

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,  
DEPARTMENT OF HUMAN  
RESOURCES,  
Appellant,  
vs.  
IRIS GROSS,  
Respondent.

No. 41654

FILED

MAR 03 2005

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

ORDER OF REVERSAL AND REMAND

This is an appeal from an order denying a petition for judicial review of an administrative hearing officer's reversal and modification of employer-imposed discipline. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

This case arises from the decision of the Department of Human Resources, Welfare Division ("Division"), to terminate respondent Iris Gross based upon a series of workplace incidents. An administrative hearing officer overturned the termination and determined that Gross's conduct only warranted a five-day suspension. The district court denied the Division's petition for judicial review, and the Division has appealed from that order.

We reverse and remand this matter for the district court to order a new administrative hearing before another hearing officer.

FACTUAL AND PROCEDURAL HISTORY

Gross's tenure with the Division was marked by numerous instances of interpersonal conflicts with coworkers, supervisors, and clients. On several occasions, the Division attempted to rectify the situation by meeting with Gross to discuss her concerns and how she could improve her interpersonal skills, and twice allowed her a transfer of

positions. Between July 1997 and May 2001, the Division resorted to disciplinary measures against Gross by issuing her three formal letters of instruction, two written reprimands, a one-day suspension, and a three-day suspension, all based on uncooperative and discourteous behavior.

In February 2002 the Division sought termination of Gross based upon the following specified charges:

- 1) On October 31, 2001, Gross interrupted a staff meeting and, after being told to wait outside, continued interrupting the meeting;
- 2) On November 28, 2001, Gross continually interrupted a conversation between other coworkers, B.J. Lester and Tracy Heberling;
- 3) On December 10, 2001, Gross improperly listened to and repeatedly interrupted a conversation between coworker Michael Alper and a Division of Motor Vehicles representative;
- 4) On December 12, 2001, Gross acted uncivilly towards a community service worker, Ann Gallardo;
- 5) On December 12, 2001, while Lester reported the Gallardo incident to Louise Bush, Gross's supervisor, Gross "barged" into Bush's office and began talking loudly. Further, when Lester got up to leave, Gross moved towards Lester in an intimidating manner;
- 6) On January 28, 2002, in violation of Division policy, Gross approached Virginia Sawyer, an African American social worker, to ask if Sawyer could see an African American client who had stated that she did not like Caucasians.
- 7) On February 12, 2002, Gross interrupted another conversation between coworkers;

8) On February 20, 2002, Gross wrongfully became involved in a heated verbal altercation with a client regarding issuance of a bus pass.

Gross appealed the termination, and a hearing officer held a four-day hearing. In his decision, the hearing officer determined that the termination was excessive, and instead issued a two-day suspension for the incident with Sawyer and a three-day suspension for the bus pass incident. As noted, the district court denied the Division's petition for judicial review of the hearing officer's ruling.

The Division appeals, asserting that (1) the hearing officer misinterpreted and failed to apply the progressive discipline provisions of NRS 284.383 and associated regulations, (2) the hearing officer's findings of fact and conclusions of law contradicted the record and lacked the support of substantial evidence, (3) the hearing officer improperly relied on documents not offered into evidence without taking official notice of them, and (4) that the hearing officer should have afforded the Division an opportunity to object to the unnoticed document.

### DISCUSSION<sup>1</sup>

#### Standard for reviewing administrative decisions

When considering an appeal from an agency's termination of an employee, the hearing officer need not defer to the appointing

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<sup>1</sup>Gross argues that this court should disregard the second and third issues argued by the Division on appeal because the Division did not include them on the docketing statement in alleged violation of NRAP 14(c). Because we find no deficiency in the statement of issues in the docketing statement or any prejudice to Gross's position, we will consider the other two issues on appeal.

authority's decision.<sup>2</sup> "A hearing officer's task is to determine whether there is evidence showing that a dismissal would serve the good of the public service."<sup>3</sup>

When reviewing an administrative decision, this court's review is limited to the agency record, and this court must "determine whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion."<sup>4</sup> Additionally, this court may not substitute its judgment for that of the administrative tribunal on the weight of evidence on any question of fact.<sup>5</sup> "Nonetheless, an administrative decision may be set aside in whole or in part, if the final decision is '[c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record,'"<sup>6</sup> or the decision is arbitrary or capricious or constitutes an abuse of discretion.<sup>7</sup> Finally, this court has

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<sup>2</sup>Knapp v. State, Dep't. of Prisons, 111 Nev. 420, 424, 892 P.2d 575, 577 (1995).

<sup>3</sup>Id.

<sup>4</sup>Secretary of State v. Tretiak, 117 Nev. 299, 305, 22 P.3d. 1134, 1138 (2001) (quoting Clements v. Airport Authority, 111 Nev. 717, 721, 896 P.2d 458, 460 (1995)).

<sup>5</sup>NRS 233B.135(3).

<sup>6</sup>Tretiak, 117 Nev. at 305, 22 P.2d at 1138 (quoting NRS 233B.135 (3)(e)) (emphasis in original).

<sup>7</sup>NRS 233B.135(3)(f).

defined substantial evidence as “that which ‘a reasonable mind might accept as adequate to support a conclusion.’”<sup>8</sup>

Progressive discipline

NRS 284.390(1) states that a hearing officer is to assess the reasonableness of a dismissal, demotion, or a suspension. We determine that, in making such an assessment, the hearing officer must apply relevant progressive discipline regulations for state employees promulgated under NRS 284.383(1).

Under NAC 284.650, “[a]ppropriate disciplinary or corrective action may be taken for . . . (4) Discourteous treatment of the public or fellow employees while on duty; . . . (6) Insubordination or willful disobedience.”

The administrative code also sets forth a system of increasingly severe, i.e., progressive, discipline. First, under NAC 284.638(1), if an employee’s performance is below standard or comes under one of the causes for disciplinary action under NAC 284.650, the employee’s supervisor shall notify the employee “promptly and specifically of the deficiencies.” Then, if appropriate, supervisors may give the employee time for improvement before initiating disciplinary action.<sup>9</sup> Second, if an oral warning does not rectify the problem, or if the incident is serious, supervisors must send the employee a written reprimand.<sup>10</sup>

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<sup>8</sup>State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).

<sup>9</sup>NAC 284.638(2).

<sup>10</sup>See NAC 284.638(3).

Third, if a written reprimand is ineffective, or the incident is sufficiently serious, under NAC 284.642(1), an employer may suspend an employee for up to 30 days without pay. Finally, “[i]f other forms of disciplinary or corrective action have proved ineffective or when the seriousness of the offense or condition warrants,” the employer may demote or dismiss the employee pursuant to NAC 284.646(1).

Further, NAC 284.742(1) permits “appointing authorities” to “determine and describe in writing, subject to the approval of the [personnel] commission, those specific [employee] activities which . . . are considered inconsistent, incompatible or in conflict with [employment] duties.” Under that authority, the Department of Human Resources promulgated a schedule of incompatible activities and concurrent penalties, setting forth a uniform system of progressive discipline. Each incompatible activity has varying levels of discipline for up to three offenses. Under this schedule, “[f]ailure to cooperate with other employees and/or supervisors” carries different levels of discipline for each offense.<sup>11</sup> Upon the first offense, an employee may be warned, reprimanded, or suspended. On the second offense, the employee may be reprimanded, suspended, demoted or dismissed. On the third offense, the only possible discipline is dismissal.<sup>12</sup>

“Refusal to comply with a reasonable and proper order or instruction from a supervisor,” “[t]hreatening, stalking, intimidating,

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<sup>11</sup>Department of Human Resources, Incompatible Activities: Prohibitions and Penalties (Approved by Personnel Commission June 4, 1999) at 2.

<sup>12</sup>Id.

attempting, or doing bodily harm to supervisor, public or fellow employee,” “or using insulting, intimidating or abusive language or conduct to supervisor, public or fellow employee,” all implicate levels of progressive discipline under the schedule of incompatible activities.<sup>13</sup> For the first offense under either of these charges, an employee may be reprimanded, suspended, demoted or dismissed. For the second offense, the employee may be suspended, demoted or dismissed. For the third offense, the only sanction is dismissal.<sup>14</sup>

Finally, “[d]iscourteous treatment of the public or a fellow employee” also has varying levels of progressive discipline. For a first offense, discipline may range from a warning to dismissal. On a second offense, discipline may range from a reprimand to dismissal. On a third offense, it may range from suspension to dismissal.<sup>15</sup>

In the present matter, the Division terminated Gross based on eight incidents that occurred between October 2001 and February 2002, the sum of which it asserted warranted termination. Further, the record discloses Gross’s lengthy history of discipline from July 1997 to May 2001: three formal letters of instruction, two written reprimands, a one-day suspension and a three-day suspension. In general, this discipline resulted from Gross’s discourteous treatment of the public, fellow employees and supervisors, use of abusive language and her failure to cooperate with other employees and supervisors.

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<sup>13</sup>Id. at 6.

<sup>14</sup>Id.

<sup>15</sup>Id.

Gross's conduct between October 2001 and February 2002 would appropriately fit as a third offense (actually a fifth offense) following Gross's previous reprimands and suspensions.<sup>16</sup> Under the schedule, the only possible discipline for a third offense of failure to cooperate with other employees or supervisors or using insulting or abusive language is termination. Additionally, the only possible discipline for a third offense of refusing to comply with an order of instruction from a supervisor is termination.

The hearing officer's decision omits any explicit application of the progressive disciplinary regulations of the Nevada Administrative Code or of the Division's published schedule of prohibited activities and

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<sup>16</sup>Gross's reprimands and suspensions involved the following violations:

11/97 – Written Reprimand: for (1) failure to cooperate with other employees, (2) refusal to comply with an order of instruction from a supervisor, (3) using insulting or abusive language, and (4) discourteous treatment of the public and fellow employees;

6/99 – Written Reprimand: for (1) failure to cooperate with other employees, (2) refusal to comply with an order of instruction from a supervisor, (3) using insulting or abusive language, and (4) discourteous treatment of the public and fellow employees.

1/01 – One-day suspension: for (1) failure to cooperate with other employees, (2) negligence in performing official duties, including failure to follow instructions or regulations, (3) refusal to comply with an order of instruction from a supervisor, (4) using insulting or abusive language, and (5) discourteous treatment of fellow employees.

5/01 – Three-day suspension: for (1) failure to cooperate with other employees and supervisors, (2) using insulting or abusive language, and (3) discourteous treatment of fellow employees.



attendant progressive disciplinary actions. We conclude that such omission constitutes error because the hearing officer's authority to review a state employer's disciplinary action is coextensive with his obligation to apply the progressive disciplinary rules.

Substantial evidence

NRS 233B.125 requires that a hearing officer's findings of fact and decision be based upon substantial evidence. There are numerous discrepancies between the hearing officer's summaries of testimony, and these errors carry into his conclusions of law. Examples cited by the Division include the following:

Order: "The client was calm when Lester and Gross returned to the latter's booth. Gross was polite."

Hearing: Lester testified that when she returned to the client, the client was calm and polite.

Order: "On cross-examination, [Bush] conceded that procedures vary between offices; the Owens office may have been procedurally more lax."

Hearing: Bush testified that it was her "understanding that the procedures at the Charleston office were much more lax than the procedures at the Owens office."

We also note two inconsistencies found within the hearing officer's order. First, the hearing officer characterized the conduct resulting in Gross's termination as "de minimus," yet the officer found that two incidents were sufficiently serious to warrant suspension. Second, the hearing officer concluded the following:

Even considering Employee's prior discipline, this hearing officer can only support a five (5) day discipline. The termination of Employee Iris Gross is excessive in light of the somewhat unusual surrounding facts of each incident, save and except the two (2) such incidents which are sustained by this hearing officer.

In this statement, the hearing officer regards the termination as excessive, yet states that two incidents supported the termination.

Gross argues that the hearing officer's alleged errors did not affect his ultimate conclusions. However, due to the pervasiveness of discrepancies between the findings and the transcript and the internal inconsistencies within the order, we cannot conclude that substantial evidence supports the hearing officer's decision.

Consideration of documents outside the record

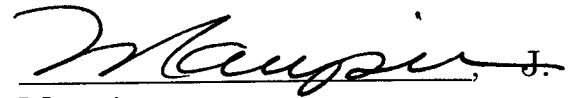
NRS 233B.121(8) provides that "[f]indings of fact must be based exclusively on substantial evidence and on matters officially noticed." NRS 233B.121(6)(c) states that the record in a contested case shall contain "[a] statement of matters officially noticed." Additionally, under NRS 233B.123(5), "[p]arties must be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they must be afforded an opportunity to contest the material so noticed."

Although the Division received notice of the transmittal of Gross's personnel file to the hearing officer, the hearing officer failed to state that he would take official notice of Gross's entire personnel file. The hearing officer should have officially noticed the file and given the parties an opportunity to contest its consideration.

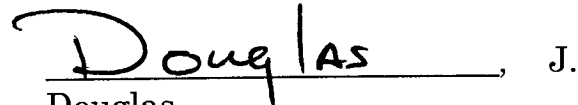
CONCLUSION

Because we conclude that the hearing officer failed to apply the progressive disciplinary rules, erroneously recited hearing testimony and made internally inconsistent conclusions in his order, and failed to officially notice Gross's personnel file and give the parties an opportunity to contest consideration of the file's contents, we reverse the district court's order denying judicial review and remand this matter for the district court to order a new hearing before a different hearing officer.

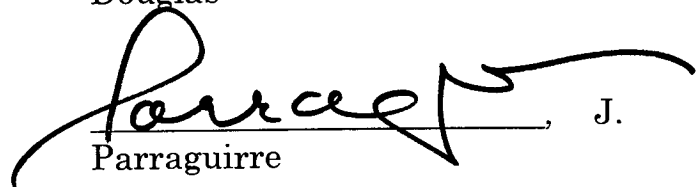
It is so ORDERED.



Maupin



Douglas



Parraguirre

cc: Hon. Jackie Glass, District Judge  
Attorney General Brian Sandoval/Las Vegas  
Norah Ann McCoy  
Clark County Clerk