IN THE SUPREME COURT OF THE STATE OF NEVADA

CHAD ZENOR,

Appellant,

vs.

THE STATE OF NEVADA, DEPARTMENT OF TRANSPORTATION,

Respondent.

Case No. 71790

Dist. Ct. Case No. 15 OC 00275 1B

On Appeal from Order Denying Motion for Attorney's Fees
dated November 17, 2016
in the First Judicial District Court, Carson City
The Honorable James Wilson Presiding

RESPONDENT'S ANSWERING BRIEF

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Respondent, STATE OF NEVADA DEPARTMENT OF TRANSPORTATION (NDOT), by and through its attorneys, ADAM PAUL LAXALT, Attorney General, and DOMINIKA BATTEN, Deputy Attorney General, files this Answering Brief.

MEMORANDUM OF POINTS AND AUTHORITIES

I. ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals because it is an administrative agency case that does not involve tax, water, or public utilities commission determinations. NRAP 17(b)(10).

II. STATEMENT OF THE ISSUES

1. The district court cannot award attorney fees unless authorized by statute, rule or contract. The underlying action is related to a petition for judicial review pursuant to NRS 233B—the Nevada Administrative Procedure Act (APA). The provisions of the APA "are the exclusive means of . . . judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies" and the APA does not include a provision for the award of attorney's fees. Did the district court err or abuse its discretion when it denied Petitioner's motion for attorney's fees?

2. NDOT petitioned the district court under the APA for judicial review of a hearing officer's decision, which had reinstated Petitioner to his pre-injury

highway maintenance job with NDOT, despite Petitioner agreeing to abandon his pre-injury position by pursuing vocational rehabilitation to become a bookkeeper. NRS 18.010(2)(b) is a discretionary statute that allows a court to award attorney's fees if it finds the opposing party maintained its action "without reasonable ground or to harass." Did the district court abuse its discretion when it declined to make findings that NDOT's petition was "without reasonable ground or to harass" under NRS 18.010(2)(b)?

III. STATEMENT OF THE CASE

Petitioner was medically separated from his highway maintenance position with NDOT after he injured his wrist and pursued vocational rehabilitation to become a bookkeeper. Vocational rehabilitation is a program available only to injured employees who can no longer perform their pre-injury jobs. With Petitioner attending vocational rehabilitation training, NDOT finalized the paperwork ending his highway maintenance employment, effective June 26, 2015.

Petitioner appealed the medical separation because his physician had released him to return to work before he entered the vocational rehabilitation program. NDOT argued that the vocational rehabilitation agreement, as approved by Petitioner's physician, constituted just cause for medically separating Petitioner under NAC 284.611 because it was the physician's final statement as to

Petitioner's ability to perform his pre-injury job. The hearing officer reversed the medical separation based on the physician's prior release to full duty.

NDOT petitioned for judicial review by the district court pursuant to NRS 233B, alleging that the hearing officer committed legal error because vocational rehabilitation was available to Petitioner only if he was unable to perform his pre-injury job, and the vocational rehabilitation document likewise plainly stated that Petitioner could not return to work. The district court denied the petition for judicial review and affirmed the hearing officer's decision. NDOT accordingly reinstated Petitioner and calculated back wages owed.

Following the district court's denial of NDOT's petition, Petitioner filed the motion for attorney's fees that is the subject of this appeal, claiming that he is entitled to attorney's fees pursuant to NRS 18.010(2)(b) because NDOT's petition for judicial review was allegedly brought and maintained without reasonable ground or to harass Petitioner. The district court denied Petitioner's motion, citing the APA's limit on judicial action to the remedies authorized by the APA, which does not provide for an award of attorney's fees. In neither its order denying the petition for judicial review nor in its order denying attorney's fees did the district court make any findings that NDOT's petition was brought or maintained without reasonable ground or to harass Petitioner.

Petitioner now appeals the district court's order denying attorney's fees to the Nevada Supreme Court.

IV. STATEMENT OF THE FACTS

Petitioner was a highway maintenance worker when on August 1, 2013, he injured his wrist when he tripped and fell while on duty.[1] PA Vol. I, p. 42; pp. 119–120. Petitioner could not perform highway maintenance work as a result of his injury and CCMSI, the workers' compensation insurer, immediately accepted Petitioner's workers compensation claim under Chapter 616. RA Vol. I, pp. 1–3. CCSMI sent Petitioner for a medical evaluation, and he eventually began treatment with Dr. Huene. PA Vol. I, pp. 119–120. Initially, Dr. Huene declined to release Petitioner to his highway maintenance job, instead restricting his work to light or modified duty, stating for some time that Petitioner was not to use his right "upper extremity" at all. RA Vol. I, pp. 5–24. NDOT accordingly placed Petitioner on light duty during his initial treatment. PA Vol. I, p. 9; 11; 12; 14; 120.

Just over three months after the injury, as light duty expired, NDOT inquired whether Petitioner could return to his job. Via CCMSI, Dr. Huene was asked if Petitioner could return to work. RA Vol. I, p. 12. In response, Dr. Huene stated that he advised Petitioner to "protect his wrist for three months and not use it," and while Petitioner had disregarded Dr. Huene's advice, Petitioner could not return to

[1] Petitioner's appendix (PA); Respondent's appendix (RA).

work yet. RA Vol. I, p. 12. Accordingly, NDOT did not return Petitioner to work, but placed Petitioner on workers' compensation leave (sometime in November, 2013) while he continued treating his wrist with Dr. Huene. PA Vol. I, p. 120.

In the summer of 2014, there was a mixed outlook whether Petitioner could return to work, or whether he needed light or medium duty. PA Vol. I, p. 148. After restricting Petitioner to light/modified duty for over six months, on June 18, 2014, Dr. Huene released Petitioner to work, with a brace restriction (NDOT did not consider such a restriction as a full duty release). PA Vol. I, pp. 124-125. Then, a week later, on June 25, 2014, Dr. Huene released Petitioner to work, this time omitting the brace restriction, but there was a note on that release indicating that Petitioner could not return to work ("pt cannot [do] full duty–NCM requesting FCE). PA Vol. I, p. 128; RA Vol. I, p. 27; p. 125; p. 128. Finally, after the June 25, 2014, release, Dr. Huene signed the functional capacity exam (FCE) indicating that Petitioner could only work light/medium level work and was unable perform his highway maintenance job. RA Vol. I, pp. 28–36.

Specifically, on July 22, 2014, Petitioner completed the FCE, a comprehensive four-to-five hour evaluation performed by a physical therapist to determine his ability to safely return to work. PA Vol. I, pp. 45–46; 1–6. During the FCE, Petitioner hesitated whether he could return to work. Petitioner stated that he did not know whether he could return to work and that he "still struggle[d]

with day to day activities. Last week, I hit my hand on a little table and it jolted my hand and sent pains up my arm. I played golf yesterday and I had pain in my hand for 24 hours . . .” PA Vol. I, p. 5. Upon administering numerous tests and assessing Petitioner’s results against his job requirements, the FCE concluded that

> Based on the job description provided by the State of Nevada as a Highway Maintenance Worker III (not dated), patient did not demonstrate the ability to safely perform the physical demands of the pre-injury job . . .

PA Vol. I, pp. 1–6. Accordingly, the FCE restricted Petitioner to light/medium level work and unable to perform his highway maintenance job. Dr. Huene signed the FCE, indicating that Petitioner “did not demonstrate the ability to safely perform the physical demands of the pre-injury job.” PA, Vol. I, p. 47; 56; 86; 192; RA Vol. I, pp. 28–36.

After the FCE, CCMSI rendered Petitioner eligible for vocational rehabilitation. On August 22, 2014, CCMSI sent a letter to NDOT that Petitioner’s physician imposed light/medium work restrictions on Petitioner, stating that NDOT “may be liable for the cost of vocational rehabilitation services” if it was unable to provide a position consistent with the physician’s restrictions. RA Vol. I, pp. 37–39; 76–77. A “roundtable” was convened, including to determine if the State had a permanent light-duty position within Petitioner’s physical restrictions. PA Vol. I, pp. 76–77; p. 144; p. 189. At the roundtable, no available State jobs

could be identified that were within Petitioner's physical restrictions. PA Vol. I, p. 145; pp. 189–190. Accordingly, Petitioner was deemed eligible for vocational rehabilitation. PA Vol. I, pp. 11–13. *See* NRS 616C.530. He subsequently began working with the vocational rehabilitation counselor, Debra Adler, developing a vocational rehabilitation program to become a bookkeeper, a position that was within his physical restrictions. PA Vol. I, pp. 15–18; p. 78; 199.

At the same time, following the roundtable, Petitioner continued seeing Dr. Huene, with Dr. Huene varying his opinion as to the level of work Petitioner could safely perform, before ultimately endorsing Petitioner's vocational rehabilitation plan on December 10, 2014. Specifically, on August 13, 2014, and on September 24, 2014, after signing the FCE, Dr. Huene went back and once again determined that Petitioner could work with a brace restriction, as needed. PA Vol. I, pp. 63–64; 7–8; p. 131. Then, on October 22, 2014, Dr. Huene stated that Petitioner could work full duty, once again omitting the need for a brace. PA Vol. I, p. 10; p. 48; p. 55; p. 64; p. 91; 180.

NDOT received the October 22, 2014, release, though the NDOT Human Resources Manager who eventually processed the medical separation, Kimberley King, did not see it until after Petitioner started vocational rehabilitation. At the appeals hearing, Petitioner testified that he went to deliver the release to his NDOT workers compensation claims manager at NDOT, Diane Kelly, but that instead he

dropped off the release to "a young gentleman" at NDOT who assured Petitioner he would provide the release "to the right people." PA Vol. I, pp. 133–134. The NDOT worker's compensation claims manager who replaced Diane Kelly after her retirement testified that she reviewed Petitioner's file and NDOT human resources did not have the October 22, 2014, release in October of 2014, but that "it may have gone to [CCMSI]." PA Vol. I, pp. 133–134; p. 173; pp. 174–175; 212- 213. In any event, on December 10, 2014, Dr. Huene endorsed Petitioner's vocational rehabilitation retraining, contradicting the October 22, 2014, release; the vocational rehabilitation program indicated to NDOT that Petitioner could not return to work because it relied on the medical opinions of the FCE, clearly stating that Petitioner could not medically return to his pre-injury job. PA Vol. I, pp. 18. It stated:

> *Not able to physically perform work as a highway maintenance worker . . .*

PA Vol. I, pp. 15. The vocational rehabilitation plan was Dr. Huene's last recommendation *before* Petitioner's eventual separation. PA Vol. I, pp. 53–55; p. 89; 218.

By December 31, 2014, nearly sixteen months after Petitioner's injury, NDOT wrote a letter to Petitioner about returning to work. PA Vol. I, p. 19; p. 83; p. 83. In the letter, NDOT instructed Petitioner to take a copy of his job requirements and meet with his doctor to document whether Petitioner could return

to highway maintenance on a full time basis. PA Vol. I, pp. 19; p. 109. The letter stated that if Petitioner did not provide NDOT with the required documents by January 21, 2015, NDOT would medically separate Petitioner under NAC 284.611. PA Vol. I, p. 19.

In response to notice of the impending separation from State employment, Petitioner faxed his supervisor Dr. Huene's October 22, 2014, medical release, who then forwarded it to NDOT human resources. PA Vol. I, p. 84; pp. 104–108; p. 210. However, Petitioner did not provide NDOT with medical documentation dated after Dr. Huene's endorsement of vocational rehabilitation. Additionally, he began studying bookkeeping via the vocational rehabilitation training while also receiving vocational rehabilitation maintenance payments from NDOT. RA Vol. I, pp. 40–50; p. 150. Petitioner would attend school and receive compensation on this basis for more than five months before his medical separation was finalized the following summer. RA Vol. I, pp. 40–50; p. 155.

Finally, on June 5, 2015, NDOT wrote to Petitioner once again, indicating that it was finalizing his medical separation. PA Vol. I, pp. 20–23. NDOT Human Resources Manager, Kimberley King, testified at the appeals hearing that at this point she saw and considered the October 22, 2014, medical release. However, Ms. King testified that she ultimately did not accept the October 22, 2014, as Dr. Huene's indication that Petitioner could return to his position because the release

was not current, *i.e.*, it came before Dr. Huene endorsed the vocational rehabilitation plan, indicating Petitioner could not return to work. PA Vol. I, pp. 94–95; 203–217. Following Petitioner's pre-termination hearing, on June 24, 2015, NDOT Deputy Director Tracy Larkin-Thomason wrote that it was her "determination that there exists a substantial basis for separation," advising Petitioner he could appeal pursuant to NRS 284.390. PA Vol. I, p. 24; pp. 142–143.

Petitioner appealed the medical separation pursuant to NRS 284.390, claiming that he could perform his pre-injury job despite pursuing vocational rehabilitation. PA Vol. I, pp. 245–259. At the appeals hearing, NDOT argued that it properly separated Petitioner because the vocational rehabilitation, as approved by Dr. Huene, was just cause to separate him from his pre-injury job. PA Vol. I, pp. 245–259. Petitioner conceded that he enrolled in vocational rehabilitation, but insisted that CCSMI forced him to sign the agreement and argued that Dr. Huene's release from October 22, 2014, was evidence that he was wrongfully medically separated. PA Vol. I, pp. 245–259.

The hearing officer reversed the medical separation and NDOT petitioned for judicial review by the district court pursuant to NRS 233B. PA Vol. I, pp. 245–259. In its petition, NDOT alleged that the hearing officer committed legal error when he reinstated Petitioner to NDOT employment despite the employee opting

for and pursuing vocational rehabilitation. PA Vol. II pp. 297–309; 334–344. The district court, however, disagreed. PA Vol. II pp. 344–355.

After the district court denied NDOT's petition, NDOT reinstated Petitioner and began calculating the back wages. (During this time, however, the parties were in settlement negotiations and NDOT granted Petitioner an absence of leave during negotiations per his request.) Petitioner then filed a motion for attorney's fees, despite no authority from the APA for the district court to award attorney's fees; Petitioner claimed that he was entitled to attorney's fees under NRS 18.010(2)(b) because NDOT's petition was brought and maintained without reasonable ground or to harass Petitioner. PA Vol. II pp. 371–394. NDOT opposed Petitioner's motion and the district court denied Petitioner's motion, stating that, as the APA explicitly states, its authority was limited to the remedies provided by the APA, which does not authorize attorney's fees. PA Vol. II pp. 395–423; 433–435. The district court made no findings, despite Petitioner's urging, that NDOT's petition was brought and maintained without reasonable ground and to harass Petitioner. Petitioner now appeals to the Nevada Supreme Court.

V. SUMMARY OF THE ARGUMENT

The district court properly denied Petitioner's motion for attorney's fees because the provisions of the APA, which are the exclusive means of judicial review of, *or judicial action concerning*, a final agency decision, provide only that

a court may "remand or affirm the final decision or set it aside in whole or in part…" The APA's provisions do not include authority for a court to award attorney's fees.

Even if this were not so, the district court still properly denied Petitioner's motion for attorney's fees under NRS 18.010(2)(b), which grants the district court discretion to award attorney's fees upon a finding that the opposing party brought or maintained its claims without reasonable ground or to harass the prevailing party. In this case, the district court declined to make such findings, despite Petitioner's urging to do so. And such a finding was not warranted, as NDOT's petition was reasonable based upon the facts of this case. Furthermore, the Nevada Supreme Court has declined to award fees under NRS 18.010 in a judicial review proceeding under the APA. Accordingly, the district court properly denied Petitioner's motion for attorney's fees.

VI. ARGUMENT

A. STANDARD OF REVIEW

The standard of review is abuse of discretion because the district court made no findings warranting attorney's fees under NRS 18.010(2)(b). "The decision to award attorney fees is within the sound discretion of the district court and will not be overturned absent a "manifest abuse of discretion.'" *Kahn v. Morse & Mowbray* 121 Nev. 464, 479, 117 P.3d 227, 238 (2005) *See also Trustees v. Developers*

Surety, 120 Nev. 56, 59, 84 P.3d 59, 61 (2004). Sometimes, the Court reviews a district court's award of attorney's fee *de novo*. In *Trustees v. Developers Surety*, the Court reviewed the district court's order *de novo* because "the district court essentially ruled that NRS 17.115, NRCP 68 and NRS 18.010 do not apply to surety bond disputes." *Id.* at 59, 61.

B. THE DISTRICT COURT DID NOT ERR OR ABUSE ITS DISCRETION WHEN IT REFUSED TO AWARD ATTORNEY'S FEES TO PETITIONER

The district court properly denied Petitioner's attorney's fees related to NDOT's petition for judicial review under the APA. The APA lists the exclusive means of judicial action in a petition for judicial review and it does not list awarding attorney's fees as a possible judicial action; therefore, under the plain text of NRS 233B, Petitioner cannot rely on NRS 18.010, which grants discretion to the court to award attorney's fees in limited circumstances, as an add-on remedy to those available under the APA, which are exclusive. Additionally, even assuming NRS 18.010 applies to matters under the APA, an award of fees under NRS 18.010(2)(b) requires a specific finding that the district court declined to make in this case. Accordingly, the Nevada Supreme Court should affirm the district court's refusal to award attorney's fees.

1. Petitioner is not entitled to attorney's fees because the APA does not authorize the district court to issue attorney's fees.

The district court properly denied Petitioner's motion for attorney's fees because the APA provides the exclusive means of judicial action in a petition for judicial review, and it does not include a provision for awarding attorney's fees. The APA as set forth in NRS 233B provides for adjudicating disputes before agencies, permitting a party that receives an unfavorable administrative decision to petition the district court for judicial review. The APA specifically limits court action to that provided by NRS 233B:

> [t]he provisions of this chapter are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies.

NRS 233B.130. Specifically, judicial action in a petition for judicial review includes reversing, affirming, or setting aside part or all of the agency's final decision as set forth in NRS 233B.135. The APA does not, however, include a provision for awarding attorney's fees.[2]

[2] To the contrary, the Nevada Legislature has enacted statutes authorizing the payment of attorney's fees under certain circumstances. For example, the Legislature has authorized the district court to order costs and fees for filing a frivolous petition of hearing officer decisions involving industrial injuries. *See* NRS 616C.385**.**

The Nevada Supreme Court has refused to award attorney's fees absent express statutory authorization from the Legislature. In *State, Dep't of Human Res., Welfare Div. v. Fowler*, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993), the Court declined to use NRS 18.010 to award fees under the APA, noting that it is well established that "a [district] court may not award attorney's fees unless authorized by statute, rule or contract." The Nevada Supreme Court accordingly reversed the district court's order granting attorney's fees under NRS 18.010(2)(a), stating, among other things, that NRS 233B provides the exclusive means of judicial review concerning an agency's final decision, and that it "does not contain any specific language authorizing the award of attorney's fees in actions involving petitions for judicial review of agency action." *Id*. at 377, 785. In *Fowler*, the Court echoed a holding from a previous case also involving attorney's fees stemming from an administrative dispute. There, in *State Indus. Ins. System v. Wrenn*, 104 Nev. 536, 539, 762 P.2d 884, 886 (1988), the Court also refused to uphold attorney's fees awarded by the district court because

> the legislature has not expressly authorized an award of attorney's fees in worker's compensation cases except in limited circumstances not applicable here. We have repeatedly refused to imply provisions not expressly included in the legislative scheme.

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The Nevada Supreme Court is thus clear that district courts cannot award attorney's fees without legislative authorization.

Here, the district court properly denied Petitioner's motion for attorney's fees because the Nevada Legislature did not provide them under the APA. *See* NRS 233B.130; *Fowler*, 109 Nev. at 377, 858 P.2d at 785. Under Nevada case law, the Nevada Legislature confidently excluded attorney's fees from the remedies it intended as permitted by the APA because in NRS 233B, the Legislature explicitly listed the sole remedies available to the district court. *See O'Callaghan v. The Eighth Judicial District Court*, 89 Nev. 33, 505 P.2d 1215, 1216 (1973) (holding that Nevada courts apply the *expressio unius* principle: "By expressly designating the areas to which NRS 463.315 shall apply, the legislature, by implication, excluded other areas therefrom."); *See also Palmer v. Del Webb's High Sierra*, 108 Nev. 673, 680, 838 P.2d 435, 439–440 (1992) (Young, J. concurring) (explaining that "[t]he legislature could have easily provided that an occupational disease 'means', 'is' or 'is defined as' any disease which 'arises out of and in the course of employment,'" but that the legislature did not, in fact, do so). Indeed, when the Nevada Legislature intends to permit the recovery of expenses or attorney fees for administrative hearings, it has done so explicitly. *See*

NRS 616C.385 (permitting attorney's fees for filing a frivolous petition of hearing officer decisions involving industrial injuries under NRS 616C).

Accordingly, awarding attorney's fees in this case would conflict with the plain language of NRS 233B and run counter to *Fowler* and *Wrenn* because the Nevada Supreme Court "does not imply provisions not expressly included in the legislative scheme." *Wrenn,* 104 Nev. at 539, 762 P.2d at 886; *Fowler,* 109 Nev. at 784, 858 P.2d at 376. Thus, the district court properly denied Petitioner's motion for attorney's fees because there is no statute, rule or contract permitting the court to issue attorney's fees in this matter.

i. NRS 18.010 does not authorize fees against NDOT for filing an NRS 233B/284 petition for judicial review.

Despite NRS 233B excluding attorney's fees, Petitioner insists that the district court should have granted attorney's fees under NRS 18.010(2)(b).[3] NRS

[3] He misstates that "[t]he Nevada Supreme Court has never addressed an award of attorney's fees under these circumstances." Actually, in in *State, Dep't of Human Resources v. Burgess*, Nev., No. 46378 at 6 (May 30, 2007), the Nevada Supreme Court analyzed 18.010(2)(b) under very similar circumstances to Petitioner's, relying on *Fowler* to reverse an award of attorney's fees against the State where the district court had found that the State submitted a frivolous opposition as part of a petition for judicial review pursuant to the APA. *State, Dep't of Human Resources v. Burgess*, 07-11876 at 6. While it is true that *Burgess* was not published, and therefore cannot be relied upon at the appellate level pursuant to NRAP 36, it is not accurate for Petitioner to then say that the Nevada Supreme Court has *never* addressed this issue before.

18.010(2)(b) is a statute that allows a court to award attorney's fees to the "prevailing party" if the court finds the "claim, counterclaim, cross-claim, or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." NRS 18.0102(b). In *Fowler*, the Supreme Court held that NRS 18.010 does not apply to petitions for judicial review because they are not actions for money damages. *Fowler*, 109 Nev. at 786, 858 P.2d at 377.

While it is true that *Fowler* involved NRS 18.010(2)(*a*), and Petitioner argues that he is entitled to fees per NRS 18.010(2)(*b*), the *Fowler* decision still precludes recovery of attorney's fees in this case. Specifically, the Nevada Supreme Court in *Fowler* clearly stated that "NRS 18.010" does not apply when a party does not request money damages and it did not distinguish between "NRS 18.010(2)(a)" and NRS 18.010(2)(b) in its holding.[4] *Fowler*, 109 Nev. at 786, 858

[4] Employee's other attempt to distinguish *Fowler* is not relevant; he argues that *Fowler* is distinguishable merely because NDOT, rather than Petitioner, brought the petition. *Fowler* does not depend on the fact that an employee, rather than the agency, was the petitioner. Rather, the case holds that employees are not entitled to attorney fees incurred in connection with termination of their employment, appeal, and subsequent reinstatement; Petitioner, like *Fowler*, was a State of Nevada employee, seeking attorney's fees against a Nevada administrative agency after the agency terminated him, the hearing officer reversed the termination, and the district court, upon petition under NRS 233B, agreed with the hearing officer that the agency was not justified in terminating Petitioner. It is directly on point.

P.2d at 377. Petitioner cites no authority or cases to suggest that the Supreme Court treats NRS 18.010(2)(a) differently from NRS 18.010(2)(b) in cases of petitions for judicial review.[5] Rather, he urges the Court to disregard *Fowler* and instead look to a case, *Franchise Tax Bd. of State v. Hyatt*, 130, Nev. Adv. Op. 71, 335 P.3d 125 (2014), interpreting NRS 41.032, not NRS 18.010 as is at issue here, and therefore is not relevant. Simply stated, there is no authority to support an award of attorney's fees under NRS 18.010(2)(b) in the context of a petition for judicial review.

As discussed above, the APA is the exclusive authority for judicial relief in a petition for judicial review. If NRS 18.010 were also to apply to APA proceedings, as Petitioner urges, it would render the APA superfluous. The Court should therefore affirm the district court's order denying attorney's fees.

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[5] In line with *Fowler*, contextual analysis of NRS 18.010 supports that NRS 18.010(2)(b), like 2(a), does not apply in the context of an APA proceeding. Both NRS 18.010(2)(a) and NRS 18.010(2)(b) only allow a district court to award attorney's fees to a "prevailing party." "Prevailing party" is a "broad [term], encompassing plaintiffs, counterclaimants and defendants." *Smith v. Crown Financial Services*, 111 Nev. 277, 285, 890 P.2d 769, 774 (1995). Petitioner was a respondent responding to an administrative petition, not a "plaintiff[s], counterclaimant[s] [or] defendant[s] in a lawsuit." *See Smith*, 111 Nev. at 285, 890 P.2d at 774.

2. Even if NRS 18.010(2)(b) extends to parties seeking judicial review pursuant to the APA, Petitioner is not entitled to attorney's fees because NDOT acted reasonably and in good faith, and the district court made no findings otherwise.

Alternatively, even if NRS 18.010(2)(b) applies to APA matters, Petitioner is not entitled to attorney's fees because NDOT brought the petition for judicial review in in good faith pursuant to NRS 233B.[6] The APA states that "[a]ny party who is . . . [i]dentified as a party of record by an agency in an administrative proceeding; and . . . [a]ggrieved by a final decision in a contested case…is entitled to judicial review of the decision." The APA allows a court to affirm, reverse or set aside the agency's final decision as set forth in NRS 233B.135.

> 3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:
>
> (a) In violation of constitutional or statutory provisions;

[6] Petitioner states in his opening brief that "the only argument advanced by NDOT for denying [Petitioner's] motion for attorney's fees" before the district court was that the APA did not provide for attorney's fees. However, NDOT argued before the district court, as it does now, that even if NRS 18.010(2)(b) applied, he is not entitled to attorney's fees because NDOT's petition for judicial review was reasonable. NDOT has never agreed with Petitioner that it acted unreasonably or in bad faith, as Petitioner's statement here would suggest. NDOT additionally argued before the district court that Petitioner's attorney's fees were excessive under the *Brunzell* factors. PA Vol. II, pp. 395–423.

(b) In excess of the statutory authority of the agency;
(c) Made upon unlawful procedure;
(d) Affected by other error of law;
(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(f) Arbitrary or capricious or characterized by abuse of discretion.

4. As used in this section, "substantial evidence" means evidence which a reasonable mind might accept as adequate to support a conclusion.

NRS 233B.135(3)–(4).

A district court can use its discretion to award attorney's fees under NRS 18.010(2)(b) in limited circumstances. NRS 18.010(2)(b) allows a court to award attorney's fees to the "prevailing party" if the court finds the "claim, counterclaim, cross-claim, or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." NRS 18.010(2)(b). The court may pronounce its decision on the fees after the trial or special proceeding concludes. NRS 18.010(3).

An award of attorney's fees under NRS 18.010(2)(b) is discretionary with the district court. *Semenza v. Caughlin Crafted Homes,* 111 Nev. 1095, 901 P.2d 687 (1995); *Foley v. Morse & Mowbray,* 109 Nev. 116, 124, 848 P.2d 519, 524 (1993). To support an award under NRS 18.010(2)(b), "there must be evidence in the record supporting the proposition that the complaint was brought without

reasonable grounds or to harass the other party." *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 486, 851 P.2d 459, 464 (1993). A claim is groundless if allegations in the complaint are not supported by any credible evidence at trial, it is brought in bad faith, or it is fraudulent. *Semenza,* 111 Nev. at 1095, 901 P.2d at 688 (citation omitted). Such an analysis depends upon the actual circumstances of the case rather than a hypothetical set of facts favoring plaintiff's averments. *Id*.

Here, the district court properly denied Petitioner's motion for attorney's fees because NRS 18.010(2)(b) is discretionary and dependent on the district court making certain findings about the underlying claims as being unreasonable or in bad faith, which the district court explicitly did not make here. To be sure, in December of 2016, Dr. Huene signed a document that plainly stated that Petitioner was unable to work as a highway maintenance worker. PA Vol. I, pp. 18; 53–55. NDOT believed that Dr. Huene would not have endorsed vocational rehabilitation if Petitioner could also perform highway maintenance work because Nevada law does not entitle Petitioner to both options.[7] *See* NRS 616C.590 (deeming an

[7] NDOT's actions here were based upon reasonable belief similar to the actions of the plaintiffs in *Semenza v. Caughlin Crafted Homes*. *See Semenza*, 111 Nev. at 1096, 901 P.2d at 688 (finding that plaintiffs brought their claim against a defendant with reasonable grounds where they indicated in interrogatory responses their belief that the defendant "personally decided to forego a drainage system in their home because of cost. Whether or not this was a misunderstanding, this belief appears to provide a reasonable ground for bringing a [negligence] claim against [defendant] individually, especially where the drainage in fact was deficient.

employee eligible for vocational rehabilitation services *only if* his or her treating physician has rendered the employee as unable to return to his previous position before). PA Vol. I, pp. 203–217.

NDOT did not ignore the October 22, 2014, release, as Petitioner argues, but considered it outdated given the later vocational rehabilitation documentation. PA Vol. I, p. 74. When on December 31, 2014, NDOT notified Petitioner it was considering medical separation, Dr. Huene's vocational rehabilitation authorization from December 10, 2014, was in his file, along with various previous releases. PA Vol. I, pp. 203-217. Even so, before ultimately relying on the vocational

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Moreover, there is no evidence in the record that the [plaintiffs] intentionally made false allegations or disregarded the truth prior to naming [defendant].")

Likewise, though it did not prevail on its petition, NDOT had reasonable grounds for its petition like the plaintiff had for his lawsuit in *Chowdhry v. NLVH, Inc.* because the vocational rehabilitation document indicated that Petitioner could not return to highway maintenance. *See ry*, 851 P.2d 459, at 465109 Nev. 478 at 487 (finding that surgeon had reasonable grounds to bring action against hospital after hospital refused to expunge reprimand from surgeon's file and, therefore, hospital and others were not entitled to recover statutory attorney fees, even though surgeon did not prevail; although surgeon did not succeed in obtaining expungement, copy of verdict showing that surgeon had not abandoned his patient was also placed in file). The Nevada Supreme Court found no support for the district judge's conclusion concerning unreasonableness and motion to harass, who had awarded fees after stating, "Dr. Chowdhry's lawsuit was made in a vindictive and unjustified effort and it was nothing more than his chance to grill his enemies and it became that, a little feud within this circle. The suit was brought without reasonable grounds in the motion [sic] to harass under the statute. I'm going to award the fees requested." *Id*. at 486–487, 464–465.

rehabilitation documentation as Dr. Huene's final medical opinion to separate him, NDOT provided Petitioner with his job description, directing Petitioner to provide it for his physician's determination whether he could perform his duties. PA Vol. I, p. 19; 109. However, instead of visiting Dr. Huene for evaluation, Petitioner presented the previous October 22, 2014, release, which NDOT did not accept as current because Dr. Huene later contradicted that release by endorsing vocational rehabilitation. PA Vol. I, p. 214. Petitioner then undeniably pursued vocational rehabilitation training, receiving maintenance compensation from NDOT for nearly six months before NDOT medically separated him on June 26, 2015. PA Vol. I, pp. 20-23; RA Vol. I, pp. 40-50. Accordingly, looking at the circumstances rather than the October 22, 2014, release by itself, there was credible evidence for Petitioner's medical separation. *Semenza,* 111 Nev. at 1095, 901 P.2d at 688.

The hearing officer's decision reversing the medical separation was a bona fide controversy about Petitioner's entitlement to his job once he accepted vocational rehabilitation. NDOT reasonably sought judicial review because Petitioner's physician-endorsed vocational rehabilitation was substantial evidence supporting NDOT's decision to medically separate Petitioner. *See* NRS 233B.135 (permitting a court to reverse the hearing officer's decision if it was "[c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record" and defining 'substantial evidence' as "evidence which a reasonable mind

might accept as adequate to support a conclusion."). While ultimately not successful before the district court, NDOT's petition to the district court was not groundless or brought in bad faith, but presented a legal question about terminating pre-injury employment once the State has rehabilitated an injured employee, as requested by that employee and his physician. As such, it cannot be said that NDOT sought judicial review on unreasonable grounds to warrant fees under NRS 18.010(2)(b).

Finally, on the one hand, Petitioner argues that NDOT's petition was groundless, yet, he maintains that the district court would have "almost certain[ly]" granted NDOT's petition if Petitioner had not obtained an attorney in response to NDOT's petition. Petitioner's statement here suggests that, contrary to the arguments made in Petitioner's motion, NDOT's petition was not frivolous or groundless. Accordingly, the Court should affirm the district court's order denying Petitioner's motion for attorney's fees.

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VII. CONCLUSION

For the reasons above, the Nevada Supreme Court should find that the district court did not err or abuse its discretion when it denied Petitioner's motion for attorney's fees.

Respectfully submitted this 28th day of August, 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP, the type face 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 2010 in font size 14 and font style Times New Roman.

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 6074 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 28e(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.

DATED this 28th day of August, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General and that on this 28th day of August 2017, I filed and served a copy of the foregoing RESPONDENT'S ANSWERING BRIEF through the Supreme Court Electronic Filing System. A copy was served electronically to the following:

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