

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, DEPARTMENT
OF MOTOR VEHICLES,

CASE NO. 49350
(8th JD No. A529007)

Appellant.

vs.

WILLIAM JUNGE,

Respondent.

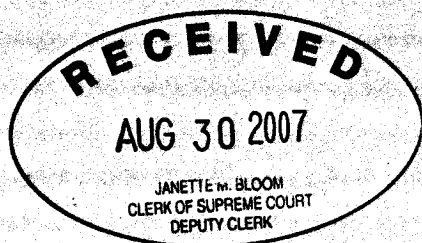
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ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT

APPELLANT'S OPENING BRIEF



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07-19307

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I.

ISSUES PRESENTED FOR REVIEW

1. Whether the Department of Motor Vehicles has the authority to regulate the content of personalized license plates pursuant to NRS 482.3667, NRS 482.3669, NAC 482.320, and NAC 482.370.
2. Whether the district court erred in substituting its judgment for that of the administrative agency when it reversed the Department of Motor Vehicles' decision to deny the issuance of the license plate, "HOE."

II.

STATEMENT OF THE CASE

This is an appeal regarding the denial of a personalized license plate. The Department of Motor Vehicles found that Petitioner William Junge's ("Petitioner") license plate, "HOE," was inappropriate under NRS 482.3667, NRS 482.3669, and NAC 482.320. Therefore, it denied the renewal of Petitioner's license plate in 2006. Petitioner requested a hearing before an Administrative Law Judge. The Administrative Law Judge upheld the decision to deny Petitioner the requested plate of "HOE." Petitioner appealed to the district court. The district court reversed the decision of the Administrative Law Judge and stated it did not find anything inappropriate regarding the word "HOE." The Department of Motor Vehicles appeals to this Court on two grounds: 1) the Department of Motor Vehicles has the authority to regulate the content of personalized license plates pursuant to NRS 482.3667, NRS 482.3669, NAC 482.320, and NAC 482.370; and 2) the district court improperly substituted its judgment for the Department of Motor Vehicles when it reversed the agency's decision.

III.

STATEMENT OF THE FACTS

Petitioner's request for the renewal of the license plate "HOE" was denied in 2006. The matter arose when a technician questioned whether the word "HOE" was appropriate for a license plate (DMV Appendix p. 6, II. 20-28 (hereinafter "DMV App.")). She brought the renewal to the attention of her supervisor, Betty Shaw (DMV App. p. 6, II. 20-26). Ms. Shaw is

1 part of the Special Plate Committee (DMV App. p. 6, ll. 4-6). Ms. Shaw e-mailed the
2 members of the Committee to vote on whether they found the plate "HOE" to be offensive
3 (DMV App. p. 6, ll. 27-28; DMV App. p. 7, ll. 1-28; DMV App. p. 8, ll. 1-3). It was unanimous
4 that the word was derogatory and should be pulled (DMV App. pp. 51-61 (Petitioner's Exhibit
5 "D" containing DMV e-mails)). Petitioner had his hearing before the Administrative Law Judge
6 on August 8, 2006, questioning the Committee's finding and stating he had renewed the plate
7 since 1999 (DMV App. p. 3, ll. 1-14; DMV App. p. 24, ll. 13-17). After reviewing the DMV's
8 policies and governing regulations and statutes, and after listening to testimony and reviewing
9 the submitted documents from both the DMV and Petitioner, the Administrative Law Judge
10 weighed the facts and decided against Petitioner's position. The denial of the license plate
11 "HOE" was upheld (DMV App. pp. 74-81).

12 IV.

13 ARGUMENT

14 A. STANDARD OF REVIEW

15 Administrative review of an agency's decision is conducted pursuant to the Nevada
16 Administrative Procedures Act, codified in NRS Chapter 233B. Chapter 233B also governs
17 judicial review of an administrative law judge's decision. NRS 233B.135 provides the
18 standard of review:

19 1. Judicial review of a final decision of an agency must
20 be:

- 21 (a) Conducted by the court without a jury; and
- 22 (b) Confined to the record. In cases concerning alleged
23 irregularities in procedure before an agency that are not shown in
24 the record, the court may receive evidence concerning
25 irregularities.

26 2. The final decision of the agency shall be deemed
27 reasonable and lawful until reversed or set aside in whole or in
28 part by the court. **The burden of proof is on the party attacking
or resisting the decision to show that the final decision is
invalid pursuant to subsection 3.**

3. The court shall not substitute its judgment for that of
the reviewing court on a question of fact. The court may remand
or affirm the final decision or set it aside in whole, or in part, 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;
- (b) In excess of the statutory authority of the agency;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;
- (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) Arbitrary or capricious or characterized by abuse of discretion.

(emphasis added.)

NRS 233B.121(8) provides: "Findings of fact must be based exclusively on substantial evidence." According to the Torres court, because the Administrative Law Judge's conclusions of law "will necessarily be closely related to the agency's view of the facts, [they] are entitled to deference, and will not be disturbed if they are supported by substantial evidence." State, Dep't of Motor Vehicles v. Torres, 105 Nev. 558, 560-61, 779 P.2d 959, 960-61 (1989). Substantial evidence has been defined as that which "a reasonable mind might accept as adequate to support a conclusion." State, Emp. Security Dep't v. Hilton Hotels Corp., 102 Nev. 606, 608, 729 P.2d 497, 498 (1986). Additionally, "[s]ubstantial evidence need not be voluminous" and may even be "inferentially shown by [a] lack of [certain] evidence." Wright v. State, Dep't of Motor Vehicles, 121 Nev. 122, 110 P.3d 1066, 1068 (2005), citing, City of Reno v. Estate of Wells, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

In Hilton Hotels, the Nevada Supreme Court further defined the substantial evidence standard:

Substantial evidence was well defined in Robertson Transp. Co. v. P.S.C., 159 N.W. 2d 636, 638 (Wis. 1968):

[S]ubstantial evidence [does] not include the idea of this court weighing the evidence to determine if a burden of proof was met or whether a view was supported by a preponderance of the evidence. Such tests are not applicable to administrative hearings. We [equate] substantial evidence with that quantity and

...

...

...

1 quality of evidence which a reasonable man could accept as
2 adequate to support a conclusion [It] does not permit this
3 Court to pass on credibility or to reverse an administrative decision
4 because it is against the great weight and clear preponderance of
5 the evidence, if there is substantial evidence to sustain it.

6 102 Nev. at 608 n.1, 729 P.2d at 498 n.1 (emphasis in original).

7 Thus, regardless of this Court's own assessment of the evidence, this Court must
8 affirm the Administrative Law Judge's decision if it finds that such decision was based upon
9 that quantity and quality of evidence which a reasonable mind could accept as adequate to
10 support the conclusion.

11 **B. THE DMV IS AUTHORIZED BY STATUTE AND REGULATION TO DENY THE**
12 **ISSUANCE OF PETITIONER'S PLATE "HOE"**

13 The DMV has been given the authority by the state legislature to regulate and limit the
14 letters, numbers and words that appear on personalized license plates. NRS 482.3667(5)
15 states as follows: "The Department may limit by regulation the number of letters and numbers
16 used and prohibit the use of inappropriate letters or combinations of letters and numbers."

17 Additionally, NRS 482.3669 states: "The Department may make such regulations as
18 are necessary to insure compliance with all applicable laws pertaining to the licensing and
19 registration of vehicles before issuing personalized prestige license plates in lieu of the
20 regular Nevada license plate or plates, and all applications for personalized prestige license
21 plates must be made to the Department."

22 The Department has indeed established regulations. NAC 482.320 establishes a
23 number of guidelines for regulating personalized plates:

24 1. The letter "O," the letter "I" and the letter "Q" must not be
25 used alone but may be used with a combination of other letters
26 and numbers if the combination does not create confusion
27 between the letter "O" or "Q" and the number "0" or between the
28 letter "I" and the number "1."

2. Only letters, numbers and spaces may be used on
personalized prestige license plates. Letters, numbers and spaces
may be used in any combination not prohibited by NRS 482.3667
or this section.

3. A blank plate will not be issued.

1 4. No letter or number may be placed on a personalized
2 prestige license plate upside down or backwards or in other than
3 its normal legible position.

4 5. No more than seven characters may be on any one
5 personalized prestige license plate.

6 6. No combination of letters, numbers or spaces is allowed
7 if it:

8 (a) Creates confusion with any combination on other license
9 plates.

10 (b) Expresses contempt, ridicule or superiority of:

- 11 (1) Race;
- 12 (2) Ethnic heritage;
- 13 (3) Religion;
- 14 (4) Gender; or
- 15 (5) Political affiliation.

16 (c) Contains any connotation that is sexual, vulgar,
17 derogatory, profane or obscene.

18 (d) Contains a direct or indirect reference to a:

- 19 (1) Drug or drug paraphernalia; or
- 20 (2) Gang.

21 (e) Makes a defamatory reference to a person or group.

22 (f) Is determined by the Department to be inappropriate.

23 7. The person who first applies for a particular letter or
24 number or combination of letters, numbers or spaces and pays the
25 prescribed fee for registration and for the personalized prestige
26 license plates has priority to receive plates with that particular
27 letter or number or combination of letters, numbers or spaces once
28 the application has been accepted by the Department.

(emphasis added).¹

16 In this case, a DMV technician questioned the suitability of Petitioner's plate, "HOE,"
17 when it was presented for renewal (DMV App. p. 6, ll. 20-28). The technician brought it to the
18 attention of her supervisor, Ms. Shaw (DMV App. p. 6, ll. 20-26). Ms. Shaw testified that she
19 had not had it brought to her attention in her prior years (DMV App. p. 13, ll. 4-6). Ms. Shaw,
20 in carrying out the mandates of NAC 482.320, followed the policies and procedures in place.
21 See Petitioner's own submitted exhibits identifying the DMV policy which provides: "If a
22 technician or supervisor questions the suitability of a license plate they may contact (email)
23 the DMV Personalized Plate Committee for comment. As per item 5-f in NAC 482.320, the
24 department can reject a license plate if it feels it is inappropriate for any reason" (DMV App. p.
25 36). Supervisor Shaw followed the DMV policy and commissioned input from the DMV
26 Personalized Plate Committee (referred to in the Record on Appeal as the "Special Plate

¹ NRS 233B.040(1) provides that the Nevada Administrative Code has the force of law.

1 Committee"). It was a unanimous decision by the Special Plate Committee to reject the plate
2 upon a finding that the word was inappropriate.² Perhaps Special Plate Committee Member
3 Duane Brunell put it best: "What was issued in 1999 does not make it appropriate in 2006, it
4 should not have been issued then. Just because he used the last 3 letters of Tahoe doesn't
5 take the meaning out of the word. He was being sly then and got away with it, he shouldn't
6 be allowed to get away with it now, it still says Whore . . . deny it." (DMV App. p. 61).

7 After thoroughly detailing the fact that the DMV regulations allow for the DMV to
8 regulate what combination of letters and numbers appear on a government-issued plate, the
9 ALJ stated: "There is nothing in the law that entitles the Petitioner to compel the DMV to
10 permit a registration plate to be manufactured and displayed that conveys a message that
11 falls outside the scope of the message that the DMV is willing to use in its regulatory scheme
12 (DMV App. p. 80, ll. 16-18)." In other words, although Petitioner may not agree with the
13 decision of the Administrative Law Judge, there is nothing that, despite prior renewals, gives
14 him the right to compel the DMV to issue him a plate that the Special Plate Committee in
15 2006 deemed inappropriate.³

16 It is further important to recognize that even though Petitioner had driven with "HOE"
17 on his plate in the past, a plate is only valid for 12 months and must be renewed. See NRS
18 482.3667(3)(stating "[p]ersonalized prestige license plates are valid for 12 months and are
19 renewable upon expiration"). Moreover, NAC 482.370 states, "The Department will revoke,
20 cancel, or not renew any personalized prestige license plates which have been issued
21 contrary to the provisions of NAC 482.320 to NAC 482.370, inclusive" (emphasis added).

22
23 ² Comments from the Committee include: "Deny, meaning is "whore." (Kathy Holthus). "My goodness, recall and
24 put on the list, we have been denying anything with HO." (Duane Brunell). "Yes recall it should never have gotten
25 out" (Duane Brunell). "Absolutely recall, this is short for whore!" (Kathy Holthus). "I would deny this." (Tomi
Blevins). "I already said deny and I still say deny. I agree it is derogatory to females" (Tomi Blevins). "DENY"
(Thea Franklin). DMV App. pp. 51-61.

26 ³ It is worth noting as well that Petitioner's counsel clarified at oral argument before the district court that apart
27 from the year 1999 and the year 2003 (in 2003 Petitioner requested a change in the plate background (DMV App.
28 p. 24, ll. 14-16), Petitioner was only required to pay fees for the renewal: "As far as renewing it the renewal
process requires not that he resubmit another application but simply that he pay the fees required for the
personalized plates....Each year after that it was renewed because he paid, did what he was required to do." TR.
p. 13, ll. 3-9.

1 Here, Petitioner was attempting to renew the use of the word "HOE" when it was questioned
2 by a DMV technician. As stated by the Administrative Law Judge, Petitioner is not entitled to
3 compel the DMV to issue him a plate with words of his choosing. That is what Petitioner had
4 essentially asked for, and the Administrative Law Judge, after giving Petitioner notice and an
5 opportunity to be heard and all due consideration, found that he cannot force the DMV in any
6 given year -- and specifically now -- to renew his plate with what the DMV found to be
7 inappropriate.⁴ Accordingly, the Administrative Law Judge upheld the decision of the DMV
8 recognizing that the legislature gave the DMV discretion in how it determines what should and
9 should not be on a personalized plate.

10 Notably, just because a plate has been in use for a number of years, it does not stand
11 to reason that an improper plate should continually and forever stay in use. In the case of
12 Kahn v. Department of Motor Vehicles, 20 Cal.Rptr.2d 6 (Cal. Ct. App. 1993), the
13 personalized plate "TP U BG" was recalled after being in use by the driver for 17 years. In
14 court reporting language, the TP could be an "F" and BG could be a "K" or letter combination
15 "ck." Id. at 163. The court stated, "...the length of time petitioner retained her license plate
16 does not raise the restriction on her freedom of expression resulting from the recall of the
17 plate above the level of the minimal and incidental. She remains free to express the same
18 sentiment on her vehicle by using a bumper sticker, license plate holder or similar medium;
19 she simply cannot continue to do so via the license plate itself." Id. at 168.

20 It should also not be forgotten that a personalized plate carries with it the approval of
21 the State of Nevada since it is issued by the government on a government-manufactured
22 plate. The court in Higgins v. Driver and Motor Vehicle Services Branch, 72 P.3d 628 (Or.
23 2003) recognized the same when it denied "WINE" "INVINO" or "VINO":

24 In our view, DMV's rules allowing a vehicle owner's limited
25 participation in the selection of characters for a customized
26 registration plate do not alter the essential character of a

27 ⁴ It may well be the case that a number of plates get issued by DMV before an error is recognized (i.e. people
28 using a foreign language or words that appear certain ways from a rear-view mirror). However, the DMV can
rescind a license plate at any time when it has been issued erroneously. See NRS 482.465(2)(stating "[t]he
Department shall rescind . . . license plates which have been issued erroneously or improperly or obtained
illegally").

1 registration plate. It remains a government-controlled device that
2 carries a government-approved identification message that vehicle
owners must display on their vehicle for regulatory purposes
unrelated to the suppression of speech. . . . Id. at 633.

3 We find nothing in the text or history of Article I, section 8,
4 that entitles petitioner to compel DMV to manufacture a
customized registration plate that conveys a message that falls
5 outside the scope of the messages that DMV was willing to use in
its vehicle regulatory scheme. Id. at 634.⁵

6 When the DMV has followed the prescribed statutes, regulations, and its own policies
7 and has denied the use of the plate "HOE," then Petitioner's real avenue of recourse is not to
8 petition the courts to change a state regulated issue, but to persuade the legislature to rewrite
9 NRS 482.3667 et seq. Petitioner cannot sidestep the fact that NRS 482.3667, NRS
10 482.3669, NAC 482.320 and NAC 482.370 give the DMV the authority to deny or recall
11 personalized plates that do not meet the statutory and regulatory standards.

12
13 **C. THE DISTRICT COURT ERRED IN REVERSING THE DECISION OF THE**
14 **ADMINISTRATIVE LAW JUDGE WHO UPHELD THE DMV'S DENIAL OF THE**
15 **LICENSE PLATE "HOE"**

16 While the standard of review has been detailed above, it is important to emphasize one
17 point which has been repeated in this Court's decisions over the years. Stated this Court:

18 This court's role in reviewing an administrative decision is identical
19 to that of the district court. We shall not substitute our judgment
20 for that of the agency in regard to questions of fact, but must
21 determine whether the agency's decision was clearly erroneous or
22 an arbitrary abuse of discretion. The decision of the agency will be
23 affirmed if substantial evidence exists to support it.

24 Currier v. State Indus. Ins. Sys., 114 Nev. 328, 956 P.2d 810 (1998).

25 See also Weaver v. State, Dep't of Motor Vehicles, 121 Nev. 494, 117 P.3d 193 (2005)
26 (stating that "when reviewing an administrative decision neither this court nor the district court
27 may . . . substitute its judgment for that of the administrative agency concerning the weight of
28 the evidence on questions of fact"); Clements v. Airport Authority of Washoe County, 111
Nev. 717, 896 P.2d 458 (1995). The Special Plate Committee of the DMV decided that,

⁵ Even the court in Hunt v. PennDOT, 47 Pa. D. & C.3d 132, 138 (Pa. Com. Pl. 1987), upheld the denial of the
plate "55-SUKZ" on a finding that that the message (a protest against the 55 mile-per-hour speed limit) was
offensive to good taste.

1 under the dictates of governing statutes and regulations, that the use of the word "HOE" was
2 inappropriate. The DMV Administrative Law Judge agreed. However, the district court
3 improperly substituted its judgment for that of the agency, deciding for itself that the word
4 "HOE" was not inappropriate.

5 During oral argument before the district court, Petitioner, through his counsel, argued
6 repeatedly that the plate "HOE" was part of a "theme" he had for his Tahoe vehicle (Transcript
7 [hereinafter "TR."] p. 3, ll. 17-18; p. 5, ll. 24-25; p. 12, ll. 11-14). However, the district court
8 stated, "Ms. Nelson, when I first read these papers and pleadings I thought perhaps your
9 client was a gardener. Any response?" Ms. Nelson replied, "He's not." (TR. p. 12, ll. 3-6).⁶
10 The district court continued, "I will tell you that I don't see, based on my review of the statutes
11 and the information cited by counsel, I don't see anything inappropriate about this plate
12 usage." (TR. p. 14, ll. 4-7). And after DMV counsel tried to persuade the district court
13 otherwise, including the suggestion that Petitioner might not be making the same argument if
14 Petitioner was denied his plate for the first time in 2006, the district court responded, "It might
15 not but the word "HOE" means a gardening tool. So frankly I don't see anything offensive
16 about it" (TR. p. 17, ll. 5-7). Not only did the district court substitute its judgment for that
17 of the agency, but it completely ignored the common definitions and connotations of the word
18 "HOE" submitted by Petitioner himself and contained in the Record on Appeal (DMV App. pp.
19 46-50 (referring to a "HOE" as a whore)).

20 Here, the district court is clearly substituting its judgment for that of the DMV and has
21 acted contrary to established Nevada Supreme Court precedent. The DMV, through the
22 channels of the technician, her supervisor, the Special Plate Committee, and before an
23 Administrative Law Judge at the DMV, decided that the use of the term "HOE" was
24 inappropriate. The DMV has the authority to carefully make such determinations under the
25

26 ⁶ While Petitioner asserted at the administrative hearing that the word "HOE" could be a farm implement (DMV
27 App. p. 14, line 28; App. p. 24, ll. 25-27), and alluded to the same in his district court brief, Petitioner always
28 maintained the purpose of the word was to relate to his Tahoe. Stated Petitioner at his hearing, "... the connection
with the Chevrolet Tahoe and the Lake Tahoe plate was the initial connection between the plate, the truck, Lake
Tahoe, everything. I think it ties together) (DMV App. p. 24, ll. 21-23). In 2003, Petitioner requested a different
plate background instead of the Lake Tahoe plate (DMV App. p. 24, ll. 14-16).

1 governing statutes and regulations cited above. The district court improperly substituted its
2 judgment for that of the agency and decided for itself that "HOE" is simply a gardening tool
3 and not inappropriate. Incredibly, Petitioner never even argued that it was his intention in his
4 application that "HOE" was meant to refer to a gardening tool; he said it was for a Tahoe (TR.
5 p. 3, ll. 17-18; p. 5, ll. 24-25; p. 12, ll. 11-14). At oral argument, Petitioner did recognize the
6 DMV's concerns and tried to discount the practical meaning of the word, "HOE," with
7 references to the supposed loose morals of Nevada; incredibly, Petitioner asserted that
8 "HOE", even if slang for whore, should be allowed because there are "counties in Nevada
9 where prostitution is legal" and so "HOE" would be a definition for an occupation (TR. p. 5, ll.
10 15-20). Petitioner, through his counsel even stated, "Here in Nevada and in several counties
11 it is legal to be a whore. You can go out and you can be a prostitute. We have plenty of
12 brothels. It's no big surprise that people in other states don't view us as a real church going
13 community." (TR. p. 12, ll. 19-24). It is no big surprise, indeed, when vehicles are being
14 driven with inappropriate words on state-endorsed plates.

15 Simply put, the district court overstepped its bounds when it substituted its judgment
16 for that of the agency pursuant to Currier, Weaver, and Clements, and therefore, the district
17 court's order should be reversed.

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V.

CONCLUSION

Based upon the foregoing, the Department respectfully requests that this Honorable Court enter an Order reversing the decision of the district court and affirming the decision of the Administrative Law Judge of the Department of Motor Vehicles.

DATED this 28th day of August, 2007.

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I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I certify that on the 28th day of August, 2007, I served a copy of **APPELLANT'S**
OPENING BRIEF on the Respondent by causing to be delivered to the Department of
General Services for mailing at Las Vegas, Nevada, a true copy thereof, addressed to:

WILLIAM JUNGE
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LAS VEGAS, NEVADA 89102

Wally Kraft
An employee of Office of the Attorney General