

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRUCE D. SMITH,
Appellant,
vs.
STATE OF NEVADA EX REL. ITS
DEPARTMENT OF
TRANSPORTATION,
Respondent.

No. 41534

FILED

MAY 17 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying judicial review in a government employment termination case. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Untimely decision by hearing officer

Appellant Bruce Smith, who was terminated from his state employment for acts of violence against his co-workers, argues that the termination decision should be reversed under NAC 284.818,¹ because the hearing officer failed to render his decision within thirty days. Smith contends that the administrative hearing was held on June 19, 2002, and that the hearing officer's decision was due on or before July 19, 2002. The decision was not submitted until August 8, 2002, approximately fourteen working days past the deadline. Smith argues that he was prejudiced by the hearing officer's failure to timely submit his decision.

¹NAC 284.818 Decision by hearing officer.

At the conclusion of the hearing, the hearing officer shall take the case under submission and shall notify the parties in writing within 30 days from the date of the hearing of the hearing officer's findings and recommendations.

The State notes that NAC 284.818 does not provide a remedy for late decisions. Additionally, the State argues that statutory time periods are generally not mandatory unless the statute expressly requires an official to act within a particular time period and specifies the consequences for failure to comply. According to the State, the fourteen-day delay should not be a reason to reverse the decision since it would unfairly penalize the Nevada Department of Transportation (NDOT) for the timing of the hearing officer's release of the decision.

This court has held that the use of the term "shall" in the statutory language is meant to mandate rather than give permission.² NAC 284.818 also uses the term "shall" in its language. Thus, the hearing officer in this case was mandated to respond within the thirty-day time frame. However, in Nixon v. State Department of Human Resources,³ the Alabama Supreme Court held that a hearing officer's failure to render a decision within the thirty-day time frame was not fatal, unless the appellant could demonstrate that his substantial rights were prejudiced by the delay. We conclude that Smith has not provided any evidence that his substantial rights were prejudiced by the fourteen-day delay.

²State of Nevada v. American Bankers Ins., 106 Nev. 880, 882, 802 P.2d 1276, 1278 (1990); State, Comm'n on Ethics v. JMA/Lucchesi, 110 Nev. 1, 9-10, 866 P.2d 297, 302 (1994).

³729 So. 2d 277, 279-80 (Ala. 1998).

The Smith decision consisted of forty pages of employment history that included promotions, incident reports, warnings and progressive disciplinary actions. The decision documented the facts of the “acts of violence” incidents, testimony of the eyewitness, the justice court’s final decision and the hearing officer’s conclusions of law. The fourteen-day delay was understandable given the thoroughness of the decision.

We reject Smith’s argument that he was prejudiced and that his rights were violated by the untimely release of the decision. Smith has not demonstrated how, if at all, the delay prejudiced him, or violated his rights.

Violation of due process rights

In Cleveland Board Of Education v. Loudermill,⁴ the Supreme Court of the United States declined to find a violation of a terminated teacher’s due process rights merely because the proceeding was prolonged. In Loudermill, the Cleveland Civil Service Commission did not enter its written decision until six and one-half months after the terminated employee’s hearing.⁵

Smith argues that his due process rights were violated by the untimely release of the hearing officer’s decision. However, Smith does not articulate how he was prejudiced or what damages if any, he suffered.

⁴470 U.S. 532, 546-47 (1985).

⁵Id. at 546 n.11.

We conclude that Smith has not demonstrated how the failure to timely submit the report affected his due process rights. The fundamental requisite of due process of law is to receive notice and the opportunity to be heard.⁶ Review of the transcripts indicates that Smith participated in both the criminal proceeding and the administrative hearing. We note that Smith had an opportunity to testify on his own behalf and to cross-examine the witnesses. Smith has not complained that either opportunity was insufficient. Smith has failed to show how the delay substantially prejudiced or impacted his rights; thus we conclude that this argument is without merit.

Consideration of criminal case during administrative hearing

Smith argues that the hearing officer improperly considered the findings of the justice court in making his decision, citing a quote from the justice of the peace in the hearing officer's decision. Smith contends that he only stipulated to the admission of the trial transcript at the hearing with the understanding that the court's findings would not be considered. Finally, Smith argues that if the trial court's decision was improperly considered by the hearing officer, then fairness dictates that the hearing officer was obligated to adopt the court's finding that he acted in self-defense.

⁶Anastassatos v. Anatassatos, 112 Nev. 317, 319, 913 P.2d 652, 653 (1996).

The State contends the hearing officer quoted a statement by the trial judge simply to make the point that the hearing officer agreed with an opinion offered by the trial judge. The State argues that the hearing officer heard testimony from many witnesses and reached his own decision as to the events that took place prior to Smith's termination.

This court's role in reviewing actions of an administrative board is identical to that of the district court.⁷ That review is limited to the record below, and to whether the board's decision is supported by substantial evidence.⁸

NAC 284.798 mandates that "[t]he hearing officer shall make no assumptions of innocence or guilt but shall be guided in his decision by the weight of the evidence as it appears to him at the hearing."


Our review of the record corroborates the State's contention that the hearing officer did not use the findings of the trial court to make his decision; rather, the hearing officer simply stated that he agreed with a comment by the trial court judge as to the credibility of Smith's own testimony. There was substantial evidence in the record to support the hearing officer's finding that Smith was not acting in self-defense during the confrontations at work, and that Smith's conduct violated work rules.

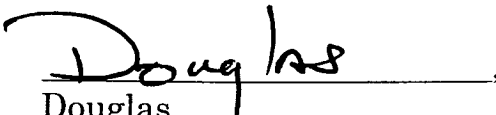
⁷State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 607, 729 P.2d 497, 498 (1986).

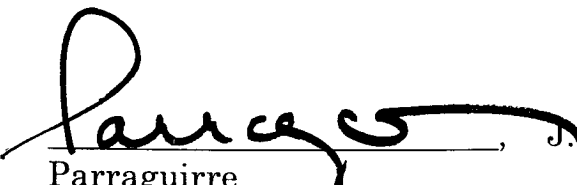
⁸Tighe v. Las Vegas Metro. Police Dep't, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994).

Further, substantial evidence supports the hearing officer's determination that termination was appropriate, given the severity of Smith's conduct and the employer's prior efforts at counseling and progressive discipline. We find Smith's contention that the decision of the hearing officer should have mirrored the decision of the justice court without merit. We conclude that the hearing officer properly considered the evidence before him in making his decision. As we are unpersuaded by Smith's assertions of error, we

ORDER the judgment of the district court AFFIRMED.

 J.
Maupin

 J.
Douglas

 J.
Parraguirre

cc: Hon. Steven R. Kosach, District Judge
Jeffrey A. Dickerson
Attorney General Brian Sandoval/Carson City
Attorney General Brian Sandoval/Transportation Division
Washoe District Court Clerk