IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE STATE OF NEVADA,
DEPARTMENT OF CORRECTIONS,
Appellant,
vs.
VANJA MALCIC, AN INDIVIDUAL,
Respondent.

No. 70341

ORDER REVERSING AND REMANDING

This is an appeal from a judicial review of a correctional officer's termination from the Nevada Department of Corrections.[1] Eighth Judicial District Court, Clark County; Susan Scann, Judge.

On appeal, the State argues that the hearing officer failed to defer to the appointing authority's decision to terminate as required by NAC 284.650(3) and *Dredge v. State ex rel., Dept. of Prisons*, 105 Nev. 39, 42, 769 P.2d 56, 58 (1989) in certain security-related cases.[2]

The hearing officer's "findings of fact and conclusions of law" are not clear as to what standard of review he applied, but it appears clear that he did not give any deference to NDOC's decision to terminate. It is sometimes true that in non-security-related cases a hearing officer might not defer to the appointing authority, but it is clearly settled that when

[1]We do not recount the facts except as necessary to our disposition.

[2]The state also argues that Malcic is not entitled to back pay under NRS 284.390(6) for the full period of her dismissal. We agree the district court that the plain language of NRS 284.390(6) entitles Malcic to back pay for the full period of her dismissal if she is entitled to be reinstated under that statute.

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certain "security concerns are implicated in an employee's termination," the appointing authority's decision to dismiss an employee is entitled to deference by the hearing officer. *See Knapp v. State ex rel. Dept. of Prisons*, 111 Nev. 420, 424, 892 P.2d 575, 577 (1995) (citing *Dredge*, 105 Nev. at 42, 769 P.2d at 58 (citing NAC 284.650(3))). The Nevada Supreme Court has clarified that *Dredge* deference applies when the facts indicate a "clear and serious security threat" and an "egregious security breach." *State ex rel. Dept. of Prisons v. Jackson*, 111 Nev. 770, 773, 895 P.2d 1296, 1298 (1995).[3]

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[3]We acknowledge there may be tension in Nevada Supreme Court caselaw regarding the standard of review a hearing officer must apply to the appointing authority's decisions and findings between *Dredge*, *Jackson*, and *Knapp*, on the one hand and, on the other, *Lapinski v. City of Reno*, 95 Nev. 898, 603 P.2d 1088 (1979). Under the standard-of-review framework espoused by the former cases, a hearing officer will normally review an agency's termination decision de novo, and the hearing officer's decisions are entitled to deference on judicial review. But when the facts of the case indicate a "clear and serious security threat" or an "egregious security breach," the hearing officer must grant deference to the appointing agency's decision. The caselaw does not make clear whether the appointing authority, the hearing officer, or the courts are to be the ultimate deciders of what security threat is "clear and serious," but under NAC 284.650(3), it appears that the hearing officer must defer to the appointing authority's determination about the nature of the security threat. On the other hand, under *Lapinksi*, a hearing officer's job might simply be to always review the appointing authority's decision for "substantial evidence," regardless of whether the case was security-related. *See generally State v. Costantino*, No. 65611 (Nev. May 31, 2016) (unpublished). We decline to resolve this conflict in the present case because if the facts here indicate a "clear and serious security threat" and an "egregious security breach," *Dredge* deference applies. *See Jackson*, 111 Nev. at 773, at 895 P.2d at 1298. Therefore, we remand for further fact finding on this issue.

Here, the record does not contain any explicit finding of fact regarding whether Malcic's conduct rose to the level of being a "clear and serious security threat" and "egregious security breach" as defined in *Jackson*. There is some evidence in the record that would support such a conclusion. For example, the warden (someone with many years of experience in this area) testified that Malcic jeopardized the safety and security of an entire hospital and the people therein, the associate warden concluded that Malcic "jeopardize[d] the safety of staff and the citizens of the State of Nevada and the security of an inmate in the custody of [NDOC]," and each concluded Malcic committed several violations that NDOC considers "Class 5"—their highest level of offense, for which their policies recommend only dismissal. Furthermore, one of NDOC's specific charges was for jeopardizing the security of the institution. Thus, a fair conclusion can perhaps be drawn from the record that NDOC concluded that Malcic's conduct represented a "clear and serious security threat."

On the other hand, the hearing officer's findings are confusing and contradictory. Both parties cite language in the hearing officer's findings that say this situation was both serious and not serious. Further, it is unclear whether the hearing officer gave any deference to NDOC's conclusion that this security breach was serious, or if he even considered this specific question. Here, if the hearing officer is not going to apply *Dredge* deference, then the decision must be based on specific findings that the facts of this case do not indicate a clear and serious security threat. *See Jackson*, 111 Nev. 770, at 895 P.2d at 1298. Otherwise, the hearing officer must give deference to the appointing authority. *Id.*

Additionally, Malcic argues that AR 339 and 460 were not properly promulgated or approved by the Personnel Commission and are

thus unenforceable as independent grounds for discipline, and that NDOC cannot circumvent NRS Chapter 284. *See* NRS 284.150(2). Even if AR 339 and 460 were not independently enforceable by law as grounds for discipline, NAC 284.650 and NAC 284.646—regulations promulgated by the Personnel Commission—might have provided multiple independent grounds to NDOC to discipline Malcic. NRS 284.385(1)(a) might represent another. NAC 284.646(1)(b) would allow for termination on NAC 284.650 grounds if the "seriousness of the offense or condition warrants such a dismissal," regardless of what NDOC has promulgated properly. And because NRS 284.383(1) excepts "cases of serious violations of law or regulations" from needing progressive discipline, then if Malcic's conduct constituted a "serious" violation of a law or regulation, a first-offense dismissal could also have been justified on this basis as well. However, it is unclear from the existing record if the hearing officer relied upon any of these grounds and the district court did not rule on this issue in its order below; thus we decline to do so in the first instance. *See Musso v. Binick*, 104 Nev. 613, 615, 764 P.2d 477, 478 (1988) (questions requiring factual findings should be addressed by the district court in the first instance).

Therefore, on remand, clarification must be provided regarding whether Malcic's conduct represented a security threat or breach that was clear, serious, and egregious; whether Malcic's conduct was a "serious" violation of law or regulation; and if the "seriousness of the offense or condition" warranted dismissal for a violation of NAC 284.650 under the appropriate standard of review.

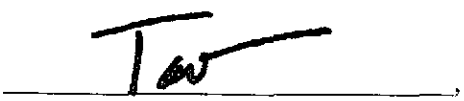
Finally, Malcic argues that the operative administrative regulations and operational procedures at the time of the offense did not apply to her because she did not have notice of them—and therefore could

not have "knowingly" violated them—and thus she should be held only to the standards of the old policies she alleges were provided at her workstation. There is conflicting evidence in the record on this issue, and although the hearing officer pointed out the discrepancy in the evidence, he did not make any explicit finding of fact regarding whether Malcic was aware of the new regulations and policies. This issue may become moot if her termination is upheld on other grounds, but if this issue remains relevant in view of the other findings that must be made on remand, then findings are also required in order to determine whether Malcic had proper notice of the policies and procedures that she was charged with violating.

Accordingly, we

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

 , C.J.
Silver

 , J.
Tao

 , J.
Gibbons

cc: Department 29, Eighth Judicial District Court
Hon. Elizabeth Gonzalez, Chief Judge, Eighth Judicial District Court
Israel Kunin, Settlement Judge
Attorney General/Carson City
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