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### O'Keefe v. State of Nev. Dep't of Motor Vehicles, Nev. Adv. Op. 92 (Dec. 6, 2018) (en banc)

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## ADMINISTRATIVE LAW: HEARING OFFICER DECISIONS

### **Summary**

The Court reviewed de novo whether a classified employee violated a law or regulation when she challenged a state agency’s decision to terminate. Moreover, the Court applied a deferential standard of reasonableness to the agency’s decision to terminate the employee in service of the public good.

### **Background**

Appellant Cara O’Keefe was a long-time employee at the Nevada Department of Motor Vehicles. After she transferred to a position at the Nevada Department of Insurance, two of her colleagues reported that she made unauthorized calls to regarding DUIs to the sheriff’s office. O’Keefe returned to the DMV but was terminated after an investigation revealed that she accessed confidential DMV databases for nonwork purposes in violation of Prohibition G(1) of the DMV’s Prohibitions and Penalties employee offense classifications. In a pre-disciplinary memorandum, the DMV administrator noted that Prohibition G(1) regarding the misuse of information technology is a terminable offense even after the first violation. The DMV director concluded that it was in the best interest of the State of Nevada to terminate O’Keefe.

O’Keefe requested a hearing to challenge her termination. The hearing officer found that she had violated Prohibition G(1). Nonetheless, the officer found that O’Keefe’s violation was not serious enough to merit termination before other disciplinary measures and the evidence did not establish that her termination would serve the public good. The hearing officer vacated the DMV’s decision and recommended a 30-day suspension. The DMV sought judicial review of the decision.

The district court set aside the hearing officer’s decision. The hearing officer found that O’Keefe had violated Prohibition G(1), which warranted termination even for a first offense. The court reasoned that this established just cause and made her termination reasonable as a matter of law. O’Keefe appealed. The court of appeals affirmed that the hearing officer’s ruling was arbitrary and erroneous. This appeal followed.

### **Discussion**

*The hearing officer acted arbitrarily and capriciously in holding that O’Keefe’s conduct did not constitute a serious violation of law or regulation*

The standard of review for a hearing officer’s decision is whether the evidence shows that the hearing officer acted arbitrarily or capriciously, therefore abusing their discretion.<sup>2</sup> Classified state employees are protected by state laws and regulations which require agencies to impose progressive discipline measures rather than termination against employees except where the conduct constitutes a “serious violation[] of law or regulation[],”<sup>3</sup> It is undisputed that O’Keefe is

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<sup>1</sup> By Jacqueline Cope.

<sup>2</sup> *Knapp v. State Dep’t of Prisons*, 111 Nev. 420, 424, 892 P.2d 575, 578 (1995).

<sup>3</sup> NEV. REV. STAT. 284.383(1) (2017).

a classified employee who violated Prohibition G(1), which amounts to a serious offense for the purpose of NRS 284.383(1) and warrants termination for a first time violation. Here, the hearing officer found that she violated the prohibition but nonetheless vacated the agency's decision. Accordingly, the hearing officer acted arbitrarily and capriciously by disregarding the DMV's regulations and vacating the agency's decision to terminate O'Keefe.

*The hearing officer applied an erroneous legal standard when it determined that O'Keefe's termination was not for the good of the public service*

The next question is whether the hearing officer applies de novo or deferential review to the agency's determination that the termination served the good of the public service as required by NRS 284.385(1)(a).<sup>4</sup> O'Keefe argues that de novo review is appropriate and that the hearing officer correctly applied the standard. However, the relevant regulation and statute that O'Keefe points to in support of de novo review authorizes a hearing officer to review de novo whether the employee committed the charged violation warranting termination, not the reasonableness or sufficient cause for the termination. De novo review is also not appropriate because the agency is in a better position to assess what serves the good of the public service. Thus, hearing officers must apply a deferential standard when determining that the agency deemed the employee's termination as serving the good of the public service required by statute.

Confusion about the appropriate standard of review is based on decisions in three cases considering disciplinary actions by the Nevada Department of Prisons ("NDOP").<sup>5</sup> The earliest case, *Dredge*,<sup>6</sup> established that deference to an agency's decision to terminate as serving the good of the public service was even more critical "whenever safety concerns are implicated in the employee's termination."<sup>7</sup> This only implies deference in situations where security is a concern, not a bright line rule that a hearing officer does not generally owe any deference unless security concerns are implicated. Further, the cases do not differentiate the standards of review as to 1) whether the employee committed the offense and 2) whether the agency's decision was reasonable and made with just cause. The Court therefore overruled the parts of *Knapp* and *Jackson* that indicate a hearing officer reviews de novo that an employee's termination serves the good of the public service.

When a classified employee challenges their termination after a first-time violation, the hearing officer must apply a three-step reasonableness test to review the agency's decision. First, the hearing officer reviews de novo whether the employee in fact committed the violation. Second, the officer determines whether the violation was a serious violation of law or regulation. If the agency has a published regulation indicating that termination is appropriate even for a first-time violation, that violation is serious as a matter of law. Finally, the hearing officer applies a deferential standard of review to the agency's decision to terminate an employee in service of the public good.

Here, the hearing officer correctly applied de novo review to determine that O'Keefe violated DMV Prohibition G(1), but acted arbitrarily or capriciously by deciding that her violation

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<sup>4</sup> NEV. REV. STAT. 284.385(1)(a) allows dismissal if "the appointing authority considers that the good of the public service will be served thereby."

<sup>5</sup> *Knapp v. State Dep't of Prisons*, 111 Nev. 420, 424, 892 P.2d 575, 578 (1995); *State Department of Prisons v. Jackson*, 111 Nev. 770, 895 P.2d 1296 (1995); and *Dredge v. State*, 105 Nev. 39, 769 P.2d 56 (1989).

<sup>6</sup> *Dredge*, 105 Nev. 39, 769 P.2d 56.

<sup>7</sup> 105 Nev. at 424, 769 P.2d at 577-78.

was not serious as a matter of law. The officer also arbitrarily and capriciously reviewed de novo the DMV's conclusion that her termination served the good of the public service. There is substantial evidence that the decision was reasonable. First, the delay of the investigation into her conduct was due to her transferring departments. Second, even though she committed no prior offenses, she still violated an offense warranting termination for a first-time violation. Finally, the evidence shows that O'Keefe was on notice that the violation could result in termination and that four other employees were terminated for ignoring the provision. The evidence thus shows that the DMV acted reasonably by determining that O'Keefe's termination served the good of the public service.

## **Conclusion**

The Court found that the district court was correct in holding that the hearing officer applied the wrong standard of review to the DMV's decision to terminate O'Keefe. Hearing officers review de novo whether the employee committed the offense. However, they must apply a deferent standard of review to the agency's determination that the termination served the good of the public service. Accordingly, the Court affirmed the district court's order granting review and setting aside the hearing officer's decision.

### **PICKERING, J. concurring:**

The hearing officer was incorrect as a matter of law in concluding that O'Keefe's violation required progressive discipline rather than termination. The DMV's Prohibition G(1) is a policy approved by the statutorily created Personnel Commission to avoid progressive discipline and terminate any employee who misuses DMV data. O'Keefe argued that the DMV did not uniformly enforce this provision prior to 2011, but the record shows the agency had since terminated four others for the same violation, thus she was not treated dissimilarly from other employees.

That should be the end of the analysis because the appeal does not implicate the issues in *Knapp*, where all of the parties agreed that termination was not warranted for the offense.<sup>8</sup> The majority misses the key point, which is that the Court owes deference to hearing officers, not agencies, in deciding mixed questions of law and fact. O'Keefe presented substantial evidence that the DMV selectively enforced Prohibition G(1), which presented a mixed question of law and fact to which the reviewing court must defer to the hearing officer under NRS 233B.135(3).<sup>9</sup>

The majority's decision decides on an issue not presented at appeal, departing from statutory mandate and unnecessarily overruling existing precedent, which adds confusion to this area of the law. This case should be resolved the way the district court did, by holding that the hearing officer committed error by second-guessing the DMV as to the seriousness of O'Keefe's unauthorized DMV queries. Justice Pickering concurred in the decision to reverse the hearing officer only because of the hearing officer's legal error in concluding O'Keefe's violation was not sufficiently serious to justify termination. However, she did not ascribe to the new three-step process and would not ignore prior cases that outline a hearing officer's duty to provide independent, fair, and impartial review of disciplinary actions against state employees.

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<sup>8</sup> 111 Nev. at 425, 892 P.2d at 578.

<sup>9</sup> *Knapp*, 111 Nev. at 423, 892 P.2d at 577.