unreasonably determined Garcia's one-minute early departure posed a serious threat justifying termination because all inmates were in their respective cells at the time. Additionally, the hearing officer rhetorically commented:

> [I]f Ms. Garcia's departure from her unit one minute prior to her relief arriving were such a serious or egregious security threat, why did NDOC allow Ms. Garcia to continue working for nine months without counseling her or otherwise notifying her that it was unacceptable and dangerous for her to leave her post even one minute prior to the arrival of her relief.

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[3]*Jackson*, *Knapp*, and *Dredge* were overruled in part by *O'Keefe v. State, Dep't of Motor Vehicles*, 134 Nev. 752, 431 P.3d 350 (2018).

The hearing officer ultimately recommended that the NDOC reinstate Garcia subject to a thirty-day suspension pursuant to NRS 284.385(1)(b). NDOC filed a petition for judicial review, which the district court granted. Garcia appeals the district court order reversing the hearing officer's determination that NDOC unreasonably terminated Garcia's employment.

Our review of a petition for judicial review of an administrative decision is identical to that of the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). Rather than defer to the district court's decision, we review the administrative agency's "factual findings for clear error or an arbitrary abuse of discretion and will only overturn those findings if they are not supported by substantial evidence." *Id.* (internal quotation marks omitted). "Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion." *Id.* (internal quotation marks omitted). However, when evaluating the evidence presented to the hearing officer, we will not reweigh evidence or reassess witness credibility. *Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 342, 302 P.3d 1108, 1118 (2013). An agency abuses its discretion when its decision was arbitrary or capricious, meaning the administrative agency disregarded the facts and circumstances. NRS 233B.135(3).

Garcia argues that NDOC failed to notify her of her misconduct prior to giving her a Formal Interrogation Notice nine months after the incident. Though NDOC properly notified Garcia of the formal investigation, Garcia contends that the agency's order terminating her employment is procedurally deficient because, as required by NAC 284.638(1), NDOC failed to "promptly and specifically" inform her of her misconduct independently of her Formal Interrogation Notice. Pointing to

NAC 284.650, NDOC counters that it did not need to notify Garcia prior to the Formal Interrogation Notice because it could either discipline her or correct her behavior, and informing Garcia of her misconduct would have been corrective.[4] Additionally, NDOC argues that it could not comply with NAC 284.638 because it would constitute an informal investigation, which NDOC alleges NRS 289.057 and NRS 289.060 prohibit.

We review questions of law, including the administrative construction of statutes, de novo. *Elizondo*, 129 Nev. at 784, 312 P.3d at 482. However, we defer to an agency's interpretation of its governing statutes or regulations when that interpretation is within the language of the statute. *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013). But we do not defer to an agency's interpretation of a regulation or statute when "an alternative reading is compelled by the plain language of the provision." *United States v. State Eng'r*, 117 Nev. 585, 589-90, 27 P.3d 51, 53 (2001) (internal quotation marks omitted). "When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989). Further, we interpret provisions within the statutory

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[4]NDOC argues that it need not comply with NAC 284.638 because notifying Garcia of her misconduct would be a corrective action, and NAC 284.650 allows either disciplinary or corrective action, but not both. *See* NAC 284.650 ("Appropriate disciplinary *or* corrective action may be taken for any of the following [24] causes . . . ." (emphasis added)). However, NDOC's interpretation is invalid because NAC 284.638(1) states that the supervisor must inform the employee of the misconduct; it does not state that this notice is corrective action. In fact, NAC 284.638(2) further supports this interpretation by referring to this notice as "a discussion of the matter" that could precede the opportunity for the employee to correct her action.

scheme "harmoniously with one another in accordance with the general purpose of those statutes." *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001).

NAC 284.638 addresses employee warnings and written reprimands, providing the initial notice requirements and procedures an agency must comply with when an employee commits misconduct outlined in NAC 284.650. It begins by providing that "[i]f an employee's conduct comes under one of the causes for action listed in NAC 284.650, the supervisor *shall* inform the employee promptly and specifically of the conduct." NAC 284.638(1) (emphasis added). NAC 284.638(2) confirms this initial warning in situations that warrant a corrective probationary period, stating, "If appropriate and justified, *following a discussion of the matter*, a reasonable period of time for improvement or correction may be allowed before initiating disciplinary action." (Emphasis added.) And, even when

> an oral warning does not cause a correction of the condition or where a more severe initial action is warranted, a written reprimand prepared on a form prescribed by the Division of Human Resource Management must be sent to the employee and a copy placed in the employee's personnel folder which is filed with the Division of Human Resource Management.

NAC 284.638(3). All three subsections provide an agency with discretion to take more or less severe measures, but each subsection, nonetheless, requires the supervisor to inform the employee of his or her misconduct.

NAC Chapter 284's statutory scheme further shows that agencies must comply with NAC 284.638. NAC 284.638 is located under the "Disciplinary Procedures" section, and precedes NAC 284.642 ("Suspensions and Demotions"), 284.646 ("Dismissals"), 284.655 ("Investigation"), and other provisions pertaining to employee rights and

disciplinary procedures. NAC 284.638's placement in the "Disciplinary Procedures" section further shows that employers must inform employees of their misconduct at some point prior to providing notice of the investigation or dismissal. Therefore, in addition to notifying an employee of a formal investigation, an agency must first inform the employee of her misconduct when the misconduct alleged is one of the causes listed in NAC 284.650.

Here, given the regulatory scheme and plain language of NAC 284.638(1), NDOC needed to inform Garcia "promptly and specifically" of her misconduct since NDOC charged Garcia with violations of NAC 284.650(1), (3), and (7), NAC 284.638(1). While "promptly and specifically" is not defined within NAC Chapter 284, we ordinarily defer to NDOC's interpretation of its regulation to find what "promptly" and "specifically" mean. However, while the record suggests that the hearing officer found that NDOC did not notify Garcia of her misconduct prior to her Formal Interrogation Notice, the hearing officer did not determine whether NDOC complied with NAC 284.638. As a result, we cannot ascertain whether this case is procedurally deficient, or how NDOC interprets and applies its regulation, without factual findings that the hearing officer never made. Therefore, we must remand this matter for further consideration of this issue.

Moreover, if the hearing officer determines on remand that the matter is not procedurally deficient, we note that the hearing officer found that Garcia's termination did not serve "the good of the public service" as that phrase was defined at the time. However, six months after the hearing officer's decision, the Nevada Supreme Court decided *O'Keefe*, 134 Nev. 752, 431 P.3d 350, which expressly overruled all three cases on which the

hearing officer had relied. *O'Keefe* states that "[w]hen a classified employee requests a hearing to challenge an agency's decision to terminate her as a first-time disciplinary measure, the hearing officer 'determine[s] the reasonableness' of the agency's decision by conducting a three-step review process." *Id.* at 759, 431 P.3d at 356 (alteration in original) (quoting NRS 284.390(1)). The hearing officer must apply the following analysis:

> First, the hearing officer reviews de novo whether the employee in fact committed the alleged violation. *See* NAC 284.798. Second, the hearing officer determines whether that violation is a "serious violation [ ] of law or regulations" such that the "severe measure [ ]" of termination is available as a first-time disciplinary action. NRS 284.383(1). If the agency's published regulations prescribe termination as an appropriate level of discipline for a first-time offense, then that violation is necessarily "serious" as a matter of law. NRS 284.383(1); NAC 284.646(1). Third and last, the hearing officer applies a deferential standard of review to the agency's determination that termination will serve "the good of the public service." NRS 284.385(1)(a). The inquiry is not what the hearing officer believes to be the good of the public service, but whether it was reasonable for the agency to "consider[ ] that the good of the public service w[ould] be served" by termination. *Id.*

Id. at 759-60, 431 P.3d at 356 (alterations in original).

Thus, to determine whether termination serves "the good of the public service," the hearing officer may consider the delay in the investigation, whether the administrative regulations permit dismissal for a first-time offense, and how the agency treated other employees in similar circumstances. *Id.* at 759-60, 431 P.3d at 356-57. Because *O'Keefe* had not yet been issued when the hearing officer rendered her decision, she did not

make factual findings consistent with the framework provided in *O'Keefe*. Consequently, we cannot determine whether substantial evidence shows that NDOC reasonably terminated Garcia for "the good of the public service." Accordingly, we

REVERSE the district court's grant of NDOC's petition for judicial review and REMAND this case to the district court so that it may remand the case to the hearing officer for further proceedings consistent with this order.[5]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Adriana Escobar, District Judge
Israel Kunin, Settlement Judge
Dyer Lawrence, LLP
Attorney General/Las Vegas
Eighth District Court Clerk

[5]Because we have instructed the hearing officer to, if NDOC complied with NAC 284.638, make findings consistent with *O'Keefe*, we decline to consider Garcia's argument that the hearing officer did not err in recommending that NDOC suspend Garcia instead of terminating her employment.