

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN POLICE  
DEPARTMENT,  
Appellant,  
vs.  
DAVID PHILLIPS,  
Respondent.

No. 65684

**FILED**

JUL 16 2015

TRAZIE K. LINDEMAN  
CLERK OF SUPREME COURT.  
BY *[Signature]*  
DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

This is an appeal from an order granting a writ petition and compelling a pretermination hearing. Eighth Judicial District Court, Clark County; Allan R. Earl, Judge.

Appellant Las Vegas Metropolitan Police Department (LVMPD) investigated respondent David Phillips, at that time an LVMPD employee, and found he had intentionally violated multiple LVMPD policies. LVMPD then gave Phillips notice that it was going to hold a pretermination hearing where a panel of three neutral LVMPD employees would evaluate both sides' evidence to determine the propriety of the termination. During the month prior to the hearing, LVMPD provided Phillips with the evidence it intended to present. On the morning of the hearing, however, LVMPD presented additional evidence that it claimed it found the previous night. This new evidence allegedly refuted Phillips' proffered defense.<sup>1</sup>

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<sup>1</sup>Neither party provided details regarding the new evidence presented on the morning of the hearing, but that information is not relevant to our analysis.

Although the parties disagree on the amount of time Phillips had to review the new evidence, with him claiming it was only a few minutes and LVMPD claiming it was at least a couple of hours, there is no dispute that Phillips was informed the hearing would not be continued to allow him to examine the new evidence further—he had to either tender his resignation immediately or proceed with the hearing. Ultimately, Phillips resigned from his position. Later that day, after he claims to have reviewed the new evidence in greater detail, Phillips attempted to retract his resignation, but LVMPD refused to reinstate him.

Phillips later filed a writ petition in the district court seeking an order directing LVMPD to hold a pretermination hearing, arguing that failing to do so was a violation of his due process rights under the Fourteenth Amendment to the United States Constitution.<sup>2</sup> LVMPD opposed the writ, arguing that Phillips had resigned, thereby waiving any right he had to a pretermination hearing. The district court granted the writ and ordered LVMPD to give Phillips a pretermination hearing, but did not articulate the basis for its order. This appeal followed.

On appeal, the parties do not dispute that Phillips is an employee who would generally be entitled to a pretermination hearing as he has a property interest in his continued employment which “is entitled to due process constitutional protections.” *State ex rel. Sweikert v. Briare*, 94 Nev. 752, 755, 588 P.2d 542, 544 (1978). Rather, LVMPD asserts, as it did in the district court, that Phillips waived his right to a pretermination

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<sup>2</sup>In the alternative, Phillips also made a claim for breach of contract. The district court’s order below did not address this claim, and the parties likewise do not present any arguments regarding breach of contract on appeal. Thus, we do not address it in this order.

hearing by resigning. Alternatively, LVMPD asserts the district court should have held an evidentiary hearing to determine disputed issues of fact before it issued its decision. Phillips argues his resignation was made under duress due to the newly presented evidence and refusal to continue the hearing, and thus, it cannot be viewed as a valid waiver of his constitutional rights.


The United States Supreme Court has indicated that courts should not “presume acquiescence in the loss of fundamental rights.” *Ohio Bell Tel. Co. v. Pub. Utils. Comm’n of Ohio*, 301 U.S. 292, 307 (1937); see also *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (providing that courts will “indulge every reasonable presumption against waiver of fundamental constitutional rights” (internal quotation marks omitted)).

In this case, although the parties argued waiver below, the district court failed to address that argument or make any findings of fact and conclusions of law regarding whether Phillips’ resignation constituted a valid waiver of his constitutional right to due process. Instead, the district court simply stated that Phillips resigned after being presented new evidence and LVMPD would not agree to rescind the resignation, and then ordered LVMPD to conduct a pretermination hearing. Without any findings or conclusions from the district court as to the waiver argument, we cannot adequately review the issue. See *Nev. Gold & Casinos, Inc. v. Am. Heritage, Inc.*, 121 Nev. 84, 89, 110 P.3d 481, 484 (2005) (noting that “waiver is generally a question of fact”). Therefore, we must reverse the district court’s decision and remand this case to the district court for it to make appropriate findings and conclusions regarding the parties’ arguments as to waiver. See *Ryan’s Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. \_\_\_, \_\_\_, 279 P.3d 166, 172 (2012) (“An

appellate court is not particularly well-suited to make factual determinations in the first instance.”).

It is so ORDERED.<sup>3</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Chief Judge, Eighth Judicial District Court  
Department 19, Eighth Judicial District Court  
Janet Trost, Settlement Judge  
Marquis Aurbach Coffing  
Richard Segerblom  
Eighth District Court Clerk

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<sup>3</sup>In remanding this case, we intimate no view as to the merits of the parties' arguments.