

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARA O'KEEFE, AN INDIVIDUAL,

Appellant,

vs.

THE STATE OF NEVADA
DEPARTMENT OF MOTOR
VEHICLES,

Respondent.

Case No.: 68460

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Dec 24 2018 09:19 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S PETITION FOR REHEARING

In Conjunction With Legal Aid Center of Southern Nevada

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Pursuant to NRAP 40(c)(2)(A) and (B), Appellant Cara O’Keefe (“O’Keefe”) moves this Court to rehear this matter because the Court has overlooked or misapprehended a material fact in the record and failed to consider a statute, NRS 233B.135(3), when deciding the remedy.

When the Hearing Officer issued her Findings of Fact, Conclusions of Law and Decision in this case on April 22, 2014, she relied on this Court’s prior interpretations of NRS Chapter 284 under *Dredge v. State ex. rel. Dept. of Prisons*, 105 Nev. 39, 769 P.2d 56 (1989) and *Knapp v. State Dept. of Prisons*, 111 Nev. 420, 892 P.2d 575 (1995). RA, Vol. I, pp. 29-30.¹ On December 6, 2018, this Court overruled “those parts of *Knapp* and *Jackson*, and their progeny, which suggest that the hearing officer decides de novo whether the employee’s termination serves the ‘good of the public service.’” Opinion filed December 6, 2018, p. 12. Pursuant to NRS 233B.135(3), this Court may remand the decision to the Hearing Officer so that she may reconsider her decision under the new three-part standard articulated by this Court on December 6, 2018. The Hearing Officer should have the opportunity to address whether O’Keefe violated a law or regulation under a de novo standard of review and to review the DMV’s decision to terminate O’Keefe using a standard of deference. Opinion, p. 2. On pages 12-

¹ O’Keefe is relying on the Transcript On Appeal and Record On Appeal delivered to O’Keefe’s counsel by the Attorney General’s office which the Attorney General represented was the record before the District Court.

13 of its Decision, this Court set forth a three-step review process with which the Hearing Officer has never been given a chance to apply.

Contrary to this Court's finding on page 13 of the Decision that, "[T]he hearing officer correctly applied de novo review to find that O'Keefe repeatedly violated DMV penalty G(1)," the Hearing Officer actually found that O'Keefe "did not manipulate data or disclose data." RA, Vol. I, p. 24. The Hearing Officer found:

The reliable, substantial probative evidence also indicates an inconsistency between Prohibition and Penalty G(1), Misuse of Information Technology, and the Memorandum regarding this offense from then-DMV Director Bruce Breslow. **[Exhibit A, p. 48]**. Whereas Prohibition and Penalty G(1) is a class 5 violation which strictly prohibits the "use, or manipulation of production data or information outside the scope of one's job responsibilities, or for non-business or personal reasons", the Memorandum merely states that a first offense of the Prohibition and Penalty G(1) "can result in termination" and "[a]ppropriate disciplinary action" will be taken if violations of this policy occur, suggesting that the level of discipline for this offense is discretionary.

RA, Vol. I, pp. 33-34.

According to this Court, whether the employee violated a law or regulation is reviewed de novo. Therefore, the Hearing Officer should decide whether O'Keefe violated DMV Penalty G(1).

Alys Dobel said that H(4) and G(1) overlap, but H(4) is a level 1-5 offense. RA, Vol. I, p. 17. The Hearing Officer found that Wayne Seidel, the Administrator

for the Motor Carrier Division of the DMV “recalled a prior case in which an employee sent out a confidential file to her boyfriend’s computer, and they recommended termination, and the employee ultimately resigned.” RA, Vol. I, pp. 20-21. The Hearing Officer further found:

Mr. Seidel further testified that not all employees have been terminated for unauthorized access to DMV data [emphasis added], and he was unfamiliar with the 2009 stalking case. Mr. Seidel acknowledged that Mr. Breslow’s memorandum used discretionary language for computer usage violations when it states that a first offense “can result” in termination, and “appropriate disciplinary action will be taken.” [Exhibit A, p. 38]. Mr. Seidel acknowledged that the earlier case he discussed involved an employee who actually took the information and sent it to someone else.”

RA, Vol. I, p. 21. The Hearing Officer also found that when Alys Dobel was recalled as a rebuttal witness, “Ms. Dobel stated that other employees had been disciplined since the 2011 Memorandum, **but not for technology issues.**” RA, Vol. I, pp. 26-27 (emphasis added). Finally, the Hearing Officer found:

Furthermore, although Employer argued that employee’s termination was commensurate with disciplinary action imposed on five other DMV employees involved in similar incidents, Employer did not provide any specific evidence to corroborate this assertion. In fact there was credible testimony by both parties’ witnesses that prior to 2011, employees were not terminated for similar conduct, including an incident where an employee accessed DMV information to stalk her ex-husband, and that employee only received a suspension.

RA, Vol. I, p. 32. Thus, contrary to the Court's Opinion, there is no evidence in the record of four other employees having been terminated for conduct similar to that of O'Keefe. If the Hearing Officer is to perform her job as set forth in NRS Chapter 284 and as articulated under the new standard set forth by this Court in its December 6, 2018 Opinion, this case should be remanded to the Hearing Officer to apply the new three-part test articulated by this Court for the first time. As this Court held, NAC 284.798 indicates that "the hearing officer reviews de novo whether the employee *in fact* committed the charged violation. Opinion, p. 10.

This Court erred as a matter of law in stating, "Here, the Hearing Officer correctly applied de novo review to find that O'Keefe repeatedly violated DMV Prohibition G(1)." Opinion, p. 13. The Hearing Officer never made such a finding. Moreover, this Court erred when it found that "four other employees had been terminated for violating that provision." Opinion, p. 14. Seidel testified that not all employees had been terminated for unauthorized access to DMV data (RA, Vol. I, p. 21), and Alys Dobel testified that other employees had been disciplined since the 2011 memorandum but **not for technology issues**. RA, Vol. I, pp. 26-27.

The concurring Opinion also errs when the Justice states, "that the DMV terminated all four other employees (or allowed them to resign) who violated Prohibition G(1) after signing the director's memo in 2011, which reminded employees about the Prohibition and that termination could follow from

unauthorized data retrieval.” Concurring Opinion, pp. 2-3. The Hearing Officer did not find that as a fact. O’Keefe respectfully requests that this Court grant her petition for rehearing and remand the issue of her termination to the Hearing Officer to apply the new three-part test articulated by this Court on December 6, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) as it is prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size and Times New Roman.

I further certify that this Petition complies with the page or type volume limitations of NRAP 40(b)(3) because it does not exceed 10 pages or 2,455 words.

Finally, I hereby certify that I have read this Petition for Rehearing 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 Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 40(a)(2), which requires every claim that the Court has overlooked or misapprehended a material fact 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 Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that pursuant to NRAP 25(c), a true and correct copy of the foregoing **APPELLANT'S PETITION FOR REHEARING** was filed electronically with the Nevada Supreme Court Electronic Filing System, and a copy was served electronically on this 22nd day of December, 2018, to the following:

Jordan T. Smith
Assistant Solicitor General
Office of the Attorney General
555 E. Washington Avenue, Suite 3900
Attorneys for Respondent

And a true and correct copy of the forgoing **APPELLANT'S PETITION FOR REHEARING** was mailed on this 22nd day of December, 2018, by U.S. first class mail, postage prepaid, to the following:

Sara Feest
Legal Aid Center of Southern Nevada
725 E. Charleston Blvd.
Las Vegas, NV 89104

/s/ Rosalie Garcia
An Employee of Hejmanowski & McCrea LLC