

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA DEPARTMENT OF PUBLIC  
SAFETY, DIVISION OF PAROLE AND  
PROBATION,

Appellant,

vs.

KENNETH SCOTT COLEY A/K/A KING  
COLEY,

Respondent.

Case No. 67864

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**APPELLANT'S OPENING BRIEF**

**(Appeal from the District Court's Order  
Granting the Petition for Writ of Mandamus)**

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I.

**JURISDICTIONAL STATEMENT**

This is an appeal from the April 2, 2015, Eighth Judicial District Court's final Order Granting Respondent KENNETH COLEY'S Writ for Mandamus. Appellant's App. pp. 116-118. The Notice of Entry of Order was filed on April 3, 2015. Appellant's App. pp. 114-115. The State's Notice of Appeal was filed in the District Court on April 20, 2015. Appellant's App. p. 119-121. A Notice of Appeal was filed in this Court on April 23, 2015. This Court has appellate jurisdiction pursuant to NEV. R. APP. P. 3A(b)(1).

II.

**ISSUE PRESENTED FOR REVIEW**

Whether the District Court erred by ordering Appellant to adhere to the provisions of NAC 213.720-213.790 to allow Respondent the opportunity to have his criminal records sealed under S.B. 282, Section 16 when this statute had expired on July 1, 2008, and Respondent had not applied until on or about June 18, 2014.

III.

**STATEMENT OF THE CASE**

On February 5, 2015, Respondent filed a Writ for Mandamus seeking an order directing Appellant to change a dishonorable discharge from probation to an honorable discharge under an uncoded 2005 statute, 2005 Statutes of Nevada at Chapter 476 §16 p. 2360-2361.<sup>1</sup> Appellant filed their Opposition on February 11, 2015, and a Reply was filed on February 12, 2015.

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<sup>1</sup> At the eventual hearing on the writ, the parties agreed that only the sentencing court could amend the discharge status and what Respondent was more accurately seeking from Appellant was an Order that Appellant make the recommendation to the sentencing court for amendment to Respondent's discharge status.

Upon oral argument on February 23, 2015, the District Court ruled that the statute, 2005 Statutes of Nevada at Chapter 476 §16 p. 2360-2361, was no longer in effect as of July 2008, but nonetheless Appellant has discretion under the applicable Nevada Administrative Code, (“NAC”), to continue the program beyond the expiration of the empowering statute and by Appellant providing the application and considering the same Respondent is entitled to complete the application process. Appellant’s App. pp. 116-118. Appellant was ordered to allow Respondent to avail himself of and complete the change in discharge status process pursuant to NAC 213.720-213.790. *Id.*

#### IV.

## STATEMENT OF RELEVANT FACTS

On June 17, 2005, the 73<sup>rd</sup> Legislature passed the statute in question, S.B. 282, Section 16 (“Section 16”). This statute was only in effect for a limited time and as such was never codified; specifically, Section 16 was only in effect, “until July 1, 2008.” Appellant’s App. p. 91. The legislature has taken no further action relative to this law since its passage. That is the law has been of no effect as of July 2, 2008. Appellant’s App. pp. 116-118.

Section 16 allowed for a dishonorably discharged probationer to apply under certain circumstances to Parole & Probation for a recommendation to the sentencing court that their dishonorable discharge be amended to an honorable discharge. Section 16 also directed the Division of Parole and Probation to adopt guidelines and procedures regarding the application process. Appellant's App. p. 91 at Section 16 (1) & (3). These regulations have been codified in the Nevada Administrative Code at NAC 213.720 – 213.790.

• • •

1 Between passage on June 17, 2005, and July 1, 2008, 16 individuals applied  
2 for change in their discharge status. Appellant's App. pp. 93-94. Over the course  
3 of approximately the next six years, no individual or attorney utilized Section 16 or  
4 the regulations in order to change the status of a discharge from probation.

5 In spring of 2014, Respondent contacted Appellant and inquired into the  
6 process of having three dishonorable discharges amended to honorable  
7 discharges. This inquiry was one of first impression, or at least unraised in many  
8 years, to the current leadership and staff at the Division of Parole and Probation. In  
9 an abundance of caution, Appellant provided Respondent the application he  
10 requested one day later. This was a mistake. The application should not have  
11 been provided because the period to apply had expired approximately 6 years  
12 prior. The fact that Section 16 was only in effect for a limited time is further  
13 highlighted in the bill's preamble stating:  
14

15 [A]llowing certain persons who have been dishonorably  
16 discharged from probation or parole to apply, **for a**  
17 **limited period**, to the Division of Parole and Probation  
18 of the Department of Public Safety to request that their  
19 dishonorable discharge be changed to an honorable  
20 discharge; (emphasis added).

21 Appellant's App. p. 90.

22 Appellant also took the affirmative step of making the same information  
23 available to the public at large through their public website as Appellant believed it  
24 was required under NAC 213.790. Thereafter, Appellant received and denied  
25 Respondent's application as to two of the three cases of dishonorable discharge.  
26 Appellant's App. p. 96. The application was denied because in Eighth Judicial  
27 District Cases C137946 and C127870, Respondent had been dishonorably  
28 discharged for failure to complete community service and as such was determined

1 to be ineligible for a change in status. *Id.* The correspondence also indicated  
2 Respondent owed \$475 in fees. *Id.* In hindsight the application should have been  
3 denied simply because the deadline to apply passed on July 1, 2008.

4 **V.**

5 **SUMMARY OF ARGUMENT**

6 The District Court erred in ordering Appellant to adhere to the dictates of  
7 NAC 213.720 - 213.790 relative to Respondent's application. This is in error  
8 because the empowering statute expired on July 1, 2008, approximately 6 years  
9 prior to Respondent's application, and the pertinent NAC does not provide  
10 discretion to allow Petitioner to act beyond the statutory authority granted by the  
11 legislature. Quite simply, once Section 16 expired, Appellant had no further  
12 authority to perform the act or duty sought by Petitioner's Writ. An administrative  
13 agency, "may not act outside the meaning and intent of the enabling statute."  
14 *Boulware v. State, Dept. of Human Res.*, 103 Nev. 218, 219, 737 P.2d 502 (1987)  
15 citing *see Andrews v. Nev. State Bd. Cosmetology*, 86 Nev. 207, 467 P.2d 96  
16 (1970). As such the District Court has created an agency power where one no  
17 longer exists. Official powers of an administrative agency cannot be assumed by  
18 agency nor can they be created by courts in the exercise of their judicial function.  
19 *Andrews v. Nev. State Bd. of Cosmetology*, 86 Nev. 207, 208, 467 P.2d 96, 97  
20 (1970) citing *Fed. Trade Comm'n v. Raladam Co.*, 283 U.S. 643 (1931); *Cabell v.*  
21 *City of Cottage Grove*, 170 Or. 256, 130 P.2d 1013 (1942).  
22  
23

24 **VI.**

25 **ARGUMENT**

26 The District Court's Order should be reversed because Section 16 expired  
27 on July 1, 2008, and therefore there is no statutory authority in effect that allows for  
28

1 Appellant to make any recommendation to the sentencing court to amend  
2 Respondent's dishonorable discharge to honorable under Section 16. Appellant  
3 cannot act outside of an enabling statute. *Boulware* citing *Andrews*. Here, there is  
4 no "enabling statute" in effect because it had expired. The application is simply  
5 untimely because it was not made between the passage of Section 16 and its  
6 expiration on July 1, 2008. Contrary to the District Court's opinion, NAC 213.720 -  
7 213.790 does not include any "provisions" to continue "the program" as ordered by  
8 the District Court beyond July 1, 2008. Appellant's App. p. 152. Thus, by virtue of  
9 its Order, the District Court has made the error of creating an agency power when  
10 this is not a proper exercise of judicial function. *Andrews* citing *Fed. Trade Comm'n*  
11 & *Cabell*.

12  
13 **A. Standard of Review of Writ of Mandamus**

14 "A writ of mandamus is available to compel the performance of an act which  
15 the law requires as a duty resulting from an office, trust or station, NRS 34.160, or  
16 to control an arbitrary or capricious exercise of discretion." *State v. Eighth Judicial*  
17 *Dist. Ct.*, 116 Nev. 374, 379, 997 P.2d 126, 130 (2000).

18  
19 In order for the District Court to have properly granted the writ, there would  
20 have needed to be a statute in effect that created a duty Appellant was bound to  
21 perform. In this case where the empowering statute was clearly expired, there was  
22 no duty for Appellant to perform as sought by Petitioner. Additionally, for the  
23 question of arbitrariness and capriciousness to be relevant there must have been  
24 some discretionary function involved. Again, because Section 16 was expired  
25 there was no discretion afforded to Appellant to which it could have exercised in an  
26 arbitrary or capricious manner.

27  
28 . . .



1 Section 16 was the statute by which a person could have their probation  
2 discharge status amended if they met certain requirements. The applicable NAC,  
3 in and of itself, is not the statutory authority that allows for the application and the  
4 amendment of discharge status. NAC 213.720 - 213.790 only provides guidelines  
5 and procedures for making the application and considering the same including  
6 providing means for indigent persons to make payments. The NAC does not grant  
7 the right to the process or a change in discharge status such as Section 16.

8  
9 The District Court's reliance on the NAC in reaching its decision is in error  
10 because with Section 16 being expired, the District Court and this Court should not  
11 even reach the point that the NAC needs to be considered in making a  
12 determination. Once the District Court determined Section 16 had expired on July  
13 1, 2008, and that Petitioner had not applied until 2014, the writ should have been  
14 denied.

15 **B. The District Court was correct in ruling that Section 16 was no longer**  
16 **in effect.**

17 The District Court correctly ruled that Section 16 was expired. Appellant's  
18 App. pp. 116-118. Petitioner conceded this point at the hearing. Appellant's App.  
19 p. 129. Nonetheless, in an abundance of caution, Appellant makes its argument as  
20 to why Section 16 is expired again here.

21  
22 **1. Section 16's expiration on July 1, 2008, is clear on its face.**

23 Questions of statutory interpretation are reviewed de novo. *State v. Catanio*,  
24 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). When interpreting a statute,  
25 legislative intent "is the controlling factor." *Robert E. v. Justice Ct.*, 99 Nev. 443,  
26 445, 664 P.2d 957, 959 (1983). The starting point for determining legislative intent  
27 is the statute's plain meaning; when a statute "is clear on its face, a court cannot go  
28 beyond the statute in determining legislative intent." *Id.*; see also *Catanio*, 120

1 Nev. at 1033, 102 P.3d at 590 (“We must attribute the plain meaning to a statute  
2 that is not ambiguous.”).

3 Section 16 (1) states:

4 [A] person who was dishonorably discharged from  
5 probation or parole before the effective date of this  
6 section, until July 1, 2008, may apply to the Division of  
7 Parole and Probation of the Department of Public  
8 Safety, in accordance to the regulations adopted by the  
9 Division pursuant to the provision of this section, to  
request that his dishonorable discharge from probation  
or parole be changed to an honorable discharge from  
probation or parole.

10 The language is clear. A person who was dishonorably discharged from  
11 probation prior to the date of enactment on June 17, 2005<sup>2</sup> could apply “until July 1,  
12 2008,” to request a change in their discharge status. Appellant’s App. p. 91. Any  
13 other interpretation is unreasonable. There are two definite dates. The first date  
14 identifies the persons who could apply (those dishonorably discharged before June  
15 17, 2005). The second date, July 1, 2008, is the deadline for application. In  
16 Section 16 the date, July 1, 2008, is not preceded by the word “before”. The date is  
17 preceded with the word “until”, which by its plain language indicates a deadline or  
18 cutoff date.  
19

20 In this case, Petitioner applied on May 5, 2014, which is nearly six years  
21 beyond the cutoff date. Appellant’s App. p. 4. The application was untimely  
22 because it was made years after the cutoff date of July 1, 2008.

23 Additionally, Section 16 (5) required the Appellant to submit a written report  
24 to the LCB on or before January 1, 2009, that contains information regarding the  
25 number of people who applied for a change in status, the number of applications  
26 granted or denied, the general reasons for denial of the applications, the estimated  
27

28 <sup>2</sup> Section 17 of S.B. 282 states Section 16 becomes effective upon passage and  
approval, which p. 90 of Appellant’s App., identifies as June 17, 2005.

1 amount of restitution and supervision fees paid as a result of enactment of this  
2 section and “any recommendations and conclusions concerning the desirability of  
3 **extending** the application provisions”. Appellant’s App. p. 91. (Emphasis added).  
4 The Division did in fact submit the report on December 8, 2008. Appellant’s App.  
5 pp. 93-94.

6 The January 1, 2009, deadline for the written report to the LCB strongly  
7 supports the statute expiration of July 1, 2008, as the deadline led into the 2009  
8 legislative session where the legislature could have extended the statute if they so  
9 desired. Appellant is unaware of any further action taken by the legislature to  
10 extend any portion of Section 16 including the July 1, 2008 date.  
11

12 **2. The intent of the legislature was that Section 16 expired on July**  
13 **1, 2008.**

14 When “the statutory language lends itself to two or more reasonable  
15 interpretations,” the statute is ambiguous, and we may then look beyond the statute  
16 in determining legislative intent. *Catania*, 120 Nev. at 1033, 102 P.3d at 590. To  
17 interpret an ambiguous statute, Nevada court looks to the legislative history and  
18 construe the statute in a manner that is consistent with reason and public policy.  
19 *Great Basin Water Network v. State Eng’r*, 126 Nev. \_\_\_\_, \_\_\_\_, 234 P.3d 912, 918  
20 (Adv. Op. 20, June 17, 2010); *see also Moore v. State*, 122 Nev. 27, 32, 126 P.3d  
21 508, 511 (2006) (looking to legislative history to determine legislative intent behind  
22 ambiguous statute); *Robert E.*, 99 Nev. at 445–48, 664 P.2d at 959–61 (looking to  
23 legislative history, reason, and public policy to determine legislative intent behind  
24 ambiguous statute). Nevada recognizes, “[a] fundamental rule of statutory  
25 interpretation is that the unreasonableness of the result produced by one among  
26 alternative possible interpretations of a statute is reason for rejecting that  
27 interpretation in favor of another that would produce a reasonable result. *Int’l*  
28

1 *Game Tech., Inc. v. Second Judicial Dist. Ct.*, 124 Nev 193, 179 P.3d 556 (2008)  
2 citing *Sheriff v. Smith*, 91 Nev. 729, 733, 542 P.2d 440, 443 (1975).

3 Even if this court determines Section 16 is ambiguous, the law's preamble,  
4 legislative history and fact that the statute was never codified demonstrate the  
5 legislative intent was the application period lasted until July 1, 2008.

6 The preamble contained in the S.B. 282 and in the 2005 Statutes of Nevada  
7 indicates the application period was intended to be temporary. The Preamble to  
8 S.B. 282, states, ". . .allowing certain persons who have been dishonorably  
9 discharged from probation or parole **to apply, for a limited period**, to the Division  
10 of Parole and Probation . . .". Appellant's App. p. 17. (Emphasis added). This  
11 same language is found in the 2005 Statutes of Nevada, Chapter 476 p. 2277.  
12 Appellant's App. p. 90. Clearly, the intent was for the application period to last for a  
13 "limited period". By the statute's language, the only date that limits the application  
14 period is the deadline of July 1, 2008.

15 Legislative history from May 19, 2005 also supports the July 1, 2008,  
16 deadline in Section 16. Allison Combs, Committee Policy Analyst, when discussing  
17 S.B. 445 concerning restoration of civil rights stated,  
18

19  
20 [T]he second would be to **authorize persons**  
21 **dishonorably discharged to apply to the Division of**  
22 **Parole and Probation, from the date the bill is**  
23 **effective until July 1, 2008**, to change that dishonorable  
24 discharge to honorable discharge in certain  
circumstances. If that change is made, then their civil  
rights are restored as if the person received an  
honorable discharge.

25 Appellant's App. p. 101. (**Emphasis added**).

26 Finally, the fact that in the near decade since it was enacted, Section 16 has  
27 never been codified further suggests, rather strongly, that the intent of this statute  
28 was that it was temporary and ended on July 1, 2008.

1 **C. The District Court's position that Appellant has authority to continue**  
2 **enforcement of Section 16 beyond its expiration on the basis that the**  
3 **Nevada Administrative Code provisions effectuate the continuation of**  
4 **the program is in error.**

5 In reaching its decision the District Court stated:

6 However, the Division certainly had within its  
7 discretion—and that's what I'm arguing—or what I'm  
8 saying today has been argued successfully is the  
9 Division exercised a discretionary function to allow the  
10 program to continue. That they have Nevada  
11 Administrative Code provision that effectuate the  
12 continuation of the program. That that certainly is legal  
13 authority to allow them to continue the program.  
14 Appellant's App. p. 152.

15 The above is categorically untrue. Section 16 only empowered Appellant to,  
16 "adopt regulations establishing guidelines and procedures to be used to carry out  
17 the provisions of this section." Appellant's App. p. 91 at Section 16(3). Nowhere in  
18 Section 16 does the legislature vest the Appellant with the authority to continue  
19 Section 16 beyond July 1, 2008. Nor does NAC 213.720 - 213.790 mention any  
20 such right by Appellant to continue Section 16 beyond July 1, 2008. The applicable  
21 NAC does not include, "provisions that effectuate the continuation of the program."  
22 Appellant's App. p. 152. The fact Appellant provided Petitioner the application  
23 beyond July 1, 2008, and considered the same, does not create additional rights for  
24 Petitioner. It certainly does not create the right to receive benefit from a statute that  
25 expired in 2008.

## 26 **VII.**

### 27 **CONCLUSION**

28 In order to grant the Writ of Mandamus, the District Court created  
administrative agency authority that does not exist. Specifically, the District Court  
has created the authority for Appellant to apply Section 16 beyond its indisputable  
expiration. By doing so in this case, the District Court has legislated from the bench

1 and usurped the legislature's authority to create and rescind legislation. As such  
2 this Court should reverse the District Court's Order granting Petitioner's Writ of  
3 Mandamus.

4 DATED this 24<sup>th</sup> day of August, 2015.

5 ADAM PAUL LAXALT  
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7  
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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 [state name and version of word processing program] in [state font size and name of type style]; or

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☒ Does not exceed 30 pages.

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

...

...

...

1 transcript or appendix where the matter relied on is to be found. I understand that I  
2 may be subject to sanctions in the event that the accompanying brief is not in  
3 conformity with the requirements of the Nevada Rules of Appellate Procedure.

4 DATED this 24<sup>th</sup> day of August, 2015.

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing **APPELLANT'S OPENING BRIEF** with the Clerk of the Court by using the electronic filing system on the 24<sup>th</sup> day of August, 2015.

The following participants in this case are registered electronic filing systems users and will be served electronically:

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