IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY; NEVADA HIGHWAY PATROL; AND STATE OF NEVADA DEPARTMENT OF PERSONNEL,
Appellants,
vs.
CHARLES LEE,
Respondent.

No. 42486

STATE OF NEVADA DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY, AND NEVADA HIGHWAY PATROL,
Appellants,
vs.
CHARLES LEE,
Respondent.

No. 42819

FILED

MAR 18 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER VACATING WRIT, REVERSING ATTORNEY FEES ORDER, AND REMANDING

These are consolidated appeals from separate district court orders issuing a writ of mandamus and awarding attorney fees. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant Nevada Highway Patrol (NHP) removed respondent Charles Lee from his probationary rank of Sergeant after an NHP investigation corroborated allegations that Lee had conspired with another officer to void an otherwise valid traffic citation. Lee petitioned for writ relief, claiming that the NHP denied his right to a hearing under NRS 289.020(2). The district court agreed and issued a writ of mandamus ordering the NHP to reinstate Lee to the rank of Sergeant with back pay

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until a hearing was provided. The district court also awarded Lee attorney fees.

On appeal, the State of Nevada Department of Motor Vehicles and Public Safety; Nevada Highway Patrol; and State of Nevada Department of Personnel (State) argue that the district court (1) erred in determining that NRS 289.020 applies to probationary employees, (2) lacked the authority to issue the writ of mandamus, and (3) abused its discretion by awarding attorney fees. For the reasons that follow, we order the writ of mandamus vacated, reverse the attorney fees award, and remand to the district court.

The NHP has employed Charles Lee since October 9, 1989. The NHP promoted Lee to the rank of Sergeant on February 5, 2001. That promotion raised Lee's pay grade from 37 to 39. Pursuant to NRS 284.290, Lee's promotion was contingent on the successful completion of a one-year probationary period. On December 18, 2001, NHP Internal Affairs notified Lee in writing that it was investigating allegations that he had conspired to void a traffic citation. A copy of NRS 289.020 and the administrative regulations regarding probationary employee discipline accompanied the written notice.

The subsequent Internal Affairs investigation report stated that the NHP should sustain three charges against Lee. On January 18, 2002, Lee received written notice that based on the charges, the NHP had rejected Lee from the rank of Sergeant and restored him to his former rank of Trooper II. On February 21, 2002, Lee received written notice that Internal Affairs had completed its investigation and that the NHP sustained two charges against him.

Lee then requested an independent review of the investigation. Based on that request, the Nevada Department of Public Safety Investigation Division (NDI) conducted its own investigation and interviewed three new witnesses. NDI's investigation did not exonerate Lee.

Lee then requested an administrative personnel hearing under NRS 284.390 and brought suit in the district court pursuant to NRS 289.120. A hearings officer dismissed Lee's administrative claim because the officer lacked jurisdiction to address Lee's claim. In the district court, Lee alleged that (1) he had successfully completed his probationary term as Sergeant by the time the investigation concluded and the rejection formalized and was thus protected by NRS Chapter 284's provisions governing permanent employees, (2) the NHP denied Lee's right to a hearing under NRS 289.020(2), and (3) the NHP denied Lee's due process rights by not providing him with a hearing. Lee sought reinstatement to the rank of Sergeant with back pay. Lee moved the district court for summary judgment or issuance of a writ of mandamus. The State opposed Lee's motion and filed a counter-motion for summary judgment.

The district court denied both parties' summary judgment motions and found that there was a genuine issue of material fact as to whether Lee was a probationary employee at the time of his rejection. Nevertheless, the district court found no genuine issue of material fact regarding the State's violation of NRS 289.020 and issued a writ of mandamus directing the State to reinstate Lee with back pay until the State conducted a hearing. The district court also granted Lee's request for attorney fees. The State timely appealed the separate orders, and we consolidated the appeals and granted a stay.

DISCUSSION

The State's actions constituted a "punitive action"

Under NRS 289.020(2), "if a peace officer is denied a promotion on grounds other than merit or other punitive action is used against him, a law enforcement agency shall provide the officer with an opportunity for a hearing." "'Punitive action' means any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand or transfer of a peace officer for purposes of punishment."[1]

The State argues that Lee was not demoted; he was rejected from his probationary employment period. The State contends that Lee was not entitled to a hearing because "rejection from trial period" is not included in the definition of "punitive action."

In his reply, Lee asserts that he was entitled to a hearing under NRS 289.020(2) regardless of the proposed distinction between "demotion" and "rejection from trial period" because the State's action reduced Lee's salary from pay grade 39 to pay grade 37. Lee asserts that such a reduction is explicitly included in the definition of punitive action under NRS 289.010(3). We find the State's argument unpersuasive and conclude that Lee suffered a punitive action because he was demoted and his salary was reduced.

"'Statutory interpretation is a question of law reviewed de novo.'"[2] In interpreting a statute, we will not look beyond the statutory

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[1]NRS 289.010(3).

[2]Firestone v. State, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004) (quoting Construction Indus. v. Chalue, 119 Nev. 348, 351, 74 P.3d 595, 597 (2003)).

language unless the language is ambiguous.[3] If a statutory phrase is left undefined, we construe the phrase according to its plain and ordinary meaning.[4] NRS 289.010(3) defines neither "demotion" nor "reduction in salary." Thus, we turn to the plain meaning of those terms.

"Demotion" means "[a] reduction to lower rank or grade, or to lower type of position,"[5] and "to reduce to a lower grade or rank [or] to relegate to a less important position."[6] On January 18, 2002, Lee held the rank of Sergeant, whereas on January 19, 2002, he held the rank of Trooper II. It is undisputed that Sergeant is a higher rank than Trooper II. Accordingly, Lee was demoted within the plain meaning of NRS 289.010(3).

"Reduction" means "the act or process of reducing: the state of being reduced."[7] "Reduce" means "to diminish in size, amount, extent, or number."[8] On January 18, 2002, Sergeant Lee was salaried at pay grade 39, whereas on January 19, 2002, Trooper Lee was salaried at pay grade 37. Accordingly, Lee's salary was reduced within the plain meaning of NRS 289.010(3).

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[3]State v. Kopp, 118 Nev. 199, 202, 43 P.3d 340, 342 (2002).

[4]Trustees v. Developers Surety, 120 Nev. 56, 61, 84 P.3d 59, 62 (2004).

[5]Black's Law Dictionary 519 (4th ed. 1968).

[6]Webster's Ninth New Collegiate Dictionary 338 (1985).

[7]Id. at 988.

[8]Id.

Based on the plain meaning of NRS 289.010(3), we conclude that Lee incurred a "punitive action" because he was demoted and his salary was reduced. Accordingly, if NRS 289.020(2) applied to him, he was entitled to receive a hearing before his demotion became effective.

NRS 289.020 applies to probationary police officers

The State argues that NRS 289.020(2) does not apply to probationary peace officers and that probationary peace officers are not entitled to a pre-termination hearing. We disagree.

The application of NRS 289.020 to peace officers during their term of probationary employment is an issue of first of impression. Ordinarily, due process does not require a pre-termination hearing unless the employee demonstrates a protected property or liberty interest in continued employment.[9] Whether or not an employee has a protected interest in his employment is a question of state law.[10]

The United States Supreme Court has held that due process requires that tenured public university professors, and staff members employed pursuant to a contract, receive a pre-termination hearing.[11] The Supreme Court has not declared that a probationary employee, who is by definition neither tenured nor under contract, has a property interest in continued employment. Rather, the Supreme Court has noted that a probationary employee's property interest is both "created and defined by the terms of his appointment."[12] We conclude that Lee has no

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[9]Board of Regents v. Roth, 408 U.S. 564, 569-570 (1972).

[10]Bishop v. Wood, 426 U.S. 341, 344 (1976).

[11]Roth, 408 U.S. at 576-77.

[12]Id. at 578.

constitutionally protected property interest in remaining a Sergeant. Thus, constitutional due process is not implicated.

The statutory language of NRS 289.020(2) does not differentiate between probationary or permanent peace officers; the statute provides that all peace officers are entitled to a hearing under certain circumstances. Thus, we conclude that NRS 289.020(2) entitled Lee to a pre-termination hearing.

The type of hearing to which Lee is entitled must be determined on remand

The district court held that if the State provides Lee with a hearing, that hearing must be before an independent entity. The State argues that if Lee is entitled to a hearing, he is entitled to no more than a name-clearing hearing and the opportunity to make a formal record of his position. We hold that Lee's employment status determines his hearing rights.

If, on remand, the district court determines that Lee was demoted during his term of probationary employment, then he is entitled to a name-clearing hearing and the opportunity to present evidence refuting the charges against him. On the other hand, if the district court determines that Lee completed his term of probation prior to the demotion, he is entitled to an evidentiary hearing.

NAC 284.458 governs a probationary peace officer's right to appeal a demotion

If Lee's demotion is upheld following the hearing prescribed above, the question then becomes whether Lee will be entitled to an appeal. As with the scope of the hearing, Lee's employment status determines his appeal rights.

All state employees within the classified service salaried at pay grade 20 or higher must serve a one-year probationary employment period.[13] The Legislature expressly delegated the authority to regulate the demotion or dismissal of probationary employees to the Personnel Commission.[14] The Personnel Commission then enacted NAC 284.458(1), which states that a probationary employee may be rejected for any lawful reason and has no right to appeal his rejection.[15]

"[M]atters involving the construction of an administrative regulation are a question of law subject to independent appellate review."[16] This court will not lightly disturb an agency's construction of its authority if that construction is within the statutory language and is intended to advance the statutory purpose.[17] The Legislature expressly delegated to the Commission the authority to promulgate regulations regarding the dismissal or demotion of probationary employees.[18] The Commission enacted a rule stating that probationary employees can be demoted or dismissed for any lawful reason and that they have no right to an appeal.[19] The Commission's construction of its delegated authority is

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[13]NRS 284.290(1); NAC 284.442.

[14]NRS 284.290(2).

[15]NAC 284.458(1).

[16]State, Div. of Insurance v. State Farm, 116 Nev. 290, 293, 995 P.2d 482, 484-85 (2000).

[17]Oliver v. Spitz, 76 Nev. 5, 10, 348 P.2d 158, 161 (1960).

[18]NRS 284.290(2).

[19]NAC 284.458(1).

well within the language of the statute and advances the statutory purpose. Therefore, we will not disturb NAC 284.458.

Furthermore, the Legislature has acquiesced to NAC 284.458's language. "[W]here . . . the legislature has had ample time to amend an administrative agency's reasonable interpretation of a statute, but fails to do so, such acquiescence indicates the interpretation is consistent with legislative intent."[20] The Legislature originally delegated rulemaking authority in 1963. NAC 284.458 became effective on August 11, 1973, and has been amended as recently as November 16, 1995. More importantly, the Legislature amended NRS 284.290(2) in 2003, thirty years after the original delegation, and gave no indication that the rule exceeded the intended grant of authority. Accordingly, the Legislature has acquiesced to the Personnel Commission's determination that probationary employees are not entitled to appeal their demotion or dismissal.

We conclude that the Legislature's acquiescence to the Commission's rule reflects the Legislature's intent to treat all probationary state employees alike. Thus, if, on remand, the district court determines that Lee was demoted during his probationary period, NAC 284.458(1) will govern his ability to appeal from a hearing which upholds that demotion.

The district court lacked the authority to order reinstatement with back pay

The district court issued a writ of mandamus ordering the State to reinstate Lee to the rank of Sergeant with back pay until he receives a hearing under NRS 289.020(2). The State contends that the

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[20]Summa Corp. v. State Gaming Control Bd., 98 Nev. 390, 392, 649 P.2d 1363, 1365 (1982).

district court abused its discretion by granting such relief because the court's power was limited to ordering the State to conduct a hearing. We agree.

A district court may issue a writ of mandamus to compel the performance of an act,[21] but "the action being compelled must be one already required by law."[22] Peace officers have the right to seek judicial review if their employer violates NRS Chapter 289, and the district court may order "appropriate injunctive or other extraordinary relief to prevent the further occurrence of the violation."[23] We hold that a grant of reinstatement and back pay was not necessary to prevent a recurring violation in this case. Accordingly, the district court abused its discretion by issuing a writ of mandamus to compel an action not required by law.[24]

This analysis is consistent with that of the United States Court of Appeals for the Eighth Circuit. In Brewer v. Chauvin, the Eighth Circuit held that a public employee was not entitled to an award of back pay absent proof that he would not have been fired if he had received a pre-termination hearing.[25] The Brewer court based its reasoning almost

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[21]NRS 34.160.

[22]Mineral County v. State, Dep't. of Conserv., 117 Nev. 235, 242-43, 20 P.3d 800, 805 (2001).

[23]NRS 289.120.

[24]See County of Clark v. Doumani, 114 Nev. 46, 53, 952 P.2d 13, 17 (1998).

[25]938 F.2d 860, 862 (8th Cir. 1991).

entirely on the United States Supreme Court's decision in Carey v. Piphus.[26]

Carey began by noting that a person whose procedural due process rights are denied is entitled only to "nominal damages without proof of actual injury."[27] The Supreme Court further held that if the party claiming a due process violation would still have suffered the "injury" if due process had been followed, the lack of process could not be advanced as the injury's cause.[28] "[I]n such circumstances, an award of damages . . . would constitute a windfall, rather than compensation."[29]

Based on Carey, the Eighth Circuit held that an order granting reinstatement and back pay was inappropriate given the complained-of procedural violation. "Damages . . . must be limited to those caused by the due process violation. This will include a full award of back pay only when there is a finding that the discharge would not have occurred if the employee's procedural due process rights had been observed."[30] In this case, the State's violation caused damages in the form of a missed opportunity for a hearing. Lee's remedy should be limited to correcting that specific harm. As described above, we conclude that Lee is entitled to a hearing under NRS 289.020(2). However, he is not entitled to

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[26]435 U.S. 247 (1978).

[27]Carey, 435 U.S. at 266.

[28]Id. at 260.

[29]Id.

[30]Brewer, 938 F.2d at 864.

reinstatement with back pay absent proof that he would not have been demoted had the NHP followed the proper procedure.

The district court abused its discretion by awarding attorney fees

The district court awarded Lee attorney fees in the amount of $5,587.50 pursuant to NRS 18.010, but did not specify which subsection the award was based upon. The State contends that the award was improper because Lee did not recover money damages and the State's defense was not groundless. We agree.

A district court may award attorney fees if authorized by agreement of the parties, statute or administrative rule.[31] NRS 18.010(2) grants district courts the authority to award attorney fees in limited situations. This court will not disturb an authorized attorney fee award absent a manifest abuse of discretion.[32] "[A]n award made in disregard of applicable legal principles may constitute an abuse of discretion."[33] Thus, the issue is whether the district court's award of attorney fees was based on a disregard of applicable legal principles sufficient to constitute an abuse of discretion.

NRS 18.010(2)(a)

NRS 18.010(2)(a) permits the award of attorney fees where the prevailing party recovers $20,000 or less. The State argues that Lee is not entitled to attorney fees under this subsection because he did not recover any money damages. We agree.

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[31]Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. 948, 956, 35 P.3d 964, 969 (2001).

[32]Id.

[33]Barozzi v. Benna, 112 Nev. 635, 638, 918 P.2d 301, 303 (1996).

The prevailing party's recovery of a money judgment is the necessary prerequisite to an NRS 18.010(2)(a) award.[34] The district court may not award attorney fees if the plaintiff's complaint did not seek money damages.[35] Lee argues that he met this requirement by including in his complaint a prayer for back pay and restoration of seniority and benefits afforded to a Sergeant. Lee's argument is without merit.

We considered this issue in State, Department of Human Resources v. Fowler and held that a request for reinstatement and back pay with benefits was not a request for money damages and, as a result, the district court lacked the authority to award attorney fees under NRS 18.010(2)(a).[36] In this case, Lee's complaint sought only reinstatement, back pay, and benefits. Accordingly, Lee was not entitled to attorney fees under NRS 18.010(2)(a).

NRS 18.010(2)(b)

NRS 18.010(2)(b) permits the award of attorney fees, "without regard to the recovery sought, when the court finds that the claim . . . or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." Lee contends that the district court's award of attorney fees was justified under NRS 18.010(2)(b) because the State advanced a frivolous distinction between

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[34]Smith v. Crown Financial Services, 111 Nev. 277, 285, 890 P.2d 769, 774 (1995).

[35]McCracken v. Corey, 99 Nev. 471, 473, 664 P.2d 349, 350 (1983). The plaintiff's complaint need not include a prayer for attorney fees. Casey v. Williams, 87 Nev. 137, 141, 482 P.2d 824, 826 (1971).

[36]109 Nev. 782, 786, 858 P.2d 375, 377 (1993).

"demotion" and "rejection from trial period" in an attempt to end-run around NRS 289.020(2). We disagree.

A defense is groundless under NRS 18.010(2)(b) if it is not supported by credible evidence.[37] We have held that the grant of attorney fees under this subsection is inappropriate where the status of the law is unclear.[38] This is a case of first impression considering the application of NRS 289.020(2) to probationary peace officers as well as the meaning of undefined statutory terms. Nevada law is unclear on these issues. Accordingly, the State's defense was not groundless, and Lee was not entitled to attorney fees under NRS 18.010(2)(b).

Contemporaneous billing records

The State next argues that the district court abused its discretion by awarding attorney fees without considering adequate contemporaneous billing records. We disagree.

We have permitted the use of a broad range of data in a district court's calculation of attorney fees.[39] In Brunzell v. Golden Gate National Bank, we laid out four factors that should be considered in calculating an appropriate award:

> (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance,

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[37]Bobby Berosini, Ltd. v. PETA, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998).

[38]Id.

[39]See, e.g., Sandy Valley Assocs., 117 Nev. at 956, 35 P.3d at 969; Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

> time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.[40]

A district court should generally consider the Brunzell factors in its award of attorney fees, but an award will not be overturned for failure to consider the factors "unless there is a manifest abuse of discretion."[41] In this case, the district court did not apply Brunzell. The district court based its award on two separate affidavits from Lee's attorney and a report from his accounting software. However, this case was decided on a pre-trial motion, and the district court could have considered the amount of time reasonably spent preparing pleadings and motions and a reasonable hourly rate for such work. Accordingly, we hold that the district court did not abuse its discretion by failing to apply Brunzell to its award of attorney fees.

CONCLUSION

We conclude that the terms "demotion" and "reduction in salary" have their plain and ordinary meaning in NRS 289.010(3). We further conclude that NRS 289.020(2) protects peace officers serving a probationary term of employment. Under NRS 289.020(2), all peace officers who incur a punitive action as defined by NRS 289.010(3) are entitled to a hearing. Permanent peace officers are entitled to a full

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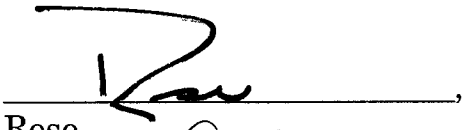
[40]Brunzell, 85 Nev. at 349, 455 P.2d at 33.

[41]Hornwood v. Smith's Food King No. 1, 107 Nev. 80, 87, 807 P.2d 208, 213 (1991).

evidentiary hearing and a right to appeal the result of that hearing, whereas probationary peace officers are entitled only to a name-clearing hearing and their ability to appeal is subject to the limitations found in NAC 284.458.

The district court lacked the authority to issue a writ of mandamus ordering the State to reinstate Lee to the rank of Sergeant with back pay. The district court also abused its discretion by awarding attorney fees; no grounds exist here for an attorney fee award. Accordingly, we

VACATE the district court's writ, reverse the attorney fees award, and REMAND this matter to the district court for further proceedings. It is so ORDERED.



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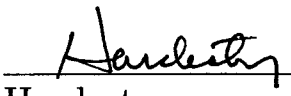

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cc: Hon. Jessie Elizabeth Walsh, District Judge
Attorney General Brian Sandoval/Las Vegas
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