

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 THE BOARD OF REVIEW FOR THE
4 NEVADA DEPARTMENT OF
5 EMPLOYMENT, TRAINING AND
6 REHABILITATION, EMPLOYMENT
7 SECURITY DIVISION; AND THE
8 ADMINISTRATOR OF THE NEVADA
9 DEPARTMENT OF EMPLOYMENT,
10 TRAINING AND REHABILITATION,
11 EMPLOYMENT SECURITY DIVISION,

12 Petitioners,

13 vs.

14 THE SECOND JUDICIAL DISTRICT
15 COURT OF THE STATE OF NEVADA,
16 IN AND FOR THE COUNTY OF
17 WASHOE, and the HONORABLE
18 SCOTT FREEMAN, DISTRICT JUDGE,

19 Respondent.

20 and,

21 McDONALD'S OF KEYSTONE,

 Real Party in Interest.

Electronically Filed
Dec 31 2015 03:19 p.m.
Case No. Tracie K. Lindeman
Clerk of Supreme Court

PETITION FOR WRIT OF MANDAMUS
 OR PROHIBITION AND REQUEST FOR A STAY

TO: THE SUPREME COURT OF THE STATE OF NEVADA

 The Nevada Department of Employment, Training and
Rehabilitation's Employment Security Division (ESD), through its counsel, Joseph

1 L. Ward, Jr., Esq., respectfully petitions this Honorable Court for the issuance of a
2 Writ of Mandamus to the Honorable Scott Freeman of the Second Judicial District
3 Court, State of Nevada, directing said Judge and Court to follow the law and
4 dismiss the underlying case, Case No. CV15-00671 – Dept. No. 9, pursuant to
5 Nevada Revised Statute (NRS) 612.530(1) and *Washoe County v. Otto*, 128 Nev.
6 ____, 282 P.3d 719 (2012); or in the alternative, issue a writ of prohibition to arrest
7 the proceedings of the district court in this matter that are in excess of its
8 jurisdiction. This Petition for Writ is made and based on Chapter 34 of NRS. ESD
9 also requests that this Court stay the district court proceedings in this matter
10 pending a ruling hereon.

11 **I.**

12 **STATEMENT OF FACTS IN SUPPORT OF**
13 **PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**

14 1. On April 13, 2015, employer McDonald's of Keystone
15 (McDonald's) filed a petition for judicial review of ESD's Board of Review's
16 decision. Despite the employee, Jessica Gerry, being a party to the proceedings
17 before the Board of Review, McDonald's failed to make her a party to the petition
18 for judicial review. *See* Exhibit 1.¹

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21 ¹ All exhibits are numerical in conformance with NRAP 11 and are made a part
hereof as contained in the accompanying Petitioners' Appendix.

1 2. On June 2, 2015, ESD filed a motion to dismiss pointing out
2 that service by McDonald's pursuant to NRS 612.530(2) was deficient and that
3 McDonald's former employee in this matter, who was a party to the proceedings
4 before ESD's Board of Review, was not made a defendant [respondent]. *See*
5 Exhibit 2. The last day to file a petition for judicial review in this case was April
6 13, 2015. *See* Exhibit 2 at its Exhibit 1.

7 3. On July 6, 2015, McDonald's filed an opposition to ESD's
8 motion to dismiss. *See* Exhibit 3.

9 4. On July 7, 2015, McDonald's filed a motion to amend its
10 petition for judicial review seeking to add Jessica Gerry as a party. As stated
11 above, Ms. Gerry was its former employee and was party to the proceedings before
12 ESD's Board of Review in this matter. *See* Exhibit 4.

13 5. On July 8, 2015, McDonald's filed an erratum to its
14 motion to amend its petition for judicial review. *See* Exhibit 5.

15 6. On July 8, 2015, ESD filed its reply to McDonald's opposition,
16 and in support of ESD's motion to dismiss. *See* Exhibit 6. Contemporaneously
17 therewith, ESD filed a request for submission of its motion to dismiss. *See* Exhibit
18 7.

19 7. Also on July 8, 2015, ESD filed its opposition to McDonald's
20 motion to amend the petition for judicial review. *See* Exhibit 8.

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8. On July 9, 2015, McDonald's filed its reply in support of its motion to amend the petition for judicial review. *See* Exhibit 9. McDonald's submitted its motion to amend the same day. *See* Exhibit 10.

9. Judge Freeman ordered the parties to appear for oral argument on all pending motions. *See* Exhibit 11 entitled “Order to Set Hearing.”

10. The district court heard argument from ESD and McDonald's on December 15, 2015. *See* Exhibit 12, the transcript of those proceedings.

11. On December 17, 2015, the district court entered its “Order Granting Request to Proceed to Judicial Review, Denying Board of Review of Nevada’s *[sic]* Motion to Dismiss Petition for Judicial Review, and Granting Petitioner’s Motion to Amend Petition for Judicial Review.” McDonald’s mailed it to ESD the same day with a “Notice of Entry of Order.” *See* Exhibit 13.

12. On December 21, 2015, McDonald's had a process server personally serve ESD's counsel with an "Amended Petition for Judicial Review." *See Exhibit 14.*

II.

ISSUE PRESENTED IN PETITION

Did the naming requirement of NRS 612.530(1) divest the district court of subject matter jurisdiction upon McDonald's failure to timely name the former employee who was a party to the proceedings before the Board of Review?

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III.

RELIEF SOUGHT IN PETITION

ESD requests that a Writ of Mandamus or Prohibition be issued by this Court directing the district court to dismiss the underlying judicial review action with prejudice or arrest its proceedings in this matter based upon a lack of subject matter jurisdiction. ESD requests a stay of the proceedings in district court in this matter pending the Court's decision on the Petition for Writ.

IV.

STANDARD OF REVIEW

This Court "may exercise its discretion to entertain a petition for mandamus under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition." *State v. Second Judicial District Court*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002). The relief sought will clarify whether district courts can allow petitioners seeking judicial review under Chapter 612 of the NRS to add necessary parties *after* the statutory subject matter jurisdictional deadline.

"[A] writ of prohibition must issue when there is an act to be 'arrested' which is 'without or in excess of the jurisdiction' of the trial judge under NRS 34.320." *Matter of Two Minor Children*, 95 Nev. 225, 228, 592 P.2d 166, 168 (1979). The district court lacks subject matter jurisdiction.

1 V.

2 ARGUMENT

3 During the course of the agency's administrative hearings, including
4 at the Board of Review level, claimant Jessica Gerry was a party. Ms. Gerry was
5 McDonald's former employee. In McDonald's petition for judicial review,
6 however, McDonald's failed to name Ms. Jessica Gerry.² After the jurisdictional
7 door closed, McDonald's attempted to rectify this omission.

8 NRS 612.530 is entitled "Judicial review of decision of Board of
9 Review; Commencement of action in district court; parties; service of petition;
10 summary hearings; appeals to Supreme Court," and states, in pertinent part:

11 1. Within 11 days after the decision of the Board of
12 Review has become final, any party aggrieved thereby or
13 the Administrator may secure judicial review thereof by
14 commencing an action in the district court of the county
15 where the employment which is the basis of the claim
was performed for the review of the decision, in which
action any other party to the proceedings before the
Board of Review *must* be made a defendant. (Emphasis
added.)

16 In the action below, the district court judge attempted to distinguish
17 NRS 612.530(1) and NRS 233B.130(2), which is entitled "Judicial review;
18 requirements for petition; statement of intent to participate; petition for rehearing."
19 NRS 233B.130(2) provides:

20 ² McDonald's filed its Petition for Judicial Review on the last day it could be filed;
21 *to-wit*: April 13, 2015. *See*, Exh. 1. It waited until July 7, 2015, to move to amend
its deficient Petition to name its former employee – a necessary party. *See*, Exh. 4.

2. Petitions for judicial review *must*:

- (a) Name as respondents the agency and all parties of record to the administrative proceeding;
- (b) Be instituted by filing a petition in the district court in and for Carson City, in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred; and
- (c) Be filed within 30 days after service of the final decision of the agency. (Emphasis added.)

In order to acquire subject matter jurisdiction for the judicial review of an administrative decision, each statute **requires** petitioners to name **all** necessary parties.

During the hearing before the district court, ESD argued that NRS 612.530(1) read in its entirety, as a whole, requires the naming of all parties to the proceedings before the Board of Review. *See* Exhibit 12 at p. 9, ll. 13-19. The district court concluded, however, that because the NRS 612.530(1) clause, “in which action any other party to the proceedings ... must be made a defendant” was not part of an alphabetical list – like that in NRS 233B.130(2) – it “is not a jurisdictional requirement.” Exhibit 13, at its Exhibit 1 – the Order, p. 3, l. 14. Despite the fact that NRS 612.530(1) is a single sentence, and despite the fact that both statutes contain the word “must,” the district court determined the lack of an “alphabetical list” made NRS 612.530(1) distinguishable. *See Id.* at p. 3, ll. 13-24.³ Assuming there is a distinction, it truly would be one without a difference. The

³ According to the Nevada Administrative Procedure Act, “[t]he special provisions of ... Chapter 612 of NRS ... for the judicial review of decisions ... prevail...” NRS 233B.039(3)(a).

1 district court follows the reasoning in *Civil Service Commission v. District Court*,
2 118 Nev. 186, 42 P.3d 268 (2002), an overruled case. In *Otto, supra*, this Court
3 noted:

4 As recognized by the district court, in *Civil Service*
5 *Commission v. District Court*, we noted that “technical
6 derelictions do not generally preclude a party's right to
7 review.” 118 Nev. 186, 189–90, 42 P.3d 268, 271 (2002)
8 (citing *Bing Constr. v. State, Dep't of Taxation*, 107 Nev.
9 630, 632, 817 P.2d 710, 711 (1991)). **To the extent that**
***Civil Service Commission* holds that a petition for**
judicial review that fails to comply with the NRS
233B.130(2)(a) naming requirement may nonetheless
invoke the district court's jurisdiction, however, it is
overruled.

10 *Washoe County v. Otto*, 128 Nev. ___, 282 P.3d 719, 725 n.9 (2012) (Emphasis
11 added). Earlier, in a case where this Court looked at NRS 612.530(1), it explained:

12 When a party seeks judicial review of an administrative
13 decision, **strict compliance with the statutory**
14 **requirements for such review is a precondition to**
jurisdiction by the court of judicial review.

15 *Kame v. Employment Sec. Dept.*, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989) (citing
16 *Teepe v. Review Board of Indiana Emp. Sec. Div.*, 136 Ind.App. 331, 200 N.E.2d
17 538, 539 (1964)).

18 In *Scott v. Nevada Employment Security Department*, 70 Nev. 555,
19 278 P.2d 602 (1954), this Court noted “that ‘where a statute upon a particular
20 subject has provided a tribunal for the determination of questions connected with
21 that subject ... the jurisdiction thus conferred **is exclusive**, unless otherwise

1 expressed or clearly manifested....’ 70 Nev. at 559, 278 P.2d at 603–604 (quoting
2 *Minnesota Valley Canning Company v. Rehnblom*, 242 Iowa 1112, 49 N.W.2d
3 553, 555 (1951)) (emphasis added).” *Caruso v. Nevada Employment Sec. Dept.*,
4 103 Nev. 75, 76, 734 P.2d 224, 225 (1987). Here, the legislature directed
5 petitioners seeking judicial review of ESD Board of Review decisions to name
6 “any ... party to the proceedings before the Board of Review.” NRS 612.530(1).
7 “While this legislative mandate may occasionally result in hardship, it is not the
8 function of this Court to substitute its judgment for that of the legislature. *See*
9 *Klosterman v. Cummings*, 86 Nev. 684, 687, 476 P.2d 14, 16 (1970).” *Caruso*,
10 *supra*, 103 Nev. at 76, 734 P.2d at 225. The restriction of review is a proper
11 exercise of the legislative function. *See Scott, supra*, 70 Nev. at 558, 278 P.2d at
12 603.

13 VI.

14 CONCLUSION

15 A Writ of Mandamus or Prohibition should be issued by this Court
16 directing the district court to dismiss the underlying judicial review action with
17 prejudice or arrest its proceedings in this matter based upon the lack of subject
18 matter jurisdiction. ESD requests a stay pending the Court’s decision on this
19 Petition for Writ.

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Regarding a stay, this Court explained:

In deciding whether to issue a stay, this court generally considers the following factors:

(1) Whether the object of the appeal or writ petition will be defeated if the stay is denied;

(2) Whether appellant/petitioner will suffer irreparable or serious injury if the stay is denied;

(3) Whether respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and

(4) Whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

See NRAP 8(c); *Kress v. Corey*, 65 Nev. 1, 189 P.2d 352 (1948).

Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). The object of this writ petition will be defeated if a stay is denied and the district court is allowed to proceed without subject matter jurisdiction. If the district court is allowed to proceed, ESD will be irreparably injured by having to litigate this matter. McDonald's and the district court will not suffer irreparably by simply waiting for this Court to decide this writ petition. ESD is likely to prevail here. Accordingly, ESD asks this Court to grant a stay.

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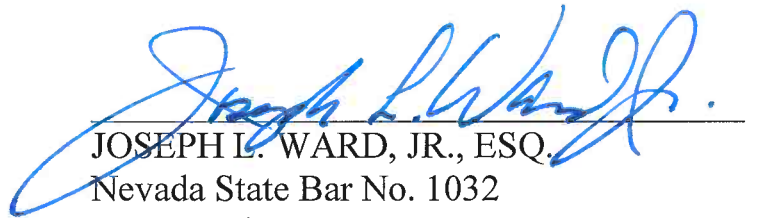
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1 AFFIRMATION Pursuant to NRS 239B.030:

2 The undersigned does hereby affirm that the preceding document does
3 not contain confidential information; including, but not limited to: the Social
4 Security number or employer identification number of any person or party.

5 **DATED** this 31st day of December, 2015.

6 
7 JOSEPH L. WARD, JR., ESQ.
8 Nevada State Bar No. 1032

9 1340 South Curry Street
10 Carson City, NV 89703

11 (775) 684-6317

12 (775) 684-6344 – Fax

13 *Attorney for Nevada ESD Petitioners*

VERIFICATION

STATE OF NEVADA)
 : ss.
IN AND FOR CARSON CITY)

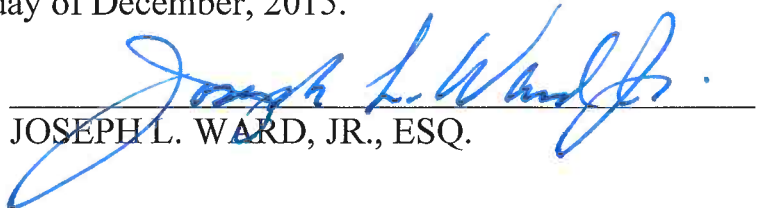
I, Joseph L. Ward, Jr., Esq., having first been duly sworn, depose and
aver under penalty of perjury the assertions of this Affidavit are true as follows:

1. That I am an attorney licensed to practice law in the State of
Nevada.

2. That I represent the State of Nevada Employment Security
Division (ESD) Petitioners in this matter and make this Affidavit in support of
ESD's foregoing Petition for Writ of Mandamus or Prohibition and Request for a
Stay.

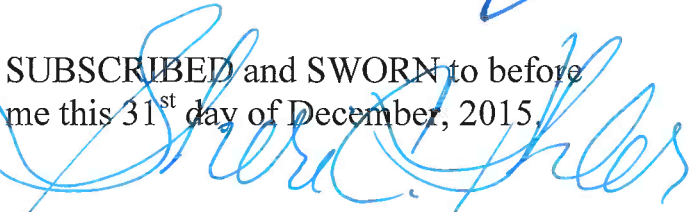
3. That I have read the foregoing Petition, know the contents
thereof, and that the same is true of my own knowledge, except for those matters
stated therein on information and belief; and, as to those matters, I believe them to
be true.

DATED this 31st day of December, 2015.

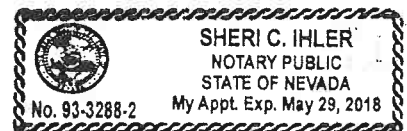


JOSEPH L. WARD, JR., ESQ.

SUBSCRIBED and SWORN to before
me this 31st day of December, 2015.



NOTARIAL OFFICER



1 **NOTICE OF PETITION AND CERTIFICATE OF SERVICE**

2 Pursuant to NRAP 25(d)(1)(B), I hereby certify that I am an employee
3 of the State of Nevada, over the age of 18 years; and that on the date hereinbelow
4 set forth, I served a true and correct copy of the foregoing PETITION FOR WRIT
5 OF MANDAMUS OR PROHIBITION AND REQUEST FOR A STAY, by
6 placing the same within an envelope which was thereafter sealed and deposited for
7 mailing with the State of Nevada Mail at Carson City, Nevada, addressed for
8 delivery as follows:

9 HON. SCOTT FREEMAN
10 Department 9
11 Second Judicial District Court
12 75 Court Street
13 Reno, NV 89501

12 CHARLES ZEH, ESQ.
13 575 Forest Street, Suite 200
14 Reno, NV 89509

14 **DATED** this 31st day of December, 2015.

15 
16 _____
17 SHERI C. IHLER
18
19
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21