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State, Sec'y of State v. Wendland, 140 Nev. Adv. Op. 64 (Sept. 26, 2024)

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State, Sec'y of State v. Wendland, 140 Nev. Adv. Op. 64 (Sept. 26, 2024)[1]

NAC 284.6562(2)(B) ONLY REQUIRES SUBSTANTIAL COMPLIANCE, AND CLASSIFIED PERMANENT EMPLOYEES IN NEVADA ARE ENETITLED TO DUE PROCESS RIGHTS PRIOR TO THEIR TERMINATION.

Summary

The Court held that NAC 284.6562(2)(b)'s attachment requirement only needs substantial compliance by employees through accurately completing and signing an NDP-54 form. If there is a motion to dismiss for failure to attach a copy of the written discipline, then the employee must attach a copy of the written discipline in response to the motion to dismiss. Additionally, a permanent employee in the State of Nevada is entitled to (1) "'oral or written notice of the charges against [them],'" (2) "'explanation of the employer's evidence,'" (3) "'and an opportunity to present [their] side of the story at a pretermination hearing" before their termination.[2] Finally, the court found the hearing officer abused their discretion by failing to consider whether the alleged misconduct of Wendland warranted termination.

Background

In 2012, Wendland was hired as a "Help America Vote Act administrator" by the Nevada Secretary of State. On November 22, 2019 Wendland was given a written notice of misconduct and put on leave with pay. On December 12, 2019 Wendland was given a notice of employee rights which advised him of the reasons he was being investigated. The stated reason for the investigation was a violation of NAC 284.650, "[d]isgraceful personal conduct which impairs the performance of a job or causes discredit to the agency" and "[d]iscourteous treatment of public or fellow employees while on duty."[3] In late December the investigator met with Wendland, but it wasn't until January 9, 2020, that Wendland wanted to add to the investigation; however, Wendland was denied from doing so because the investigation was complete. On March 20, 2023 Wendland was given a letter of termination after months of investigation for misconduct. The next day, Wendland appealed his dismissal using the required NDP-54 form. While Wendland failed to attach his termination letter, he did accurately include his date of dismissal, and signed an affirmation that the information within his NDP-54 form was "true and correct."

The Secretary of State moved to dismiss Wendland's appeal because NAC 284.6562(2)(b) requires any state employee contenting their dismissal to file documents which must include "the written notification of the appointing authority's decision regarding the proposed action."[4] Wendland opposed the motion, and in-so-doing submitted his termination letter to the hearing officer. The hearing officer denied the motion to dismiss because the attachment requirement only required substantial compliance, and that Court found Wendland had substantially complied by including the correct date his dismissal on the NDP-54 form.

The hearing officer then ordered the reversal of Wendland's termination because Wendland's procedural due process rights had been violated. The hearing officer held that the Secretary of State violated NRS 284.387 by: not giving proper notice of the specific allegations, not re-interviewing Wendland at the end of the investigation, and not allowing Wendland to

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[1] By Zachary Sweetin.
[2] Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).
[3] NEV. ADMIN. CODE § 284.650.
[4] NEV. ADMIN. CODE § 284.6562(2)(b).

submit additional evidence. Thus, the hearing officer did not make a determination as to whether Wendland's termination was reasonable.

The Secretary of State petitioned the district court for judicial review because Wendland's appeal failed to comply with NAC 284.6562(2)(b)'s attachment requirement; additionally, the Secretary of State argued Wendland's due process rights were not violated. The district court denied the petition making two findings. First, Wendland substantially complied with the attachment requirement. Second, Wendland's due process rights were violated twice: (1) during the course of the investigation, and (2) by the general allegations contained within the charging specifications.

Discussion

The Court reviews questions of law and constitutional challenges on a de novo standard of review.[5] This case provides a question of law: "whether NAC 284.6562(2)(b) demands strict compliance or may be satisfied by substantial compliance[?]" Additionally, this case provides a constitutional challenge: what "procedural due process rights are owed to permanent classified state employees during internal investigations conducted pursuant to NRS 284.387"? The Court also addresses whether the hearing officer abused her discretion by failing to determine "whether the general allegations warranted termination." If the Court does find error with lower rulings, they will only reverse if the error is "prejudicial and not harmless."[6]

NAC 284.6562(2)(b)'s attachment requirement may be satisfied by substantial compliance, as it was here

Kassebaum v. Department of Corrections[7] affirmed that a hearing officer *may* dismiss an appeal if the employee has failed to comply with NAC 284.6562(2)(b)'s attachment requirement. However, *Kassebaum* never dealt with, "whether a hearing officer is required to dismiss an appeal for an employee's failure to strictly comply with the attachment requirement."[8] If this provision requires strict compliance, then anything less than exact compliance to the provision will require the hearing officer to dismiss the appeal. However, if this provision requires substantial compliance, then a party's failure to strictly follow the provision is excused so long as the party's actions fulfill the objective of the rule.

In determining whether NAC 284.6562(2)(b)'s attachment requirement requires strict or substantial compliance the Court takes into account four issues: (1) whether the rule uses mandatory or permissive language, (2) the type of provision at issue, (3) the purpose of the attachment requirement, and (4) policy and equity principles.

First, the attachment requirement uses mandatory language. Mandatory language suggests that this provision should require strict compliance. However, the mere existence of mandatory language does not settle the question.

Second, there are "time and manner" provisions and there are "form and content" provisions.[9] "Time and manner provisions address when performance must take place and the

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[5] Nassiri v. Chiropractic Physicians' Bd., 130 Nev. 245, 248, 327 P.3d 1121, 1124 (2018).
[6] Khoury v. Seastrand, 132 Nev. 520, 539, 377 P.3d 81, 94 (2016).
[7] Kassebaum v. Department of Corrections, 139 Nev., Adv. Op. 34, 535 P.3d 651 (2023)).
[8] State, Sec'y of State v. Wendland, 140 Nev. Adv. Op. 64, 10 (Sept. 26, 2024).
[9] BMO Harris Bank, 139 Nev., Adv. Op. 31, 535 P.3d at 245 (2023)).

way in which the deadline must be [met]."[10] Form and content provisions require a description of the person required to take action and what information is required of them.[11] Accordingly, if a provision has to do with form and content then it favors substantial compliance because a party can still fulfill the objective of the rule without strict compliance. If a provision has to do with time and manner then it favors strict compliance because the only way to fulfill the objective of the rule is through strict compliance. NAC 284.6562(2)(b)[12] is considered a form and content provision because it describes the required documents to attach to a hearing request. Thus, this issue favors the provision using substantial compliance.

Third, the purpose of the attachment requirement can still be achieved without a strict compliance to it. The purpose of this provision was set forth in *Kassebaum*[13], where the Court clarified this requirement to help facilitate the hearing officer in their review of disciplinary appeals. This reasoning is further refined by the hearing officer's justification for the provision, which provides notice of when the agency issued a final decision, effective on a particular date. The court found that this purpose can be accomplished if the employee accurately fills out the NDP-54 appeal form, particularly the date of the effective discipline. Additionally, the NDP-54 form requires the employee to sign and affirm the truthfulness and correctness of the information. If there is an objection to truthfulness of the form, the problem can be cured by the employee providing the disciplinary notice when objections arise. Accordingly, because the purpose of the attachment requirement can be achieved without strict compliance, this issue favors the provision using substantial compliance.

Fourth, in an attempt to avoid, "harsh, unfair, or absurd consequences" the Court takes into account policy and equity principles.[14] The Secretary of State was not prejudiced by this issue because they knew the date of the termination decision and their reasoning for the termination. Furthermore, the Counsel for the Secretary of State admit that they were not "hindered" by Wendland's noncompliance. Accordingly, the Court found that policy and equity principles support the provision using substantial compliance.[15]

While the first issue weighs in favor of the provision using strict compliance, each of the next three issues weigh in favor of the provision using substantial compliance. The court held that NAC 284.6562(2)(b)[16] attachment requirement only requires substantial compliance.

The hearing officer erred as a matter of law in finding that Wendland's due process rights were violated during the investigation and in the specificity of charges

A "permanent classified employee of the state of Nevada," has a property interest in their employment. This property interest entitles the employee to a procedural due process right prior to termination.[17] To terminate such an employee, an agency must determine that "the good of the public service will be served."[18] Furthermore, such an employee has the statutory right, pursuant

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[10] Id.
[11] Markowitz, 129 Nev. At 664, 310 P.3d at 572.
[12] NEV. ADMIN. CODE § 284.6562(2)(b).
[13] Kassebaum v. Department of Corrections, 139 Nev., Adv. Op. 34, 535 P.3d 651 (2023).
[14] Leven v. Frey, 123 Nev. 399, 407, 168 P.32 712 (2007).
[15] Markowitz, 129 Nev. At 664, 310 P.3d at 572.
[16] NEV. ADMIN. CODE § 284.6562(2)(b).
[17] Bd. of Regents of State Coll. V. Roth, 408 U.S. 564, 576—78 (1972).
[18] NEV. REV. STAT. § 284.385(1)(a); *see also* Nigro v. Nev. State Bd. of Cosmetology, 103 Nev. 496, 498, 746 P.3d 128, 129 (1987).

to NRS 284.390(2)[19], to contest their termination before a hearing officer, "and subsequent judicial review."

In weighing the competing interests at hand, the court looks to three interests. The first interest addressed is the employee's interest in keeping their employment. The second interest addressed is the government's ability to remove employees when needed. The final interest addressed is the right of wrongful termination.

The court has previously held "the right to procedural due process under Nevada's Constitution is consistent with the procedural due process under the United States Constitution."[20] The United States Supreme Court takes up the issue at hand in *Loudermill*[21]. In *Loudermill*, the Court clarifies three procedural due process rights for a permanent employee prior to termination: (1) "the notice of the charges," (2) "an explanation of the evidence," (3) "and an opportunity to respond."[22] The Court held that those are also the procedural due process rights in Nevada. Under this test the Court finds "Wendland received the procedural due process required by *Loudermill*."

While Wendland claims the allegations were too vague, the Court disagrees. There are general allegations; however, there are also very specific allegations. "The general allegations, coupled with the specific incidents" were sufficient to "noti[fy] Wendland that the Secretary of State had serious concerns."[23] Wendland saw the full investigatory evidence against him. Accordingly, this was a sufficient explanation of the evidence against him. Finally, Wendland had an opportunity to respond on March 13, 2020, when he had his attorney present and was able to give a pre-written position statement against the allegations towards him.

Additionally, the hearing officer ruled that Wendland had due process rights stemming from NRS 284.387[24], which were also violated. The court held that when the case has to do with government employment a mere violation of state law is not, by itself, enough to establish a due process violation. Each of those findings were an error of the hearing officer. Furthermore, even if there was a violation of NRS 284.387[25], by not being given a notice in writing before being questioned, or by not allowing the employee to have a representative present when being questioned. Wendland did not suffered "actual prejudice."[26] There was no actual prejudice because Wendland had an opportunity to fully explain himself prior to the Secretary of State terminating his employment.

The hearing officer abused her discretion by failing to consider whether the general allegations warranted termination

N.R.S. 284.390(1)[27] requires a hearing officer to "determine the reasonableness" of the decision to terminate by the Secretary of State. In determining reasonableness, a hearing officer must determine whether an employee committed the violations, whether their termination was

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[19] NEV. REV. STAT. § 284.390(2).
[20] Turner v. Saka, 90 Nev. 54, 62, 518 P.2d 608, 603 (1974).
[21] Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985).
[22] Id.
[23] de Llna v. Berglund, 282 F.3d 1031, 1035 (8th Cir. 2002).
[24] NEV. REV. STAT. § 284.387.
[25] NEV. REV. STAT. § 284.387.
[26] Jones v. Nev., Cmm'n on jud. Discipline, 130 Nev. 99, 105, 107, 318 P.3d 1078, 1082, 1084 (2014).
[27] NEV. REV. STAT. § 284.390(1).

the appropriate level of discipline, and whether the "termination will serve 'the good of the public service.'"[28] In this case, the hearing officer found that two of the allegations were without sufficient evidence. However, the hearing officer failed to consider whether the alleged misconduct warranted termination. This failure means the hearing officer could not "determine the reasonableness" of the decision to terminate Wendland. As such, the Secretary of State's substantial rights were affected. The Court reversed and remanded the case to district court in order for a determination of reasonableness regarding Wendland's termination to occur.

Conclusion

The court's holding reversed the district court's denial of the Secretary of State's petition for judicial review, and remanded the case to the district court to correctly guide the hearing officer. Particularly by taking into account the "general allegations of unprofessional behavior" and considering whether termination was warranted for the alleged misconduct. The Court held that NAC 284.6562(2)(b)'s[29] attachment requirement only needs to be substantially complied with in order to fulfill the purpose of the requirement. A party may still file for a motion to dismiss if a copy of the written discipline is not attached; however, if the employee attaches a copy of the written discipline in response to the motion to dismiss, then that attachment will suffice the attachment requirement. As Wendland did exactly that, he sufficiently complied with the attachment requirement. Finally, this Court held that pursuant to *Loudermill*, a permanent employee in the State of Nevada has certain procedural due process rights before they are terminated.[30] Employees are entitled to receive (1) notice of the charges against them, (2) explanation of evidence, and (3) an opportunity to present a defense at a pretermination hearing. Wendland received a proper notice of the charges against him, reviewed the evidence against him, and had a representative present with them to present a defense at his pretermination hearing.

[28] O'Keefe v. Dep't of Motor Vehicles, 134 Nev. 752, 759-60, 431 P.3d 350, 356 (2018).
[29] NEV. ADMIN. CODE § 284.6562(2)(b).
[30] Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985).