

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ABC RECYCLING INDUSTRIES, LLC,
Appellant,
vs.
STATE ENVIRONMENTAL
COMMISSION, A POLITICAL
SUBDIVISION OF THE STATE OF
NEVADA; AND NEVADA DIVISION OF
ENVIRONMENTAL PROTECTION, A
POLITICAL SUBDIVISION OF THE
STATE OF NEVADA,
Respondents.

No. 83027-COA

FILED

JUL 21 2022

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

ORDER OF AFFIRMANCE

ABC Recycling Industries, LLC, appeals from a district court order denying its petition for judicial review of the revocation of a reclamation permit issued by the Nevada Division of Environmental Protection (NDEP). Eighth Judicial District Court, Clark County; Bitu Yeager, Judge.

NDEP revoked ABC's reclamation permit because ABC failed to pay the annual permit fee of \$4,166 that was due by April 15, 2019.¹ Prior to the revocation, NDEP had sent multiple notices to ABC, which explained the specific Nevada statute and regulation ABC was violating by failing to pay the annual permit fee, and had provided ABC with several extensions to make the overdue payment and come into compliance. ABC failed to comply, and NDEP eventually held a formal hearing on the matter. Following the hearing, NDEP gave ABC one last opportunity to pay its

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

annual permit fee. NDEP advised ABC that if it failed to make payment as required by Nevada law, its permit would be revoked and it would forfeit the cash surety held by NDEP. ABC failed to submit payment by the final deadline granted by NDEP, and NDEP revoked ABC's reclamation permit. NDEP notified ABC that its cash surety of \$205,791 was forfeited.²

Thereafter, ABC appealed to the Nevada State Environmental Commission (the Commission) and requested a hearing regarding NDEP's decision to revoke ABC's permit. NDEP subsequently moved for summary judgment, arguing that there was no genuine issue of material fact and NDEP's revocation decision was authorized by Nevada statutes and regulations. In its opposition, ABC argued that "[t]he State's reason for revoking ABC's permit [was] simply a pretext to cover for its arbitrary and capricious behavior in unreasonably withholding approval of ABC's plan of reclamation."³ ABC also requested additional time under NRCP 56(d)⁴ to conduct discovery and gather evidence to support its position.

²On appeal, ABC does not explicitly challenge the forfeiture of the surety. However, we note that the forfeiture inherently flows from ABC being in violation of Nevada's requirement to pay the annual permit fee, as discussed below.

³To request the appeal hearing, ABC submitted the required Form #3, which requires the appealing party to check a corresponding box indicating the grounds on which the decision is being appealed. We note that ABC selected "Final decision was affected by other error of law" but did not select the option "Final decision was arbitrary or capricious or characterized by abuse of discretion," which appears to be how ABC characterized its main arguments against NDEP in its opposition to NDEP's motion for summary judgment.

⁴NRCP 56(d) provides that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: . . . (2) allow time to obtain affidavits or declarations or to take discovery." NRCP 56(d)(2). Prior to the 2019

The Commission conducted a hearing on NDEP's motion for summary judgment. Robert Ford, ABC's managing member, testified about ABC's prior interactions with NDEP and alleged that various representatives had given him inconsistent directives as to whether he had to pay the annual permit fee. As to the argument that NDEP was withholding approval of ABC's plan of reclamation, ABC's counsel admitted that "maybe the reclamation plan had not actually been submitted."⁵ Ultimately, the three-person Commission panel voted unanimously to grant NDEP's motion for summary judgment.⁶ The Commission's subsequent order noted that it was uncontested that ABC failed to pay its annual permit fee and determined that NDEP acted within its authority under NRS 519A.150(9) and NAC 519A.390 when it revoked ABC's permit and ordered

amendments to the NRCP, NRCP 56(d) was NRCP 56(f), but for our purposes we use the subsection's current designation. See *Sciarratta v. Foremost Ins. Co.*, 137 Nev., Adv. Op. 32, 491 P.3d 7, 12 n.5 (2021) (explaining that the amendment was stylistic).

⁵Ford offered contradictory testimony before the Commission, arguing that reclamation plans had been submitted. This was contradicted by Todd Process, the Reclamation Branch Supervisor, however, who testified in a declaration that his review of the database revealed that no revised reclamation plan had been submitted by ABC for NDEP's review. Regardless, we note that the determination letter revoking the permit solely focuses NDEP's decision on ABC's failure to pay the annual permit fee and makes no mention of the reclamation plan approval process.

⁶Our review of the record reveals that the panel did seem at times sympathetic to ABC's arguments and concerned about the alleged dealings between NDEP and ABC. However, the panel correctly noted that no Nevada authority permits ABC to simply not pay the annual permit fee pending consideration or resolution of its grievances.

its cash surety forfeited.⁷ Thereafter, ABC timely petitioned for judicial review of the Commission's decision. The district court denied ABC's petition because there was substantial evidence in the record to support the Commission's findings and the revocation of the permit was not based on an error of law. ABC appeals that decision.

On appeal, ABC argues that (1) the Commission had the authority to set aside NDEP's decision because of NDEP's allegedly arbitrary and capricious behavior—primarily that NDEP's officials gave ABC conflicting directives and that NDEP acted in bad faith, revoking the permit on pretextual grounds; and (2) the Commission should have granted ABC additional time under NRCP 56(d) to conduct discovery to identify the material facts that would demonstrate NDEP's malice, ill will, or bad intent. In turn, the Commission and NDEP argue that (1) summary judgment was proper because ABC failed to pay the statutorily required annual permit fee; (2) NDEP had legal authority to revoke ABC's permit; and (3) ABC did not require additional discovery because ABC conceded it never paid the required permit fee. We agree with respondents.

As a preliminary matter, “[w]e review an administrative agency’s decision in the same manner as the district court.” *Clark County v. Bean*, 136 Nev. 579, 581, 482 P.3d 1207, 1209 (2020), *as amended*. Factual findings are reviewed “for clear error or an arbitrary abuse of discretion, only overturning if they are not supported by substantial evidence.” *Id.* Substantial evidence exists when “a reasonable person could find the evidence adequate to support the agency’s conclusion.” *Id.* (quoting *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013)). However,

⁷As discussed below, NRS 519A.150(9) grants NDEP the power to revoke permits and NAC 519A.390 is related to the forfeiture of a surety.

“[q]uestions of law, including the agency’s interpretation of statutes, are reviewed de novo without deference to the agency’s decision.” *Id.*; *see also* NRS 233B.135 (providing standards and procedures for the judicial review of a final decision of an agency). The grant of summary judgment is reviewed de novo. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (reviewing a district court’s decision to grant summary judgment de novo). Finally, in our review of an agency’s decision, this court does “not give any deference to the district court decision.” *City of North Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011).

Each year, an operator⁸ is required to pay to NDEP an annual permit fee and submit a status report. NRS 519A.260(1) (“Each operator shall, on or before April 15 of each year, submit to the Administrator a report . . . and shall pay to the Division a fee”); *see also* NAC 519A.235 (“[O]n or before April 15 of each year thereafter, an operator of an exploration project or a mining operation shall submit to the Division . . . the applicable fees required by this section.”).

A violation of NRS 519A.260 is grounds for NDEP to suspend or revoke a permit. NRS 519A.150(9) (granting NDEP the authority to “[s]uspend or revoke a permit upon a noticed hearing and a finding by the Division that the holder of the permit has violated any provision of NRS 519A.010 to 519A.280, inclusive”). Further, in reading NAC 519A.390(1)(b)⁹

⁸As defined under NAC 519A.065, an operator is “any person who owns, controls or manages an exploration projection or a mining operation.”

⁹“A surety filed with the Division . . . is subject to forfeiture if: . . . (b) the permit is suspended or revoked pursuant to NAC 519A.220.” NAC 519A.390(1).

in conjunction with NAC 519A.220,¹⁰ a violation of either NRS 519A.260 or NAC 519A.235, both discussed above, can result in a filed surety being subjected to forfeiture.

First, we perceive no error in the Commission's interpretation of the relevant statutes and regulations regarding ABC's legally mandated obligation to pay the required annual permit fee of \$4,166 by April 15 and the authority of NDEP to revoke ABC's permit for failure to pay its annual permit fee as statutorily required. Second, substantial evidence in the record clearly demonstrates that ABC never paid the required annual permit fee, despite being given multiple notices of noncompliance and opportunities to comply by paying the overdue fee.

Finally, as it is undisputed that ABC failed to pay the annual permit fee, we conclude that summary judgment was appropriate because there was no genuine dispute as to any material facts. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029 ("Summary judgment is appropriate and shall be rendered forthwith when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." (internal quotation marks omitted) (alteration in original)). Further, additional time to conduct discovery under NRCP 56(d) was unnecessary, as no amount of discovery would change the dispositive fact that ABC failed to pay the annual permit fee as mandated by NRS 519A.260(1) and NAC 519A.235. *See Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 118, 110 P.3d 59, 62 (2005) ("[A] motion for a continuance under [NRCP 56(d)] is

¹⁰NAC 519A.220 addresses the effective date when NDEP "suspends or revokes a permit for noncompliance with the provisions of: 1. NAC 519A.010 to 519A.415, inclusive; [or] 2. Chapter 519A of NRS."

appropriate only when the movant expresses how further discovery will lead to the creation of a genuine issue of material fact.”).¹¹ Accordingly, we

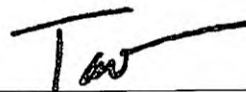
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla

TAO, J., concurring:

I concur in the judgment.


_____, J.
Tao

cc: Hon. Bitá Yeager, District Judge
Persi J. Mishel, Settlement Judge
Law Offices of Byron Thomas
Attorney General/Carson City
Eighth District Court Clerk

¹¹Insofar as the parties have raised 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.