

No. 83027

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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ABC RECYCLING INDUSTRIES, LLC,

Appellant,

v.

STATE ENVIRONMENTAL COMMISSION; and
NEVADA DIVISION OF ENVIRONMENTAL PROTECTION,

Respondents.

On Appeal from the Eighth Judicial
District Court of the State of Nevada
Case No. A-20-818624-J

RESPONDENT NDEP'S ANSWERING BRIEF

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I. JURISDICTIONAL STATEMENT

This is an appeal from the April 26, 2021, final order of the Eighth Judicial District Court denying ABC Recycling Industries, LLC’s (“ABC”) Petition for Judicial Review. Appellant’s Appendix (A.A.) at 279–80. On April 30, 2021, Notice of Entry of the same was filed. A.A. at 282. ABC filed its Notice of Appeal on June 1, 2021. A.A. at 289. Accordingly, ABC’s appeal is timely pursuant to NRAP 4(a)(1).

II. ROUTING STATEMENT

Although appellate jurisdiction is proper under NRAP 3A(a) and 3A(b)(1), it appears this case could be assigned to the Court of Appeals under NRAP 17(b)(9). That rule provides that “administrative agency cases except those involving tax, water, or public utilities commission determinations” are presumptively assigned to the Court of Appeals. *See* NRAP 17(b)(9). This case does not involve any tax, water, or public utilities commission determinations. Rather, it involves a mining reclamation permit issued under NRS 519A.

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III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

- A. Is the State Environmental Commission’s (the “Commission”) action to uphold the Nevada Division of Environmental Protection’s (NDEP) decision to revoke ABC’s permit supported by substantial evidence given the undisputed fact that ABC failed to pay its statutorily required annual fee?
- B. Did the Commission arbitrarily abuse its discretion in denying ABC’s request for additional time to conduct discovery despite ABC not disputing that it had failed to pay its required annual fee?

IV. STATEMENT OF THE CASE

On February 15, 2020, ABC filed its appeal of NDEP’s February 6, 2020, decision to revoke its mining reclamation permit and forfeit its reclamation surety cash deposit. A.A. at 22. ABC’s grounds for appeal stated that the “final decision was affected by other error of law.” *Id.* On March 11, 2020, NDEP submitted its Motion for Summary Judgment. A.A. at 55. ABC submitted its Opposition to NDEP’s Motion on April 24, 2020. A.A. at 90. NDEP submitted its Reply in Support of its Motion on

May 15, 2020. A.A. at 129. Utilizing its powers under NAC 445B.8913, the Commission set a prehearing conference date of June 12, 2020, to rule on NDEP's Motion. A.A. at 139.

On June 12, 2020, a three-member panel of the Commission convened to rule on NDEP's Motion for Summary Judgment. *See* a copy of the Transcript for the Commission's June 12, 2020, Hearing at A.A. 141–91. Ultimately, the Commission found that no genuine issue of material fact existed because it was undisputed that ABC failed to pay its required annual fee of \$4,166 by April 15, 2019. *See* the Commission's Order Granting NDEP's Motion for Summary Judgment at A.A. 193. The Commission recognized that NDEP had given ABC several opportunities to come into compliance, but ABC failed to do so. *Id.* The Commission acknowledged that under NRS 519.260 and NAC 519A.235, ABC was legally required to pay its annual fee by April 15, 2019. *Id.* Finally, the Commission concluded that "NDEP justifiability utilized its powers under NRS 519A.150(9) to revoke ABC's Permit," and properly "forfeited ABC's reclamation surety cash deposit pursuant to NAC 519A.390." *Id.* As such, the Commission granted
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NDEP's Motion for Summary Judgment and thereby affirmed NDEP's decision to revoke ABC's permit.

On July 27, 2020, ABC filed a Petition for Judicial Review in Eighth Judicial District Court challenging the Commission's decision. *Id.* ABC filed its opening brief on January 28, 2021 (A.A. 207), NDEP filed its answering brief on March 1, 2021 (A.A. 228), and ABC submitted its reply brief on April 9, 2021 (A.A. 260). The District Court heard oral argument regarding ABC's Petition on April 15, 2021. *See* a copy of the Transcript for the District Court's April 15, 2021, Hearing at A.A. 273–78. The Court found that based on ABC's non-payment of the required annual fee, as well as the documented notice that NDEP provided to ABC about its responsibility to meet the requirement, the Commission's decision to grant summary judgment was supported by substantial evidence. *Id.* at A.A. 277. Further, the Court found that the Commission did not error in denying ABC's request for additional time to conduct discovery because the case revolved around "a payment or non-payment of the fee." *Id.* As such, on April 26, 2021, the District Court entered judgment denying ABC's Petition for Judicial Review.

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ABC filed its Notice of Appeal of the District Court's decision on June 1, 2021.

V. STATEMENT OF THE FACTS

On June 9, 2015, NDEP transferred reclamation permit #0171 (the "permit") to ABC for the operation of Lathrop Mill. A.A. at 64. As the permittee, ABC was required to submit an annual permit fee of \$4,166 to NDEP by April 15, 2019. A.A. at 64–65. ABC failed to pay the fee by the April 15 deadline, and NDEP issued a Notice of Noncompliance and Order on August 13, 2019. A.A. at 68. The Notice directed ABC to pay the fee by September 13, 2019. *Id.* ABC did not respond to the Notice of Noncompliance and Order, and NDEP sent a second Notice requiring payment by October 11, 2019. A.A. at 74. Although ABC acknowledged that it received the Notice, it still failed to make its annual permit fee payment. A.A. at 65.

On November 21, 2019, NDEP sent ABC a letter setting a hearing date for January 10, 2020, regarding possible suspension or revocation of ABC's reclamation permit and forfeiture of ABC's reclamation cash deposit due to its failure to pay its annual permit fee. A.A. at 80. At the hearing, ABC's representative, Robert Ford, informed NDEP that ABC

was reluctant to put any additional money into the property, which included paying the annual permit fee. A.A. at 66. At the end of the hearing, NDEP provided ABC with a final deadline of January 24, 2020, to submit its annual permit fee. *Id.*

Despite NDEP's many attempts to gain compliance, ABC still failed to pay its \$4,166 annual permit fee. *Id.* For that reason, NDEP sent a letter to ABC on February 6, 2020, informing ABC that NDEP made the decision to revoke its permit and that ABC's cash deposit would be forfeited to reclaim the site. A.A. at 83.

VI. STANDARD OF REVIEW ON APPEAL

The Supreme Court “reviews an administrative agency’s decision in the same manner as the district court.” *Clark Cty. v. Bean*, 136 Nev. Adv. Op. 65, 482 P.3d 1207, 1209 (2020). When appealing an administrative agency final decision, “the burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid.” NRS 233B.135(2). “The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact.” NRS 233B.135(3). Like the district court, the Supreme Court reviews “factual findings for clear error or an arbitrary abuse of

discretion, only overturning if they are not supported by substantial evidence.” *Bean*, 482 P.3d at 1209 (2020) (citing *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). “Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency’s conclusion.” *Law Offices of Barry Levinson v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 384 (2008). “It is reasonable to conclude that in enacting NRS 233B.135 the legislature intended for the district court to have the power to reverse and remand a decision for a factual determination *where there is no evidence on the record to decide the issue.*” *Gen. Motors v. Jackson*, 111 Nev. 1026, 1029, 900 P.2d 345, 348 (1995) (emphasis added). Further, “an agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action.” *City of N. Las Vegas v. State Loc. Gov’t Emp.-Mgmt. Rels. Bd.*, 127 Nev. 631, 638, 261 P.3d 1071, 1076 (2011).

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VII. ARGUMENT

A. **The Commission Properly Granted Summary Judgment In NDEP's Favor Because ABC Did Not Contest That It Failed To Pay Its Statutorily Required Annual Fee, And NDEP Acted Within Its Authority In Revoking ABC's Permit Based On The Nonpayment Of This Fee**

Summary judgment is appropriate when “no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.” *Wood v. Safeway, Inc.*, 121 Nev. 724, 729 (2005). A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party. *Id.* While the pleadings and proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to “do more than simply show there is some metaphysical doubt” as to the operative facts in order to avoid summary judgment being entered in the moving party’s favor. *Id.* at 732.

NRS 519.260 requires each operator holding a reclamation permit to, on or before April 15 of each year, pay NDEP a fee based on the amount of land that has been disturbed by mining operations or exploration projects engaged in by the operator and not reclaimed. Additionally, NAC 519A.235 establishes a regulatory fee due on

April 15 of each year that requires each mining operation for which a permit has been issued to submit a fee based on the total amount of affected land. Finally, NRS 519A.150(9) grants NDEP the authority to revoke a permit for violation of a statute or a regulation adopted by the Commission.

Here, the Commission granted summary judgment in favor of NDEP because there was no genuine issue as to the only material fact in the case, whether ABC paid its required annual fee. During the hearing, the Commission observed that the facts of the case made clear that ABC did not pay its annual fee. A.A. at 186 (Commissioner Porta stating: “I think it’s clear they did not pay this fee. It’s required by the regulations and statutes, and that’s what we have to determine today. I didn’t see anything else that was presented evidence-wise or information or anything in my packet that shows otherwise”). ABC has not disputed this fact throughout the case. In fact, in its opposition to NDEP’s Motion, ABC essentially admitted it. *See* A.A. at 92 (“it makes no sense for ABC to pay the fees while the State continues to unreasonably without [sic] hold approval of the reclamation plan”). Additionally, ABC admitted that it never actually submitted the

reclamation plan that it had accused NDEP of unreasonably withholding approval of. *See* A.A. at 155 (ABC’s attorney stating: “And I admit that maybe the reclamation plan had not actually been submitted”).

Given that ABC had failed to pay its annual fee, the Commission determined that NDEP acted within its legal authority in deciding to revoke the permit. *See* NRS 519A.150(9) (granting NDEP authority to revoke for violation of a statute or a regulation adopted by the Commission), NRS 519A.260 (requiring a mine operator to pay an annual reclamation permit fee by April 15), NAC 519A.235 and 519A.240 (requiring a mine operator to pay an annual fee by April 15) and NAC 519A.390 (stating that a surety filed with NDEP is subject to forfeiture upon revocation of a permit). The Commission acknowledged the unambiguous requirement that the annual fee be paid. *See* A.A. at 186 (Chairman Gans stating: “There’s an issue here, and the issue is, I believe the permittee has to pay that annual fee, regardless of anything else. It’s in the law and you’re required by it. The permittees should know that when they pick up a permit, [they] pick up another responsibility. It just almost goes without saying”). *See also* A.A. at 185

(Commissioner Porta stating: “When they sign on or any entity signs on with a permit with the division, they’re required to meet the requirements that are in the permit, and part of that is to pay the fees, submit reports, do testing and things of that nature. And I think everything we’ve heard today shows that this fee was not paid to the Division as required”). As such, the Commission found that NDEP lawfully utilized its power under NRS 519A.150(9) to revoke ABC’s permit. *See* A.A. at 193.

In its Opening Brief, ABC makes the unsupported claim that NDEP is using ABC’s non-payment of required fees as a “smokescreen to hide the unreasonable withholding of the approval of ABC’s reclamation plan.” *See* ABC’s Opening Brief at 2. Essentially, ABC appears to be irrationally speculating that NDEP revoked ABC’s permit for reasons other than the nonpayment of fees. However, NDEP’s basis and reasoning for revoking ABC’s permit is clear and uncontroverted on the face of the record. NDEP’s correspondence with ABC prior to revoking the permit make clear that NDEP’s basis for revocation was ABC’s nonpayment of its required annual fee. This fact is clearly established in NDEP’s correspondence with ABC. *See* A.A. 68, A.A. 74,

A.A. 80 and A.A. 83. Thus, whether ABC paid its fee was the only material fact necessary for the Commission to decide whether NDEP acted lawfully in revoking the permit. Further, as discussed above, ABC never even submitted a reclamation plan, which ABC seems to be incorrectly alleging is the reason NDEP revoked its permit. See A.A. at 155 (ABC’s attorney stating: “And I admit that maybe the reclamation plan had not actually been submitted”). Ultimately, the Commission’s decision to uphold NDEP’s revocation of ABC’s permit is supported by substantial evidence. As stated above, “substantial evidence exists if a reasonable person could find the evidence adequate to support the agency’s conclusion.” *Law Offices of Barry Levinson v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 384 (2008). In this instance, it was certainly reasonable for the Commission to find that no genuine issue of material fact existed regarding ABC’s nonpayment of its annual fee. Further, the Commission’s decision that NDEP acted properly under the law is supported by the applicable statutes and regulations regarding mining reclamation permits.

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B. The Commission Properly Denied ABC’s Request For Additional Time Under NRCP 56(d) Because It Would Not Have Led To The Creation Of A Genuine Issue Of Material Fact

In its Opposition to NDEP’s Motion for Summary Judgment, ABC requested that it be given more time to oppose summary judgment under NRCP 56(d). A.A. at 92. That rule states that a court may allow additional time to obtain discovery when the nonmovant shows by affidavit or declaration that it cannot present facts essential to justify its opposition. But, “a motion for continuance under [NRCP 56(d)] is appropriate only when the movant expresses *how further discovery will lead to the creation of a genuine issue of material fact.*” *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 117–18 (2005) (emphasis added). In this instance, ABC never demonstrated that additional time would lead to the creation of a genuine issue of material fact. The only material fact in this case was ABC’s failure to pay its statutorily required annual fee. ABC’s Opposition admitted that it did not pay the fee. *See* A.A. at 92 (“it makes no sense for ABC to pay the fees while the State continues to unreasonably without hold [sic]

approval of the reclamation plan”). No amount of time would change this uncontested fact. Presented with this evidence, the Commission properly concluded that an extension of time would not lead to the creation of any genuine issues of material fact. A.A. at 188–89 (Chairman Gans stating: “I’d like to add to that that ABC’s request under 56(f) is not germane to what this panel has to consider”). The Commission’s decision was entirely appropriate and supported by substantial evidence. The District Court properly found that the Commission did not abuse its discretion in denying ABC’s request for additional time given that the case revolved around payment of a fee. *See* A.A. 277 (the Court: “And I don’t find that it was error to not allow discovery, if I’m going down further on that, because it had to do with basically a payment or a non-payment of the fee”).

VIII. CONCLUSION

For these reasons, the Commission did not err in granting NDEP’s Motion for Summary Judgment and upholding NDEP’s February 6, 2020, decision to revoke the Lathrop Mill Reclamation Permit #0171. ABC failed to set forth any facts or law showing that NDEP acted outside the scope of its jurisdiction and authority. ABC failed to show

any evidence that it had paid its annual fee—in fact it did not even dispute that fact. The Commission properly noted that NDEP gave ABC many chances to remedy its noncompliance, but that ABC had refused to take advantage of those opportunities. ABC’s noncompliance in paying its annual fee violated NRS 519A.260 and NAC 519A.235. Based on these undisputed facts and law, it is clear that the Commission’s decision to uphold NDEP’s revocation is supported by substantial evidence. Therefore, NDEP requests that this Court affirm the Commission’s decision.

RESPECTFULLY SUBMITTED this 12th day of January, 2022.

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By: /s/ Daniel P. Nubel
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word/Office 365 in 14 pitch Century Schoolbook.

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 2,844 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 28(e)(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.

RESPECTFULLY SUBMITTED this 12th day of January, 2022.

AARON D. FORD
Attorney General

By: /s/ Daniel P. Nubel
DANIEL P. NUBEL
Senior Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 12th day of January, 2022, I served a copy of the foregoing RESPONDENT NDEP'S ANSWERING BRIEF, by the Nevada Supreme Court's EFlex Electronic Filing System to:

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