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### State, Dep't of Transp. v. Bronder, 136 Nev. Adv. Op. 76 (December 3, 2020)

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## NAC 281.305(1)(a) AS AN INVALID JURISDICTIONAL RULE

### **Summary**

The Nevada Supreme Court considered whether NAC 281.305(1)(a) is a procedural rule within the rulemaking authority that NRS 281.641(5) gives the Nevada Department of Administration's Personnel Commission, or instead a jurisdictional rule that exceeds the Personnel Commission's authority and thus invalid. The Court concluded that NAC 281.305(1)(a) is a jurisdictional rule and is invalid.

### **Background**

NRS 281.641(5) gives the Nevada Department of Administration's Personnel Commission authority to adopt procedural rules for whistleblower appeal hearings.<sup>2</sup> NAC 281.305(1)(a), which the Personnel Commission promulgated under NRS 281.641(5), provides that a state officer or employee claiming whistleblower protection "must" file a whistleblower appeal within 10 workdays of the alleged reprisal or retaliation.<sup>3</sup>

The dispute in question concerns respondent John Bronder who was fired by appellant Nevada Department of Transportation (NDOT). Bronder filed a whistleblower appeal alleging that his termination was in retaliation for his disclosure of certain information eight months after his termination.

NDOT argued that Bronder violated the 10-day rule for filing a whistleblower appeal and moved to dismiss. The hearing officer ruled that the 10-day rule was invalid and ordered Bronder reinstated at NDOT. The district court denied NDOT's petition for judicial review, which NDOT now appeals.

At issue before the Court is whether the hearing officer erroneously concluded that Bronder timely filed his whistleblower appeal.

### **Discussion**

On appeal, NDOT argues that NAC 281.305(1)(a) is valid because it was adopted in accordance with NRS 281.641. Bronder argues that because NRS 281.641(5) allows rules for conducting hearings and NAC 281.305(1)(a) is a rule for filing an appeal, NAC 281.305(1)(a) is invalid.

While this is an issue of statutory interpretation that is customarily reviewed *de novo*, the Court acknowledged that it will "defer to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute."<sup>4</sup> The hearing officer's interpretation of NRS 281.641(5) was that it authorizes procedural rules, but not jurisdictional rules. Because the language of NRS 281.641(5) authorizes the adoption of "rules of procedure for conducting a hearing," the hearing officer's interpretation is squarely within the statute's language, and the Court deferred to the hearing officer's interpretation.<sup>5</sup>

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<sup>1</sup> By Alina Krauff.

<sup>2</sup> NEV. REV. STAT. § 281.641(5) (2019).

<sup>3</sup> NEV. ADMIN. CODE § 281.305(1)(a).

<sup>4</sup> *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008).

<sup>5</sup> NEV. REV. STAT. § 281.641(5) (2019).

The hearing officer reasoned that a rule providing a time limit for filing an administrative appeal is not procedural but jurisdictional based on reasoning in similar statutory interpretation cases. For example, another case ruled that a rule specifying a time period for filing a petition for judicial review under NRS Chapter 2338 is a jurisdictional rule.<sup>6</sup> Therefore, NAC 281.305(1)(a) is also a jurisdictional rule.

**Conclusion**

The Court affirmed the district court's denial of NDOT's petition for judicial review because NAC 281.305(1)(a) is a jurisdictional rule, which is outside the statutory authority of the agency.

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<sup>6</sup> K-Kel, Inc. v. State, Dep't of Taxation, 134 Nev. 78, 80-81, 412 P.3d 15, 17 (2018).