

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTCO DISTRIBUTION, LLC,
Appellant,
vs.
THE STATE OF NEVADA
DEPARTMENT OF TAXATION; AND
NEVADA TAX COMMISSION,
Respondents.

No. 85070

FILED

JUN 09 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying judicial review of an administrative ruling from the Nevada Department of Taxation. Eighth Judicial District Court, Clark County; Erika D. Ballou, Judge.

Appellant Westco Distribution, LLC, holds a Nevada “other tobacco products” (OTP) wholesale dealer license for its Las Vegas location. In June 2021, an investigator for respondent Nevada Department of Taxation received a tip from a U.S. Treasury Department special agent that nonparty TForce Logistics Company was in possession of 17 pallets of OTP. After determining that TForce did not hold a license to possess or store any type of tobacco products, the investigator went to the warehouse and confirmed TForce’s possession of 17 pallets of OTP. A warehouse employee told the investigator that the pallets belonged to Westco and that TForce provided “cross docking” services in which it would temporarily store pallets for Westco. The warehouse employee also gave documents to the investigator pertaining to previous shipments of Westco’s OTP delivered to TForce’s warehouse in 2020 and 2021. The investigator concluded that TForce was acting as an unlicensed OTP logistics company in violation of Nevada law and seized the 17 pallets, worth approximately \$272,000.

Westco filed a petition to claim the seized property arguing that TForce's temporary storage of the OTP did not equate to TForce acting as an unlicensed logistics company because it did not take any other actions regarding the OTP. After a hearing, the administrative law judge (ALJ) entered an order in favor of the Department, finding that TForce acted as an unlicensed logistics company and that the Department therefore properly seized the OTP as contraband. The ALJ also rejected as unsupported Westco's argument that the seizure constituted an unconstitutional excessive fine. Westco appealed to respondent Nevada Tax Commission, who affirmed the ALJ's order and Westco then filed the underlying petition for judicial review. The district court upheld the ALJ's decision and this appeal followed.

NRS 233B.135 provides that an agency decision may be overturned on a petition for judicial review if a party's "substantial rights" have been prejudiced because the decision exceeds the agency's statutory authority; is "[c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record; or" is "[a]rbitrary or capricious or characterized by abuse of discretion." NRS 233B.135(3)(b), (e), (f). When reviewing an administrative agency decision, this court sits in the same seat as the district court, reviewing de novo the agency's legal conclusions. *Harrah's Operating Co. v. State, Dep't of Tax.*, 130 Nev. 129, 132, 321 P.3d 850, 852 (2014). We defer to an agency's findings of fact so long as they are supported by substantial evidence. *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013); *see also* NRS 233B.135(3). Substantial evidence is that "which a reasonable mind might accept as adequate to support a conclusion." NRS 233B.135(4).

Westco argues that the district court should have granted its petition because the ALJ erred in concluding that TForce was acting as an

unlicensed logistics company such that the OTP in its possession was subject to seizure by the Department. It also asserts that the district court should have granted its petition because the Department's eventual auction or destruction of the OTP constitutes an excessive fine or penalty in violation of the Eighth Amendment. We disagree and discuss each point in turn.

Whether the OTP was subject to seizure

Westco argues that TForce did not violate NRS 370.547(1)(b) because it was not acting as a logistics company as defined by that statute. It reads NRS 370.547(1)(b) as only being violated when an entity temporarily stores, fulfills orders, *and* coordinates the transport or delivery of OTP. And because TForce only temporarily stored, but did not fulfill or coordinate orders of OTP, Westco argues that it did not meet the statutory definition of a logistics company. Based on this, it argues that the OTP was not contraband and not subject to seizure by the Department. The Department contends that the ALJ and district court appropriately interpreted the statute such that we should affirm.

We generally review statutory construction issues *de novo*. *Taylor*, 129 Nev. at 930, 314 P.3d at 951. We also “interpret a statute or regulation by its plain meaning unless the statute or regulation is ambiguous or the plain meaning would provide an absurd result.” *Home Warranty Adm’r of Nev., Inc. v. State, Dep’t of Bus. & Indus.*, 137 Nev. 43, 45, 481 P.3d 1242, 1246 (2021) (internal citation and quotation marks omitted).

NRS Chapter 370 governs tobacco licenses. It defines a “[l]ogistics company” as a person who is

[a]uthorized by a manufacturer, a wholesale dealer of cigarettes or a wholesale dealer of other tobacco products to temporarily store, fulfill orders for and

coordinate the transport or delivery of cigarettes or other tobacco products from a facility in this State on behalf of and at the direction of the manufacturer, wholesale dealer of cigarettes or wholesale dealer of other tobacco products.

NRS 370.547(1)(b). A person or entity must be licensed to act as a logistics company under NRS Chapter 370. NRS 370.567(3) (“A person shall not engage in business as a logistics company unless that person first secures a license to engage in that activity from the Department.”). Indeed, a licensed wholesale dealer of OTP, such as Westco, may only “[t]emporarily store and fulfill orders for other tobacco products” through licensed entities. NRS 370.585(3)(c) (including “a licensed logistics company” as one of the enumerated entities).

If the Department locates any “contraband tobacco products” within Nevada that are “being used in violation of any provision of [NRS Chapter 370],” it must seize those products. NRS 370.415(1). NRS 370.025(5)(b) defines “[c]ontraband tobacco products” as including OTP that is “[i]n any way held in the possession or constructive possession of any person not authorized under [NRS Chapter 370] to possess or constructively possess the [OTP].”

Having considered the foregoing, we agree with the district court and the ALJ. While NRS 370.547(1)(b) provides that a licensed logistics company is one authorized “to temporarily store, fulfill orders for and coordinate the transport or delivery of” OTP, it does not create a conjunctive test regarding violations under NRS Chapter 370. Rather, it gives permission to logistics companies to engage in any of the three enumerated activities and be covered by the statute. Here, TForce engaged in one of the activities—temporarily storing the OTP—such that its actions fall within the statute. However, because TForce is not a logistics company,

as it lacks the requisite license required by NRS 370.567(3), any OTP in its possession was contraband, *see* NRS 370.025(5)(b), and subject to seizure pursuant to NRS 370.415(1). Moreover, as stated by the ALJ, Westco's interpretation would lead to an absurd result because a logistics company could avoid the licensing requirement by merely performing only one, or even two, of the three enumerated actions: "The narrow reading of the statute proposed by Westco would lead to a licensing loophole: a logistics company need only limit their business to one of the specified activities in order to avoid licensure." We therefore decline to reverse based on this argument.

Whether the destruction of the OTP violates the Eighth Amendment

Westco challenges the auction or destruction of the OTP as an excessive fine in violation of the Eighth Amendment of the United States Constitution, an issue we review *de novo*. *See Valdez-Jimenez v. Eighth Judicial Dist. Court*, 136 Nev. 155, 161, 460 P.3d 976, 984 (2020) (holding that "the meaning or applicability of constitutional provisions . . . present questions of law [that] we review *de novo*"). NRS 370.415(4)(b) gives the Department the discretion, after seizing contraband tobacco products, to auction or destroy the OTP:

[After seizing contraband tobacco products] the Department shall:

(1) Sell the other tobacco products to the highest bidder among the licensed wholesale dealers in this State after due notice to all licensed Nevada wholesale dealers has been given by mail to the addresses contained in the Department's records; or

(2) If there is no bidder, or in the opinion of the Department the quantity of the other tobacco products is insufficient, or for any other reason such disposition would be impractical, destroy or dispose

of the other tobacco products as the Department may see fit.

The Eighth Amendment states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII; *see also Timbs v. Indiana*, ___ U.S. ___, ___, 139 S. Ct. 682, 688 (2019) (concluding that the Excessive Fines Clause applies to the states through the Fourteenth Amendment). “The Excessive Fines Clause . . . ‘limits the government’s power to extract payments, whether in cash or in kind, as punishment for some offense.’” *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (emphasis and internal quotation marks omitted). In applying this clause, the Supreme Court and federal lower courts consider four factors: “(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused.” *United States v. \$100,348.00 in U.S. Currency*, 354 F.3d 1110, 1122 (9th Cir. 2004) (citing *Bajakajian*, 524 U.S. at 337-40). A fine is unconstitutional “[i]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant’s offense.” *Bajakajian*, 524 U.S. at 337.

Considering the four factors, we do not find the auction or destruction of the OTP, valued at approximately \$272,000, to be an excessive fine. The single offense charged was not minor in value or in the amount of product involved; there was evidence of multiple other instances of similar illegal activities; and the only other penalty available under the statutory scheme is a fine but that is in addition to, rather than instead of,

the OTP's auction or destruction.¹ Even if the harm caused was minimal, the other factors demonstrate that the penalty imposed did not violate the Eighth Amendment. Indeed, the penalty—Westco's loss of possession of the OTP at issue—is commensurate with its violation—illegally storing the OTP. The penalty is therefore not "grossly disproportional to the gravity of [Westco's] offense." *Id.*

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.

Stiglich, C.J.
Stiglich

Cadish, J.
Cadish

Pickering, J.
Pickering

Herndon, J.
Herndon

Lee, J.
Lee

Parraguirre, J.
Parraguirre

Bell, J.
Bell

cc: Hon. Erika D. Ballou, District Judge
Paul M. Haire, Settlement Judge
Chesnoff & Schonfeld
Attorney General/Carson City
Attorney General/Reno
Eighth District Court Clerk

¹NRS 370.523 provides for monetary fines for violations of NRS Chapter 370, but only "[i]n addition to any other penalty authorized by law." NRS 370.523 (emphasis added).