

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES RICHARDSON,
Appellant,

vs.

THE STATE OF NEVADA, EX REL. ITS
DEPARTMENT OF
TRANSPORTATION,
Respondent.

No. 54961

FILED

NOV 15 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting a petition for judicial review in an administrative law and state employment action. First Judicial District Court, Carson City; James Todd Russell, Judge.

Appellant James Richardson was terminated from his employment as a pilot with respondent, Nevada Department of Transportation (NDOT), after failing to timely report an engine overspeed incident in one of Nevada's state planes. Richardson's failure to report violated the Nevada Administrative Code, NDOT policies, and Federal Aviation Administration regulations.

Richardson administratively appealed the decision and an administrative hearing officer reversed the termination. The hearing officer determined that Richardson's failure to immediately notify his supervisor about the overspeed incident showed a serious lack of judgment and justified severe discipline, but that it would have been just and reasonable for NDOT to apply principles of progressive discipline. Thus, the hearing officer determined that Richardson should have been disciplined in a less severe manner and recommended demotion instead of termination, as this incident was NDOT's first disciplinary action against

Richardson. Subsequently, the hearing officer clarified his decision, stating that Richardson's demotion must be within the pilot class.

Thereafter, NDOT filed a petition for judicial review. The district court reversed the decision of the administrative hearing officer and reinstated Richardson's termination. The district court found that the hearing officer erred in failing to defer to NDOT's disciplinary decision and in not recognizing and applying the rationale of Dredge v. State ex rel. Department of Prisons, 105 Nev. 39, 769 P.2d 56 (1989). The district court also found that the hearing officer's decision was not based upon reliable, probative, and substantial evidence.¹

On appeal, Richardson argues that the district court improperly applied the same level of deference to the appointing authority in Richardson's employment action that Dredge affords to the Nevada Department of Corrections (NDOC) in employment actions involving security violations. Richardson also argues that the hearing officer's decision was supported by reliable, probative, and substantial evidence on the whole record. We agree, and therefore reverse the district court's decision to grant the petition for judicial review and reinstate Richardson's termination. In doing so, we also determine that an administrative hearing officer has the authority to issue an order of clarification.

Standard of review

The Nevada Administrative Procedure Act, codified in NRS Chapter 233B, governs the standard of review by which this court evaluates a hearing officer's decision. "This court reviews an administrative decision in the same manner as the district court," Garcia

¹The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

v. Scolari's Food & Drug, 125 Nev. 48, 56, 200 P.3d 514, 519-20 (2009), that is, "for clear error or abuse of discretion." Grover C. Dils Med. Ctr. v. Menditto, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005); see NRS 233B.135(3)(e), (f). While we independently review purely legal determinations, "[w]e defer to an agency's findings of fact as long as they are supported by substantial evidence." Rio All Suite Hotel & Casino v. Phillips, 126 Nev. ___, ___, 240 P.3d 2, 4 (2010); see NRS 233B.135(3). "Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion." Law Offices of Barry Levinson v. Milko, 124 Nev. 355, 362, 184 P.3d 378, 384 (2008). Our review is limited to the record before the agency. NRS 233B.135(1)(b); Garcia, 125 Nev. at 56, 200 P.3d at 520.

The district court erred in deferring to NDOT's decision to terminate Richardson for safety violations

This court held in Dredge v. State ex rel. Department of Prisons, 105 Nev. 39, 769 P.2d 56 (1989), that NDOC should be afforded deference in employment actions involving security violations by its employees. The district court applied that level of deference to NDOT in Richardson's employment action concerning his safety violations. Richardson contends that the district court impermissibly used the Dredge deferential standard.

"Generally, a hearing officer does not defer to the appointing authority's [termination] decision." Knapp v. State, Dep't of Prisons, 111 Nev. 420, 424, 892 P.2d 575, 577 (1995). However, in Dredge, this court carved out an exception to the general rule by stating that a decision by NDOC to dismiss an employee is entitled to deference from a hearing officer "whenever security concerns are implicated in an employee's termination." 105 Nev. at 42, 769 P.2d at 58; see NAC 284.650(3); see also State, Dep't of Prisons v. Jackson, 111 Nev. 770, 772-73, 895 P.2d 1296,

1297-98 (1995) (applying Dredge deference in the case of a security breach by a correctional officer). While there is a critical need to ensure that Nevada's state planes are airworthy and that its pilots obey safety regulations to protect themselves, state employees, and the public, the record fails to establish that this case falls within the ambit of a serious security breach.

In this case, Richardson, a state pilot for NDOT, was charged with failing to follow a Federal Aviation Association (FAA) regulation. Rather than offer expert proof of the safety threat the violation assertedly posed, NDOT relied on the FAA ^{regulation itself.} ~~warning Richardson received.~~ But the FAA declined to treat the infraction as meriting discipline, beyond making the infraction a matter of record for two years. This does not establish the serious threat to individual security or safety that Dredge deference demands—assuming arguendo that Dredge applies outside the prison context.

The deferential “exception will be applied only in cases of egregious security breaches and will not be allowed to undermine the job security of otherwise permanent employees, who deserve to have a fair and independent evaluation of the agency head’s termination decision.” Jackson, 111 Nev. at 773, 895 P.2d at 1298. Ultimately, the hearing officer determines the reasonableness of the termination without deference to the appointing authority’s decision. NRS 284.390(1); Knapp, 111 Nev. at 424, 892 P.2d at 577. Therefore, we conclude that the district court erred in assuming that the hearing officer was required to defer to NDOT’s decision to terminate Richardson. See Knapp, 111 Nev. at 424, 892 P.2d at 578.

Substantial evidence supports the administrative hearing officer's decision

The hearing officer considered each of NDOT's charges against Richardson during the three days of administrative hearings, which included 8 witnesses and 50 exhibits, in determining whether Richardson was appropriately terminated based on his conduct. Specifically, the hearing officer took into account the seriousness of the safety offenses and the treatment by NDOT of other employees who committed similar safety offenses and considered whether principles of progressive discipline should be applied. In reversing NDOT's decision to terminate Richardson, the hearing officer determined that Richardson's failure to immediately notify his supervisor of the overspeed incident showed a serious lack of judgment justifying severe discipline. The hearing officer also determined that NDOT terminated Richardson for one safety violation while Richardson's immediate superior was not terminated for his transgressions. These included flying one of the state planes with low fuel, taking off when the plane was overweight, and allowing a 14-year-old to pilot the plane. The hearing officer concluded that it would have been just and reasonable to apply principles of progressive discipline by disciplining Richardson, a first-time offender, in a less severe manner.

We conclude that the hearing officer's decision is supported by substantial evidence and is not arbitrary or capricious in any way. Moreover, we conclude that the district court erred in substituting its judgment for that of the hearing officer. See Knapp, 111 Nev. at 425, 892 P.2d at 578 (reviewing the severity of employment discipline for clear error or an abuse of discretion).

Administrative hearing officers have the authority to issue orders of clarification

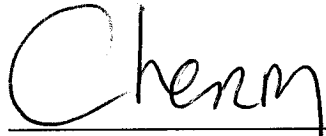
Although Richardson did not raise this issue on appeal nor did the State file a cross-appeal, we have determined that this issue is


important to a proper resolution of this case. See Ford v. Showboat Operating Co., 110 Nev. 752, 755, 877 P.2d 546, 548 (1994) (recognizing that a party “who is not aggrieved by a judgment need not appeal from the judgment in order to raise arguments” appearing in the record).


A hearing officer’s authority is exhausted upon publication of his or her decision, unless the decision contains an apparent mistake, ambiguity, or is incomplete. Broth. of Teamsters v. Silver State Disposal, 109 F.3d 1409, 1411 (9th Cir. 1997). We conclude that the hearing officer’s initial decision was incomplete as it failed to specify the remedy in definite terms. See id.; see also Courier-Citizen v. Boston Electrotypers Un. No. 11, 702 F.2d 273, 279 (1st Cir. 1983). The hearing officer did not specify in definite terms whether Richardson’s demotion must be within the pilot class or within NDOT. In the clarification order, the hearing officer completed his decision by stating that a demotion must be within the pilot class. Accordingly, we conclude that administrative hearing officers have the authority to issue orders of clarification under the aforementioned circumstances. See City of Henderson v. Kilgore, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006) (holding that “certain powers may be implied even though they were not expressly granted by statute, when those powers are necessary to the . . . performance of . . . enumerated duties”).

Accordingly, we reverse the order of the district court and affirm the decision of the hearing officer. Therefore, we

ORDER the judgment of the district court REVERSED and
REMAND this matter to the district court for proceedings consistent with
this order.


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Pickering

cc: Hon. James Todd Russell, District Judge
Robert G. Berry, Settlement Judge
Jeffrey S. Blanck
Attorney General/Transportation Division/Carson City
Carson City Clerk