IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JODY YTURBIDE,
Appellant,
vs.
CITY OF RENO; AND CANNON COCHRAN MANAGEMENT SERVICES, INC.,
Respondents.

No. 81528-COA

FILED

JUL 21 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jody Yturbide appeals from a district court order denying a petition for judicial review. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Yturbide was employed by the City of Reno (the City) as a dispatcher from 1995 until 2016, when she was released from her position due to the City's inability to accommodate her physical restrictions caused by several industrial injuries that she sustained as the result of working as a dispatcher.[1] These restrictions included being unable to sit for prolonged periods or work more than six consecutive hours. Accordingly, under NRS 616C.555, she was entitled to participate in a vocational rehabilitation program, paid for by the City, to assist her in finding other suitable employment. A vocational rehabilitation counselor determined that Yturbide did not have any marketable skills and recommended a plan for a program pursuant to NRS 616C.555(3), which would provide additional training or education.

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

With the assistance of her counselor, Yturbide selected and agreed to a vocational rehabilitation program to pursue a career as a medical assistant. Yturbide, her attorney, the vocational counselor, and a representative of the City's third party administrator, Cannon Cochran Management Services (Cannon), agreed to and signed the plan for the program. Yturbide ultimately received her associate's degree in health studies as well as obtained a medical assistant certificate, enabling her to seek employment in the field. After graduating, Yturbide attended multiple interviews and received at least three job offers. She declined the offers, however, claiming that each offer's starting wage was not equal or greater than at least 80 percent of her gross pre-injury wage. Based on this, she requested the development of a second program of vocational rehabilitation, also to be paid for by the City. Cannon denied Yturbide's request, stating that because she graduated with her associate's degree, obtained the necessary certification, and had received multiple job offers, the initial program was successful, and therefore she was not entitled to a second one.

Yturbide appealed the administrator's denial of her request for a second program. The hearing officer affirmed the administrator's decision. Yturbide appealed this decision, and the appeals officer affirmed the hearing officer, upholding the administrator's denial. Yturbide then petitioned the district court for judicial review. The court denied the petition. Yturbide now appeals.

An appellate court's role in reviewing an administrative agency's decision is identical to that of the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). We review an administrative agency's legal conclusions, such as those resolving questions

of statutory interpretation, de novo. *See State Dep't of Taxation v. Masco Builder Cabinet Grp.*, 127 Nev. 730, 735, 265 P.3d 666, 669 (2011).

However, we will defer to an agency's interpretation of its governing statutes or regulations if its interpretation is within the language of the statute. *See Taylor v. State Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013); *see also Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 618, 625, 310 P.3d 560, 565 (2013) ("While not controlling, an agency's interpretation of a statute is persuasive when the statute is one the agency administers." (citation and internal quotation marks omitted)). Further, we review an administrative agency's factual findings for clear error or an abuse of discretion. NRS 233B.135(3)(e), (f); *Elizondo*, 129 Nev. at 784, 312 P.3d at 482. And we will not overturn the agency's findings unless they are "not supported by substantial evidence." *Elizondo*, 129 Nev. at 784, 312 P.3d at 482.

Yturbide first argues that the appeals officer erred in determining that her initial program was successful. Specifically, she argues that because she would not be able to earn a wage equal to or greater than 80 percent of her gross pre-injury wage pursuant to NRS 616C.555(9), the program was unsuccessful pursuant to the statute. The City argues that NRS 616C.555(9) does not entitle an employee to earn a certain wage upon completion of the program, and the amount of the wage is not determinative of the success of the program. We agree with the City.

We interpret a statute or regulation by its plain language unless the statute or regulation is ambiguous, *Savage v. Pierson*, 123 Nev. 86, 89, 157 P.3d 697, 699 (2007); the plain meaning "would provide an absurd result," *Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 130 Nev. 540, 546, 331 P.3d 850, 854 (2014); or the interpretation "clearly was

not intended," *Sheriff, Clark Cty. v. Burcham*, 124 Nev. 1247, 1253, 198 P.3d 326, 329 (2008); *see also In re Friedman*, 116 Nev. 682, 685, 6 P.3d 473, 475 (2000) (providing that "[w]hen the language of a statute is plain and unambiguous, there is no room for construction, and the courts are not permitted to search for meaning beyond the statute itself"). A statute is ambiguous when its language is subject to two or more reasonable interpretations. *Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983).

NRS 616C.555(9) provides that where an initial vocational rehabilitation program is unsuccessful, an employee may request a second program. Despite Yturbide's argument that the term "unsuccessful" is ambiguous, we conclude that the term is "an ordinary word with a commonly understood meaning that is the only reasonable interpretation in this context." *Young v. Nev. Gaming Control Bd.*, 136 Nev., Adv. Op. 66, 473 P.3d 1034, 1037 (2020). Specifically, "unsuccessful" means that there was not a favorable outcome. *See Unsuccessful*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2007); *see also Successful*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2007).

A plan for a vocational rehabilitation program created pursuant to NRS 616C.555(3) trains or educates a person and provides job placement assistance. Here, Yturbide's initial program accomplished this. Yturbide received her associate's degree and medical assistant certificate, participated in interviews with the assistance of a job placement counselor, and received multiple job offers. Further, all of the offers included a starting wage within the anticipated wage range set forth in the plan for a medical assistant. And while Yturbide argues that her wage was required to be equal to or greater than 80 percent of her gross pre-injury wage, the plain

language of the statute does not include this requirement. Rather, the potential wage referenced in NRS 616C.555(2) is prefaced with the language "when practicable" and "goal." This language is aspirational and does not require a specific wage to be earned in order to render a program successful.

Thus, NRS 616C.555(2) and (9) does not support that Yturbide's plan was unsuccessful based on her inability to earn at least 80 percent of her gross pre-injury wage. Accordingly, because there is no statutory wage requirement, the appeals officer did not err in determining that Yturbide's initial program was successful as she completed it and received multiple job offers, albeit at a lesser wage than she had earned with the City.

Nevertheless, Yturbide next argues that she established good cause to participate in a second program. Specifically, Yturbide argues that because the initial plan failed to ensure at least 80 percent of her gross pre-injury wage, she established good cause for a second plan. We disagree.

NRS 616C.555(9) provides that, "[i]f an initial program of vocational rehabilitation pursuant to this section *is unsuccessful*, an injured employee may submit a written request for the development of a second program of vocational rehabilitation which relates to the same injury. An insurer shall authorize a second program for an injured employee *upon good cause shown*." (Emphases added.)

By the statute's plain language, an unsuccessful initial vocational rehabilitation program is a precondition for showing "good cause" for a second program. As discussed above, Yturbide's initial program was not unsuccessful, and therefore, she does not satisfy the precondition. Further, because there is no wage requirement in NRS 616C.555(9), a lesser wage than Yturbide's gross pre-injury wage does not establish good cause

for a second vocational program, particularly when the wages offered were within the anticipated wage range for a medical assistant as set forth in the plan. Therefore, the appeals officer did not err in determining that Yturbide was not entitled to a second vocational rehabilitation program under NRS 616C.555(9).

Finally, Yturbide argues that the appeals officer erroneously found that she agreed to the initial plan without a provision requiring her to earn at least 80 percent of her gross pre-injury wage. Yturbide asserts that her lawyer annotated the plan at the time she signed it, incorporating prior emails and text messages requiring that she earn at least 80 percent of her gross pre-injury wage.

The initial plan was signed by the parties and contains a section on anticipated wages. This section set forth the anticipated high, low, and median annual wage range for a medical assistant employed in Reno, Nevada, and provided that "Ms. Yturbide accepts entry level wages as suitable, gainful employment, given her need to change occupations." At the end of the plan, Yturbide's counsel provided two annotations[2] and struck

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[2]We note that while the plan was included in the record on appeal, the written annotations in the version provided were illegible. It is well established that the appellant has the burden of providing this court with an adequate appellate record. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). And when the appellant fails to meet this burden, we presume that the missing portion of the record supports the district court's decision. *Id.* Even accepting the annotations as described in Yturbide's opening brief, substantial evidence supports the finding that Yturbide accepted the plan without a specific wage being guaranteed upon her completion of the program.

the last two "summary" paragraphs regarding what would occur if she applied for temporary partial disability, among other things. However, the parties unequivocally agreed to the remainder of the plan, including the "anticipated wage" section.

To resolve the issue of whether the annotations referencing the emails and text messages changed the terms of the plan, we turn to the parol evidence rule. Under this rule, "extrinsic evidence is not admissible to add to, subtract from, vary, or contradict . . . written instruments which . . . are contractual in nature and which are valid, complete, unambiguous, and unaffected by accident or mistake." *State ex rel. List v. Courtesy Motors*, 95 Nev. 103, 106, 590 P.2d 163, 165 (1979). However, "[a]s long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document, including a separate agreement . . . ." 11 Richard A. Lord, *Williston on Contracts* § 30:25 (4th ed. 1999) (footnotes omitted).

Despite Yturbide's assertions, it is unclear which emails and text messages were incorporated or referenced in the plan. Nor does it appear that all parties who signed the plan agreed to modify the anticipated wage range. *See id.*; *see also Williams Constr. Co. v. Standard–Pac. Corp.*, 61 Cal. Rptr. 912, 920 (Ct. App. 1967) (providing that in order for the terms of one document to be read into another, said reference "must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known" (internal quotation marks omitted)). As such, there is

substantial evidence that the parties did not modify the anticipated wage range of the plan for a medical assistant.

Further, Yturbide, her attorney, the City's representatives, and the vocational counselor signed the plan *after* all of the communications between the parties had occurred. We decline to modify the terms of the written vocational plan through these prior communications. Yturbide's interpretation of the plan is in direct conflict with other provisions of the plan, including express provisions which unambiguously set forth an anticipated wage range. Therefore, using the emails and text messages to modify the plan is barred by the parol evidence rule. *See Courtesy Motors*, 95 Nev. at 106, 590 P.2d at 165.

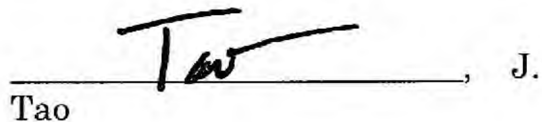
In addition, we decline to rewrite the plan to include the emails and text messages. To do so would be contrary to the other provisions of the plan and would be an impermissible rewriting of the parties' agreement. *See Reno Club, Inc. v. Young Inv. Co.*, 64 Nev. 312, 323-24, 182 P.2d 1011, 1016-17 (1947).

Finally, Yturbide acknowledged that while there are two annotations on the last page of the plan, the anticipated wage section and the remainder of the plan did not otherwise mention a wage *requirement* or *guarantee*. Absent any such provision within the four corners of the plan, the appeals officer's finding that Yturbide agreed to the plan without being guaranteed a specific wage upon completion of the program is supported

substantial evidence and not clearly erroneous.[3] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

______________________, C.J.
Gibbons



______________________, J.
Tao

______________________, J.
Bulla

cc: Hon. Barry L. Breslow, District Judge
Hutchison & Steffen, LLC/Reno
McDonald Carano LLP/Reno
Washoe District Court Clerk

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[3]We have considered Yturbide's remaining arguments and conclude that they do not provide a basis for relief, or are otherwise waived because they were not raised below. *See State Bd. of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) (providing that because judicial review is limited to the administrative record, arguments made for the first time on judicial review are generally waived).