

FILED

IN THE COURT OF APPEALS OF THE STATE OF NEVADA DEC 21 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

CARA O'KEEFE, an Individual,)
)
 Appellant,)
 vs.)
)
 STATE OF NEVADA, *ex rel.*, its)
 DEPARTMENT OF MOTOR)
 VEHICLES,)
)
 Respondent.)
)

Court of Appeals Case No. 68460
District Court Case No. 14 OC 00103 1 B

RESPONDENT'S ANSWERING BRIEF

ADAM PAUL LAXALT
Nevada Attorney General
DOMINIKA J. BATTEN
Nevada State Bar No. 12258
Deputy Attorney General
Bureau of Litigation,
Personnel Division
5420 Kietzke Lane, Suite 202
Reno, NV 89511
Telephone: (775) 850-4117
Email: dbatten@ag.nv.gov
Attorneys for Respondent

15-901631

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CARA O'KEEFE, an Individual,) Court of Appeals Case No. 68460
) District Court Case No. 14 OC 00103 1 B
)
 Appellant,)
)
 vs.)
)
 STATE OF NEVADA, *ex rel.*, its)
 DEPARTMENT OF MOTOR)
 VEHICLES,)
)
 Respondent.)
)
 _____)

RESPONDENT'S ANSWERING BRIEF

ADAM PAUL LAXALT
Nevada Attorney General
DOMINIKA J. BATTEN
Nevada State Bar No. 12258
Deputy Attorney General
Bureau of Litigation,
Personnel Division
5420 Kietzke Lane, Suite 202
Reno, NV 89511
Telephone: (775) 850-4117
Email: dbatten@ag.nv.gov
Attorneys for Respondent

Respondent, STATE OF NEVADA, *ex rel.*, its DEPARTMENT OF MOTOR VEHICLES (DMV), by and through its attorneys, ADAM PAUL LAXALT, Attorney General, and DOMINIKA BATTEN, Deputy Attorney General, files this Answering Brief.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE ISSUES

WHETHER THE DISTRICT COURT CLEARLY ERRED IN REVERSING THE HEARING OFFICER'S DECISION REVERSING EMPLOYEE'S TERMINATION AFTER FINDING THAT EMPLOYEE COMMITTED A TERMINABLE OFFENSE

II. STATEMENT OF THE CASE

DMV terminated Appellant, Cara O'Keefe ("Employee"), for performing an unauthorized transaction for a friend while at work. Employee appealed her termination to a hearing officer, who reinstated Employee despite finding that Employee committed terminable offenses. The District Court reversed the hearing officer's decision because the hearing officer overturned Employee's termination despite finding Employee committed a "class-5" offense. Employee now appeals.

III. STATEMENT OF THE FACTS

A. Appellant's employment

Employee was a revenue specialist for DMV's Motor Carrier division. RA,

Vol. I, p. 3.¹ On December 5, 2012, Employee left DMV for a State of Nevada, Division of Insurance, position. RA, Vol. II, p. 20. However, the Division of Insurance rejected Employee from probation, reverting her back to DMV. *Id.*; See NAC 284.462. DMV terminated Employee for violating Nevada law and DMV policy, effective December 16, 2013. RA, Vol. I, p. 12-15.

B. The incident

After Employee left DMV for the Division of Insurance, two Motor Carrier employees reported events they witnessed while Employee had worked for DMV. RA, Vol. I, p. 4. They overheard Employee discussing a driver's license with the Sheriff's office on the telephone. *Id.* Employee identified herself as a DMV employee to the Sheriff's office, indicating that a customer was at her counter. *Id.*; RA, Vol. II, p. 39, p. 63 - 65. The coworkers were suspicious because Motor Carrier employees do not handle driver's license issues for customers at counters. RA, Vol. II, p. 39, p. 52, p. 66.

Upon Employee's return to DMV, an investigation was completed. RA, Vol. I, p. 2, p. 4; Vol. II, p. 130. Employee had accessed DMV's proprietary database at least ten times to help a friend, named Daniel, with his revoked driver's license. RA, Vol. I, p. 4. She also called the Sheriff's office twice, representing herself as a DMV employee assisting a customer with DMV business, when she

¹ DMV cites to the Respondent's Appendix ("RA") submitted with this brief.

was really calling to help Daniel with a personal issue. *Id.* Accessing DMV's database unauthorized and misrepresenting official DMV capacity, as she did here, are terminable offenses. *Id.* at p. 3-11.

C. DMV's zero-tolerance database policy

Employee's conduct especially concerned DMV because DMV strictly prohibits employees from accessing the DMV database for personal or non-business reasons. DMV's Prohibition and Penalty-G(1) strictly prohibits employees from looking up records in the DMV database for non-business or personal reasons. RA, Vol. I, p. 6; RA, Vol II, p. 177. Indeed, in April of 2011, former-DMV director, Bruce Breslow, wrote a memo to all DMV employees about G(1) database-misuse violations after DMV records had been accessed improperly. *Id.* at p. 1; RA, Vol. II, p. 135. Mr. Breslow reminded employees that "querying DMV records for a purpose other than DMV business is strictly forbidden" and that they could not do transactions on their own records or for their family, friends or acquaintances. RA, Vol. I, p. 1. In bold lettering, Mr. Breslow reminded Employees that database misuse is a terminable offense. *Id.*

DMV supervisors discussed Mr. Breslow's memo with their employees and Employee met with her supervisor, Karen Stoll, and signed her name that she understood DMV's policy. RA, Vol. I, p. 1; Vol. II, p. 136. Yet, Employee accessed the database for the very reasons stated as prohibited on the memo.

D. Employee's termination

After the investigation, DMV issued a Specificity of Charges to Employee, recommending Employee's termination for violating the following DMV prohibitions and penalties: G(1) (class-5); B(23) (class 2-5); H(7) (class 1-5); H(4) (class 1-5); and C(4) (class 1-2). RA, Vol. I, p. 3-11. DMV guidelines prescribe termination as the only penalty for Employee's violation of a G(1) database-misuse offense, while also permitting termination as an available penalty for three other offenses: B(23), H(7) and H(4). *Id.*

Before DMV imposed any discipline, it provided Employee a pre-disciplinary hearing. RA, Vol. I, p. 12-15. After the hearing, DMV terminated Employee effective December 13, 2013. *Id.* at p. 16-18.

E. Post-termination appeals

Employee appealed to the hearing officer. RA, Vol. I, p. 19-20. The hearing officer upheld violation of all but one DMV prohibition and penalties, yet then inexplicably reversed the dismissal that DMV had lawfully imposed, and instead, recommended that Employee receive a suspension. *Id.* at 47-52.

DMV petitioned the District Court for relief from the hearing officer's decision. RA, Vol. I, p. 54-56. The District Court granted DMV's petition for judicial review and Employee now appeals to the Court of Appeals. *Id.* at p. 57-64

IV. ARGUMENT

A. STANDARD OF REVIEW

When a party appeals a petition for judicial review, this Court reviews the administrative decision in the same manner as the district court. *Elizondo v. Hood Mach, Inc.*, 129 Nev. ___, ___ 312 P.2d 479, 482 (2013). NRS 233B provides that a court may remand, affirm or set aside a hearing officer's decision if the decision prejudices the petitioner's substantial rights because the agency's decision 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.

Courts review a hearing officer's decision for an abuse of discretion or clear error. *Taylor v. State Dep't of Health & Human Servs.*, 129 Nev. ___, ___, 314 P.3d 949, 951 (2013). The court also reviews the evidence presented at the hearing to determine if the decision was supported by the evidence, and to ascertain whether the hearing officer acted arbitrarily, capriciously, or contrary to the law. *Turk v. Nev. State Prison*, 94 Nev. 101, 103, 575 P.2d 599, 601 (1976).

The courts generally review a hearing officer's conclusions of law *de novo*, but will uphold the hearing officer's findings of fact if substantial evidence supports the findings. *Taylor*, 129 Nev. ___, ___, 314 P.3d 949, 951 (2013); *see also* NRS 233B.135(3). Substantial evidence is evidence "a reasonable mind

might accept as adequate to support a conclusion.” *State, Emp. Security v. Hilton Hotels*, 102 Nev. 602, 608, 792 P.2d 497 (1986).

B. THE DISTRICT COURT PROPERLY REVERSED THE HEARING OFFICER’S DECISION BECAUSE THE HEARING OFFICER FOUND THAT HELPING DANIEL WITH HIS DUI/DRIVER’S LICENSE ISSUE WAS A TERMINABLE OFFENSE.

This Court should affirm the District’s Court reinstatement of termination because DMV had statutory authority to terminate Employee. An appointing authority may dismiss an employee for any reason stated in NAC 284.650 if the agency “has adopted any rules or policies which authorize the dismissal of an employee for such a cause.” NAC 284.646(1). DMV’s prohibitions and penalties, as approved by the Personnel Commission, authorize DMV to dismiss employees for “class-5” offenses. NRS 284.065; NAC 284.378; NAC 284.742.

A dismissed employee may appeal to the administrative hearing officer, who can set aside the dismissal if the dismissal was without just cause. NRS 284.390. Nevada law does not authorize hearing officers to “prescribe the amount of discipline to be imposed.” *Taylor*, 314 P.3d at 951. Rather, appointing authorities discipline employees, while hearing officers “determine the reasonableness of disciplinary actions and recommend appropriate levels of discipline.” *Id.* Only appointing authorities “have the power to prescribe the actual discipline imposed on permanent classified state employees.” *Id.*

Here, it is undisputed that that hearing officer found that Employee violated “class-5” and “class-5”-ranged offenses when she helped Daniel with his DUI. Despite finding that Employee violated such offenses, the hearing officer overturned the termination. The hearing officer’s conclusion was inconsistent with her factual findings because NAC 284.650 and NAC 284.646 authorize DMV to dismiss Employee for these class-5 offenses. DMV’s prohibitions and penalties designate termination for the offenses upheld by the hearing officer and Nevada law does not authorize the hearing officer to invalidate DMV’s prohibitions and penalties. NRS 284.390(1); *Taylor*, 314 P.3d at 951. Since it is undisputed that the hearing officer found that Employee violated terminable offenses, DMV properly terminated Employee; thus the Court should affirm the District Court.

C. EMPLOYEE’S CLAIMS ARE MERITLESS

Employee’s arguments, many raised improperly for the first time on appeal, do not negate DMV’s Chapter 284 authority to terminate her for the offenses upheld by the hearing officer.

a. Employee improperly attempts to justify her misconduct

Employee attempts to justify her misconduct by arguing that: Daniel “authorized” Employee to look at his records,² she did not “benefit” from her misconduct, and she was striving for customer service. However, the relevant

² Employee misconstrues NAC 284.646 “authority.”

issue is that the hearing officer found that she committed terminable offenses despite Employee presenting these issues at hearing.³ Employee did not appeal or dispute the hearing officer's finding that she committed "class-5" offenses to the District Court, so the Court should not consider her claims now. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

b. Lapse of time does not invalidate discipline

Employee argues that her discipline was not "prompt" per a handbook and a supervisor guide, but DMV was prompt, notifying Employee of the allegations and investigating *immediately* once Employee returned to DMV. Moreover, Chapter 284 does not invalidate discipline that is not "prompt" per these publications.⁴

Employee continues that a lapse of time prevented her from getting recordings from the Sheriff's office, but even if that is true,⁵ the recordings would

³ These claims do not affect Employee's violation of the offenses. Employee testified that Daniel let her access his records (DMV rebutted that a customer cannot authorize an employee to break policy) and that DMV promoted customer service. Also, her counsel closed that Employee did not use the information for her benefit. RA, Vol. II, p. 139, p. 215, p. 223; Vol. III, p. 31.

⁴ As far as timelines, NRS 284.387 requires a disciplinary determination within 90 days of notifying employees of allegations, but that is not at issue here. DMV provided Employee with all the process due to her. See RA, Vol. I, p. 2-49. Additionally, the courts have held that the remedy for a due process violation is to order the due process that was due and any attendant damages directly resulting from the failure to give the proper procedure. See *Brady v. Gebbie*, 859 F.2d 1543, 15551 (9th Cir. 1988).

⁵ Employee did not argue her inability to access the transcripts at District Court.

not have changed her hearing outcome. A transcript is not necessary to show that Employee misrepresented her DMV capacity to the Sheriff's office because Employee admitted at the hearing that she identified herself as a DMV employee to the Sheriff's office ROA, Vol. II p. 218. Additionally the G(1) database-misuse offense is terminable on its own, and violation of the G(1) offense does not depend on her misrepresentations to the Sheriff's office. Accordingly, lapse of time does not invalidate Employee's termination.

c. Transcript Errors

Employee improperly argues, for the first time, an issue with the hearing transcript, so the Court should not consider it. *Old Aztec Mine*, Nev. 49, 52, 623 P.2d 981, 983. Still, if the transcripts have such "errors and omissions," they are immaterial. Employee states that the transcripts erroneously say that she received Daniel's wife's permission to access her records, and that they omit that an employee recognized her supervisor's guide exhibit. But Daniel's wife's authorization or this witness' familiarity with a publication do not affect that DMV lawfully terminated Employee under Chapter 284, and Employee does not state how they do. Accordingly, Employee's argument is improper and immaterial.

See Old Aztec Mine, Nev. 49, 52, 623 P.2d 981, 983.

d. Disparate Treatment⁶

Citing no authority that another employee's discipline affects hers, Employee argues that DMV was more lenient with an employee who looked up information "on her ex and his current girlfriend." DMV had lawful and factual basis to terminate Employee for *her* misconduct because *she* violated terminable offenses. RA, Vol. I, p. 16-18. But even if another employee's discipline is relevant, this employee's discipline does not show a disparity. DMV terminated all employees, including Employee, for G(1) database misuse *after* Mr. Breslow's 2011 memo. RA, Vol. II p. 80-83. The other employee's discipline is not inconsistent because it occurred in 2007, years before Mr. Breslow's memo imposed DMV's zero tolerance for G(1) offenses. *Id.* at p. 257.

V. CONCLUSION

The Court of Appeals should affirm the District Court.

Respectfully submitted this 21st day of December, 2015.

ADAM PAUL LAXAL

Attorney General

By: 

DOMINIKA J. BATTEN

Deputy Attorney General

Bureau of Litigation

Personnel Division

Attorneys for Respondent

⁶ The law does not require the government to treat its employees equally in the public employment context. *See Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 603-05 (2008).

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type face requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:


This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in font size 14 and font style Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 2,162 words.

3. Finally, 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 NRAP 28e(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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.

DATED this 21st day of December, 2015.

ADAM PAUL LAXALT
Attorney General


By: 
DOMINIKA J. BATTEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 21st day of December, 2015, I served a copy of the foregoing **RESPONDENT'S ANSWERING BRIEF**, by placing said document in the U.S.

Mail, first class postage prepaid, addressed to:

Cara O'Keefe
1775 Myles Way
Carson City, NV 89701



An Employee of the
Office of the Attorney General