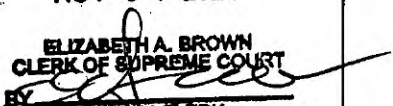


IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL BURKE,
Appellant,
vs.
NEVADA COMMISSION ON PEACE
OFFICERS' STANDARDS AND
TRAINING; AND MICHAEL D.
SHERLOCK, EXECUTIVE DIRECTOR,
Respondents.

No. 86435

FILED
NOV 04 2024
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for a writ of mandamus. First Judicial District Court, Carson City; James E. Wilson, Judge.

Appellant Michael Burke worked for the Josephine County Sheriff's Office in Oregon from 1998 to 2007. He was terminated for unreasonable use of force during an incident that occurred in May 2007. During that incident, Burke placed a cooperative vehicle passenger under arrest using an arm bar variation. Burke then grabbed the passenger's thumb, bent it, and threatened to break his finger if he did not tell Burke the identity of the driver of the vehicle. Burke disabled the in-car video and, during transport, abruptly stopped the vehicle twice, each time pulling the passenger's shirt over his head and forcing the passenger's head between his knees, injuring his ear. During the second stop, Burke bounced up and down on the passenger while the passenger's head was in between his legs.

As a result of Burke's termination for cause, the State of Oregon revoked Burke's police officer certifications.

Two additional incident reports were filed against Burke for excessive force while he was at the Josephine County Sheriff's Office prior to his termination. The first complaint arose from an arrest where Burke allegedly grabbed a 120-pound female suspect by the hair on the back of her head and violently slammed her face into the trunk of his patrol vehicle. She suffered a facial laceration, bruising and swelling around the eyes, and her hair was torn from her head. A witness corroborated the allegation, and a check of Burke's patrol vehicle revealed a dent on the trunk lid. This complaint resulted in a criminal investigation that was ultimately closed without the filing of criminal charges. The second incident occurred during a call where the suspect had been calm and compliant, but Burke escalated the situation by shoving the suspect and arresting him in a scuffle.

In January 2022 the Nye County Sheriff's Office (NCSO) hired Burke as a deputy sheriff. After conducting a background investigation NCSO determined that, in its opinion, Burke met the requirements to be appointed as a peace officer in Nevada following the successful completion of a police training academy. Later that month, respondent Michael Sherlock, the Executive Director of respondent Nevada Commission on Peace Officers' Standards and Training (POST), emailed Nye County Sheriff Sharon Wehrly notifying her of an issue with Burke's application. POST informed NCSO that Burke was not eligible for certification in Nevada because of the revocation of his certification in Oregon for excessive force. NCSO responded asserting that POST was required to certify Burke because, while he was ineligible for certification under the lateral transfer

provision of POST's regulations, he was eligible following the successful completion of a training academy.

NCSO petitioned POST in May 2022 to reconsider its position, and the commissioners voted unanimously to deny certification based on the Oregon revocation because of the documented use of excessive force. Following the denial, NCSO requested to administer the certification examination to its academy students, including Burke. POST informed NCSO that Burke was not permitted to be on the roster and that it would not allow Burke to sit for the examination. Despite this, NCSO allowed Burke to sit for the examination and Burke purportedly passed.

In October 2022, Burke petitioned the First Judicial District Court for a writ of mandamus compelling POST to issue a Category I basic peace officer certification to him. The district court denied the petition, and Burke now appeals.

POST's waiver argument is unpersuasive

POST contends that Burke's appeal should be denied because the district court based its denial in part on its finding that Burke did not validly take the certification examination and Burke failed to appeal this issue. We find this argument unpersuasive as Burke clearly argued that he met the requirements of NAC 289.200 because he took and passed the examination. Additionally, NAC 289.200 does not dictate whether or when an individual must "validly" take the certification examination. NAC 289.200(1)(b), (2)(e), and (3)(b) dictate only that the applicant must pass the examination with a score of at least 70 percent, and Burke purports that he did. Further, the record does not demonstrate that Burke had any knowledge of the communications between POST and NCSO regarding his eligibility to sit for the exam. Thus, we turn to the merits of Burke's appeal.

Burke does not meet the minimum standards of appointment to become a peace officer in Nevada

Burke asserts that he met the minimum standards for appointment under Nevada Administrative Code Chapter 289 and that his decertification in Oregon is not grounds for denial of a certificate in Nevada. He further argues that the district court abused its discretion in finding that POST based its denial of certification on his history of violence.

The district court's decision to grant or deny a writ petition is reviewed for an abuse of discretion. *Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). And "mandamus is available only where 'the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will.'" *Walker v. Second Jud. Dist. Ct.*, 136 Nev. 678, 680-81, 476 P.3d 1194, 1197 (2020) (quoting *State v. Eighth Jud. Dist. Ct. (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011)).

Burke's argument rests on the premise that he met the minimum standards for appointment under NAC 289.110 and, because he met those standards, POST was legally required to grant him certification. Thus, he concludes that the district court erred in denying mandamus. This argument is not supported by the record.

NAC 289.110(4)(c) states that "[a] person may not be appointed to perform the duties of a peace officer if he or she has . . . [a] documented history of physical violence." Burke was terminated for cause and had his Oregon certification permanently revoked as a result of the incident where

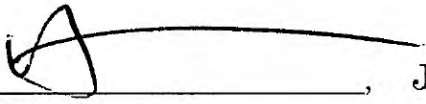
he was found to have used excessive force (i.e., physical violence). While POST indicated its decision was based on the revocation of Burke's Oregon certification, the revocation itself occurred because of acts of physical violence committed by Burke, and the commission clearly found that the decertification met the physical violence disqualifying factor. Director Sherlock connected Burke's conduct back to the minimum standards, asserting that "a documented and sustained case of excessive force clearly violates the minimum standard of prohibiting the hiring of someone with a documented history of physical violence. That's exactly what the Oregon revocation is." Another commissioner expressed that Burke "did not have a background worthy of even getting to the point of hiring" and that he, "does not meet the minimum requirements[.]"


POST's decision was based on its finding that Burke's documented history of physical violence disqualified him from appointment as a peace officer under NAC 289.110(4)(c). Thus, the district court did not abuse its discretion in determining that extraordinary relief was not warranted. Because no candidate is entitled to a peace officer certification if they do not meet the minimum standards of appointment, we decline to consider Burke's arguments related to the interpretation of NAC 289.200. *See* NAC 289.200(1).

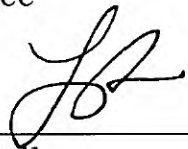
We conclude that the district court did not abuse its discretion in denying Burke's petition because POST did not override or misapply the law in determining that Burke does not meet the minimum standards of

appointment under NAC 289.110(4)(c). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Herndon


_____, J.
Lee


_____, J.
Bell

cc: Hon. James E. Wilson, District Judge
Madelyn Shipman, Settlement Judge
Law Office of Daniel Marks
Attorney General/Carson City
Jesselyn De Luna
Carson City Clerk