IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTHONY ALDO BARBIERI,
Appellant,
vs.
THE STATE OF NEVADA EMPLOYMENT SECURITY DIVISION; RENEE OLSON, IN HER CAPACITY AS ADMINISTRATOR OF THE EMPLOYMENT SECURITY DIVISION; AND J. THOMAS SUSICH, IN HIS CAPACITY AS CHAIRPERSON OF THE EMPLOYMENT SECURITY DIVISION BOARD OF REVIEW,
Respondents.

No. 79576-COA

ORDER OF AFFIRMANCE

Anthony Aldo Barbieri appeals the denial of his petition for judicial review of the Nevada Employment Security Division's (ESD) denial of his application for unemployment benefits. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Barbieri formerly worked for Timeshare Liquidators, LLC ("TLC") as a parking lot attendant.[1] On August 25, 2017, Barbieri arrived late to work. His supervisor, Jesus Arenivas, instructed Barbieri to go home because he arrived late. Barbieri became angry with Arenivas and used profanity.[2] Barbieri also called TLC's director of operations, Bobby Burns, and made profane statements to him as well.

[1]We only recount the facts as necessary for our disposition.

[2]According to Arenivas, Barbieri told him to go "fuck himself," that he was a "bitch," and that he could talk to him any way he wanted because he

When Barbieri returned to work on August 26, Arenivas informed Barbieri that he was being suspended. Barbieri again became angry and used foul language. At some point, Arenivas attempted to obtain Barbieri's signature to document his suspension, but Barbieri refused to sign. At that time, Barbieri threatened Arenivas with a Taser, stating, "I'll fuck you up." Barbieri activated the Taser, which made a loud shocking noise, but did not use it on anyone before he left.

Barbieri turned in his work uniforms to TLC on August 28. Barbieri submitted his application for unemployment benefits the same day. In the application, Barbieri claimed that he was terminated for arriving late to work. Barbieri signed a TLC "employee separation report and final check request" on September 1. The report stated that Barbieri's reason for separation was resignation.

The ESD denied Barbieri's application for benefits. Barbieri appealed. An ESD appeal tribunal affirmed, finding that Barbieri was terminated for misconduct, and the Board of Review affirmed the tribunal's decision. Barbieri then petitioned for judicial review. The district court granted review. In its decision, the district court explained that the appeal tribunal did not make findings of fact regarding whether Barbieri's behavior constituted misconduct:

> Petitioner's use of profanity at work may have been inappropriate and may have amounted to NRS 612.385 misconduct, however, the Referee did not make any factual findings regarding whether or not Petitioner's use of profanity constituted misconduct.

---

was off the clock. When Barbieri commenced employment with TLC, he signed documentation detailing TLC's policies, including its prohibition of foul language at work.

> It is hereby concluded that the record lacks substantial evidence to support the determination of misconduct, and the Referee's decision was therefore arbitrary and capricious.

The district court reversed the appeal tribunal's decision and remanded Barbieri's case to the Office of Appeals "for a new hearing on the merits."

On remand, the appeal tribunal—presided over by a different referee—assumed jurisdiction over the issue of whether Barbieri voluntarily quit. The tribunal acknowledged that the parties had a right to prior notice on the issue of whether Barbieri voluntarily quit. The tribunal explained this right to the parties and asked if they would waive it. Both Barbieri and TLC waived their right to prior notice, permitting the tribunal to resolve the voluntary quit issue. Barbieri presented facts and argument in support of his position on the issue of whether he voluntarily quit throughout the hearing. Barbieri emphasized that he was fired for being late and, accordingly, could not have quit.

After hearing from both parties, the appeal tribunal concluded that Barbieri voluntarily quit. It found Barbieri's supervisors' written statements recounting Barbieri's behavior credible and consistent. The tribunal cited Barbieri's testimony that he turned in his uniforms and signed documentation stating he resigned to support its decision as well. The tribunal further concluded that, because Barbieri denied quitting, he failed to establish that he quit for good cause under NRS 612.380. The tribunal declared that, alternatively, it would have affirmed the denial of benefits due to Barbieri's misconduct, which was sufficient grounds for termination.

The Board of Review affirmed the appeal tribunal's decision. Barbieri again petitioned for judicial review. Barbieri's second petition for judicial review was assigned to a different judicial department than his first petition. The district court denied Barbieri's second petition, concluding that substantial evidence supported the appeal tribunal's decision and that neither the Board nor the tribunal acted arbitrarily or capriciously. Barbieri now appeals to this court.

On appeal, Barbieri argues (1) the second appeal tribunal improperly considered whether he voluntarily quit because TLC waived or forfeited the right to argue he voluntarily quit and the law of the case doctrine precluded the appeal tribunal from considering the issue, and (2) the second appeal tribunal's decision that Barbieri voluntarily quit or alternative ruling that he committed misconduct was not supported by substantial evidence. We disagree.

Whether the appeal tribunal exceeded its jurisdiction by considering whether Barbieri quit

Barbieri argues that the law of the case doctrine precluded the appeal tribunal from considering on remand whether he voluntarily quit. According to Barbieri, the first appeal tribunal's determination that he was terminated became the law of the case when the district court affirmed the Board of Review and remanded his case to determine whether he engaged in misconduct. Barbieri further explains that his waiver of prior notice that the tribunal would address the issue of whether he voluntarily quit on remand does not amount to consent to the tribunal's jurisdiction over the issue because he was proceeding pro se and did not know the law of the case doctrine applied. Barbieri also argues that TLC waived or forfeited its right to argue that Barbieri voluntarily quit on remand. Although TLC raised the argument on appeal before the first tribunal, Barbieri contends that

TLC's failure to raise the issue in subsequent proceedings, particularly when Barbieri first petitioned for judicial review, deprived TLC of the right to argue the issue on remand.

ESD responds that Barbieri's case was remanded for a hearing de novo, unconstrained by prior decisions. ESD adds that, even if TLC waived or forfeited the issue, the tribunal properly considered it because NRS 612.500(2) requires appeals referees to consider "all issues affecting the claimant's right to benefits" "without regard to statutory and common law rules." Barbieri replies that, although the district court's order explicitly states that Barbieri's case was remanded "for a new hearing on the merits, before a new referee[,]" the entirety of the order indicates that the only issue to be considered on remand was whether Barbieri was terminated for misconduct. Barbieri cites the second appeal tribunal's Notice of Hearing, which states that the purpose of the hearing was to address the termination for misconduct issue.

We conclude that the second appeal tribunal acted within its statutory authority when it considered the issue of whether Barbieri voluntarily quit notwithstanding the doctrines of waiver or the law of the case. Furthermore, the district court did not decide the issue of whether Barbieri voluntary quit explicitly or by necessary implication such that the law of the case doctrine limited or precluded the issues the appeal tribunal could consider on remand. Barbieri additionally acquiesced to the tribunal's authority to address the issue by waiving his right to prior notice and presenting argument on the issue.

"When reviewing an agency's decision, we, like the district court, consider whether the decision was affected by an error of law or was 'an arbitrary and capricious abuse of discretion.'" *Sierra Packaging &*

Converting, LLC v. Nev. OSHA, 133 Nev. 663, 666, 406 P.3d 522, 524 (Ct. App. 2017) (citing *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 383 (2008)); *see also* NRS 233B.135(3)(d), (f). "Courts have no inherent appellate jurisdiction over official acts of administrative agencies except where the legislature has made some statutory provision for judicial review." *Tate v. Bd. of Medical Exam'rs*, 131 Nev. 675, 678, 356 P.3d 506, 508 (2015) (citing *Crane v. Continental Tel.*, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989)) (internal quotation omitted). "[W]hen the legislature creates a specific procedure for review of administrative agency decisions, such procedure is controlling." *Washoe Cty. v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 724 (2012) (citing *Crane*, 105 Nev. at 401, 775 P.2d at 706) (internal quotation omitted).

"Nevada's Administrative Procedure Act (APA), codified at NRS Chapter 233B, governs judicial review of administrative decisions." *Heat & Frost Insulators & Allied Workers Local 16 v. Labor Comm'r*, 134 Nev. 1, 3, 408 P.3d 156, 159 (2018); *see* NRS 233B.130(6). Notably, the APA provides that "[t]he court may remand or affirm the final decision [of the agency, reverse,] or set it aside in whole or in part[,]" but does not provide that the reviewing court may bind the agency to consider a particular issue to the exclusion of others on remand. *See* NRS 233B.135(3). However, "[t]he special provisions of . . . Chapter 612 of the NRS for . . . the judicial review of decisions of the Employment Security Division of the Department of Employment, Training and Rehabilitation . . . prevail over the general provisions of" Chapter 233B. NRS 233B.039(3).

"An Appeal Tribunal shall inquire into and develop all facts bearing on the issues and shall receive and consider evidence without regard to statutory and common law rules." NRS 612.500(2). "In addition

to issues raised by the appealed determination, the Appeal Tribunal may consider all issues affecting the claimant's rights to benefits from the beginning of the period covered by the determination to the date of the hearing." *Id.*

"The law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case." *Dictor v. Creative Mgmt. Services, LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010) (citation omitted). "Application of the [law of the case] doctrine requires that the appellate court actually address and decide the issue explicitly or by necessary implication." *Fergason v. LVMPD*, 131 Nev. 939, 947, 364 P.3d 592, 597 (2015) (internal quotation omitted). "Waiver occurs when a party knows of an existing right and either actually intends to relinquish the right or exhibits conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished." *Hudson v. Horseshoe Club Operating Co.*, 112 Nev. 446, 457, 916 P.2d 786, 792 (1996).

Neither the law of the case doctrine nor TLC's alleged waiver or forfeiture limited the issues the appeal tribunal could consider on remand. First, applying the law of the case doctrine as Barbieri proposes would contravene the express language of the APA. The APA prescribes the "exclusive means" of judicial review of agency decisions, except that its general provisions yield to the specific provisions of Chapter 612 in the context of unemployment benefits. *See* NRS 233B.130(6). Chapter 612 does not provide district courts with any remedial powers beyond those stated in NRS 233B.135; thus, the district court in the first appeal was limited to reversing, "remand[ing] or affirm[ing] the final decision" of the ESD, or "set[ting] it aside in whole or in part." NRS 233B.135(2), (3). None of these

powers implies that a district court has the authority to foreclose an administrative appeal tribunal's consideration of a particular issue on remand.[3] Therefore, applying the law of the case doctrine as Barbieri proposes would contravene the language of the provisions of the APA.

Second, applying the law of the case doctrine or waiver would further contradict the express language of NRS 612.500(2). NRS 612.500(2) permits appeal tribunals to consider "*all issues* affecting the claimant's rights to benefits" and requires appeal tribunals to "inquire into and develop all facts on the issues and . . . consider evidence without regard to statutory and common law rules." (Emphasis added.) The law of the case doctrine and waiver are "statutory and common law rules," and the issue of whether Barbieri voluntarily quit is an issue affecting his right to benefits. NRS 612.500(2) thus militates against applying the doctrines of waiver or the law of the case here.

Third, even if the provisions of the APA and Chapter 612 allowed for the application of the law of the case doctrine, the district court did not actually address or decide the issue of whether Barbieri voluntarily quit explicitly or by necessary implication. The district court decided that the first appeal tribunal's decision that Barbieri was terminated for misconduct was not supported by substantial evidence because the tribunal "did not make any factual findings regarding whether or not [Barbieri's] use of profanity constituted misconduct." Nowhere in its order does the district

---

[3]We note that Barbieri does not cite any Nevada precedent ruling that the law of the case doctrine allows district courts to limit the issues an agency may consider on remand. We asked Barbieri during oral argument whether any Nevada precedent to this effect exists, and he was not aware of any.

court expressly say that the appeal tribunal may not consider any particular issue or factual matter on remand.[4] Further, the district court did not resolve or settle the factual disputes underlying the issue of whether Barbieri voluntarily quit when it determined that the appeal tribunal's decision was not supported by substantial evidence.[5] Thus, we disagree with Barbieri that the district court intended its order for a "new hearing on the merits" to limit the issues the appeal tribunal could consider on remand. Instead, we interpret the order at face value and in accordance

---

[4]During oral argument, Barbieri cited to a passage in the district court's decision preceding its ultimate order "for a new hearing on the merits" in which the court stated "[a]s to the *merits* of the Petition for Judicial Review, the Court found that the manner in which Respondent employer suspended or terminated Petitioner was procedurally defective, as employer failed to provide Petitioner the status of his employment." (Emphasis added.) Barbieri argued that the use of "merits" in the earlier passage implied that its order for a "new hearing on the merits" confined the appeal tribunal on remand to the issue of whether Barbieri was terminated for misconduct. We disagree that the earlier passage implies that the district court intended to narrow the meaning of "merits" in its order. The word "merits" is used with reference to Barbieri's petition for judicial review in the earlier passage and, as ESD pointed out during oral argument, the court's order did not include instructions or qualifying language, which we would expect to see if the court intended to constrain a lower tribunal on remand.

[5]Indeed, as the ESD reminded us during oral argument, we are not a fact-finding court. *See Lellis v. Archie*, 89 Nev. 550, 554, 516 P.2d 469, 471 (1973) ("We should not pass upon the credibility of witnesses or weigh the evidence, but limit review to a determination that the board's decision is based upon substantial evidence." (internal quotations omitted)).

with NRS 612.500(2), which does not limit the issues or evidence an appeal tribunal may consider and, in effect, provides for a hearing de novo.[6]

Lastly, Barbieri acquiesced to addressing the issue on remand by waiving notice and arguing the issue. The appeal tribunal gave Barbieri the option to address the issue at a later hearing, explained Barbieri's right to prior notice, and obtained Barbieri's waiver thereafter. *See Bd. of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) ("Because judicial review of administrative decisions is limited to the record before the administrative body, we conclude that a party waives an argument made for the first time to the district court on judicial review." (citation omitted)); *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007) (stating that waiver may be inferred from conduct that clearly indicates the party's intention). Barbieri did not object to the tribunal's ability to consider the voluntary quit issue on remand, but rather argued at length that he did not voluntarily quit after waiving his right to prior notice.[7]

---

[6]The fact that the notice of appeal, which was created by the appeal tribunal and not the district court, stated that the hearing would address whether Barbieri was terminated for misconduct was immaterial to whether the second appeal tribunal had authority to consider the voluntary quit issue on remand. While the notice's omission of the issue regarding whether Barbieri voluntarily quit implicated Barbieri's right to prior notice, he waived notice at the hearing.

[7]During oral argument, Barbieri asserted that the tribunal did not give him an opportunity to object to the tribunal's jurisdiction over the issue of whether he voluntarily quit. However, Barbieri could have objected to the tribunal's jurisdiction when the referee presented him with the choice to address the voluntary quit issue at the hearing or at a later hearing.

Whether substantial evidence supports the appeal tribunal's decision

Barbieri argues that the appeal tribunal's determination that he voluntarily quit is not supported by substantial evidence. Barbieri emphasizes that TLC presented only one witness on remand—Bobby Burns—who relied on William Grey and Jesus Arenivas's statements to testify and did not witness any of Barbieri's conduct. Barbieri insists he turned in his work uniforms to avoid a deduction from his final check,[8] and that he signed the separation report without knowing it indicated he resigned. ESD replies that substantial evidence supported the tribunal's conclusion that Barbieri voluntarily quit, including Grey's and Arenivas's written statements, the separation documentation showing Barbieri resigned, and Barbieri's act of turning in his uniforms.

"A person is ineligible for benefits for the week in which the person has voluntarily left his or her last or next to last employment . . . without good cause." NRS 612.380(1)(a). "In any judicial proceeding under this section, the finding of the Board of Review as to the fact[s]," are conclusive if supported by substantial evidence, and we will only review questions of law. NRS 612.530(4). Substantial evidence is that

---

Regardless, the tribunal was acting in accordance with NRS 612.500(2) when it exercised its jurisdiction.

[8]Barbieri cites the tribunal's finding from the first appeal that Barbieri may have turned in his uniforms to avoid a deduction from his final check. This finding is not controlling in our review of the second appeal tribunal's conclusions. *See generally State, Nev. Emp't Sec. Dep't. v. Weber*, 100 Nev. 121, 124, 676 P.2d 1318, 1320 (1984) ("[T]he district court [may not] simply prefer[ ] a lower level administrative decision . . . [and] substitute its judgment for that of the Board [of Review]. This [is] error. It is not the district court's function to choose among the various decisions made during an administrative proceeding.").

"which a reasonable mind might accept as adequate to support a conclusion." NRS 233B.135(4). "We should not pass upon the credibility of witnesses or weigh the evidence, but limit review to a determination that the board's decision is based upon substantial evidence." *Lellis*, 89 Nev. at 554, 516 P.2d at 471.

A reasonable mind could conclude that Barbieri voluntarily quit insofar as he signed the separation documentation indicating he resigned and turned in his uniforms. Barbieri's contentions that he was unaware the documents indicated he quit and that he turned his uniforms in to avoid a deduction from his check are factual disputes, which are left to the appeal tribunal to resolve. Likewise, the tribunal's determination that Barbieri did not show good cause for quitting because he maintained he was terminated was a finding of fact, not a question of law subject to this court's review. Barbieri's criticism that Burns relied on hearsay is inapposite because hearsay may be regarded as substantial evidence in administrative proceedings. *See State Dep't of Motor Vehicles v. Kiffe*, 101 Nev. 729, 732-33, 709 P.2d 1017, 1020 (1985); NRS 233B.123(1).

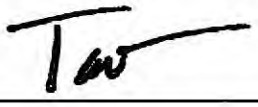
We also conclude Barbieri's argument that substantial evidence does not support the tribunal's alternative conclusion that Barbieri was terminated for misconduct is unpersuasive. The record supports the tribunal's alternative conclusion that Barbieri was terminated for misconduct. Barbieri used profanity and threatened his coworkers. The tribunal commented, "The claimant's own testimony establishes that he was insubordinate by saying, 'fuck you' when [his supervisor] instructed him to go home on August 25, 2017, and that he was also insubordinate by his refusal to sign the warning when he was suspended on August 26, 2017."

Therefore, we also affirm the district court's denial of judicial review on this ground.

Thus, substantial evidence supports the appeal tribunal's determination that Barbieri voluntarily quit, or alternatively, was terminated for misconduct. Accordingly, we

AFFIRM the district court's denial of judicial review.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Tierra Danielle Jones, District Judge
Hutchison & Steffen, LLC/Las Vegas
State of Nevada/DETR
Eighth District Court Clerk