

IN THE COURT OF APPEALS FOR THE STATE OF NEVADA

REGINALD BINGHAM,

Appellant,

VS.

STATE OF NEVADA; PUBLIC
EMPLOYEES RETIREMENT
SYSTEM,

Respondents.

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APPELLANT’S OPENING BRIEF

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the Appellant hereby certifies that there are no persons or entities that must be disclosed, other than the Appellant and his undersigned counsel, as set forth herein. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Dated this 2nd day of August, 2016.

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1. JURISDICTIONAL STATEMENT:

Pursuant to Nevada Constitution, Article 6, section 4, the Supreme Court has appellate jurisdiction over the within appeal in that it arises from a civil action before the District Court.

This appeal is from an order denying the Appellant's petition for writ of mandamus, which is a final decision subject to direct appellate review under NRAP 3 and 4.

NRAP 28- Routing Statement: Under NRCP 17(b)(4), this matter is related to an appeal from an administrative agency decision. Therefore, this case should be routed to the Nevada Court of Appeals as a presumptive appeal assignment.

2. STATEMENT OF ISSUES PRESENTED FOR REVIEW:

a. Whether the district court abused its discretion in denying the writ of mandamus based on the record below.

3. STATEMENT OF THE CASE

Bingham initiated the district court proceeding which sought to challenge a PERS Board decision by filing a petition for judicial review on February 20, 2015. App., 4. Bingham filed an errata to the petition which included the PERS Board administrative decision on March 12, 2015. App., 7.

The Respondent filed the record on appeal of the PERS proceedings on April 13, 2015. ER, 13.

Bingham's memorandum in support of his petition was filed on June 9, 2015. App., 69. The parties stipulated to convert the proceedings to a writ of mandamus proceeding on July 24, 2015. App., 84. The Respondent filed its answer to the petition on July 23, 2015. App., 75.

At a hearing on the petition on September 15, 2015, the district court denied the writ of mandamus. App., 87. The final order from the hearing was filed and served on February 5, 2016. App., 93.

Bingham timely filed his notice of appeal to this Court on March 4, 2016. App., 100.

4. STATEMENT OF THE FACTS:

In 2008, Bingham sued his former employer, the City of Las Vegas, in federal court for violations of the Americans with Disabilities Act in federal case number 2:08-cv-01861-JCM. A federal jury returned a verdict against Bingham's claims in March, 2011. The suit was based on the allegations that Bingham was a disabled employee and that the City refused to accommodate the disability.

In 2010, prior to his federal jury trial, Bingham was officially terminated by the City. To effectuate the termination, the City sent a termination letter to Bingham at former address, which sought to advise Bingham of his official termination date of July 16, 2010. App. 63. The City's letter also notified Bingham that if he wanted to apply for PERS disability retirement, he must do so while still actively employed and that the application must occur before his effective termination date of July 16, 2010. Id.

As documented in the letter of Bingham's Counsel to PERS from May 20, 2014, Bingham did not receive the City's termination letter at any time prior to July 16, 2010. App. 61. The City of Las Vegas failed to send the termination letter to Bingham's appropriate address or to his lawyer's office, despite the ongoing federal litigation at the time. Id.

As a result of the defective service of the termination letter, Bingham did

not timely apply for disability benefits with PERS prior to his July 16, 2010, termination effective date. He was unaware of the process given the failure of proper service of the termination letter.

In 2012, Bingham contacted PERS regarding his eligibility for PERS based disability retirement benefits. PERS responded with a letter dated November 26, 2012, which advised Bingham that he did not apply for benefits prior to his termination in July, 2010, and, therefore, he was not eligible for those benefits pursuant to NRS 286.620. App., 64.

PERS maintained the position that because Bingham did not timely apply for PERS disability retirement benefits in July, 2010, prior to his termination date, that PERS did not have the authority to allow him to apply later for those same benefits. App., 57. PERS' communication to Bingham did indicate that he could appeal that denial to the PERS Board. Id.

Bingham requested a hearing before the PERS Board to address the matter. App., 51. On January 21, 2015, Bingham argued his position to the PERS Board, App., 22-30. Bingham contended that because he did not receive proper notice of his City termination in July, 2010, that he was unaware of the requirement to file for disability retirement while still employed with the City. Id. Bingham sought equitable relief from the Board to now allow him to apply for those benefits. Id.

The PERS Board acknowledged that it had the power to correct an “error or inequity” under NRS 286.190, however, the Board refused to grant any relief to Bingham. App., 18-20. The Board ruled that even though Bingham did not receive timely notification from the City about applying for disability benefits prior to his termination, this event “does not eliminate the statutory requirements as provided by the Retirement Act.” App., 20.

At the district court hearing on Bingham’s writ, the court found that Bingham had waited too long to apply for the disability benefits. App., 99. The court found that Bingham failed to apply for benefits while he was still employed with the City, as required by NRS 286.620. Id. The court did not find that any equitable relief should apply, despite the fact that Bingham did not receive proper or timely notice of his termination in order to comply with NRS 286.620.

5. ARGUMENT:

A. The district court erred in denying Bingham's writ, as his circumstances justified the application of equitable relief by the PERS Board:

Standard of Review: A review of a PERS Board decision is based on whether substantial evidence supports the Board's decision. City of Reno v. Traveler's Hotel Ltd., 100 Nev. 436, 439 (1984). The denial of a writ of mandamus is reviewed for a manifest abuse of discretion or whether the decision is arbitrary or capricious. Building and Construction Trades Council of Northern Nevada v. State of Nevada ex rel Public Works Board, 836 P.2d 633, 636 (Nev. 1992). In this case, substantial evidence did not support the Board's actions against Bingham and, further, the district court denial of the writ was an abuse of discretion.

Under NRS 286.190(3), the PERS Board has the inherent equity power to: "adjust the service or correct the records, allowance or benefits of any member, retired employee or beneficiary after an error or inequity has been determined."

Under NRS 286.190(4), the term "error or inequity" is defined as "the existence of extenuating circumstances." The relevant statute provides a non-exhaustive list of examples of "extenuating circumstances," however, the examples do not limit the total scope of what constitutes an extenuating

circumstance sufficient to warrant the Board's power to correct an error or inequity.

The Respondent contended below that Bingham had no evidence of a material misrepresentation made by PERS, which hindered his ability to apply for benefits in 2010, in reliance on the example set forth in N.R.S. 286.190(4). App., 80. This statutory example does not limit Bingham's ability to apply for equity relief given his particular situation. Bingham's extenuating circumstances and substantial evidence supports the application of the equity relief allowed by statute.

The undisputed facts in this case indicate that Bingham never received timely notification from the City in July, 2010, that (1) he was being terminated and (2) that if he wanted to apply for PERS disability benefits, that he must do so before the July 16, 2010, effective date of his termination. Given the failure of service of the letter to Bingham, he did not timely file for PERS disability retirement prior to the July 16 termination date.

The City's failure to send the termination letter to Bingham's correct address or to Bingham's then existing federal counsel contributed to the overall failure of Bingham to timely file for PERS disability retirement. App., 61. However, Bingham did meet the overall requirements for PERS disability

retirement under NRS 286.620, as he had a permanent physical disability and he had been with his government employer for well over 5 years.

It is clear that had Bingham properly and timely received the termination letter, he would have been able to apply for and receive the PERS disability benefit. He met all statutory criteria.

The PERS Board decision to deny these benefits ignored the statutory authority and equity powers allowed the Board under NRS 286.190. Substantial evidence was presented to the Board that indicated Bingham had not received timely notice of his termination. This evidence supported a finding that Bingham could not comply with N.R.S. 286.620, since he was not on notice of its application requirements prior to his July 16, 2010, termination date. The Board's decision was an arbitrary refusal to deny a qualified former public employee those benefits to which he would be entitled by statute.

The district court made note that Bingham waited two years before contacting PERS about the disability retirement in 2012, yet whether the delay was two weeks or two years, it is undeniable that Bingham did not receive the July, 2010, termination letter which set forth the time frames to apply for disability retirement benefits.

Between 2010 and 2011, Bingham was still involved in active federal litigation with the City and then a subsequent Ninth Circuit appeal. The resolution of those matters contributed to Bingham's delays in seeking equity relief from the PERS Board. App., 89-91. However, the passage of that time does not diminish or alter the basis of Bingham's argument for relief under NRS 286.190.

Without receipt of the letter, Bingham was not on notice of his termination prior to July 16, 2010, and he therefore could not take action to apply for the PERS benefits prior to that effective date as required by N.R.S. 286.620. The City's failure to properly notify Bingham or his counsel of the July, 2010, termination is inexcusable, however, this failure was not of Bingham's making or blame.

The PERS Board was presented substantial evidence of this failure of notification and how it adversely impacted Bingham's ability to timely apply for PERS disability retirement while he was still officially employed with the City. The Board's equity power set forth in NRS 286.190 clearly allowed the Board the authority to rely on these extenuating circumstances and grant Bingham relief, to wit: allow him to now file for disability retirement benefits. Yet, the Board's refusal was arbitrary, capricious and lacking in compassion for Bingham's unique set of facts.

The district court's decision to deny Bingham's writ was in derogation to the authority granted by NRS 286.190. The district court deliberately chose to ignore Bingham's evidence of extenuating circumstances and summarily denied the writ. This denial was an abuse of discretion, when balanced with the factual record from the PERS proceedings.

6. CONCLUSION:

For all the foregoing reasons, the district court order should be reversed and the matter remanded for further proceedings.

Dated this 2nd day of August, 2016.

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7. CERTIFICATE OF COMPLIANCE WITH NRAP 28.2 AND NRAP 32:

As undersigned counsel for the Appellant, I hereby certify as follows:

1. I have prepared and read the foregoing opening brief;
2. To the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
3. I certify that the brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found; and
4. I certify that the brief complies with the formatting requirements of Rule 32(a)(4)-(6) and the page and/or type volume limitations stated in Rule 32 (a)(7).
5. I hereby further certify that this brief complies with the typeface and type style requirements of Rule 32(a)(4)-(6) as it utilizes times new roman type face with a 14 point type style. Further, this brief is in compliance with the type-volume limitations as it contains less than 14,000 words and has a word count of

approximately 1,100 words in the countable sections of the brief.

Dated this 2nd day of August, 2016.

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8. CERTIFICATE OF SERVICE:

I hereby affirm that on this 2nd day of August, 2016, I mailed via first class U.S. Mail a copy of the foregoing brief to the Respondent at the address below:

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