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### State Dep't of Corr. v. Ludwick, 135 Nev. Adv. Op. 12 (May 2, 2019)

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*State Dep't of Corr. v. Ludwick*, 135 Nev. Adv. Op. 12 (May 2, 2019)<sup>1</sup>

## CLEAR ERROR: ADMINISTRATIVE REVIEW OF TERMINATION

### **Summary**

The Court determined that (1) a hearing officer must also give deference to the agency's determination that a crime is so serious that termination serves the public good, even when the agency has no published regulation dictating that outcome, and (2) an administrative hearing officer committed a clear error of law in relying, in any way, upon an invalid regulation to review an agency's determination to terminate for a first-time disciplinary action.

### **Background**

Brian Ludwick worked for the Nevada Department of Corrections ("NDOC") as a correctional officer. He was assigned to Unit 1 which housed inmates returning from solitary confinement and inmates with violent tendencies. During his shift, Ludwick began to feel unwell and, after failing to contact his supervisor, he left the unit. The supervisor then reported Ludwick for abandoning his post.

NDOC reviewed the report, then charged him with violating four different administrative regulations relating to his employment.<sup>2</sup> NDOC then terminated Ludwick's employment. Following termination, Ludwick administratively appealed.

After reviewing the case, the hearing officer ultimately determined that Administrative Regulation 339, which was one of the four administrative regulations NDOC charged Ludwick with breaking, was invalid because the State Personnel Commission ("SPC") never approved it. However, the hearing officer then used AR339 to gauge officers' expectations to determine whether Ludwick's actions constituted inexcusable neglect under another regulation and justified termination for a first-time offense. Ultimately, the hearing officer reversed Ludwick's termination, and NDOC consequently filed a petition for judicial review, which the district court denied.

### **Discussion**

The Court reviews a district court's denial of an agency's petition for judicial review the same way the district court did initially: a de novo review for clear error of a hearing officer's determination.<sup>3</sup>

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<sup>1</sup> By Tayler Bingham.

<sup>2</sup> Nevada Administrative Code ("NAC") 284.650(1) (activity incompatible with employee's conditions of employment), NAC 284.650(3) (violating or endangering the security of the institution), NAC 284.650(7) (inexcusable neglect of duty), and NDOC's Administrative Regulation ("AR") 339.05.15 (neglect of duty—leaving an assigned post while on duty without authorization of a supervisor).

<sup>3</sup> See *Taylor v. State Dep't of Health & Human Serv.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013).

### *The hearing officer's review of NDOC's decision to terminate*

When reviewing an agency decision, a hearing officer determines de novo whether the employee committed the act in fact.<sup>4</sup> But when the officer reviews an agency's determination that termination serves the public good, the officer must give deference to the agency. The hearing officer must also give deference to the agency's determination that a crime is so serious that termination serves the public good, even when the agency has no published regulation dictating that outcome.

### *The hearing officer erred by relying on an invalid regulation in reviewing the termination decision*

A hearing officer uses a three-step process to review an agency's termination decision as a first-time disciplinary measure. First, the officer reviews de novo whether the employee in fact committed the alleged violation. Second, the officer determines whether the violation was serious enough to warrant termination as a first-time disciplinary action. Third, the officer gives deference to an agency's determination that termination serves the public good.

All the alleged violations were based Ludwick's leaving of his post without prior permission, and he claims he had implied permission to do so under the FMLA. However, 29 C.F.R. § 825.303(c) (2018) requires compliance with the employer's customary practices, unless there were unusual circumstances, which Ludwick did not show, and Ludwick failed to follow the customary practice of notifying his supervisor.

Consequently, the hearing officer had to determine whether Ludwick's leaving of his post violated the regulations with which he was charged. Beginning with AR 339, the hearing officer determined the regulation was not approved by the Commission and could not serve as a basis for discipline. While NDOC argues a separate statute permits them to regulate employee labor without approval, separate statutes and administrative codes require Commission approval for prohibited activities subject to discipline.

However, even though the hearing officer correctly determined that AR 339 was never approved by the SPC and consequently invalid for disciplinary purposes, the hearing officer subsequently used AR 339 to determine whether Ludwick's actions constituted inexcusable neglect under another regulation and justified termination for a first-time offense.

The Court held that in so doing, the hearing officer committed a clear error of law warranting remand. Since the regulation itself was invalid, the hearing officer should not have relied on it for any purpose related to the disciplinary charges in this case.

### **Conclusion**

The Court concluded that the hearing officer committed a clear error of law in relying upon an invalid regulation to determine whether a correctional officer had violated the NAC in leaving his post early without notifying his supervisor.

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<sup>4</sup> O'Keefe v State Dep't of Motor Vehicles, 134 Nev., Adv. Op. 92, 431 P.3d 350 (2018) (citing NRS 284.390(1), NRS 284.385(1)(a), NAC 284.798, NRS 284.383(1), NAC 284.646(1)).