

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CASINO CONNECTION
INTERNATIONAL, LLC, A GEORGIA
LIMITED LIABILITY COMPANY,
Appellant,

vs.

NEVADA LABOR COMMISSIONER, A
NEVADA ADMINISTRATIVE AGENCY,
AND JOHN BUYACHEK, JR.,¹
Respondents.

No. 82683-COA

FILED

FEB 17 2022

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

ORDER OF AFFIRMANCE

Casino Connection International, LLC (CCI), appeals from a district court order denying its petition for judicial review in an action for unpaid commissions. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

CCI is a publisher of gaming-related magazines, such as Global Gaming Business Magazine (GGB).² CCI sells advertising space in these publications as part of its business. GGB's former Sales and Marketing Director John Buyachek filed a wage claim asserting that CCI owed him commissions on his ad sales contracts that were outstanding when he left the company (Buyachek had negotiated an agreement with the client, but the ad had not been published and the client had not paid).

In 2015, CCI's chief operating officer (COO) offered Buyachek employment, and he accepted. They memorialized their agreement in a

¹We direct the Clerk of the Court to amend the caption on the court's docket to conform to the caption on this order.

²We recount the facts only as necessary for our disposition.

signed, written offer letter. Regarding compensation, the offer stated that “5% commission will be paid on existing sales you will be managing. 12.5% commission will be paid on any new sales you make. Commissions are paid on collected net revenues the month following the collections.”

Initially, Buyachek accrued 5% in commissions for managing his predecessor’s outstanding sales that had not yet been published.³ Buyachek also negotiated several new sales of his own while working for CCI. Oftentimes, Buyachek would negotiate one “bulk” sale with a client that would cover its advertising needs for the calendar year. In such cases, the client would pay its fee in installments whenever the ads were actually published. Buyachek accrued 12.5% in commissions on every payment CCI received for such sales, as reflected in his paycheck the month following collection.

After almost three years with GGB, Buyachek was either terminated or laid off for reasons unknown effective May 9, 2018. At the time, Buyachek claimed to have negotiated some 45 sales contracts for which payment had not yet been received and for which he had not been paid as a result. CCI’s COO told Buyachek that even when CCI received payment for these sales, Buyachek would not receive commissions for them because he was no longer employed by CCI. Buyachek objected. The COO then verbally offered Buyachek 12.5% commissions on the payments CCI received on his sales through June 30, 2018 (\$11,554.21), which he rejected. There was no termination agreement in place. Instead, CCI paid a new employee 5% commissions once payment was received for managing each of Buyachek’s existing sales contracts.

³On occasion, CCI paid Buyachek a 12.5% managing fee for unknown reasons.

Buyachek filed a claim with the Office of the Labor Commissioner (OLC) on October 23, 2018, alleging that CCI owed him commissions for payments received on his outstanding sales from May 10, 2018, (the day after his employment ended) to October 22, 2018 (the day before he filed his claim) (\$64,442.57).⁴ CCI disputed the claim, and the OLC began an investigation. Pursuant to the investigator's requests, CCI produced records for May 9, 2018, to June 30, 2018. Based on that information, the investigator was "unable to substantiate [Buyachek's] claim for \$64,442.57." Instead, the investigator determined that Buyachek was entitled to 12.5% commissions on the payments CCI received through June 30, 2018. It appears that the investigator was not aware of the subsequent payments received by CCI through Buyachek's efforts. CCI timely tendered payment to the OLC based upon 12.5% commissions without objection.

Buyachek objected to the amount of the payment and requested a hearing on the determination because the investigator did not address his commissions for outstanding sales contracts that were paid from July 1, 2018, to October 22, 2018. At the hearing, Buyachek argued that his employment offer entitled him to 12.5% commissions on all his negotiated sales, whenever CCI received payment, even if he was no longer a GGB employee when the client paid. CCI argued that Buyachek was entitled to no commissions on his outstanding sales because he had not completed a list of 14 prerequisite steps it claimed were necessary to earn commissions. Alternatively, CCI appears to have argued that, even if Buyachek were entitled to commissions, it should be reduced to 7.5% to account for the fee it

⁴Buyachek also references a previous claim he filed in May 2018. But the May 2018 claim itself is not in the record and is not identified as an issue on appeal. Therefore, we do not address it.

paid his successor for completing the steps necessary to get Buyachek's outstanding ads published. Thereafter, the hearing officer issued her Findings of Fact, Conclusions of Law, and Order, awarding Buyachek 12.5% commissions on all sales he negotiated for which payment was received from May 10, 2018, to October 22, 2018 (\$42,244).⁵

The hearing officer made the following pertinent factual findings. First, the only document that spoke to commissions was Buyachek's offer of employment. Second, CCI did not write down the process for ending a salesperson's employment—particularly how the commissions on his or her outstanding sales would be affected by his or her termination. Third, CCI did not know if Buyachek was aware that payment of a 5% managing fee would be deducted from the 12.5% owed to the salesperson who negotiated the sale once they were terminated. Fourth, “[a]fter the contract was entered into, the sale was complete” and “[a]fter the sale was complete, in preparation for the ad[] being run, the salesperson may or may not have to perform additional duties.” Finally, CCI received \$337,952.60 on Buyachek's outstanding sales from May 10, 2018, to October 22, 2018, and 12.5% of that sum was \$42,244.07.

The hearing officer made the following relevant conclusions of

⁵It appears that Buyachek's claim for \$64,442.57 filed on October 23, 2018, included commissions that became through February 2019. The hearing officer noted in her order that she asked the parties at the hearing whether they wanted her to determine commissions owed after October 22, 2018, but that CCI objected because it had not yet reviewed its sales records for that period. She therefore limited her order to commissions for May 10, 2018, to October 22, 2018, and stated that “[t]his Order does not preclude Claimant from attempting to collect unpaid commissions for the time period after October 23, 201[8].” Furthermore, it appears that the hearing officer rounded Buyachek's award to the nearest dollar, reducing the commissions owed from \$42,244.07 to \$42,244.

law. First, she concluded that CCI violated NAC 608.120—the administrative provision governing commissions—by failing to tender Buyachek his commissions when they became payable pursuant to his offer of employment. She concluded that the offer was “silent as to . . . the triggering event to be paid” 12.5% commissions and that entering “the original [sales] contract was . . . the triggering event.” Next, she concluded that “[b]ased on the terms of the agreement the parties mutually entered into,” Buyachek was entitled to 12.5% of the payments received on his outstanding sales. The hearing officer reasoned that 12.5% was appropriate because the offer “[did] not speak to” what happened to outstanding commissions when an employee left CCI and “[t]he parties are bound by the four corners of the document and we cannot look at what [the COO]’s intent may have been.” CCI timely filed a petition for judicial review, which the district court denied after a hearing because “Buyachek met the burden of showing that he was entitled to a 12.5% commission.”⁶ This appeal followed.

CCI argues that the hearing officer abused her discretion by awarding Buyachek 12.5% commissions on payments received from May 10, 2018, to October 22, 2018. According to CCI, Buyachek was not entitled to commissions for this period and, if anything, his commissions should have been reduced to 7.5% to account for the 5% managing fee CCI paid to Buyachek’s successor.⁷ The OLC counters that the hearing officer did not err

⁶The OLC has been a named party to this case since CCI filed its petition for judicial review. See NRS 233B.130(2)(a) (stating that petitions for judicial review must name the agency as respondent).

⁷Although CCI petitioned for a writ of mandamus and/or prohibition in the alternative, it does not appear that it appealed the denial of that writ petition on appeal.

in awarding Buyachek 12.5% and that the district court properly affirmed the hearing officer's final decision.

“On appeal, the standard for reviewing petitions for judicial review of administrative decisions is the same for this court as it is for the district court.” *Elizondo v. Hood Machine, Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013) (alteration and internal quotations omitted). As such, “[w]e do not give any deference to the district court decision when reviewing an order regarding a petition for judicial review.” *City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 119, 251 P.3d 718, 721 (2011).

This court may set aside an agency's final decision if it (a) violates constitutional or statutory provisions; (b) exceeds the agency's statutory authority; (c) is “[m]ade upon unlawful procedure”; (d) is affected by an error of law; (e) is “[c]learly erroneous in view of the reliable, probative and substantial evidence”; or (f) is “[a]rbitrary or capricious or characterized by abuse of discretion.” NRS 233B.135(3). The party attacking the agency's decision bears the burden of showing that it should be set aside. NRS 233B.135(2).

The hearing officer did not abuse her discretion in applying NAC 608.120

CCI asserts that the hearing officer abused her discretion by shifting the burden of proof under NAC 608.120 from Buyachek to CCI. In CCI's view, the hearing officer placed the burden of proving that Buyachek was not entitled to 12.5% on CCI instead of making Buyachek prove he was entitled to it. CCI argued that this was a “misapplication” of NAC 608.120 and the hearing officer's order should accordingly be set aside pursuant to

NRS 233B.135(3).⁸ The OLC counters that CCI points to no authority regarding who bears the burden and that nothing in the hearing officer's order indicates she put the burden on CCI.

Foremost, it appears from the record that CCI may have waived its burden of proof argument by failing to assert it until its petition for judicial review in district court. *State ex rel. State 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, . . . a party waives an argument made for the first time to the district court on judicial review."). The hearing officer announced her NAC 608.120 determination at the hearing itself, and CCI did not object. Indeed, CCI made no mention of evidentiary burdens in the hearing transcript.

If waived, we then can only review CCI's claim through the deferential lens of plain error. *See Torres v. Farmers Ins. Exch.*, 106 Nev. 340, 345 n.2, 793 P.2d 839, 842 n.2 (1990). "An error is plain if the error is

⁸In the alternative, CCI states that placing the burden of proof on CCI was a "plain legal error," or a violation of "basic due process." We address plain error below. However, CCI waived its due process argument by raising it for the first time in its reply brief. *See Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 198-99 (2005) (explaining that this court need not consider issues raised for the first time on appeal in appellant's reply brief); *see also Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). And while "issues of a constitutional nature may be addressed when raised for the first time on appeal," *Levingston v. Washoe Cty.*, 112 Nev. 479, 482, 916 P.2d 163, 166 (1996), we decline to do so here as CCI conducts no analysis for its due process argument, nor does it provide authority to support its position, *see Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogent or lacks the support of relevant authority).

so unmistakable that it reveals itself by a casual inspection of the record.” *Id.* (internal quotations omitted). Here, CCI summarily argues plain error, and it provides no authority indicating that Buyachek had the burden of proof under NAC 608.120, nor has it indicated where in the record the hearing officer misplaced the burden on CCI. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Therefore, CCI did not meet its burden of demonstrating plain error. *Lioce v. Cohen*, 124 Nev. 1, 19, 174 P.3d 970, 982 (2008) (“In deciding whether there is plain error, the district court must then determine . . . whether the complaining party met its burden of demonstrating . . . irreparable and fundamental error.”).

Even considering this issue on the merits, CCI’s burden-shifting claim still fails. We defer “to an agency’s interpretation of its governing statutes or regulations if the 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) (internal quotations omitted). An agency’s interpretation is within the language of a statute where nothing in the statutory language controverts the agency’s interpretation. *See Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008).

Here, the hearing officer did not expressly indicate which party bore the burden of proof under NAC 608.120 as she never referenced it at the hearing or in the order. However, CCI’s argument regarding NAC 608.120 does not demonstrate that the hearing officer must explicitly state the burden. As such, CCI has not shown that NAC 608.120’s statutory language controverts the hearing officer’s interpretation of the provision. Therefore, we defer to the hearing officer’s interpretation.

Still, setting aside the deference owed, nothing in the order or

testimony indicates the hearing officer put the burden of proof on CCI at the hearing. The OLC makes this argument on appeal, and CCI offers insufficient evidence to refute it in reply. CCI argues that the hearing officer must have shifted the burden because the order makes no “reference to any sufficient evidence offered by Buyachek, the claimant, aside from the Offer of Employment.” But the employment offer was critical as it is the only written agreement regarding commissions between the parties, and the hearing officer also cited testimony from both parties in her order. Therefore, the hearing officer did not improperly shift the burden of proof.

Last, and in any event, we disregard errors that do not affect the parties’ substantial rights. *See Khoury v. Seastrand*, 132 Nev. 520, 539, 377 P.3d 81, 94 (2016) (“To be reversible, an error must be prejudicial and not harmless.”); *cf.* NRCP 61 (“At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party’s substantial rights.”). Here, as discussed below, the hearing testimony and order indicates that Buyachek did meet the burden of demonstrating he was entitled to 12.5% commissions on payments CCI received for his outstanding sales from May 10, 2018, to October 22, 2018. Buyachek submitted a copy of the offer which indicated he was entitled to 12.5% commissions on all sales he negotiated payable whenever CCI got paid. He testified, and CCI admitted, that this was the only written agreement between the parties; no termination agreement existed. Buyachek further testified that he was unaware his commissions would cease upon termination or that they would be reduced by the 5% managing fee. Last, he testified that he had no knowledge that completing the sales cycle was a prerequisite to receiving commissions. We do not reweigh the hearing officer’s credibility determinations. *Elizondo*, 129 Nev. at 784, 312 P.3d at 482. Therefore,

assuming arguendo that the hearing officer misapplied the burden in the first instance, CCI has not demonstrated that such an error would have made a difference on appeal. Thus, we cannot conclude that the hearing officer abused her discretion in applying NAC 608.120.

Substantial evidence supports the hearing officer's Findings of Fact, Conclusions of Law, and Order

CCI asserts that substantial evidence did not support the hearing officer's decision to award Buyachek 12.5% commissions on revenues received from May 10, 2018, to October 22, 2018. The OLC counters that substantial evidence supports the hearing officer's order and that this court should therefore affirm.

As an initial matter, this court determines whether substantial evidence supports the ruling made below, *see Elizondo*, 129 Nev. at 784, 312 P.3d at 482, not whether substantial evidence could have supported an alternative ruling. Therefore, to the extent CCI's argument is that substantial evidence supported a ruling in its favor, we do not consider it. *See id.* To the extent CCI properly argues that substantial evidence did not support the ruling the hearing officer *made*, we consider CCI's three sub-arguments.

First, CCI claims the hearing officer disregarded evidence that Buyachek knew and agreed he would not receive commissions on revenues received after he was terminated and/or that any commissions would be reduced to 7.5%. CCI argues that Buyachek did not rebut evidence that CCI paid his successor 5% for managing his outstanding sales, and that he himself accrued 5% to manage his predecessor's outstanding contracts. Finally, CCI asserts the offer itself is "clear evidence" that managing an outstanding sale "had a specific monetary value" and that you do "not

complete a sale by simply obtaining a signed contract.”⁹ The OLC counters that nothing in the record indicates the parties agreed Buyachek would receive zero or reduced commissions for outstanding sales after his termination.

“We review an 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.” *Elizondo*, 129 Nev. at 784, 312 P.3d at 482. In this context, “substantial evidence’ means evidence which a reasonable mind might accept as adequate to support a conclusion.” NRS 233B.135(4).

Here, the parties presented the hearing officer with conflicting evidence regarding whether Buyachek was aware and agreed he would not receive commissions after his termination and/or that the 5% managing fee paid to his successor would be deducted from his 12.5%. Buyachek testified that he did not know how the 12.5% and 5% commissions were accounted for. Meaning, he did not know whether the 5% was deducted from his 12.5% or whether they were both paid separately (whether CCI paid 17.5% commissions on some sales). CCI testified that Buyachek had accrued 5% to

⁹CCI also argues substantial evidence did not support the following finding: “[if] an [] employee left employment[,] . . . the contract would be re-assigned to a new salesperson who would then receive a management fee of 5% . . . [t]his is not memorialized in writing.” (First and fourth alteration and omissions in original.) We disagree. Indeed, both parties testified that the employment offer was the only written agreement between the parties, and its express terms do not speak to employee turnover or the reassignment of sales. Regardless, as discussed below, the hearing officer had substantial evidence for her decision to award Buyachek his 12.5% commissions even without this finding. *Miller v. Burk*, 124 Nev. 579, 588-89 & n.26, 188 P.3d 1112, 1118-19 & n.26 (2008) (explaining that this court need not address issues that are unnecessary to resolve the case at bar).

manage his predecessor's sales and that it never paid commissions on payments received after an employee's termination. CCI testified that it never contemplated paying 17.5% commissions in total (12.5% to the terminated salesperson who negotiated the contract and 5% to the new employee who took over managing the outstanding sale). CCI testified that it "would think" Buyachek was aware of this.

After hearing testimony from both parties, the hearing officer found that "[CCI] did not know if [Buyachek] was aware of the redistribution of commissions after an employee's employment ended." Buyachek's testimony is evidence a reasonable mind might accept as adequate to support this finding. Again, the parties do not dispute that the offer of employment was the parties' only written agreement regarding Buyachek's compensation and no termination agreement existed. Therefore, it was essentially Buyachek's testimony against CCI's regarding whether he was aware he would receive no commissions or at least reduced commissions upon termination. The hearing officer found Buyachek's testimony more credible. *McClanahan v. Raley's, Inc.*, 117 Nev. 921, 925, 34 P.3d 573, 576 (2001) (stating that "[a]n administrative agency's decision based on a credibility determination is not open to appellate review" (alteration in original) (internal quotations omitted)). Therefore, substantial evidence supports the hearing officer's finding.

Second, CCI claims the hearing officer's findings should have mentioned the 14 sales cycle steps it alleges were a prerequisite to receiving the 12.5% commission. CCI argues that Buyachek acknowledged the steps were required at the hearing and the fact that he received no separate compensation for completing them indicated he did the steps to earn commission. Without substantial evidence, CCI asserts, the hearing officer

instead found that “the salesperson may or may not have to perform additional duties depending on the needs of the client.” The OLC counters that the sales cycle was not reduced to writing until six months after Buyachek’s termination and that, though he admitted to doing some of the activities listed, he did not have to complete them to receive his commission—similar to other work tasks he completed but was not compensated for.

Here, the parties again offered conflicting evidence at the hearing. Buyachek testified that the sales cycle was separate from his employment agreement, his commissions were not contingent upon the sales cycle, the work he did to get ads published “depend[ed] upon the client,” and “there was a time or two where I was unable—I was either sick or whatever and the magazine came out fine. Magazine was published.” Buyachek testified that he was not compensated for completing the 14 sales steps and that he did other uncompensated tasks not outlined in the sales cycle as well. Indeed, Buyachek testified that he had not seen the 14 steps until CCI memorialized them in a letter 6 months after his termination. CCI testified that although Buyachek had not seen the steps in writing prior to that point, he was aware of them and had performed them during his employment. And “if it wasn’t understood, I think that’s—he would have asked those questions early on because he was required to do those when he was trained by [his predecessor].”

Following this testimony, the hearing officer found that the client’s needs dictated whether and what additional tasks were required for an ad to be published. Again, Buyachek’s testimony is evidence that a reasonable mind might accept as adequate to support the hearing officer’s finding. The parties agree that the sales cycle was not reduced to writing before or during Buyachek’s employment, nor was it part of his written

employment agreement. Therefore, it was again Buyachek's word against CCI's regarding whether the 14 steps were in fact a prerequisite to receiving the 12.5% commission. And the hearing officer found Buyachek's testimony more credible and interpreted the contract accordingly. *McClanahan*, 117 Nev. at 925, 34 P.3d at 576. Therefore, substantial evidence supports the hearing officer's finding.

Third, CCI argues the hearing officer lacked substantial evidence to conclude that entering the sales contract was "the triggering event to be paid" a 12.5% commission. According to CCI, the 5% managing fee was an "express term" in the offer which indicated the triggering event was completing the sales cycle. Therefore, Buyachek was entitled to zero commissions once he was terminated, or at least a commission rate reduced by 5%.¹⁰ The OLC counters that substantial evidence supported the hearing officer's conclusion.¹¹

"Although the district court may decide pure legal questions without deference to an agency determination, an agency's conclusions of law which are closely related to the agency's view of the facts are entitled to

¹⁰As part of this argument, CCI asserts former employees are owed nothing because the offer letter says commissions will be paid via "paychecks" and "[o]ne does not receive a paycheck after leaving an employment." We do not accept this argument because it is contradicted by the record, which includes a separation agreement that describes severance payments to a former employee via "paycheck."

¹¹The OLC also argues that the employment offer unambiguously requires Buyachek to be paid his 12.5% commissions on all sales he negotiated regardless of his employment status. And even if the agreement is ambiguous, principles of contract interpretation require us to construe the offer against CCI as the drafter. *See Am. First. Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015). We need not consider this issue because we resolve each of the substantial evidence issues in the OLC's favor. *See Miller*, 124 Nev. at 588-89 & n.26, 188 P.3d at 1118-19 & n.26.

deference and should not be disturbed if they are supported by substantial evidence.” *State Indus. Ins. Sys. v. Khweiss*, 108 Nev. 123, 126, 825 P.2d 218, 220 (1992); *see also* NRS 233B.135(3). Here, the hearing officer concluded that “the original contract was the sale—the triggering event.” Buyachek and CCI’s hearing testimony together are evidence that a reasonable mind might accept as adequate to support this conclusion. Buyachek testified that most of the work (90-95%) on the bulk sales was done within the first month of obtaining the sale. CCI did not dispute this. Nor did it testify as to how many sales steps Buyachek allegedly had remaining on his outstanding sales. And as previously stated, the parties offered conflicting evidence regarding whether Buyachek knew his commissions would be zero or reduced when he was terminated. Based on this testimony, a reasonable mind could conclude that Buyachek only had to negotiate a sale (complete the first three sales cycle steps) to receive the full 12.5% commissions. As such, substantial evidence supports the hearing officer’s conclusion. Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

¹²Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Kathleen E. Delaney, District Judge
Persi Mishel, Settlement Judge
Garman Turner Gordon
John Buyachek, Jr.
Attorney General/Carson City
Eighth District Court Clerk