IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN FRANKS AND RONALD FOX,
Appellants,
vs.
LAS VEGAS METROPOLITAN POLICE DEPARTMENT,
Respondent.

No. 36507

FILED

AUG 2 0 2002

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a decision on remand after an appeal of a district court order denying a petition for writ of certiorari. Respondent Las Vegas Metropolitan Police Department ("LVMPD") disciplined appellants Steven Franks and Ronald Fox. After the Civil Service Board upheld that discipline, Franks and Fox filed a petition for writ of certiorari. The district court denied that petition. On appeal, we remanded for a determination of whether certain undisclosed documents in LVMPD's possession were privileged, and if not, whether nondisclosure prejudiced Franks and Fox.

The district court conducted a review, determined that some documents were privileged and that nondisclosure of the others did not prejudice Franks and Fox, and again denied the petition. Franks and Fox appeal.

Standard of review

Franks and Fox contend that the district court utilized an improper arbitrary and capricious standard of review. The Nevada Administrative Procedure Act[1] (the "APA") does not apply to local agencies.[2] When reviewing a municipal agency's actions, however, we generally adopt the standards of review set forth in the APA.[3] Under the APA, questions of law are reviewed de novo,[4] while factual findings will only be set aside if clearly erroneous and amounting to an arbitrary and capricious abuse of discretion.[5] An agency's determination of whether an evidentiary privilege applies is a legal question subject to de novo review.[6]

We find no merit in LVMPD's argument that the standard differs here because Franks and Fox petitioned for a writ of certiorari.

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[1]NRS 233B.010 et seq.

[2]See Washington v. Clark County, 100 Nev. 425, 427-28, 683 P.2d 31, 33-34 (1984) (county not subject to the APA); State ex rel. Sweikert v. Briare, 94 Nev. 752, 756, 588 P.2d 542, 545 (1978) (quoting NRS 233B.020) (municipal corporation not subject to the APA).

[3]See id. at 757, 588 P.2d at 545.

[4]Bullock v. Pinnacle Risk Mgmt., 113 Nev. 1385, 1388, 951 P.2d 1036, 1038 (1997); see also NRS 233B.135(3) ("The court may remand . . . if substantial rights of the petitioner have been prejudiced because the final decision of the agency is: (a) In violation of constitutional or statutory provisions; . . . (d) Affected by other error of law[.]").

[5]See Gandy v. State ex rel. Dir. Investigation, 96 Nev. 281, 282-83, 607 P.2d 581, 582-83 (1980).

[6]See Gwich'in Steering v. Office of Governor, 10 P.3d 572, 577-78 (Alaska 2000); see also Pina v. Espinoza, 29 P.3d 1062, 1066 (N.M. Ct. App. 2001).

Where the APA does not apply to the administrative agency, review occurs by writ of certiorari rather than petition for judicial review.[7] In such cases, the writ petition is treated the same as a petition for judicial review under the APA.[8] Accordingly, a de novo standard of review applies.

The district court's order concluded that "the Civil Service Board did not act arbitrarily or capriciously." Yet, our reading of the entire order leads us to conclude that this statement referred to the Civil Service Board's ultimate decision to uphold the discipline. The district court's discussion of the documents proceeds in a de novo manner, and ultimately concludes that the documents were "clearly privileged" or "clearly irrelevant." This leads us to conclude that the district court determined that the Civil Service Board's privilege rulings were correct even under a de novo standard of review.

Privilege log

Our order of remand instructed LVMPD "to provide appellants with a privilege log, which describes the undisclosed information with sufficient particularity, so that appellants may adequately contest [LVMPD]'s claim of privilege." Franks and Fox argue that LVMPD's privilege logs were inadequate. We agree. Many of the entries identified "various" as the author, and provided no meaningful description of the subject matter. Many of the entries provided no more useful information

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[7]See Washington v. Clark County, 100 Nev. 425, 427-28, 683 P.2d 31, 33-34 (1984).

[8]Id.; see also Clements v. Airport Authority, 111 Nev. 717, 733, 896 P.2d 458, 467-68 (1995) (Springer, J., concurring and dissenting) ("[In reviewing an administrative decision,] a petition for judicial review [is] the statutory analogue of the common law writ of certiorari[.]").

than that the documents were "personnel records." These entries did not allow Franks and Fox to adequately address LVMPD's privilege claims.

We conclude that this error was harmless,[9] however, as the district court reviewed the actual documents. This review cured the defects in the privilege logs.

Balancing of interests

Franks and Fox argue that the district court failed to balance their interest in obtaining the privileged documents against LVMPD's interest in confidentiality. We have recognized the need to balance the agency interest in confidentiality against the individual's right to the documents.[10] An administrative agency claiming privilege bears the burden of establishing that its interest outweighs the individual's interest.[11]

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[9]See NRCP 61.

[10]See, e.g., Donrey of Nevada v. Bradshaw, 106 Nev. 630, 635-36, 798 P.2d 144, 147-48 (1990) (balance of interests heavily favored disclosure); State ex rel. Tidvall v. District Court, 91 Nev. 520, 525, 539 P.2d 456, 459 (1975) (noting that balancing test would apply in absence of statutory absolute privilege).

[11]See DR Partners v. Bd. of County Comm'rs, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (quoting MacEwan v. Holm, 359 P.2d 413, 421-22 (Or. 1961) ("'[T]he scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference.'").

The district court's order did not cite our cases, but did discuss cases from other jurisdictions that are in accord with Nevada law.[12] These cases require the trial court to balance competing interests.[13] Additionally, one of those cases assigned the burden of showing that the confidentiality interest outweighs the disclosure interest to the party asserting privilege.[14]

Franks and Fox point out that the district court did not balance any enumerated factors. Yet, our cases do not define any specific factors that the district court must always consider. The pertinent concerns surrounding a claim of privilege vary widely from case to case. The district court must consider the totality of circumstances of each case before determining whether the party asserting privilege has met its burden.

Here, the district court made a determination of prejudice and privilege as directed by our order of remand. The district court correctly balanced the competing interests, assigning the burden to LVMPD. We therefore affirm the district court's order regarding the documents, which it reviewed.

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[12]See Gehring v. Case Corp., 43 F.3d 340, 342 (7th Cir. 1994) (disclosure not warranted where personnel files contained employees' private information and had little relevance to trial); Blum v. Schlegel, 150 F.R.D. 38, 41-42 (W.D.N.Y. 1993) (disclosure not warranted where information was sensitive and embarrassing to co-worker and had little bearing on issues).

[13]See Gehring, 43 F.3d at 342; Blum, 150 F.R.D. at 41-42.

[14]See Blum, 150 F.R.D. at 41.

Documents not submitted to the district court

Franks and Fox informed the district court that the privilege logs did not address all documents on which LVMPD's Internal Affairs Department ("IAD") compiled in this case. Specifically, Franks and Fox pointed out that the Civil Service Board testimony revealed that IAD possessed (1) computer disks containing some of Fox's original performance evaluations, (2) outlines typed into LVMPD computers by other officers, and (3) materials supplied to Lieutenant Douglas Gillespie prior to his testimony. These items are not included in the privilege logs, and the district court did not address them in its order.

We conclude that the district court erred in not requiring LVMPD to submit these documents. An agency cannot avoid a duty to submit investigative material for in camera review simply by removing it from its file.[15] We must therefore remand to the district court for consideration of these documents. LVMPD should prepare a privilege log if it claims a privilege for any of these documents, and submit those documents for in camera review. The parties shall then provide briefing regarding privilege and prejudice from nondisclosure.

LVMPD shall disclose all documents for which it does not assert a privilege to Franks and Fox, and the parties shall provide briefing on whether nondisclosure prejudiced Franks and Fox. The district court shall, as with the first order of remand, review the documents, determine whether the documents are privileged, and, for unprivileged documents,

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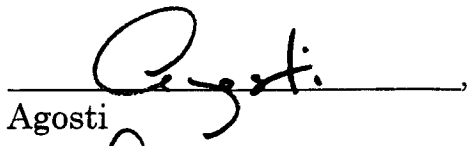
[15]Cf. Roberts v. State, 110 Nev. 1121, 1135, 881 P.2d 1, 9-10 (1994) (ordering police department to submit confidential informant file "whether known by that or any other name" for in camera review), overruled on other grounds by Foster v. State, 116 Nev. 1088, 13 P.3d 61 (2000).

determine whether nondisclosure prejudiced Franks and Fox. Based upon that determination, the district court shall grant or deny the writ petition.

Having considered all the parties arguments, we

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



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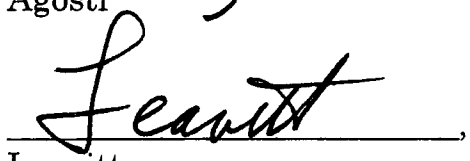

_____, J.
Leavitt

cc: Hon. Jack Lehman, District Judge
Law Offices of Thomas D. Beatty
Kathleen M. Paustian
Clark County Clerk

MAUPIN, C.J., dissenting:

The majority correctly concludes that a de novo standard of review applies to this case. Yet, the majority does not actually apply this standard. "This court's review of an administrative decision is identical to that of the district court."[1] Our order of remand instructed the district court to consider the contents of the investigative file. Because Franks and Fox have appealed the district court's subsequent decision, we must now consider the contents of that file in the same manner as the district court.

LVMPD has not submitted the investigative file for our in camera review, making it impossible for this court to conduct a review identical to that which the district court conducted. The majority, rather than addressing this dilemma, simply defers to the district court's conclusion. This is hardly the de novo review of the civil service board's legal conclusion, which the law requires us to undertake.[2] I would order LVMPD to submit the investigative file for our review prior to deciding this appeal.

Maupin, C.J.
Maupin

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[1]State, Tax Comm'n v. Nevada Cement Co., 117 Nev. ___, ___, 36 P.3d 418, 420 (2001).

[2]See SIIS v. Engel, 114 Nev. 1372, 1374, 971 P.2d 793, 795 (1998); NRS 233B.135(3)(d).