

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 71848

Electronically Filed
Apr 11 2017 01:22 p.m.
Elizabeth A. Brown
~~Clerk of Supreme Court~~

HEAT & FROST INSULATORS AND ALLIED WORKERS LOCAL 16,

Petitioner/Appellant,

v.

LABOR COMMISSIONER OF THE STATE OF NEVADA;
THE UNIVERSITY OF NEVADA, RENO; CORE CONSTRUCTION;
and RENO TAHOE CONSTRUCTION,

Respondents/Appellees.

Appeal from the Second Judicial District Court, Washoe County
The Honorable Elliott A. Sattler, District Judge
District Court Case No. CV16-00353

JOINT APPENDIX

Eric B. Myers, Nevada Bar # 8588
Sarah Varela, Nevada Bar # 12886
David L. Barber, Nevada Bar # 14165
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Attorneys for Petitioner/Appellant

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Opposition to Motion to Enlarge Time	JA 0065 to JA 0069
Transcript of Proceedings	JA 0070 to JA 0115
Order	JA 0116 to JA 0123
Notice of Appeal	JA 0124 to JA 0127

1 **3550**
2 SARAH VARELA, SBN 12886
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6 Telephone: (702) 386-5107
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9 *Attorneys for Petitioner*

10
11 **IN THE SECOND JUDICIAL DISTRICT COURT OF**
12 **THE STATE OF NEVADA IN AND FOR THE**
13 **COUNTY OF WASHOE**

14 HEAT & FROST INSULATORS AND ALLIED
15 WORKERS LOCAL 16;

16 Petitioner,

17 vs.

18 LABOR COMMISSIONER OF THE STATE OF
19 NEVADA; THE UNIVERSITY OF NEVADA,
20 RENO; CORE CONSTRUCTION; and RENO
21 TAHOE CONSTRUCTION,

22 Respondents.

CASE NO.:

DEPT. NO.:

**PETITION FOR JUDICIAL
REVIEW**

23 Petitioner Heat and Frost Insulators and Allied Workers Local 16 hereby petitions this Court
24 for judicial review of the final administrative determination by the Labor Commissioner concerning
25 the prevailing wage determination by the University of Nevada, Reno, about prevailing wages for
26 the installation of Gilsulate insulation by Core Construction and Reno Tahoe Construction. The
27 Labor Commissioner's Order Affirming Awarding Body's Determination, dated February 2, 2016,
28 is attached to this Petition as **Exhibit 1**. This petition is brought pursuant to the Nevada
Administrative Procedure Act, NRS 233B.130.

The grounds for judicial review are as follows:

First, the Labor Commissioner's order is arbitrary and capricious and clearly erroneous. It

1 ignores the plain language of the scope-of-work determination for the Mechanical Insulator job
2 classification, which was issued by the Labor Commissioner. That determination is attached as
3 **Exhibit 2.**

4 Second, the Labor Commissioner's order is an exercise in illegal underground regulation.
5 Without engaging in the required administrative procedures, it substantially modifies the
6 Mechanical Insulator and Laborer job classifications that were previously issued by the Labor
7 Commissioner.

8 Third, the Labor Commissioner failed to afford Petitioner an evidentiary hearing on its
9 administrative complaint, despite Petitioner's request for such a hearing, and the Labor
10 Commissioner's order is procedurally deficient in other ways.

11 Fourth, the Labor Commissioner's order completely failed to address an issue raised by
12 Petitioner in the administrative proceedings concerning UNR's failure to order the payment of
13 Insulator rates to workers involved in wrapping pipes with insulation.

14 For these reasons, the Court should vacate the order by the Labor Commissioner, and remand
15 the matter for proper determination.

16
17 Dated: February 17, 2016

Respectfully submitted,

18 McCracken, Stemerman & Holsberry

19
20 By: 

21 Sarah Varela, SBN 12886
22 1630 S. Commerce Street, Suite A-1
23 Las Vegas, Nevada 89102
24 Tel: 702-386-5107
25 Fax: 702-386-9848

Attorneys for Petitioner

1 **AFFIRMATION PURSUANT TO NRS 239B.030**

2

3 The undersigned hereby affirms that this document does not contain the social security

4 number of any person.

5

6 Dated: February 17, 2016

McCRACKEN, STEMERMAN & HOLSBERRY

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8 By: 

9 Sarah Varela

Attorneys for Petitioner

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EXHIBIT LIST

- Exhibit 1: Labor Commissioner's Order Affirming
Awarding Body's Determination
Dated February 2, 2016 4 pages**
- Exhibit 2: 2014 Prevailing Wage Rates Washoe County
Determination Date: October 1, 2013 7 pages**

EXHIBIT 1

FEB 16 2:10 PM

BEFORE THE NEVADA STATE LABOR COMMISSIONER
LAS VEGAS, NEVADA

IN THE MATTER OF:

Case # 28163

HEAT & FROST INSULATORS & ALLIED
WORKERS LOCAL 16,

Complainants,

v.

CORE CONSTRUCTION and RENO
TAHOE CONSTRUCTION,

Respondents.

University of Nevada, Reno

West Stadium Utility Trench, UNR
Project #1211-P238

PWP #WA-2015-014

FILED

FEB 02 2016

NEVADA
LABOR COMMISSIONER - CCORDER AFFIRMING AWARDING BODY'S DETERMINATION

On August 11, 2015, Heat & Frost Insulators and Allied Workers Local 16 ("Heat & Frost/Local 16") filed a Verified Complaint for Prevailing Wage Violations with the Office of the Labor Commissioner ("OLC") against the Prime Contractor CORE Construction ("CORE") and its subcontractor, Reno-Tahoe Construction ("RTC"), for the University of Nevada Reno ("UNR") West Stadium Utility Trench, UNR Project #1211-P238, PWP #WA-2015-014 ("Project"); the Complaint alleged that work performed under this contract fell primarily within the job description of Mechanical Insulators and that RTC had underpaid its employees by misclassifying them as Laborers and Operating Engineers. The Complaint stated that its claim was supported by the UNR Contract requirement to install Gilsulate and use experienced insulation installers. Heat & Frost supported their Complaint stating they had personally observed the jobsite and noted that the work fell within the Mechanical Insulator Job Classification, which resulted in misclassification of workers and the

1 underpayment of wages to workers performing work on this job. The Complaint further
2 alleged that RTC failed to specify the job class of its apprentice on its Certified Payroll
3 Reports ("CPR's"), in accordance with the reporting requirements of Nevada Revised
4 Statutes (NRS) Section 338 and Nevada Administrative Code (NAC) Section 338. The OLC
5 notified UNR of the Complaint on September 15, 2015, and requested an Investigation
6 pursuant to NRS 338.070.

7 On November 9, 2015, UNR issued a Determination that there were no violations of
8 NRS 338.010 to 338.090, inclusive, or NAC 338.005 to 338.125, inclusive. UNR based its
9 Determination on the following: copies of timesheets; payroll statements; CPR's;
10 confirmation of the type of insulation used on this project; schedule of Values and Daily Logs
11 listing specific dates and hours the insulation of Gilsulate was being poured; names of
12 workers; identification of workers in photos taken during the application of Gilsulate; the
13 materials and method used to apply the Gilsulate; and meetings with Jim Miller from CORE,
14 and Fred Reeder from RTC. In addition, a teleconference was held on November 9, 2015,
15 with Andrew Kahn, Esq., counsel for Heat & Frost/Local 16. Based on the Investigation and
16 evidence reviewed by UNR, UNR determined that the work performed on the Project was
17 properly performed by the Laborer and Operating Engineer Job Classifications.

18 On November 19, 2015, Heat and Frost/Local 16 filed an Objection to the November
19 9, 2015, Determination.

20 The Determination issued by UNR on November 9, 2015, is affirmed. The
21 November 9, 2015 Determination, clearly lays out all of the evidence and information that
22 was considered by UNR. The nature of the Project required a different method for applying
23 the Gilsulate that required the work of Operating Engineers and Laborers. Heat &
24 Frost/ Local 16 was offered an opportunity to present information regarding their position,
25 and there is no additional information contained in the November 30, 2015, Objection that
26 would support the modification of the Determination issued by UNR on November 9, 2015.

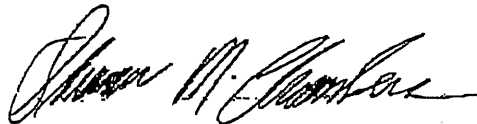
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28 ///

1 THEREFORE, it is ORDERED that:

- 2 1. The allegations contained in the Complaint filed by Heat & Frost/Local 16 with
3 the OLC on August 11, 2015, are unsubstantiated.
4 2. The November 9, 2015 Determination issued by UNR is hereby AFFIRMED
5 pursuant to NAC 338,112.

6 DATED this 2nd day of February, 2016.

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10 Shannon M. Chambers
11 Labor Commissioner
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CERTIFICATE OF MAILING

I, Rosiland M. Hooper, do hereby certify that I mailed a true and correct copy of the foregoing **ORDER AFFIRMING AWARDING BODY'S DETERMINATION**, via the United States Postal Service, Carson City, Nevada, in a postage-prepaid envelope to the following:

Chris Greaney, Esq.
Heat & Frost Insulators &
Allied Workers Local 16
3801 Park Road
Benicia, California 94510

Michael B. Springer, Esq.
LAW OFFICES OF MICHAEL B.
SPRINGER, P.C.
9460 Double R Boulevard, Suite 103
Reno, Nevada 89521
Attorney for Reno-Tahoe Construction

Denise Baclawski, Senior Director
University of Nevada, Reno
Planning & Construction Services
Facilities Services Department
1664 No. Virginia Street
Reno, Nevada 89557

Dean Hitchcock, Director
University of Nevada, Reno
Planning & Construction Services
University of Nevada, Reno/0182
Reno, Nevada 89557-0182

Mary Phelps Dugan, General Counsel
University of Nevada, Reno
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Jim Miller
CORE Construction
750 Cascade Valley Court
Las Vegas, Nevada 89128

Fred Reeder
Reno-Tahoe Construction
2050 Kleppe Lane
Sparks, Nevada 89431

Andrew Kahn, Esq.
McCRACKEN STEMERMAN BOWEN
& HOLSBERRY
1630 So. Commerce Street
Las Vegas, Nevada 89102

Dated this 2nd day of February, 2016.

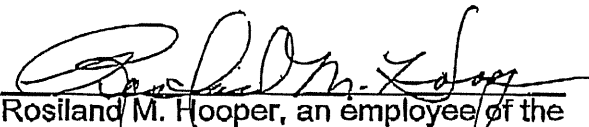
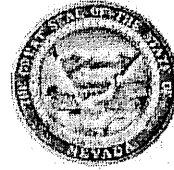

Rosiland M. Hooper, an employee of the
Nevada State Labor Commissioner

EXHIBIT 2



nevada

Office of the Labor Commissioner



2014 PREVAILING WAGE RATES WASHOE COUNTY

DATE OF DETERMINATION: October 1, 2013

APPLICABLE FOR PUBLIC WORKS PROJECTS BID/AWARDED
OCTOBER 1, 2013 THROUGH SEPTEMBER 30, 2014*

***Pursuant to NAC 338.040(3), "After a contract has been awarded, the prevailing rates of wages in effect at the time of the opening of bids remain in effect for the duration of the project."**

As Amendments/Addenda are made to the wage rates, such will be posted to sites of the respective counties. Please review regularly for any amendments posted or contact our offices directly for further assistance with any amendments to the rates.

AIR BALANCE TECHNICIAN
ALARM INSTALLER
BOILERMAKER
BRICKLAYER
CARPENTER
CEMENT MASON
ELECTRICIAN-COMMUNICATION TECH.
ELECTRICIAN-LINE
ELECTRICIAN-NEON SIGN
ELECTRICIAN-WIREMAN
ELEVATOR CONSTRUCTOR
FENCE ERECTOR
FLAGPERSON
FLOOR COVERER
GLAZIER
HIGHWAY STRIPER
HOD CARRIER-BRICK MASON
HOD CARRIER-PLASTERER TENDER

2013-2014 Prevailing Wage Rates – Washoe County

IRON WORKER
LABORER
MECHANICAL INSULATOR
MILLWRIGHT
OPERATING ENGINEER
OPERATING ENG. STEEL FABRICATOR/ERECTOR
OPERATING ENGINEER-PILEDRIIVER
PAINTER
PILEDRIIVER (NON-EQUIPMENT)
PLASTERER
PLUMBER/PIPEFITTER
REFRIGERATION
ROOFER (Does not include sheet metal roofs)
SHEET METAL WORKER
SPRINKLER FITTER
SURVEYOR (NON-LICENSED)
TAPER
TILE /TERRAZZO WORKER/MARBLE MASON
TRAFFIC BARRIER ERECTOR
TRUCK DRIVER
WELL DRILLER
LUBRICATION AND SERVICE ENGINEER (MOBILE AND GREASE RACK)
SOIL TESTER (CERTIFIED)
SOILS AND MATERIALS TESTER

PREVAILING WAGE RATES INCLUDE THE BASE RATE AS WELL AS ALL APPLICABLE FRINGES

NRS 338.010(21) "Wages" means:

- (a) The basic hourly rate of pay; and
- (b) The amount of pension, health and welfare, vacation and holiday pay, the cost of apprenticeship training or other similar programs or other bona fide fringe benefits which are a benefit to the workman.

NRS 338.035 Discharge of part of obligation of contractor or subcontractor engaged on public work to pay wages by making certain contributions in name of workman. The obligation of a contractor engaged on a public work or a subcontractor engaged on a public work to pay wages in accordance with the determination of the Labor Commissioner may be discharged in part by making contributions to a third person pursuant to a fund, plan or program in the name of the workman.

Plasterer Tender-Journeyman	35.01
Plasterer Tender-Gun Tender	36.01
Plasterer Tender-Foreman	36.37

IRON WORKER

Ironworker-Journeyman	59.30
Ironworker-Foreman	62.60
Ironworker-General Foreman	66.23

LABORER

ADD ZONE RATE

SEE GROUP CLASSIFICATIONS

Landscaper	26.41
Furniture Mover	27.91
Group 1	31.57
Group 1A	28.70
Group 2	31.67
Group 3	31.82
Group 4	32.07
Group 4A	33.22
Group 5	32.37
Group 6	
Nozzlelemen, Rodmen	32.37
Gunmen, Materialmen	32.07
Reboundmen	31.72
Gunit Foremen	32.77

MECHANICAL INSULATOR

ADD ZONE RATE

Mechanical Insulator-Mechanic	58.43
Mechanical Insulator-Foreman	61.71
Mechanical Insulator-General Foreman	64.99

MILLWRIGHT

ADD ZONE RATE

Millwright	53.26
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OPERATING ENGINEER

ADD ZONE RATE

SEE GROUP CLASSIFICATIONS

Group 1	44.74
Group 1A	47.50
Group 2	48.03

2013-2014 Prevailing Wage Rates – Washoe County

13. Handling, racking, sorting, cutting, bending, hoisting, placing, burning, welding and tying all material used to reinforce concrete construction;

LABORER, includes but is not limited to:

Perform tasks involving physical labor at building, highway, and heavy construction projects, tunnel and shaft excavations, and demolition sites. May operate hand and power tools of all types: air hammers, earth tampers, cement mixers, small mechanical hoists, and a variety of other equipment and instruments. May clean and prepare sites, dig trenches, set braces to support the sides of excavations, erect scaffolding, clean up rubble and debris, and remove asbestos, lead, and other hazardous waste materials. May assist other craft workers.

MARBLE MASON, includes but is not limited to:

1. Cutting, tooling, and setting marble slabs in floors and walls of buildings and renovating and polishing marble slabs previously set in buildings;
2. Trimming, facing and cutting marble to a specific size using a power saw, cutting and facing equipment, and hand tools
3. Drilling holes in marble slabs and attaching brackets;
4. Spreading mortar on the bottom and sides of a marble slab and on the side of adjacent marble slabs;
5. Setting blocks in positions, tamping a marble slab into place and anchoring bracket attachments with wire;
6. Filling joints between marble slabs with grout and removing excess grout with a sponge;
7. Cleaning and beveling cracks and chips on marble slabs using hand tools and power tools;
8. Heating cracked or chipped areas of a marble slab with a blowtorch and filling the defect with a composition mastic that matches the grain of the marble slab; and
9. Polishing marble slabs and other ornamental stone to a high luster by using hand tools and power tools.

MECHANICAL INSULATOR, includes but is not limited to:

1. Covering and lining structures with cork, canvas, tar paper, magnesia and related materials;
2. Installing blown-on insulation on pipe and machinery;
3. Lining of mechanical room surfaces and air handling shafts;
4. Filling and damming of fire stops and penetrations including, but not limited to, electrical and mechanical systems;
5. Foam applications for the purpose of thermal, acoustical, or fire protective purposes, including RTV foams or equivalents, applied to mechanical or electrical systems;
6. Duct lining and duct wrapping, direct application and installation of fire protection of grease ducts, exhaust systems, or any other ductwork for acoustical or thermal purposes;

2013-2014 Prevailing Wage Rates – Washoe County

7. Insulation of field joints on pre-insulated underground piping and the pouring of Gilsilite or its equivalent;
8. The application of material, including metal and PVC jacketing, on piping, fittings, valves, flanges, boilers, ducts, plenums, flues, tanks, vats, equipment and any other hot or cold surface for the purpose of thermal control;

MILLWRIGHT, includes but is not limited to:

1. Installing machinery and equipment according to layout plans, blueprints and other drawings in industrial establishments by using hoists, lift trucks, hand tools and power tools;
2. Dismantling machines by using hammers, wrenches, crowbars and other hand tools;
3. Assembling and installing equipment, including, without limitation, shafting, conveyors, monorails and tram rails, by using hand tools and power tools;
4. Constructing foundations for machines by using hand tools and building materials, including, without limitation, wood, cement and steel;
5. Assembling machines and bolting, welding, riveting or otherwise fastening them to a foundation or other structure by using hand tools and power tools; and
6. Repairing and lubricating machines and equipment (at the site of the public work) assembled and used by millwrights.

OPERATING ENGINEER, includes but is not limited to:

Operate one or several types of power construction equipment, such as motor graders, bulldozers, scrapers, compressors, pumps, derricks, shovels, tractors, or front-end loaders to excavate, move, and grade earth, erect structures, or pour concrete or other hard surface pavement.

PAINTER, includes but is not limited to:

1. All painting of walls, equipment, buildings, bridges and other structural surfaces by using brushes, rollers and spray guns;
2. Application of wall coverings/wall paper;
3. Removing old paint to prepare surfaces before painting the surface;
4. Mixing colors or oils to obtain desired color or consistency;
5. Sanding surfaces between coats and polishing final coat to a specified finish;
6. Cutting stencils and brushing and spraying lettering and decorations on surfaces;
7. Washing and treating surfaces with oil, turpentine, mildew remover or other preparations;
8. Filling cracks, holes and joints with caulk, putty, plaster or other filler by using caulking gun or putty knife;

PILEDRIVER, includes but is not limited to:

GROUP CLASSIFICATIONS

LABORER, includes but is not limited to:

Group 1

All cleanup work of debris, grounds, and building including windows and tile

Dumpmen or Spotter (other than asphalt)
Handling and Servicing of Flares, Watchmen
General Laborer
Guide Posts and Highway Signs
Guardrail Erection and Dismantling
Limber, Brushloader and Piler
Pavement Marking and Highway Striping
Traffic Control Supervisor

Group 2

Choker setter or Rigger (clearing work only) Pittsburgh
Chipper and similar type brush shredders
Concrete worker (wet or dry) all concrete work not listed in Group 3
Crusher or Grizzly Tender
Greasing Dowels
Guinea Chaser (Stakemen)
Panel Forms (wood or metal) handling, cleaning and stripping of Loading and unloading,
(Carrying and handling of all rods and material for use in reinforcing concrete
Railroad Trackmen (maintenance, repair or builders)
Sloper
Semi-Skilled Wrecker (salvaging of building materials other than those listed in Group 3)

Group 3

Asphalt Workers (Ironers, Shovelers, Cutting Machine)
Buggymobile
Chainsaw, Faller, Logloader and Bucker
Compactor (all types)
Concrete Mixer under 1/2 yard
Concrete Pan Work (Breadpan type), handling, cleaning\stripping
Concrete Saw, Chipping, Grinding, Sanding, Vibrator
Cribbing, Shoring, Lagging, Trench Jacking, Hand-Guided Lagging Hammer
Curbing or Divider machine
Curb Setter (precast or cut)
Ditching Machine (hand-guided)
Drillers Helper, Chuck Tender
Form Raiser, Slip Forms
Grouting of Concrete Walls, Windows and Door Jams
Headerboardmen
Jackhammer, Pavement Breaker, Air Spade
Mastic Worker (wet or dry)
Pipewrapper, Kettlemen, Potmen, and men applying asphalt, creosote and similar type

2014-2015 Prevailing Wage Rates – Washoe County

materials

All Power Tools (air, gas, or electric), Post Driver

Riprap-Stonepaver and RockSlinger, including placing of sack concrete wet or dry

Rototiller

Rigging and Signaling in connection with Laborers' work

Sandblaster, Potmen, Gunmen or Nozzlemen

Vibra-screed

Skilled Wrecker (removing and salvaging of sash, windows, doors, plumbing and electrical fixtures)

Group 4

Burning and Welding in connection with Laborers' work

Joy Drill Model TWM-2A, Gardner Denver Model DN143 and similar type drills (in accordance with Memorandum of Understanding between Laborers and Operating Engineers dated at Miami, Florida, Feb. 3, 1954) and Track Drillers, Diamond Core Drillers, Wagon Drillers, Mechanical Drillers on Multiple Units

High scalers

Concrete pump operator

Heavy Duty Vibrator with Stinger 5" diameter or over

Pipelayer, Caulker and Bander

Pipelayer-waterline, Sewerline, Gasoline, Conduit

Cleaning of Utility Lines

Slip Lining of Utility Lines (including operation of Equipment)

TV Monitoring and Grouting of Utility Lines

Asphalt Rakers

Group 4A

Foreman

Group 5

Construction Specialists

Blasters and Powdermen, all work of loading, placing, and blasting of all powder and explosives of any type, regardless of method used for such loading and placing

Asbestos removal

Lead abatement

Hazardous waste

Material removal

Group 6

Gunite Foremen, Nozzlemen, Rodmen, Gunmen, Materialmen, Reboundmen

OPERATING ENGINEER, includes but is not limited to:

Group 1

Engineer Assistant

2014-2015 Prevailing Wage Rates – Washoe County

CV16-00353
DC-09900075197-036
HEAT & FROST INSULATORS, VS. 3 Pages
District Court 03/18/2016 04:20 PM
Washoe County 1067
BMSJMET

CODE NO: 1067

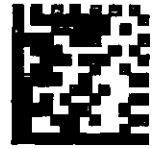
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Clients Info:
MCCRACKEN STEMERMAN & HOLSBERRY
1630 S COMMERCE ST, STE A-1
LAS VEGAS, NV 89102

2016 MAR 18 PM 4:20

ATTORNEY FOR Plaintiff:

ALLIED WORKERS LOCAL 16
DISTRICT COURT
WASHOE COUNTY



IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF WASHOE

HEAT & FROST INSULATORS AND
ALLIED WORKERS LOCAL 16

Plaintiff,

Case No: CV16-00353

vs.

Dept.No:

LABOR COMMISSIONER OF THE STATE
OF NEVADA, ET AL

Defendant

AFFIDAVIT OF SERVICE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF WASHOE

HEAT & FROST INSULATORS AND
ALLIED WORKERS LOCAL 16

Plaintiff,

Case No: CV16-00353

vs.

LABOR COMMISSIONER OF THE STATE
OF NEVADA, ET AL

Defendant

Affidavit of Service

STATE OF NEVADA
COUNTY OF WASHOE ss.:



MIKE JONES, being duly sworn says: That at all times herein affiant was and is a citizen of the United States over 18 years of age, not a party to nor interested in the proceedings in which this affidavit is made.

The affiant received copy(ies) of the **PETITION FOR JUDICIAL REVIEW** on **03/17/2016** and served the same on **03/17/2016** at **3:04 PM** by delivering and leaving a copy with:

STACEY NEVE, MANAGER, pursuant to NRS 14.020 as a person of suitable age and discretion, of the office of **FRED S REEDER**, registered agent for **RENO TAHOE CONSTRUCTION**, at the registered address of:

Service address: 2050 KLEPPE LANE, Sparks, NV 89431

A description of **STACEY NEVE** is as follows:

Sex	Color of skin/race	Color of hair	Age	Height	Weight
Female	Caucasian	Brown	33	5ft 6in	131-140lbs
Other Features:					

Pursuant to NRS 239B.030 this document does not contain the social security number of any person.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on **03/18/2016**
by **MIKE JONES**

JOHNNO LAZETICH
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 04-89542-2 - Expires January 28, 2020

Notary Public



74929

X
MIKE JONES
Registration#: R-023632
JUNES LEGAL
630 SOUTH 10TH STREET SUITE B
LAS VEGAS, NV 89101
702-579-6300

1 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND**
2 **FOR THE COUNTY OF WASHOE**

3 **AFFIRMATION**
4 **Pursuant to NS 239B.030**

5 The undersigned does hereby affirm that the preceeding document, filed in the case number:

6 ☒ Document does not contain the social security number of any person.

7
8 _____
9 (Signature)

10 _____
11 (Print Name)

12 _____
13 (Attorney for)

CV16-00353 DC-09B00075417-008
HEAT & FROST INSULATORS, VS. 3 Pages
District Court 03/24/2016 04:13 PM
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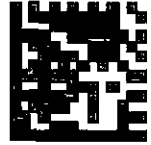
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Clients Info:
MCCRACKEN STEMERMAN & HOLSBERRY
1630 S COMMERCE ST, STE A-1
LAS VEGAS, NV 89102

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ALLIANCE CREDIT
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BY [Signature]



ATTORNEY FOR Plaintiff:

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF WASHOE

HEAT & FROST INSULATORS AND
ALLIED WORKERS LOCAL 16

Plaintiff,

Case No: CV16-00353

vs.

Dept.No:

LABOR COMMISSIONER OF THE STATE
OF NEVADA, ET AL

Defendant

AFFIDAVIT OF SERVICE

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///

///

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF WASHOE

HEAT & FROST INSULATORS AND
ALLIED WORKERS LOCAL 16

Plaintiff,

Case No:CV16-00353

vs.

LABOR COMMISSIONER OF THE
STATE OF NEVADA, ET AL

Defendant

DECLARATION OF SERVICE

STATE OF NEVADA
COUNTY OF WASHOE ss.:



MIKE JONES, being duly sworn says: That at all times herein affiant was and is a citizen of the United States over 18 years of age, not a party to nor interested in the proceedings in which this affidavit is made.

The affiant received copy(ies) of the **PETITION FOR JUDICIAL REVIEW**, on **03/17/2016** and served the same on **03/23/2016** at **3:35 PM** by delivering and leaving a copy with:

DAN KLAICH, CHANCELLOR who stated he/she is authorized to accept service on behalf of **THE UNIVERSITY OF NEVADA - RENO**.

Service address:2601 ENTERPRISE RD. RENO, NV 89512

A description of **DAN KLAICH** is as follows:

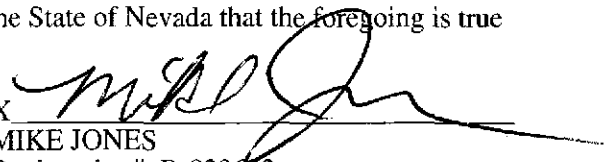
Sex	Color of skin/race	Color of hair	Age	Height	Weight
Male	Caucasian	Black/Gray	56	6ft 2in	171-180lbs
Other Features:					

Pursuant to NRS 239B.030 this document does not contain the social security number of any person.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on: 03/24/2016
by MIKE JONES

No Notary is Required per NRS 53.045

X 
MIKE JONES
Registration#: R-023632
JUNES LEGAL
630 SOUTH 10TH STREET SUITE B
LAS VEGAS, NV 89101
702-579-6300



74927

AFFIRMATION
Pursuant to NS 239B.030

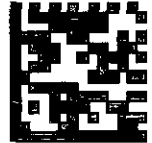
☒ Document does not contain the social security number of any person.

(Attorney for)

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 24

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CLERK OF THE COURT
BY B DEPUTY



///

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF WASHOE

HEAT & FROST INSULATORS AND
ALLIED WORKERS LOCAL 16

Plaintiff,

Case No:CV16-00353

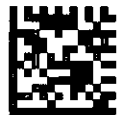
vs.

LABOR COMMISSIONER OF THE
STATE OF NEVADA, ET AL

Defendant

DECLARATION OF SERVICE

STATE OF NEVADA
COUNTY OF WASHOE ss.:



JOHN LEE, being duly sworn says: That at all times herein affiant was and is a citizen of the United States over 18 years of age, not a party to nor interested in the proceedings in which this affidavit is made.

The affiant received copy(ies) of the **PETITION FOR JUDICIAL REVIEW**, on **03/17/2016** and served the same on **03/17/2016** at **2:25 PM** by delivering and leaving a copy with:

LIDA TORRES, ADMINISTRATIVE ASSISTANT who stated he/she is authorized to accept service on behalf of **LABOR COMMISSIONER OF THE STATE OF NEVADA**.

Service address:1818 E COLLEGE PARKWAY, SUITE 102 Reno, NV 89557

A description of **LIDA TORRES** is as follows:

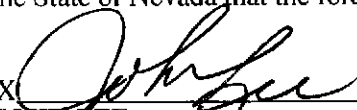
Sex	Color of skin/race	Color of hair	Age	Height	Weight
Female	Hispanic	BRN	25	5'6	145
Other Features:					

Pursuant to NRS 239B.030 this document does not contain the social security number of any person.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Sworn to and subscribed before me on
03/18/2016
by JOHN LEE

No Notary is Required per NRS 53.045

X 
JOHN LEE
Registration#: R-004475
JUNES LEGAL
630 SOUTH 10TH STREET SUITE B
LAS VEGAS, NV 89101
702-579-6300



74924

AFFIRMATION
Pursuant to NS 239B.030

☒ Document does not contain the social security number of any person.

(Attorney for)

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

2300

ADAM PAUL LAXALT

Attorney General

MELISSA L. FLATLEY

Deputy Attorney General

Nevada Bar No. 12578

Attorney General's Office

100 North Carson Street

Carson City, Nevada 89701-4717

(775) 684-1218 - Telephone

(775) 684-1156 – Facsimile

Email: mflatley@ag.nv.gov

Attorneys for the Nevada Office of the Labor Commissioner

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HEAT & FROST INSULATORS and
ALLIED WORKERS LOCAL 16,

Petitioners,

v.

LABOR COMMISSIONER OF THE STATE
OF NEVADA; THE UNIVERSITY OF
NEVADA, RENO; CORE
CONSTRUCTION; and RENO TAHOE
CONSTRUCTION,

Respondents.

CASE NO.: CV16-00353

DEPT. NO.: 10

MOTION TO DISMISS FOR LACK OF JURISDICTION PURSUANT TO NRCP 12(b)(1)

Comes now Respondent, Labor Commissioner of the State of Nevada, by and through counsel Attorney General ADAM PAUL LAXALT, and Deputy Attorney General MELISSA L. FLATLEY, and hereby moves this Court for an *Order* dismissing the *Petition for Judicial Review* because there is no subject matter jurisdiction. This *motion* is based upon the following Points and Authorities, and incorporates the other pleadings and papers on-file in this matter, and any argument that the Court may consider.

///

1 **I. INTRODUCTION**

2 The judicial review of the decision of an administrative agency is a special jurisdiction,
3 and available only by strict compliance with the Administrative Procedures Act (APA), Nevada
4 Revised Statutes ("NRS") Chapter 233B. In 2015, the statute stating the rules for invoking the
5 jurisdiction of the Court, NRS 233B.130, was amended. The statute now requires that the
6 *Petition for Judicial Review* be served upon the Attorney General in Carson City, as well as
7 the administrative agency issuing the decision, and the time for completing service is still 45
8 days. Petitioner, Heat & Frost Insulators and Allied Workers Local 16 ("Heat & Frost"), did not
9 complete the required service. Though a harsh outcome to dismiss a case, the Nevada
10 Supreme Court has been clear that the APA requires strict compliance in order for a court to
11 take jurisdiction over a *Petition for Judicial Review*. Therefore, the Labor Commissioner now
12 requests that the *Petition for Judicial Review* be dismissed due to the Petitioner's failure to
13 comply with NRS 233B.130.

14 **II. PROCEDURAL HISTORY**

15 The Office of the Labor Commissioner issued its order affirming the determination of
16 University of Nevada Reno ("UNR") on February 2, 2016. Heat & Frost filed its *Petition for*
17 *Judicial Review* pursuant to NRS 233B.130(1) on February 18, 2016. Although Heat & Frost
18 had 45 days from the date of the *Petition* being filed to complete service as required in NRS
19 233B.130(5), the Office of the Attorney General has not been served to date. More than 45
20 days have passed.

21 **III. LEGAL ARGUMENT**

22 The Administrative Procedures Act must be strictly followed in order for the District
23 Court to gain jurisdiction to conduct a review of an agency decision. Without subject matter
24 jurisdiction, the case must be dismissed.

25 **A. STANDARD OF REVIEW ON A MOTION TO DISMISS**

26 A motion to dismiss may be used when a lack of jurisdiction over the subject matter
27 appears on the face of the pleading. *Girola v. Roussille*, 81 Nev. 661, 408 P.2d 918 (1965).
28 Subject matter jurisdiction is the Court's authority to render judgment in a particular category

1 of case. *Landreth v. Malik*, 127 Nev. __, 251 P.3d 163, 168 (Adv. Op. 16, May 12, 2011). If a
2 District Court lacks subject matter jurisdiction, the judgment is rendered void. *Id.* at 166. Thus,
3 before considering the merits of the *Petition for Judicial Review*, the Court must first
4 determine whether it has statutory authority to review the action of an executive branch
5 administrative agency.

6 **B. THE APA HAS CLEAR REQUIREMENTS FOR INVOKING THE**
7 **JURISDICTION OF THE COURT**

8 Judicial review of the official acts of administrative agencies is only available where the
9 legislature has created a specific procedure for review of those acts. *Washoe Co. v. Otto*, 128
10 Nev. __, 282 P.3d 719, 724 (Adv. Op. 40, Aug. 9, 2012). Without specific compliance with the
11 Administrative Procedures Act ("APA"), the District Court is without subject matter jurisdiction
12 to review the decision of the administrative agency. *Otto*, 282 P.3d at 725, citing *Ultsch v.*
13 *Illinois Mun. Retirement Fund*, 874 N.E.2d 1, 7 (2007). When a Petition for Judicial Review
14 under the APA is properly instituted, it is under the special statutory jurisdiction of the Court.

15 The procedure here is set forth in NRS Chapter 233B, and specifically NRS 233B.130.
16 The statute was amended in 2015, effective July 1, 2015, and now states in pertinent part:

17 "2. Petitions for judicial review must:

18 (a) Name as respondents the agency and all parties of record to the
19 administrative proceeding;

20 (b) Be instituted by filing a petition in the district court in and for
21 Carson City, in and for the county in which the aggrieved party
22 resides or in and for the county where the agency proceeding
23 occurred; ~~and~~

24 (c) Be served upon:

25 (1) *The Attorney General, or a person designated by the Attorney*
26 *General, at the Office of the Attorney General in Carson City; and*

27 (2) *The person serving in the office of administrative head of the*
28 *named agency; and*

(d) Be filed within 30 days after service of the final decision of the
agency.

26 ///

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5. The petition for judicial review and any cross-petitions for judicial review must be served upon the agency and every party within 45 days after the filing of the petition, unless, upon a showing of good cause, the district court extends the time for such service."

AB 53 (2015), sec. 9. (Amendment reflected in italics.)

The intent behind the amendment was to bring the requirements for service of a lawsuit found in NRS 41.031 clearly within the APA. See "Minutes of Senate Committee on Government Affairs, April 24, 2015" at page 6. Thus, in order for service to be effective against a state agency, the Petitioner must serve the agency and the Attorney General.

In this case, the 45-day limit for service has passed and Heat & Frost did not seek an enlargement of the time to serve the Attorney General before the service period had passed. The Petition was filed on February 18, 2016, and the 45-day period ended April 4, 2016. Because the requirements of NRS 233B.130(2)(c) were not completed, the Court has no subject matter jurisdiction and the case must be dismissed.¹

IV. CONCLUSION

Heat & Frost seeks appellate review of the decision of the Office of the Labor Commissioner, an executive branch administrative agency. The District Court has authority to review an administrative action only if the Petitioner strictly complies with the requirements established by the Legislature. Here, the Legislature requires that the Petitioner provide service on the Attorney General within 45 days of filing the petition. The Petitioner failed to do that in this case, and therefore the Court is without jurisdiction. The Labor Commissioner respectfully requests that the Court dismiss the *Petition for Judicial Review*.

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¹ See *Garcia v. State, ex rel Nevada System of Higher Educ. ex rel University of Nevada*, 2012 WL 2308648, June 15, 2012 (Unpublished), dismissing a petition for judicial review for failing to either serve the respondent within 45-days after filing or request an enlargement of the time to serve the respondent.

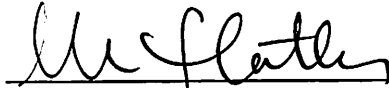
AFFIRMATION

Pursuant to NRS 239B.030, the undersigned affirms that this document does not contain the personal information of any person.

Dated this 14th day of April 2016.

ADAM PAUL LAXALT
Attorney General

By:



MELISSA L. FLATLEY
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1218 - Telephone
(775) 684-1108 - Facsimile
Attorneys for Respondent
Office of the Labor Commissioner

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and on the 15th day of April 2016, I served a true and correct copy of the foregoing ***Motion to Dismiss for Lack of Jurisdiction Pursuant to NRCP 12(b)(1)***, as follows:

Regular Mail Only:

Mike B. Springer, Esq.
9460 Double R. Boulevard, Suite 103
Reno, Nevada 89521

Regular Mail Only:

Core Construction
5422 Longley Lane, Suite B
Reno, Nevada 89511

Regular Mail Only:

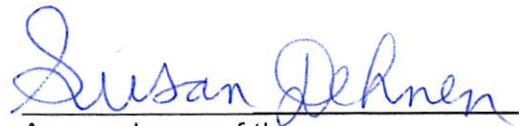
James Kevin Jacobs, President
Core Construction Services of Nevada
7150 Cascade Valley Court
Las Vegas, Nevada 89128

Regular Mail Only:

Bryan L. Wright, Esq.
University of Nevada, Reno
Sara H. Fleischmann Building, Suite 100 C
1664 North Virginia Street, MS 550
Reno, Nevada 89557-0550

Electronically Filed Using the ECF System:

svarela@dcbsf.com
Sarah Varela, Esq.



An employee of the
Office of the Attorney General

1 **1067**
2 SARAH VARELA, SBN 12886
3 MCCracken, Stemerman & Holsberry
4 1630 S. Commerce St.
5 Las Vegas, NV 89102
6 Telephone: (702) 386-5107
7 Fax: (702) 386-9848
8 svarela@dcbsf.com
9
10 *Attorneys for Petitioner*

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**IN THE SECOND JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WASHOE**

HEAT & FROST INSULATORS AND ALLIED
WORKERS LOCAL 16;

Petitioner,

vs.

LABOR COMMISSIONER OF THE STATE OF
NEVADA; THE UNIVERSITY OF NEVADA,
RENO; CORE CONSTRUCTION; and RENO
TAHOE CONSTRUCTION,

Respondents.

CASE NO.: CV16-00353

DEPT. NO.: 10

**AFFIDAVIT OF SERVICE ON
CORE CONSTRUCTION**

AOS

**DISTRICT COURT , WASHOE COUNTY
WASHOE COUNTY, NEVADA**

**HEAT & FROST INSULATORS AND
ALLIED WORKERS LOCAL 16**

Plaintiff

VS

**LABOR COMMISSIONER OF THE
STATE OF NEVADA, ET AL**

Defendant

CASE NO: CV16-00353

HEARING DATE/TIME: 00/00/0000 at 00:00am

DEPT NO:

AFFIDAVIT OF SERVICE

GREGORY BROWN R-013683 being duly sworn says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to or interested in the proceedings in which this affidavit is made. That affiant received 1 copy(ies) of the PETITION FOR JUDICIAL REVIEW, on the 16th day of March, 2016 and served the same on the 22nd day of March, 2016, at 15:56 by:

serving the servee CORE CONSTRUCTION by personally delivering and leaving a copy at (address) 7150 CASCADE VALLEY COURT, LAS VEGAS NV 89128 with SHAVONE WESTON BURKE as , an agent lawfully designated by statute to accept service of process;

702-794-0550

Pursuant to NRS 53.045

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.



EXECUTED this 22 day of Mar, 2016.

GREGORY BROWN R-013683

Junes Legal Services - 630 South 10th Street - Suite B - Las Vegas NV 89101 - (702) 579-6300 - Fax (702) 259-6249 - Toll Free (888) 56Junes

EP164772E JASB16-0019

JA 0034

1
2 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND**
3 **FOR THE COUNTY OF WASHOE**

4 HEAT & FROST INSULATORS AND
5 ALLIED WORKERS LOCAL 16

6 Plaintiff,

Case No: CV16-00353

7 vs.

Dept.No:

8 LABOR COMMISSIONER OF THE
9 STATE OF NEVADA, ET AL

10 Defendant

11 **AFFIDAVIT OF ATTEMPTS**

12 STATE OF NEVADA
13 COUNTY OF CARSON CITY ss.:

14 **LISA MORLAN**, the undersigned, being duly sworn, deposes and says that I was at the time of
15 attempting service over the age of eighteen and not a party to this action. I reside in the STATE
16 OF NEVADA.

17 I received **PETITION FOR JUDICIAL REVIEW** with instructions to complete service upon
18 **CORE CONSTRUCTION** during the period of **03/17/2016** through **03/17/2016** and have been
19 unable to effect service as described in the attempts listed below:

Date/Time	Address	Remarks
03/17/2016-2:27 PM	202 S MINNESOTA STCAPITOL CORPORATE SERVICES INC Carson City, NV89703	LEEANN BROOKS SAID NOT THE R/A FOR THIS COMPANY

21 I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true
22 and correct.

23 Sworn to and subscribed before me on
24 03/18/2016
25 by LISA MORLAN

Notary Public

X *Lisa Morlan*
LISA MORLAN
Registration#: R-062428
JUNES LEGAL
630 SOUTH 10TH STREET SUITE B
LAS VEGAS, NV 89101
702-579-6300



74932



AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned hereby affirms that this document does not contain the social security number of any person.

Dated: April 25, 2016

McCRACKEN, STEMERMAN & HOLSBERRY

By:



YIEN SAELEE

1 **2645**

2 SARAH VARELA, SBN 12886
3 MCCracken, Stemerman & Holsberry
4 1630 S. Commerce St.
5 Las Vegas, NV 89102
6 Telephone: (702) 386-5107
7 Fax: (702) 386-9848
8 svarela@dcbsf.com

9 *Attorneys for Petitioner*

10
11 **IN THE SECOND JUDICIAL DISTRICT COURT OF**
12 **THE STATE OF NEVADA IN AND FOR THE**
13 **COUNTY OF WASHOE**

14 HEAT & FROST INSULATORS AND ALLIED
15 WORKERS LOCAL 16;

16 Petitioner,

17 vs.

18 LABOR COMMISSIONER OF THE STATE OF
19 NEVADA; THE UNIVERSITY OF NEVADA,
20 RENO; CORE CONSTRUCTION; and RENO
21 TAHOE CONSTRUCTION,

22 Respondents.

CASE NO.: CV16-00353

DEPT. NO.: 10

**PETITIONER'S OPPOSITION TO
MOTION TO DISMISS**

23 **I. Introduction**

24 The Labor Commissioner's motion to dismiss this Petition for Judicial Review, brought by
25 the Attorney General, rests entirely on the contention that failure to serve the Petition on the
26 Attorney General is a jurisdictional defect. But this contention is contradicted by the only published
27 Supreme Court case to address the subject, *Civil Service Commission v. Second Judicial Dist. Court*,
28 118 Nev. 186, 189, 42 P.3d 268,271 (2002), overruled on other grounds by *Washoe County v. Otto*,
282 P.3d 719, 725 n.9 (2012). It is also directly contradicted by an unpublished Supreme Court
case, *Garcia v. State ex rel. Nevada System of Higher Education*, 2012 WL 2308648 (Nev. No.
57475, June 15, 2012) which the Labor Commissioner utterly misconstrues. And the Labor

Commissioner's contention is incompatible with the text of the statute, which clearly gives the Court the discretion to extend the time for service on a party—and thus does not deprive the Court of jurisdiction over the matter if service is late.

II. Procedural History

The Office of the Labor Commissioner issued an order affirming the determination of University of Nevada Reno ("UNR") on February 2, 2016. Petitioner Heat & Frost Insulators Local 16 ("Local16") timely filed a Petition for Judicial Review on February 18, 2016. The petition named as respondents the agency (the Labor Commissioner) and the other parties of record to the administrative proceeding. Local 16 served the Petition on all named parties.

Because the recently enacted requirement of service on the Attorney General had not been published in an official statutory compilation, Local 16 did not serve the Petition on the Attorney General within the 45 days specified by NRS 233B.130(5). *See* Motion for Extension of Time to Serve Petition, filed concurrently with this opposing memorandum. However, the Attorney General evidently received a copy of the Petition, as demonstrated by the fact that the Attorney General wrote and filed the Motion to Dismiss to which this memorandum responds.

III. Argument

The Labor Commissioner moves to dismiss under NRCP 12(b)(1), claiming that this Court lacks jurisdiction over the subject matter of the Petition for Judicial Review. But late service of the Petition upon the Attorney General, where all other requirements of NRS 233B.130 were met, does not deprive this Court of jurisdiction.

A. Late service on the Attorney General does not deprive this Court of jurisdiction over the petition for judicial review.

Controlling precedent of the Nevada Supreme Court holds that the time requirement set forth in NRS 233B.130(5) is not a jurisdictional, even though some of the statute's other requirements are jurisdictional. The Supreme Court's holding on this issue is soundly rooted in the text of the statute itself, which indicates that the time-for-service requirement is not absolute and does not prevent a court from taking jurisdiction over a petition that is not timely served.

The only Supreme Court case to address the subject is *Civil Service Commission v. Second*

1 *Judicial Dist. Court*, 118 Nev. 186, 42 P.3d 268 (2002). There, a petition for judicial review was
2 defective with respect to the procedural requirements of 233B.130 in two respects: (1) it failed to
3 name one of the parties to the administrative proceedings as a respondent, and (2) it was not timely
4 served on another of the parties to the administrative proceedings. The Court noted that while
5 “[f]iling requirements are mandatory and jurisdictional, . . . technical derelictions do not generally
6 preclude a party’s right to review.” *Id.* at 189-90. The Court reasoned that because the petition was
7 timely filed, the district court had jurisdiction—and could exercise its discretion to decline to
8 dismiss the petition. The Court specifically held that neither the failure to name one party nor the
9 failure of timely service on another party deprived the district court of jurisdiction. *Id.* at 190.

10 In a later case, *Washoe County v. Otto*, the Supreme Court overruled half of its *Civil Service*
11 *Commission* holding but left the other half in place. 282 P.3d 719 (2012). In *Otto*, a petition for
12 judicial review was filed but was defective in not adequately naming “all parties of record to the
13 administrative proceeding” as required by NRS 233B.130(2)(a). The Supreme Court declared that
14 this defect deprived the district court of jurisdiction to consider the petition. In so holding, the Court
15 explicitly overruled only so much of *Civil Service Commission* as held the opposite. The *Otto* court
16 plainly stated:

17 As recognized by the district court, in *Civil Service Commission v. District Court*, we
18 noted that “technical derelictions do not generally preclude a party’s right to review.”
19 [Citation]. To the extent that *Civil Service Commission* holds that a petition for
20 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.

21 *Otto*, 282 P.3d 729 n.9.

22 The *Otto* court said nothing about the other holding in *Civil Service Commission*, that the
23 failure of timely service of a petition for judicial review on a single party, as called for by
24 233B.130(5), does not deprive the district court of jurisdiction to hear the petition. Since the *Otto*
25 opinion takes such care to overrule *Civil Service Commission* only “[t]o the extent that” it permits
26 leniency about “the NRS 233B.130(2)(a) naming requirement,” it follows that *Otto* does not disturb
27 any other aspect of the *Civil Service Commission* precedent—and in particular, in the wake of *Otto*,
28 the holding in *Civil Service Commission* that the timely service requirement of 233B.130(5) is *not*

1 jurisdictional remains the binding precedent of the Supreme Court. In fact, *Otto* approvingly quotes
2 *Civil Service Commission* for the proposition that “technical derelictions do not generally preclude a
3 party’s right to review.” *Otto*, 282 P.3d 729 n.9, quoting *Civil Service Comm’n*, 118 Nev. at 189-90.

4 Besides the binding precedent of *Civil Service Commission*, the conclusion that failure to
5 comply with the timely service requirement of 233B.130(5) is not a jurisdictional defect also
6 follows directly from the text of the statute itself. The timely service requirement set forth in
7 subsection (5) permits the district court to extend the time for service:

8 The petition for judicial review and any cross-petitions for judicial review must be
9 served upon the agency and every party within 45 days after the filing of the petition,
10 unless, upon a showing of good cause, the district court extends the time for such
11 service.

12 Since the district court has jurisdiction to extend the time for service, it follows that the district court
13 has jurisdiction over a petition for judicial review even if it is not timely served.

14 **B. The Labor Commissioner cites no legal authority that supports her contention**
15 **that the timely service requirement is jurisdictional.**

16 The Labor Commissioner cites no cases that support her contention that noncompliance with
17 the 45-day service requirement creates a jurisdictional defect. In fact, the Labor Commissioner cites
18 one unpublished Supreme Court case that directly states the opposite.

19 The Labor Commissioner cites *Otto* for the proposition that, as the Labor Commissioner puts
20 it, “Without specific compliance with the Administrative procedures Act (“APA”), the District
21 Court is without subject matter jurisdiction to review the decision of the administrative agency.
22 *Otto*, 282 P.3d at 715.” Motion to Dismiss at 3:10-13. But that was not the holding of *Otto*.
23 Rather, as discussed above, *Otto* decided that a failure to name all necessary parties in a petition for
24 judicial review creates a jurisdictional defect. This is a requirement found in NRS 233B.130(2)(a).
25 The 45-day service requirement, including the clear statutory permission for a court to extend the
26 time for service, is found in a different subsection of the statute, NRS 233B.130(5). And as
27 discussed above, the *Otto* court took pains *not* to overrule *Civil Service Commission*’s holding that
28 noncompliance with the timely service requirement of 233B.130(5) did not deprive a district court

1 of jurisdiction over the petition. *Otto*, 282 P.3d 729 n.9.

2 In addition to misstating the holding of *Otto*, the Labor Commissioner cites an unpublished
3 Supreme Court decision for a proposition directly contrary to that decision's holding. The Labor
4 Commissioner contends: "Because the requirements of NRS 233B.130(2)(c) were not completed the
5 Court has no subject matter jurisdiction and the case must be dismissed." Motion to Dismiss at
6 4:12-13. A footnote from this sentence purports to give authority for the contention: "See *Garcia v.*
7 *State, ex rel Nevada System of Higher Educ. ex rel University of Nevada*, 2012 WL 2308648, June
8 15, 2012 (Unpublished), dismissing a petition for judicial review for failing to either serve the
9 respondent within 45-days after filing or request an enlargement of the time to serve the
10 respondent." Motion to Dismiss at 4 n.1.

11 *Garcia* does not support Labor Commissioner's contention that where a petition is not timely
12 served, "the Court has no subject matter jurisdiction and the case must be dismissed." Rather, in
13 *Garcia*, a petitioner failed to timely serve the petition *and* did not move the district court for an
14 extension of time. The district court dismissed the petition. The *Garcia* court stated that "When a
15 party fails to comply with the service requirement of NRS 233B.130, however, dismissal is not
16 mandatory and the district court has jurisdiction whether to dismiss the petition." *Garcia* at *1,
17 citing *Civil Service Comm'n*, 118 Nev. at 190. The *Garcia* court went on to uphold the district
18 court's exercise of discretion to dismiss the petition because petitioner had not shown good cause
19 for the delay.

20 *Garcia* plainly says that a failure to comply with the service requirement does not deprive the
21 district court of jurisdiction over the petition. This statement in *Garcia* is consistent with, and
22 indeed compelled by, the binding precedent of the *Civil Service Commission* case. It is puzzling
23 why the Labor Commissioner's motion cites *Garcia* to support the contention that failure to timely
24 serve creates a jurisdictional defect, which is exactly contrary to what *Garcia* actually says.

25 Aside from *Otto* and *Garcia*, the Labor Commissioner cites no other cases in support of its
26 contention about the jurisdictional effect of noncompliance with the 45-day service requirement.
27 Since the Labor Commissioner's contention lacks support in statutory language and is directly
28 contradicted by the applicable Supreme Court precedent, it should be rejected by this Court.

1 **C. This Court should exercise its discretion not to dismiss the instant petition but**
2 **rather to allow it to be heard on the merits.**

3 There are two compelling reasons for this Court to exercise its discretion and permit Local
4 16's petition for judicial review to be considered on the merits, in addition to the good cause for
5 permitting late service that is shown by Plaintiff in the separate motion filed concurrently with this
6 brief. First is the strong policy in favor of resolving cases on their merits. Here, the statute
7 explicitly permits this Court to extend the time for service of the petition, and Petitioner Local 16
8 has moved this Court for an extension. The petition itself raises significant problems of procedure
9 and substance in the administrative proceedings, and these significant issues should not be brushed
10 away on a technicality that the Court has the power to excuse.

11 Second is the fact that even though the Attorney General was not served within the initial 45-
12 day period, the Attorney General nevertheless received a copy of the petition, as evidenced by the
13 motion to dismiss having been signed and apparently authored by Melissa L. Flatley, Deputy
14 Attorney General, on behalf of the Attorney General. Thus, no prejudice whatsoever accrued to the
15 Attorney General or the Labor Commissioner due to late service on the Attorney General—
16 particularly because under the procedure set by the Administrative Procedure Act, the substantive
17 briefings on the merits of the petition are not due yet, and Petitioner must file the first briefing on
18 the merits. It would make a mockery of the notion of judicial review of administrative decisions if
19 the petition here were dismissed despite raising significant issues and despite the single technical
20 defect in its service not having caused any prejudice to any party or to the Attorney General.

21 ///

22 ///

23 ///

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28 ///

1 **IV. Conclusion**

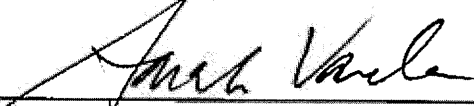
2 For the reasons stated above, this Court has jurisdiction over the Petition for Judicial Review.
3 The Motion to Dismiss should be denied, and the Court should exercise its discretion to deem the
4 late service of the petition upon the Attorney General acceptable in this instance.

5 Dated: April 26, 2016

Respectfully submitted,

6 McCRACKEN, STEMERMAN & HOLSBERRY

7
8 By:


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Las Vegas, Nevada 89102
Tel: 702-386-5107
Fax: 702-386-9848

12 *Attorneys for Petitioner*

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned hereby affirms that this document does not contain the social security number of any person.

Dated: April 26, 2016

McCRACKEN, STEMERMAN & HOLSBERRY

By:


Sarah Varela

Attorneys for Petitioner

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of McCracken, Stemerman
3 & Holsberry, and that on the 26th day of April, 2016, I served a true copy of
4 **PETITIONER'S OPPOSITION TO MOTION TO DISMISS** on all parties to this
5 action by E-Filing through the E-Flex filing system addressed as follows:
6

7 By Electronic Service Through E-Flex:

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11 **IN THE SECOND JUDICIAL DISTRICT COURT OF**
12 **THE STATE OF NEVADA IN AND FOR THE**
13 **COUNTY OF WASHOE**

14 HEAT & FROST INSULATORS AND ALLIED
15 WORKERS LOCAL 16;

16 Petitioner,

17 vs.

18 LABOR COMMISSIONER OF THE STATE OF
19 NEVADA; THE UNIVERSITY OF NEVADA,
20 RENO; CORE CONSTRUCTION; and RENO
21 TAHOE CONSTRUCTION,

22 Respondents.

CASE NO.: CV16-00353

DEPT. NO.: 10

**MOTION FOR EXTENSION OF
TIME TO SERVE PETITION**

(NRS 233B.130(5))

COMES NOW PETITIONER Heat & Frost Insulators Local 16 ("Local 16") and moves this Court to extend the time for service of its Petition for Judicial Review upon the Attorney General and deem the service made upon the Attorney General on April 25, 2016 to be timely. This motion is based on the following points and authorities, on the accompanying Declaration of Sarah Varela, on all documents filed in this matter, and on such argument and evidence as may be offered at oral argument should the Court so direct.

1. This Court is permitted by NRS 233B.130(5) to extend the time for service of the Petition for Judicial Review upon the Attorney General.

NRS 233B.130(5) states in pertinent part:

The petition for judicial review and any cross-petitions for judicial review must be served upon the agency and every party within 45 days after the filing of the petition, unless, upon a showing of good cause, the district court extends the time for such service.

In 2015, the Legislature amended a different subpart of NRS 233B.130, adding a requirement to serve the petition upon the Attorney General as subpart (2)(c)(1). Laws 2015, c. 160, § 9, eff. July 1, 2015. In amending subpart (2), the Legislature left subpart (5) unaltered, both in requiring service within 45 days of the petition's filing and in permitting the district court to extend the 45-day period upon a showing of good cause. This Court therefore has the power, granted by explicit statutory language, to extend the 45-day service period.

2. Petitioner shows good cause for an extension.

Here, Petitioner Local 16 failed to serve the Petition upon the Attorney General with 45 days of filing for a reason that should be excused by the Court. Petitioner's attorneys relied upon the official Nevada statutes published by the Nevada Legislative Counsel Bureau, and upon the online version of the Nevada statutes available on the Legislature's web site, <http://www.leg.state.nv.us/nrs/>. Neither of these official sources presently (as of today's date) reflects the 2015 amendment to NRS 233B.130.

The Legislative Counsel Bureau publishes new editions of the Nevada statutes on a two-year schedule. Petitioner's attorneys subscribe to the Bureau's Nevada statutes and have the most recent

1 publication, dated 2013. Declaration of Sarah Varela (“Varela Dec.”) ¶¶ 3-4. The 2015 edition is
2 not yet available. Varela Dec. ¶ 5. Petitioner’s attorneys used the latest printed version of the
3 Nevada Revised Statutes to prepare the petition and to determine whom to serve. Varela Dec. ¶ 6.
4 In addition, Petitioner’s attorneys checked the online version of NRS 233B.130 that is maintained
5 on the Legislature’s own web site. At the time of filing, that version also did not reflect the 2015
6 amendment. Varela Dec. ¶ 7.

7 Since the pre-2015 version of NRS 233B.130 did not require service of the Petition upon the
8 Attorney General, Petitioner did not serve it. Petitioner timely complied with all other procedural
9 requirements set by the statute.

10 Petitioner submits that it was reasonable to rely on the both of the most recent available
11 official compilations of Nevada statutory law provided by the Legislature, one printed and one
12 online. Because the requirement of service upon the Attorney General is so new that it is not even
13 reflected in the official statute books or on the Legislature’s own website, this Court should extend
14 the time to serve the Attorney General and permit Petitioner to cure this technical defect.

15 **3. Neither the Labor Commissioner nor the Attorney General was prejudiced by**
16 **the delayed service upon the Attorney General, since the Labor Commissioner**
17 **received the petition timely and provided it to the Attorney General.**

18 There can be no claim that the Attorney General or the Labor Commissioner would be
19 prejudiced by late service upon the Attorney General, because the Attorney General already has a
20 copy of the Petition, which Deputy Attorney General Melissa L. Flatley apparently used in order to
21 write the Motion to Dismiss on behalf of the Labor Commissioner. The Labor Commissioner was
22 timely served. Service on the Attorney General in this case is purely a technicality.

23 Nor can the Labor Commissioner or the Attorney General claim they would be prejudiced by
24 an extension of the time for service, because such an extension would make them litigate the merits
25 of the case. The purpose of the judicial-review process in the Administrative Procedures Act is to
26 permit a petitioner to bring a challenge to an administrative decision on its merits, and “good public
27 policy dictates that cases be adjudicated on their merits.” *Scrimmer v. Dist. Ct.*, 116 Nev. 507, 516–
28 17, 998 P.2d 1190, 1196 (2000). It is no prejudice if the Labor Commissioner and Attorney General

1 must defend the merits of the Labor Commissioner's decision.

2 In addition, the Attorney General's office did not contact Petitioner prior to filing its Motion
3 to Dismiss. Rather, they waited until the 45-day deadline ticked by, clearly hoping to use the 2015
4 amendment as a trap for the unwary rather than engaging in a substantive response to the significant
5 concerns about the administrative process that are raised in the Petition. "[T]echnical derelictions
6 do not generally preclude a party's right to review." *Civil Service Commission v. Second Judicial*
7 *Dist. Court*, 118 Nev. 186, 42 P.3d 268 (2002), *rev'd on other grounds by Washoe County v. Otto*,
8 282 P.3d 719 (2012). This Court has the power not to permit the Attorney General's gamesmanship
9 to prevent consideration of the merits of the Petition.

10 For the reasons given above, Petitioner respectfully asks this Court to extend the time for
11 service of the Petition for Judicial Review on the Attorney General and deem the service made on
12 April 25, 2016 to be timely.

13
14 Dated: April 26, 2016

Respectfully submitted,

15 McCracken, Stemerman & Holsberry

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17 By:



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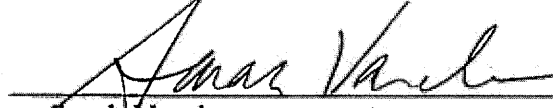
AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned hereby affirms that this document does not contain the social security number of any person.

Dated: April 26, 2016

McCRACKEN, STEMERMAN & HOLSBERRY

By:


Sarah Varela
Attorneys for Petitioner

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of McCracken, Stemerman &
3 Holsberry, and that on the 26th day of April, 2016, I served a true copy of **MOTION FOR**
4 **EXTENSION OF TIME TO SERVE PETITION** on all parties to this action by E-Filing
5 through the E-Flex filing system addressed as follows:

6
7 By Electronic Service Through E-Flex:

8 Bryan L. Wright
9 Assistant General Counsel
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11 1664 N. Virginia Street, MS 550
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13 *Counsel for University of Nevada, Reno*

14 By United States Postal Service:

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19 *Counsel for Reno Tahoe Construction*

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9 *Attorneys for Petitioner*

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11 **IN THE SECOND JUDICIAL DISTRICT COURT OF**
12 **THE STATE OF NEVADA IN AND FOR THE**
13 **COUNTY OF WASHOE**

14 HEAT & FROST INSULATORS AND ALLIED
15 WORKERS LOCAL 16;

16 Petitioner,

17 vs.

18 LABOR COMMISSIONER OF THE STATE OF
19 NEVADA; THE UNIVERSITY OF NEVADA,
20 RENO; CORE CONSTRUCTION; and RENO
21 TAHOE CONSTRUCTION,

22 Respondents.

CASE NO.: CV16-00353

DEPT. NO.: 10

**DECLARATION OF SARAH
VARELA IN SUPPORT OF
PETITIONER'S MOTION FOR
EXTENSION OF TIME TO SERVE
PETITION**

23 I, Sarah Varela, declare:

24 1. I am an attorney licensed in the State of Nevada, and I represent Heat & Frost
25 Insulators Local 16 ("Local 16") in this action.

26 2. I have personal knowledge of the facts contained in this declaration and if called to
27 testify to them under oath I would do so.

28 3. My law office maintains a library of publications that are used frequently in our legal
work. Among the publications we have is a complete set of the Nevada Revised Statutes published
by the Nevada Legislative Counsel Bureau (the "Bureau").

1 4. The printed NRS set that we currently have is dated 2013. The Bureau publishes a
2 new version every two years.

3 5. The Bureau currently lists the 2015 edition for sale on its website. However, when
4 our firm called the Bureau on April 15, 2016, we were told that the 2015 edition has not yet been
5 released and is not available at this time.

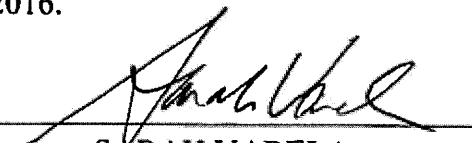
6 6. When my firm prepared the Petition for Judicial Review regarding the recent Labor
7 Commissioner determination, we looked up the procedural requirements for such a petition in our
8 printed NRS set. The version of NRS 233B.130 that is printed therein does not contain the 2015
9 amendment that requires service on the Attorney General.

10 7. In addition, as we prepared the petition for judicial review, we checked NRS
11 233B.130 as it appears on the Nevada Legislature's website at [https://www.leg.state.nv.us/nrs/NRS-](https://www.leg.state.nv.us/nrs/NRS-233B.html#NRS233BSec130)
12 [233B.html#NRS233BSec130](https://www.leg.state.nv.us/nrs/NRS-233B.html#NRS233BSec130). As of today's date, the online version still reflects only the pre-2015
13 text of the statute and does not include the amendment requiring service on the Attorney General.

14 8. Prior to receiving a copy of the Labor Commissioner's Motion to Dismiss for failure
15 to timely serve the Attorney General, we received no word from either the Office of the Labor
16 Commissioner or the Office of the Attorney General about the lack of service upon the Attorney
17 General. Had we received word within the 45 days, we would immediately have served the Petition
18 upon the Attorney General.

19 9. After we received the Motion to Dismiss, we had the Petition served upon the
20 Attorney General. Service was made on April 26, 2016.

21 I declare under penalty of perjury of the laws of the State of Nevada that the foregoing is
22 true and correct. Executed this 26th day of April 2016.

23
24 
25 SARAH VARELA
26
27
28

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned hereby affirms that this document does not contain the social security number of any person.

Dated: April 26, 2016

McCRACKEN, STEMERMAN & HOLSBERRY

By:


Sarah Varela

Attorneys for Petitioner

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of McCracken, Stemerman &
3 Holsberry, and that on the 26th day of April, 2016, I served a true copy of **DECLARATION OF**
4 **SARAH VARELA IN SUPPORT OF PETITIONER'S MOTION FOR EXTENSION OF**
5 **TIME TO SERVE PETITION** on all parties to this action by E-Filing through the E-Flex filing
6 system addressed as follows:

7
8 By Electronic Service Through E-Flex:

9 Bryan L. Wright
10 Assistant General Counsel
11 University of Nevada, Reno
12 1664 N. Virginia Street, MS 550
13 Reno, Nevada 89557-0550
Counsel for University of Nevada, Reno

14 By United States Postal Service:

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21 Nevada Office of the Attorney General
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11 **IN THE SECOND JUDICIAL DISTRICT COURT OF**
12 **THE STATE OF NEVADA IN AND FOR THE**
13 **COUNTY OF WASHOE**

14 HEAT & FROST INSULATORS AND ALLIED
15 WORKERS LOCAL 16;

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17 vs.

18 LABOR COMMISSIONER OF THE STATE OF
19 NEVADA; THE UNIVERSITY OF NEVADA,
20 RENO; CORE CONSTRUCTION; and RENO
21 TAHOE CONSTRUCTION,

22 Respondents.

CASE NO.: CV16-00353

DEPT. NO.: 10

**AFFIDAVIT OF SERVICE ON
OFFICE OF THE ATTORNEY
GENERAL, NEVADA**

**DISTRICT COURT , WASHOE COUNTY
WASHOE COUNTY, NEVADA****HEAT & FROST INSULATORS****Plaintiff****vs****LABOR COMMISSIONER****Defendant****CASE NO: CV16-00353****HEARING DATE/TIME:****DEPT NO: 10****AFFIDAVIT OF SERVICE**

PATRICK J. PEREGRIN being duly sworn says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to or interested in the proceedings in which this affidavit is made. That affiant received 1 copy(ies) of the PETITION FOR JUDICIAL REVIEW; CASE INFO COVER SHEET, on the 22nd day of April, 2016 and served the same on the 25th day of April, 2016, at 12:35 by:

serving the servee OFFICE OF THE ATTORNEY GENERAL by personally delivering and leaving a copy at (address) 100 NORTH CARSON STREET, CARSON CITY NV 89701 with LULU GONZALEZ as , an agent lawfully designated by statute to accept service of process;

Pursuant to NRS 53.045

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

**EXECUTED this 25 day of Apr, 2016.****PATRICK J. PEREGRIN**

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned hereby affirms that this document does not contain the social security number of any person.

Dated: April 27, 2016

McCRACKEN, STEMERMAN & HOLSBERRY

By: 

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10 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
11 **IN AND FOR THE COUNTY OF WASHOE**

12	HEAT & FROST INSULATORS and)	CASE NO.: CV16-00353
13	ALLIED WORKERS LOCAL 16,)	
14	Petitioners,)	DEPT. NO.: 10
15	v.)	
16	LABOR COMMISSIONER OF THE STATE)	
17	OF NEVADA; THE UNIVERSITY OF)	
18	NEVADA, RENO; CORE)	
19	CONSTRUCTION; and RENO TAHOE)	
20	CONSTRUCTION,)	
21	Respondents.)	

21 **REPLY TO MOTION TO DISMISS FOR LACK OF**
22 **JURISDICTION PURSUANT TO NRCP 12(b)(1)**

23 Comes now Respondent, Labor Commissioner of the State of Nevada, by and through
24 counsel Attorney General ADAM PAUL LAXALT, and Deputy Attorney General MELISSA L.
25 FLATLEY, and makes its reply to the *Petitioner's Opposition to The Labor Commissioner's*
26 *Motion to Dismiss the Petition for Judicial Review for Lack of Subject Matter Jurisdiction*. This
27 *Reply* is based upon the following Points and Authorities, and incorporates the other
28 pleadings and papers on-file in this matter, and any argument that the Court may consider.

1 I. INTRODUCTION

2 The question raised in the *Motion to Dismiss* is whether the Petitioner complied with
3 the mandatory requirements of Nevada Revised Statutes ("NRS") 233B.130(2), and not
4 whether it can demonstrate good cause to enlarge the time to serve. The reasonable
5 application of the Court's rationale in *Otto* to interpret the amended version of NRS 233B.130
6 leads to the necessary conclusion that the Petitioner has failed to comply with the mandatory
7 provisions of the Administrative Procedures Act, and the *Petition* must be dismissed.

8 II. THE PETITION FOR JUDICIAL REVIEW HAS BEEN SERVED

9 Since the time of making the *Motion to Dismiss*, the Petitioner has served the Attorney
10 General with the *Petition for Judicial Review*. The Labor Commissioner filed the relevant
11 *Motion to Dismiss* on April 15, 2016. On April 25, 2016, the *Petition for Judicial Review* was
12 served on the Attorney General in Carson City, Nevada. On April 26, 2016, Petitioner filed its
13 *Motion to Enlarge Time for Service*.

14 III. LEGAL ARGUMENT

15 The Administrative Procedures Act must be strictly followed in order for the District
16 Court to gain jurisdiction to conduct a review of an agency decision. Without subject matter
17 jurisdiction, the case must be dismissed.

18 A. THE LANGUAGE OF NRS 233B.130(2) IS MANDATORY

19 In *Civil Service Commission v. District Court*, 118 Nev. 186, 190, 42 P.3d 268, 271
20 (2002), the Court said that "dismissal is not mandatory when a party substantially complies
21 with the technical requirements of NRS 233B.130, save the jurisdictional filing requirement."
22 The "technical requirements" referenced there are from *Bing Const. Co. of Nevada v. Nevada*
23 *Dept. of Tax'n*, 107 Nev. 630, 817 P.2d 710 (1991), where the Court vacated the *Order* of the
24 District Court dismissing a *Petition for Judicial Review* because the petitioner failed to include
25 the civil case coversheet. "While NRS 233B.130 is jurisdictional in nature and is designed to
26 place limits on the substantive rights of parties to seek review in a civil action commenced
27 before an agency, NRS 3.275 is clearly designed to facilitate the gathering of data." 107 Nev.
28 at 631. Without evidence that the civil case coversheet was required to control the substantive

rights of the parties, it was considered a technical requirement and did not function as the proper basis to dismiss a case.

Following *Civil Service Commission*, the Court considered only timely filing to be necessary for the District Court to have jurisdiction. However, when deciding *Otto*, it relied upon the mandatory language of subsection 2 to incorporate naming as an additional jurisdictional requirement. *Washoe Co. v. Otto*, 128 Nev. __, 282 P.3d 719, 725 (Adv. Op. 40, Aug. 9, 2012) ("Further, this Court has previously held that the "[f]iling requirements [paragraph (c) of NRS 233B.130(2)] are mandatory and jurisdictional. Given that the word "must" applies to both the filing requirement of NRS 233B.130(2)(c) and the naming requirement of NRS 233B.130(2)(a), we see no reason to treat the naming requirement any differently.").

In *Otto*, the Court said that "[nothing] in the language of that provision [NRS 233B.130(2)] suggests that its requirements are anything but mandatory and jurisdictional." *Id.* Although the subsection was amended in 2015, the mandatory language is still present. The amended statute states in pertinent part:

"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 served upon:*
 - (1) *The Attorney General, or a person designated by the Attorney General, at the Office of the Attorney General in Carson City; and*
 - (2) *The person serving in the office of administrative head of the named agency; and*
- (d) Be filed within 30 days after service of the final decision of the agency.

(as amended, and emphasis added).

The rationale of *Otto* applies also to the new language inserted at Sub-section c. The Legislature is presumed to know the existing judicial interpretation of law when considering amendments to a statute. *Northern Nevada Ass'n of Injured Workers v. Nevada SIIS*, 107 Nev. 108, 112, 807 P.2d 728, 730 (1991). The mandatory directive -- "petitions for

1 judicial review **must...**" -- remained intact following the amendment. Presumably, the
2 Legislature knew that the Court had interpreted the provisions of Subsection 2 of NRS
3 233B.130 to be jurisdictional when it added the requirement of service on the Attorney
4 General and the Agency Head. The statutory language used by the Court in *Otto* remains
5 unchanged, and thus it is presumed that the Legislature approved of the Court's
6 interpretation.

7 **B. WHETHER GOOD CAUSE EXISTS TO ENLARGE THE TIME TO SERVE THE**
8 **PETITION IS NOT RELEVANT TO WHETHER SERVICE IS JURISDICTIONAL**

9 Whether an action is mandatory for the Court's jurisdiction, and whether the Court may
10 exercise its discretion to extend the time to perform that mandatory act, are two separate
11 issues. The only question on the *Motion to Dismiss* is whether the act was completed.
12 Because the service occurred outside of the 45-days allowed by NRS 233B.130, the burden
13 is now on the Petitioner to demonstrate that it has good cause to seek the additional time.

14 As the Labor Commissioner will more fully demonstrate in *Opposition* to the *Motion to*
15 *Enlarge Time*, the Petitioner has not demonstrated good cause for an enlargement of time.
16 The Petitioner's ignorance of the law is no excuse. Amended sections of the NRS are readily
17 identifiable from the Nevada Legislature; although not codified in the NRS, legislation carries
18 the force of law if contained in the official Statutes of Nevada. See *Halverson v. Secretary of*
19 *State*, 124 Nev. 484, 186 P.3d 893 (2008). In addition, a construction of the clear language of
20 the statute is hardly a trap for the unwary.

21 It is not novel to consider dismissal for the failure to comply with procedural rules; the
22 Court has authority to do so pursuant to NRCP and other sections of the NRS. For example,
23 the procedures for appeal of unemployment decisions under NRS Chapter 612. In *Kame v.*
24 *Employment Sec. Dept.*, 105 Nev. 22, 25-26, 769 P.2d 66, 68 (1989), the Court said:

25 "When a party seeks judicial review of an administrative decision,
26 strict compliance with the statutory requirements for such review is
27 a precondition to jurisdiction by the court of judicial review.
28 Noncompliance with the requirements is grounds for dismissal of
the appeal... Although the mandate of NRS 612.530(1) may
occasionally cause hardship, it is not the function of this court to
substitute its judgment for that of the Legislature."

1 (citations omitted)

2 And so it is on the *Petition for Judicial Review* under the APA, applying *Otto* and the clear
3 mandatory language of NRS 233B.130(2). Though the outcome may occasionally cause
4 hardship, the Legislature has exercised its judgment in making service on the Attorney
5 General a jurisdictional item.

6 **IV. CONCLUSION**

7 Heat & Frost seeks appellate review of the decision of the Office of the Labor
8 Commissioner, an executive branch administrative agency. The District Court has authority to
9 review an administrative action only if the Petitioner strictly complies with the requirements
10 established by the Legislature. Here, the Legislature requires that the Petitioner provide
11 service on the Attorney General within 45-days of filing the Petition, without having previously
12 made a *Motion for an Enlargement of Time*. The Petitioner failed to do that in this case, and
13 therefore, the Court is without jurisdiction. The Labor Commissioner respectfully requests that
14 the Court dismiss the *Petition for Judicial Review*.

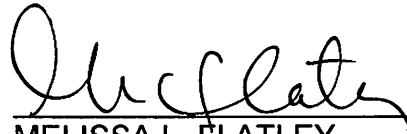
15 **AFFIRMATION**

16 Pursuant to NRS 239B.030, the undersigned affirms that this document does not
17 contain the personal information of any person.

18 Dated this 6th day of May 2016.

19 ADAM PAUL LAXALT
20 Attorney General

21
22 By:



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Attorneys for Respondent
Office of the Labor Commissioner

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and on the 6th day of May, 2016, I served a true and correct copy of the foregoing ***Reply to Motion to Dismiss for Lack of Jurisdiction Pursuant to NRCP 12(b)(1)***, by depositing for mailing at Carson City, Nevada, first class, postage prepaid, fully addressed as follows:

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13 *Attorneys for the Nevada Office of the Labor Commissioner*

14 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

15 **IN AND FOR THE COUNTY OF WASHOE**

16 HEAT & FROST INSULATORS and)
17 ALLIED WORKERS LOCAL 16,)

CASE NO.: CV16-00353

18 Petitioners,)

DEPT. NO.: 10

19 v.)

20 LABOR COMMISSIONER OF THE STATE)
21 OF NEVADA; THE UNIVERSITY OF)
22 NEVADA, RENO; CORE)
23 CONSTRUCTION; and RENO TAHOE)
24 CONSTRUCTION,)

25 Respondents.)

26 **OPPOSITION TO MOTION TO ENLARGE TIME**

27 Comes now Respondent, Office of the Labor Commissioner of the State of Nevada, by
28 and through counsel Attorney General ADAM PAUL LAXALT, and Deputy Attorney General
MELISSA L. FLATLEY, and opposes Petitioner's *Motion to Enlarge Time* in which to serve
the *Petition for Judicial Review* in this matter. This *Opposition* is based on the following points
and authorities, on all documents filed in this matter, and on such argument and evidence as
the Court may request.

///

1 I. PROCEDURAL HISTORY OF THE CASE

2 The Petitioner timely served its *Petition for Judicial Review* seeking review of the
3 decision of the Office of the Labor Commissioner on February 17, 2016.¹ Pursuant to Nevada
4 Revised Statutes ("NRS") 233B.130(5), the Petitioner had 45-days to complete service upon
5 the agency and the parties, or by April 2, 2016. Among those required to be served is the
6 Attorney General. NRS 233B.130(2)(c). The Attorney General was served after the April 2nd
7 deadline, on April 25, 2016. *Petitioner's Motion to Enlarge Time* was filed and served by mail
8 on April 26, 2016.

9 II. POINTS AND AUTHORITIES

10 1. Ignorance of the Law is Not Good Cause to Enlarge the Time for Service

11 Petitioner's request to enlarge time is largely predicated on the failure to be aware of
12 the changes enacted to NRS 233B in 2015. The Statutes of Nevada are the official statement
13 of Nevada law. In *Halverson v. Secretary of State*, 124 Nev. 484, 186 P.3d 893 (2008), the
14 Court was asked to determine the constitutionality of legislation creating new judicial positions
15 for a term less than what was required in the state constitution. The Court relied on the official
16 Statutes of Nevada:

17 Although the language of S.B. 195, stating that the new judicial
18 positions began January 2007 and ended January 2009, was not
19 codified in NRS 3.018, it was passed and included in the 2005
20 Statutes of Nevada, Chapter 436, Section 3. S.B. 195's language,
21 however, was included in the reviser's notes to NRS 3.018. NRS
22 220.170(3) states that while the Nevada Revised Statutes may be
23 cited as prima facie evidence of the law, it "may be rebutted by
24 proof that the statutes cited differ from the official Statutes of
25 Nevada." Thus, while not enacted in NRS 3.018, the two-year term
26 limitation is law, as it was enacted in the official Statutes of
27 Nevada.

28 *Id.* at 486-87, 186 P.3d at 895,96.

As Petitioner points out, NRS 233B.130 was amended in the 2015 Legislative session
by Assembly Bill ("A.B.") 53. Petitioner also provided the citation to the Statutes of Nevada:
2015 Statutes of Nevada, c. 160 page 709.² The law, as written in the Statutes of Nevada, is

¹ The *Petition for Judicial Review* was not filed until February 18th, but the document is still considered timely.

² This information can be found on the same Nevada Legislature website that Petitioner's counsel

1 controlling over the codified version.

2 The purpose of the amendment to NRS 233B.130(2) is further indication of why this
3 change should not have come as a surprise to Petitioner. When proposed at the Legislature,
4 the stated purpose of the amendment to require service upon the Attorney General in Carson
5 City and the agency head was to make service of *Petitions for Judicial Review* more
6 consistent with requirements for service upon state agencies of other summons and
7 pleadings. See NRS 41.031; *Minutes of Senate Committee on Government Affairs, April 24,*
8 *2015.*

9 2. Labor Commissioner is Prejudiced if the Time is Enlarged

10 Despite Petitioner's argument that the Labor Commissioner is not prejudiced by the
11 late service upon the Attorney General, the Labor Commissioner's position is that service
12 upon the Attorney General is jurisdictional, and the failure to enforce those jurisdictional
13 requirements is prejudicial. As argued in the *Motion to Dismiss*, NRS 233B.130(2) lists the
14 mandatory factors in order for the District Court to have jurisdiction to review an administrative
15 agency decision. See *Washoe County v. Otto*, 128 Nev. __, 282 P.3d 719, 724 (Adv. Op. 40,
16 Aug. 9, 2012). The failure to fulfill those mandatory requirements prevents the District Court
17 from taking jurisdiction. *Id.* Because the request to enlarge the time to serve was not made
18 until after the time for service had run, the case is properly dismissed.

19 III. CONCLUSION

20 The Petitioner failed to comply with the mandatory provisions of NRS 233B.130(2),
21 which requires that service be made upon the Attorney General in Carson City. It was not until
22 after the Labor Commissioner moved to dismiss the petition for failing to comply with NRS
23 233B.130(2) that the Petitioner had the Attorney General served, and after service was
24 complete, filed the *Motion to Enlarge Time* with the Court. Petitioner has failed to demonstrate
25 good cause why the time should be enlarged. Moreover, any enlargement of time will
26 prejudice the Labor Commissioner because the case is properly dismissed. Therefore, the

27
28 checked for the updated codified laws: the 78th (2015) Session page there is a link entitled "NRS Chapters
Proposed to be Amended by Addition" and a "Subject Index" where it is indexed under "Administrative Law and
Procedure, Contested Cases, Judicial Review, Procedures, AB 53." The Legislature also sells the Advance
Sheets before the Nevada Revised Statutes codification³ is available.

1 Labor Commissioner respectfully requests that the Petitioner's *Motion to Enlarge Time* be
2 denied.

3 **AFFIRMATION**

4 Pursuant to NRS 239B.030, the undersigned affirms that this document does not
5 contain the personal information of any person.

6 Dated this 13th day of May 2016.

7 ADAM PAUL LAXALT
8 Attorney General

9
10 By: /s/ Melissa L. Flatley
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28

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and on the 13th day of May 2016, I served a true and correct copy of the foregoing ***Opposition to Motion to Enlarge Time***, as follows:

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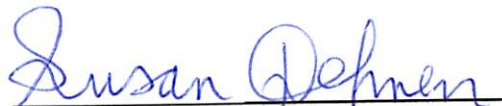
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CERTIFIED
COPY

8 SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

9 IN AND FOR THE COUNTY OF WASHOE

10 HONORABLE ELLIOTT A. SATTler, DISTRICT JUDGE

11 HEAT & FROST INSULATORS and
12 ALLIED WORKERS LOCAL 16,

13 Plaintiffs,

Case No. CV16-00353

14 vs.

Dept. No. 10

15 LABOR COMMISSIONER OF THE STATE
16 OF NEVADA, et al.,

17 Defendants.
18 _____/

19 TRANSCRIPT OF PROCEEDINGS

20 HEARING ON MOTION TO DISMISS FOR LACK OF JURISDICTION

21 Friday, August 19, 2016

22 Reno, Nevada

23
24 Reported by:

LORI URMSTON, CCR #51

APPEARANCES:

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FOR THE DEFENDANT,
CORE CONSTRUCTION:

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1 RENO, NEVADA; FRIDAY, AUGUST 19, 2016; 10:00 A.M.

2 --o0o--

3 THE COURT: This is Heat & Frost Insulators and
4 Allied Workers Local 16 versus Labor Commissioner of
5 the State of Nevada, et al. Mr. Myers is here on
6 behalf of the plaintiffs.

7 Good morning, sir.

8 MR. MYERS: Good morning, Your Honor. Thank you.

9 THE COURT: Ms. Flatley is here on behalf of the
10 Labor Commission of the State of Nevada.

11 Good morning to you, Ms. Flatley.

12 MS. FLATLEY: Good morning, Your Honor.

13 THE COURT: Mr. Bustos, you are here on behalf of
14 Core Construction; is that correct?

15 MR. BUSTOS: That's correct, Your Honor.

16 THE COURT: Nice to see you. It's been ten full
17 minutes since I saw you on the last case.

18 And, Mr. Wright, you're here on behalf of the
19 University of Nevada, Reno; correct?

20 MR. WRIGHT: Yes, Your Honor.

21 THE COURT: Good morning to everybody.

22 We're here on a motion to dismiss for lack of
23 subject matter jurisdiction. The Court has received
24 and reviewed the April 15th, 2016, file-stamped Motion

1 to Dismiss for Lack of Jurisdiction Pursuant to NRC
2 12(b)(1). I think I said a moment ago lack of subject
3 matter jurisdiction. That would be incorrect. It's
4 just lack of jurisdiction.

5 The Court has also received and reviewed the
6 April 26th, 2016, file-stamped Petitioner's Opposition
7 to the Motion to Dismiss. And the Court has received
8 and reviewed the May 6th, 2016, file-stamped Reply to
9 the Motion to Dismiss. The motion and the reply were
10 filed by Ms. Flatley on behalf of the Labor Commission.
11 The motion was submitted for the Court's consideration
12 on May 6th of 2016. Core Construction joined in the
13 motion on April 22nd of 2016 and the University joined
14 in the motion on April 19th of 2016.

15 The Court scheduled -- or, excuse me -- entered an
16 order scheduling oral argument on June 30th of 2016.
17 And that is why we are here today.

18 The Court would note that the Petition for Judicial
19 Review was filed on February 18th of 2016. I have
20 reviewed the pleadings myself and I've also gone
21 through and reviewed, I think, most of the cases.
22 Well, actually not most. I reviewed all the cases that
23 are cited. There are not really that many of them to
24 be familiar with.

1 The Court would point out to all parties that
2 citation to unpublished opinions is a violation of
3 Supreme Court Rule 123 and it's inappropriate. The
4 State -- or, excuse me -- the Attorney General's Office
5 cited to Garcia versus State, which is 212 Westlaw
6 2308648, an unpublished opinion of the Nevada Supreme
7 Court, in their motion. Mr. Myers cited to the same
8 case in his opposition. And both parties argue it as
9 some sort of persuasive authority.

10 Last year in November, if I remember correctly, the
11 Nevada Supreme Court adopted ADKT 0504. And what ADKT
12 0504 says is that people can cite to unpublished
13 opinions after January 1st of 2016; that is, the
14 unpublished opinion itself has to be entered by the
15 court after January of this year.

16 For some reason, attorneys seem to think now that
17 after ADKT 0504 was passed, you can just cite to all
18 kinds of unpublished opinions. That's not what that
19 ADKT says. It specifically says anything published
20 after January 1st of 2016.

21 I think the reasoning behind it is clear. The
22 Nevada Supreme Court acknowledged that its unpublished
23 opinions going forward would be cited as legal
24 precedent. And so they didn't want to adopt all of the

1 unpublished opinions that they had announced in the
2 past and say you can cite to those. They're just
3 saying from this point forward we acknowledge that
4 unpublished opinions will be cited.

5 So I just advise people that -- you're not the
6 first to do that, but don't cite unpublished opinions
7 prior to January 1st of 2016. I don't consider them
8 persuasive authority, I don't give them any weight
9 whatsoever, because I do believe they violate Supreme
10 Court Rule 123, because Supreme Court Rule 123 had some
11 very specific limitations on how you could cite to
12 unpublished opinions and what precedential value they
13 had, if any. And the citation to that case in these
14 proceedings would violate that rule and, therefore, the
15 Court will not consider Garcia in any decision that it
16 makes in this case. The Court will rely only on
17 supreme court opinions from the State of Nevada that
18 have been published and any unpublished opinions after
19 January 1st of 2016.

20 Ms. Flatley, it is your motion. Go ahead.

21 MS. FLATLEY: Thank you, Your Honor. May I remain
22 seated? Do you mind? I'm getting ready to have back
23 surgery and I --

24 THE COURT: Of course not. Feel free to remain

1 seated.

2 MS. FLATLEY: Well, first, I apologize for the
3 footnote citation and I'll make sure to not violate the
4 supreme court rules again.

5 THE COURT: Okay.

6 MS. FLATLEY: But even without considering that
7 case, the supreme court has been clear that all of the
8 sections of NRS 233B.130, Subsection 2, which now
9 compose four parts, (a), (b), (c) and (d) -- the
10 supreme court has weighed in on (a, (b) and what was
11 previously (c) and is now (d) saying that each of those
12 requirements are mandatory and jurisdictional.

13 The first case was Civil Service Commission in 2002
14 which found that the filing requirement of Subsection
15 (c), which is now (d), is mandatory and jurisdictional.
16 It just meant the petition had to be filed 30 days
17 within the decision of the administrative agency. Then
18 Washoe County versus Otto in 2012 which now made the
19 naming requirement mandatory and jurisdictional which
20 is subpart (a).

21 And there the court said that the "must" -- in
22 reading the language of 233B.130, the "must" applies to
23 both subsections (a) and (c), which is now (d). (b)
24 wasn't an issue in that case.

1 And then in 2014 -- this case was found after the
2 briefing was all submitted, Liberty Mutual v.
3 Thomasson. It's 317 P.3d 831.

4 THE COURT: Hold on a second.

5 MS. FLATLEY: Sure.

6 MR. MYERS: I'm sorry. What's the cite?

7 MS. FLATLEY: 317, three one seven, P.3d, 831.

8 MR. MYERS: And that's called Liberty Mutual?

9 MS. FLATLEY: Liberty Mutual v. Thomasson,
10 T-h-o-m-a-s-s-o-n.

11 THE COURT: Okay. I've got that case. It's also
12 130 Nevada Advanced Opinion No. 4. Just give me a
13 second. I'm going to print it.

14 Okay. Go ahead, Ms. Flatley. I've printed out
15 that case.

16 MS. FLATLEY: Sure.

17 So in Liberty Mutual, Liberty Mutual filed a
18 petition for judicial review of an administrative
19 decision of the -- of a workers' comp claim. And
20 Liberty Mutual filed in Washoe County. However, the
21 incident and the respondent resided in Carson City. So
22 the respondent moved to dismiss on the basis that the
23 petition had been filed in the wrong venue.

24 Initially the district court had said, "Well, this

1 is a venue, we'll just transfer it," and they
2 transferred it to the -- the court ordered it
3 transferred to Carson City, but the supreme court came
4 back and said, "Well, this is included under Subsection
5 2, therefore, it's always mandatory and jurisdictional
6 and the petition must be filed in the proper venue."

7 So now we have supreme court authority on three of
8 the requirements that existed at the time saying that
9 they're all mandatory and jurisdictional.

10 THE COURT: The three being (a, (b) and (d)?

11 MS. FLATLEY: Correct.

12 THE COURT: Okay.

13 MS. FLATLEY: So (c) is the new provision. And
14 it's only new within the context of being included in
15 233B. The rule -- the statute was amended at the 2015
16 legislative session and it incorporated service
17 requirements on state agencies from NRS 41.031 which
18 says if you sue a state agency you also have to serve
19 the attorney general in Carson City. So they just --
20 it was sort of ambiguous before the session, so the
21 legislature included it within the mandatory section of
22 NRS 233B.130.

23 So because the -- at the time that I filed the
24 motion to dismiss, the Attorney General's Office hadn't

1 been served yet. And because that's a mandatory
2 jurisdictional requirement, at the time the court did
3 not yet have subject matter jurisdiction to take the
4 case. Petitions for judicial review are only available
5 with compliance of all of the mandatory requirements.
6 And because we had not been served, those requirements
7 had not been met.

8 THE COURT: But the one difference in 233B.130,
9 Subsection 2, that Mr. Myers points out is that we do
10 have Subsection 5 which seems to contemplate something
11 different. How would you respond to that argument,
12 that Subsection 5 gives the court more discretion in
13 deciding what to do with the service prong of
14 Subsection 2?

15 MS. FLATLEY: Yes, but the party still needs to
16 request to have that additional time. So within that
17 45 days, the petitioner had not requested for
18 additional time to complete service on the Attorney
19 General's Office in Carson City. And to this point
20 they still haven't. We've been served now, but the
21 court would still need to prove the enlargement of time
22 for service.

23 THE COURT: Okay. I'm just pulling up your -- or
24 the motion for the extension of time. The motion for

1 extension of time is not the subject of this hearing
2 today. The Court would note that the motion was filed
3 with the court on April 26th of 2016. So if memory
4 serves me correctly, it was a day or two after -- oh,
5 no. It was some time after the motion to dismiss for
6 lack of jurisdiction. So the motion to dismiss for
7 lack of jurisdiction is filed April 15th of 2016 and
8 then 11 days later the plaintiffs come in and ask for
9 an extension of time to serve the Attorney General's
10 Office.

11 Go ahead.

12 MS. FLATLEY: Although the rules of civil procedure
13 don't apply when there's statutory -- when there's
14 other statutory rules. The same policy argument could
15 be made that under NRS 4 -- I'm sorry -- NRCP 4, it was
16 amended to require the extension -- the request for an
17 extension of time to be made before the expiration of
18 the time having run. And that's persuasive in this
19 case. Giving a strict reading to 233B.130, service
20 would need to be made within 45 days unless with the
21 Court's discretion and upon a showing of good cause the
22 petitioner has demonstrated that an enlargement of time
23 would be appropriate.

24 THE COURT: Okay. And one of the things that kind

1 of jumps out to me is that the Court wonders if the
2 motion for the extension of time would have ever been
3 filed but for the motion to dismiss. So the motion to
4 dismiss for lack of jurisdiction is the triggering
5 event causing the plaintiffs to file their motion for
6 the extension of time.

7 I'm not quite sure why it took 11 days to get that
8 motion on file, but the Attorney General's Office, it
9 would appear, waited the statutory period of time and
10 then waited some extended period of time.

11 How many days after the lapse of the 45 days did
12 the State wait until it filed its motion to dismiss for
13 lack of jurisdiction?

14 MS. FLATLEY: I can look and see, but what
15 triggered it for me was that you had issued a
16 scheduling order and I hadn't received it, so I got a
17 call from my client saying, "Did you get this order?"
18 And I said I hadn't. And that was when I saw that 45
19 days had passed and we hadn't been served.

20 THE COURT: Okay. Anything else, Ms. Flatley?

21 MS. FLATLEY: Not at this time, Your Honor. Thank
22 you.

23 THE COURT: On behalf of your client, Mr. Bustos.

24 MR. BUSTOS: Your Honor, Core Construction joined

1 in the motion, but I don't have anything substantive to
2 add to the argument.

3 THE COURT: Thank you.

4 MR. WRIGHT: Yes, Your Honor. Bryan Wright on
5 behalf of the University of Nevada, Reno.

6 I do want to briefly talk about the court's
7 discretion under Subsection 5, the whole concept of
8 good cause. The supreme court has made it clear that
9 good cause and excusable neglect are not the same
10 thing. In Mosley versus District Court -- that's 124
11 Nevada 654 -- in Footnote 66, the court talked about
12 the difference between excusable neglect on one side,
13 good cause on the other.

14 The court said that excusable neglect generally
15 requires a showing that the party acted in good faith
16 and had a reasonable basis for its failure to comply
17 with the rule. Conversely, good cause, quote,
18 generally is established when it is shown that the
19 circumstances causing the failure to act are beyond the
20 individual's control.

21 And here what we have is from the petitioner
22 they've acknowledged that their failure to serve the
23 A.G.'s Office within the 45-day time frame wasn't
24 necessarily because it was something beyond their

1 control, it was, at best, excusable neglect. It was
2 inadvertence of counsel not realizing that that was a
3 requirement.

4 And that's similar to what happened in another
5 supreme court case. That's Dougan versus Gustaveson --
6 it's 108 Nevada 517 -- where the court looked at an
7 analogous rule under Rule of Civil Procedure 4. Now,
8 that allows the court for good cause to extend the time
9 to serve a summons and complaint.

10 There the plaintiff had failed to serve the
11 defendant because of a calendaring error. They
12 miscalculated when the deadline was, served them after
13 the time. And the supreme court said, quote,
14 inadvertence does not justify untimely service. So the
15 court was looking at the issue of good cause and
16 whether or not it was something that was within the
17 party's control.

18 Here the issue of serving the A.G. in a timely
19 manner was within the petitioner's control. It's not
20 like the A.G. was evading service. It was a mistake by
21 counsel that may qualify as excusable neglect but
22 doesn't meet the standard for good cause under our
23 supreme court's enunciation of what that standard
24 requires.

1 I point out, just in full candor to the Court, the
2 Dougan case was abrogated in part by a later case in
3 2007. That's Arnold versus Kip. It's 123 Nevada 410.
4 In Dougan the Court looked at two issues; one, was
5 there good cause to extend; two, when they found that
6 there wasn't good cause to extend the time, was there
7 any prejudice to the party and should they excuse the
8 failure to serve and the failure to prove good cause.

9 Now, in Arnold versus Kip the supreme court came
10 back and said under a good cause standard, the issue of
11 prejudice to the defendant is not a consideration for
12 the court. Neither is the issue of prejudice to the
13 party who may have their complaint dismissed.

14 Now, in Arnold versus Kip, the issue was Rule 16.1.
15 That again requires a party to file certain reports,
16 like an early case conference report, and prosecute
17 within a timely manner. The court has discretion under
18 Rule 16.1 for good cause shown to extend those
19 deadlines. And, again, the supreme court made it clear
20 that good cause shown doesn't require the defendant
21 asking for dismissal to prove prejudice.

22 So I know that's something that's argued in the
23 briefs. And I would say that that's not appropriate
24 under the supreme court standard to determine whether

1 or not this case should be dismissed for a lack of
2 subject matter jurisdiction.

3 THE COURT: You're saying it's argued in the
4 briefs. It's argued in the briefs for the motion for
5 the extension of time.

6 MR. WRIGHT: It's actually argued in both, Your
7 Honor.

8 THE COURT: Where is it argued in this one? I must
9 have forgotten.

10 MR. WRIGHT: In the opposition to the motion to
11 dismiss on page 6, Your Honor, Section C. "This court
12 should exercise its discretion not to dismiss the
13 instant petition but rather allow it to be heard on the
14 merits."

15 And in there it talks about in the second
16 paragraph -- I'm sorry. It's in that second paragraph.
17 They talk about no prejudice whatsoever accrued to the
18 attorney general.

19 THE COURT: I understand now why you're making that
20 argument. I just didn't remember the citations to
21 those specific cases in the pleadings on this issue.
22 That's why I said I didn't remember it being there.

23 Go ahead.

24 MR. WRIGHT: Okay. So, Your Honor, I think I'll in

1 conclusion just say that the issue of good cause has
2 shown up in these briefs. And while I recognize that
3 the motion to extend is not technically before Your
4 Honor, I think looking at the overall picture here,
5 good cause has not been shown. At best it's excusable
6 neglect which is not sufficient under Subsection 5 of
7 NRS 233B.130. And, therefore, this case should be
8 dismissed.

9 THE COURT: Thank you, Mr. Wright.

10 MR. WRIGHT: Thank you, Your Honor.

11 THE COURT: Okay. Mr. Myers, on behalf of the
12 plaintiffs.

13 MR. MYERS: Yes, Your Honor.

14 THE COURT: There's a couple of things that I kind
15 of was thinking of just as you go forward in framing
16 your argument. I appreciate the distinction that the
17 plaintiffs draw between the two leading cases that the
18 parties are citing which are Washoe County versus
19 Otto -- one moment. I just had it here. There it
20 is -- Washoe County versus Otto, O-t-t-o, 128 Nevada
21 Advanced Opinion 40, 282 P.3d 719, a 2012 case, and
22 Civil Service Commission for the City of Reno versus
23 Carter, which is 118 Nevada 186, 42 P.3d 268, a 2002
24 case.

1 I'm not quite sure that I understand the fine
2 distinction that you believe that the Nevada Supreme
3 Court made in Otto, that you think that Otto is a very
4 narrow limiting of the previous case. So I need you to
5 explain that to me.

6 And then also the argument that you make in your
7 motion that discusses the fact that the Attorney
8 General's Office was -- though not served, they
9 actually knew of the lawsuit. To paraphrase your
10 argument, it's "Well, the A.G.'s Office knew about the
11 lawsuit anyway, because they filed their motion to
12 dismiss."

13 I actually had to deal with this issue once before
14 and I went and pulled up some of the old case law that
15 I had found on it. And the Nevada Supreme Court has
16 addressed that very issue on a number of occasions.
17 The seminal case is C.H.A. Venture versus Wallace
18 Consulting Engineers, Incorporated, 106 Nevada 381, 794
19 P.2d 707, a 1990 case.

20 In that case at page 384 of the Nevada Reporter,
21 the Nevada Supreme Court states, quote, "Unfortunately
22 for Wallace, notice is not a substitution for service
23 of process. Personal service or a legally provided
24 substitute must still occur in order to obtain

1 jurisdiction over a party."

2 The Nevada Supreme Court has cited Wallace on a
3 number of occasions for that very principle, that the
4 mere fact that you know of a lawsuit or you know you're
5 being sued doesn't mean that you've been served. The
6 party still has the obligation to comply with the
7 service requirements.

8 One of the more recent citations to Wallace that I
9 found was in Abreu, A-b-r-e-u, versus Gilmer,
10 G-i-l-m-e-r, 115 Nevada 308, 985 P.2d 746, a 1999 case.
11 And in that case in Footnote No. 5, the Nevada Supreme
12 Court states, quote, "We reiterate, however, that
13 actual notice of a suit is not an effective substitute
14 for service of process," citing back to Wallace.

15 So, you know, the argument somehow that "Well, they
16 knew about it and, therefore, they're on notice," I
17 don't think that qualifies for service.

18 Wallace has been cited a number of times by the
19 Nevada Supreme Court in unpublished opinions that I
20 won't refer to, but they continue to acknowledge that
21 that is the state of the law, that you don't get to
22 say, "Well, you knew about it, so technically, yeah, we
23 didn't serve you, but you knew about it."

24 So go ahead.

1 MR. MYERS: Right, Your Honor. And I'm going to
2 delve into that, if I may, on the second moment of my
3 discussion, because I think that goes into the cause,
4 the good cause showing, under Subsection 5.

5 Let me start by addressing the Court's observations
6 with respect to Otto. I don't -- I appreciate you read
7 our papers saying that we consider Otto to be a narrow
8 exception. I would phrase it this way. We consider
9 Otto to be a robust decision and it entirely overruled
10 Civil Service Commission with respect to one of the --
11 what the Civil Service Commission decision had phrased
12 as technicalities. Otto said no, that's not a
13 technicality. The statute is framed in mandatory
14 terms. It says you must name the party to the action
15 below. And there's nothing about saying "must" that
16 suggests that the court has any discretion to say,
17 well, must, but maybe -- you know, maybe a few days
18 later is not a problem.

19 In that sense the decision in Otto is robust and
20 not limited. However, what is limiting about Otto is
21 that it explicitly on no less than three occasions
22 makes clear in my reading of it that it is not reaching
23 the decision in the Civil Service Commission that the
24 service requirement is not a mandatory jurisdictional

1 requirement.

2 And it -- one way it does that is in Footnote 8 it
3 specifically draws attention to Subsection 5 of NRS
4 233B.130 and talks about in contrast to the naming
5 requirement the service requirement has the -- invests
6 the court with discretion. And that is not true of the
7 naming requirement; ergo, the naming requirement is a
8 mandatory jurisdictional requirement.

9 In Footnote 9 the court took pains to say that it
10 is only overruling Civil Service Commission, quote, to
11 the extent that it held that the naming requirement may
12 nonetheless invoke the district court's jurisdiction.

13 THE COURT: So in order to fall under that type of
14 analysis then, is it the position of the plaintiffs
15 that the court would have to find the failure to serve
16 the Attorney General's Office to be a, quote, technical
17 dereliction, unquote, or in the alternative, is it
18 simply that I would then refer to Subsection 5 of the
19 applicable statute and decide whether or not good cause
20 was shown?

21 MR. MYERS: I think the latter, Your Honor. The
22 term "technical dereliction" is not a statutory term.
23 And I think that the appropriate place to start in all
24 cases is with the statute, particularly because, as

1 here, the statute has been amended since the last time
2 the supreme court has looked at it. And the statute,
3 as the Court is well aware, in Section 2 has four
4 requirements that are under the term "must." These are
5 things that the petitioner must do.

6 Of those there is one thing that the petitioner
7 must do, but if it doesn't -- but if it doesn't do it
8 within the certain time, the court nonetheless has the
9 legal authority to look at the circumstances and to
10 rule in its discretion that the petition may
11 nonetheless go forward. And that is the service
12 requirement.

13 Our reading of the statute gives effect to both the
14 "must" provision -- because we're not saying it's a
15 technicality and saying, "Well, you knew about it,
16 therefore, we never really have to do it."

17 Our reading of the statute gives effect to the term
18 "must," because we understand we have an obligation to
19 do it. And we've done it. And if we had not done it,
20 if we had come to court and said, "Well, Your Honor,
21 you know, it's -- please, we don't think that's
22 important. They really knew about it," the Court may
23 well throw us out the door. But we've done it. And
24 that gives effect to the term "must," but it also gives

1 effect to subpart 5 which gives this court discretion
2 with respect to that service requirement to say in
3 the -- look at the facts and look at the circumstances
4 and exercise in this case his judgment.

5 THE COURT: So the argument is I could --
6 theoretically I could deny it on the -- I could either
7 grant or deny the motion on the grounds of Otto. So I
8 would look at it under Otto and say it's just a
9 requirement, it's not a technical requirement, it's a
10 requirement. That could be track No. 1.

11 Assuming that I don't want to decide that, then the
12 next step is then you look at Subsection 5 and decide
13 whether or not good cause is shown to give an extension
14 of time.

15 MR. MYERS: Absolutely, Your Honor. And it really
16 goes to the sort of -- we're betwixt and between here,
17 I think. I mean, the way the attorney general has
18 phrased it, we think that the proper -- that her motion
19 should simply be denied because that's not what the law
20 requires, that the service requirement is not per se
21 jurisdictional such that this court has no discretion
22 whatsoever, we shouldn't even be here. That's their
23 argument reduced to its core.

24 Once you realize that that argument is not correct

1 and it's not supported by the supreme court or by the
2 statute itself, you have to get into Section 5. I'm
3 happy to get into Section 5 today, although we've been
4 sort of betwixt and between on that.

5 I'll note that Mr. Wright gave an effective and
6 long lengthy explanation brief, oral brief, on Section
7 5. I regret he didn't file a brief, because that would
8 have given us the opportunity if he had filed what he
9 says in response to our opposition or if he was -- or
10 in opposition to our motion, that would have given us
11 the opportunity to have examined the authorities he
12 raises and look at the arguments he makes.

13 THE COURT: Well, the Court would note that the
14 April 26th, 2016, Motion for Extension of Time hasn't
15 even been submitted for consideration. So there's --
16 unless I'm looking at something incorrectly on my
17 computer, the motion is filed, the declaration is
18 associated with it. An opposition is filed by the
19 Attorney General's Office on May 6th.

20 MR. MYERS: Well, in that case, Your Honor, I
21 will --

22 THE COURT: Hold on a second, Mr. Myers.

23 MR. MYERS: I'm sorry.

24 THE COURT: Only one of us can talk at the same

1 time.

2 MR. MYERS: I apologize. I thought you were done.
3 I'm sorry.

4 THE COURT: No, that's all right.

5 Then I'm looking through. There's two requests for
6 submission. There is a request for submission of a
7 motion filed by the Attorney General's Office on
8 May 6th of 2002 [sic]. And that's regarding the
9 jurisdictional request. But then it was filed again.
10 For some reason it was filed twice. I'm not quite sure
11 why that happened.

12 Then there is the May 13th, 2016, file-stamped
13 Opposition to Motion to Enlarge Time filed by the
14 State, but nothing after that. So it's not even before
15 the Court for consideration.

16 Ms. Clerk, was it ever submitted or was there a
17 reply filed by the plaintiffs?

18 THE CLERK: No, Your Honor. The last thing I see
19 also is the opposition and I do not see another
20 document regarding that motion after that.

21 THE COURT: Okay. So go ahead.

22 MR. MYERS: Well, Your Honor, I will have to
23 investigate that within our office. And the Court has
24 made clear at the outset that that motion is not before

1 it. At the same time, I think inevitably we sort of
2 strayed into the arguments that it raises. And one of
3 the arguments that the Court identified -- and I want
4 to make sure I don't neglect that -- is whether -- it
5 is certainly true, and we don't claim, that notice of a
6 lawsuit is the same as service of a lawsuit.

7 If I sue somebody and then go out and do a press
8 release and tell the whole world that I've just sued
9 this company and that this is what we're going to do
10 and I call them up on the phone and I say, "Hey, we
11 just sued you," none of that matters in terms of legal
12 service. It's not substitute for service. That's a
13 due process issue. Actual service of the summons and
14 the complaint needs to happen. That goes to the core
15 of due process.

16 Where we are landing on this, though, is it's a
17 question of good cause which is in the end an exercise
18 of weighing equities and looking at whether a party who
19 is aware of a pleading and didn't miss a deadline
20 because of a pleading, in this case whether there's
21 good cause to extend that service requirement. I think
22 that's a different inquiry, because we're not saying
23 that we don't need to or that it's the same that they
24 had notice, we're saying that that's one of the factors

1 that the court in its discretion could and should
2 consider in terms of whether the deadline should be
3 extended.

4 And I will also say that we also think that
5 reliance upon the published version of the NRS that is
6 on the Nevada Legislature's website provides additional
7 good cause. It is certainly true that attorneys around
8 the state and the public around the state can subscribe
9 to the advanced sheets and do legislative research
10 every time they're going to look at a statute. I think
11 that's what we would have had to have done to make sure
12 that the statute had not been modified since the last
13 time the legislature updated its website. But
14 according to the evidence and according to what
15 actually happened, we verified the statute based on the
16 website of the Nevada Legislature. And I think that
17 that's good cause.

18 I think that there are certainly attorneys, for
19 example, in the Attorney General's Office who are going
20 to be tracking the bills, particularly bills such as
21 this one, that directly affects her office.
22 Understandable. But for the public at large and for
23 attorneys and for non-attorneys, I think it's fair that
24 they look at the website of the legislature and get the

1 law there.

2 And if they don't, they -- that is good cause for
3 curing a mistake that can easily be effected without
4 any adverse impact on the parties.

5 THE COURT: Do you have any authority for that, I
6 mean, other than that's kind of what you think? And I
7 appreciate the fact that you think it. Is there any
8 authority for that proposition?

9 The reason I ask you if you have any authority,
10 Mr. Myers, is because in my mind the counter argument
11 to that is more persuasive. Ignorance of the law is
12 not a defense. The legislature changed the law. And I
13 appreciate the fact that it's difficult for anyone,
14 lawyer or layperson, to keep up with everything that
15 the legislature does.

16 I assume that Ms. Flatley doesn't keep up with
17 what's going on in the criminal section or possibly
18 what's going on regarding wills, trusts and estates,
19 because it doesn't impact her daily existence dealing
20 with the commission that she deals with. So she
21 focuses primarily her analysis on what's going on with
22 those issues that are important to her. But I just
23 don't know that it's reasonable to say that the
24 legislature changed the law -- and I think it went into

1 effect in July. I've got the printout here. The
2 effective date of the amendment to NRS 233B.130 was
3 July 1st of 2015.

4 So there's no question that it's effective in
5 February of 2016 when the petition for judicial review
6 is filed. You know, it's not like they changed it on
7 July 1st and on July 2nd it wasn't available. It was
8 the law for seven months by the time that you filed
9 your petition for judicial review.

10 And I don't -- I don't know how I could go back or
11 anyone could go back and find out exactly what the law
12 was or what it looked like on the LCB website, the
13 Legislative Counsel Bureau website, or the
14 legislature's website. I have no idea how I would
15 figure that out.

16 The legislature acts. The governor signs it.
17 That's the law.

18 MR. MYERS: Well, Your Honor, I appreciate
19 ignorance of the law is not an excuse. That maxim has
20 a lot of strength and a lot of context. There's also
21 competing maxims, that important issues of state policy
22 in this case and the underlying petition should be
23 determined on their merits and not determined upon --
24 in this case not determined at all. That's a competing

1 maxim that I think is quite compelling.

2 There's a maxim that says that a party that is not
3 actually prejudiced in this case -- in this case
4 because she didn't miss the filing deadline or an
5 opposition deadline to the petition for review or any
6 of the deadlines, the lack of prejudice is something to
7 be weighed in that balance.

8 With respect to Your Honor's observation that you
9 don't know how one would find out what was on the
10 website -- again, this is straying into the motion, but
11 there's a declaration by the attorneys who actually
12 looked at the website. On the very day that they
13 looked at it in April of 2016, the Nevada Legislature's
14 website, counsel bureau website, still had the prior
15 version of the statute on its website. And that's --
16 that is the fact.

17 And I don't know why it took eight months for the
18 counsel bureau to amend the website to put those
19 changes into the law so that the public generally would
20 have access to them. But if this arguably -- and this
21 is not the case before you. But arguably if it was a
22 jurisdictional issue and the law changed, then the
23 argument -- then the statements you made would have, I
24 think, more applicability. The law changed. Sorry.

1 It's tough. But this is a question of good cause and
2 discretion in light of everything. And I think that
3 the public and attorneys practicing may reasonably rely
4 on the legislature's own pronouncements of what the law
5 is on its website. That's our view.

6 THE COURT: Okay. Let me just check one thing.
7 Hold on.

8 I'm just trying to calculate the time between the
9 filing for the petition for judicial review, which was
10 on February 18th of 2016, and the date that the
11 petitioners filed a motion to extend time. There's a
12 website you can use to do that, but it comes up with 68
13 days between the filing of the petition and the request
14 to extend the time.

15 The Court would note that the motion to dismiss was
16 filed 11 days prior to the motion to extend the time.
17 So the motion to dismiss was 57 days after the
18 deadline.

19 Mr. Myers, why did the -- if there's an answer.
20 Why did the petitioner wait 11 days to even file the
21 motion to extend the time? You're obviously put on
22 notice, I guess is the best way to put it, on the
23 15th of April that you have forgotten someone. And
24 then 11 days goes by before you file a motion to extend

1 the time and then you filed your opposition to the
2 motion to dismiss contemporaneously with your motion
3 for the extension of time.

4 MR. MYERS: With respect to the first -- Your
5 Honor, it's absolutely correct that we became aware of
6 the service upon the attorney general requirement when
7 we got the motion to dismiss. We're not trying to
8 suggest otherwise on that.

9 And with respect to the 11 days, Your Honor, I
10 think that I would have to look to see when we actually
11 received it, if it was sent by mail, served by mail. I
12 would suggest, although I haven't done sort of an
13 exegesis of this, that -- and if it was served -- for
14 example, if the date that it was filed fell on a
15 particular day of the week, it could take three or four
16 days for us to have gotten it. And from then I think
17 we acted, I would submit, expeditiously.

18 I'm certain at least -- there could well be two
19 weekends in that accounting for some of those 11 days.
20 Certainly one weekend. But I think by the time we
21 received it and the time we effectuate service, because
22 we, in fact -- or whatever -- we effectuated service
23 simul -- well, before in this case and then filed the
24 motion once service had been effectuated. That's what

1 accounts for that 11 days, Your Honor.

2 THE COURT: So just to sum up then, Mr. Myers, it's
3 the position of the petitioner that the only
4 requirement under NRS 233B.130, Subsection 2, that does
5 not carry with it the strict compliance analysis is
6 Subsection (c) because there is that discretionary
7 provision of Subsection 5? So while the Nevada Supreme
8 Court has found that NRS 233B.132 (a), (b) and (d) are
9 jurisdictional and subject to a strict compliance
10 analysis rather than a substantial compliance analysis,
11 that one subsection that we're talking about, the only
12 one applicable here, Subsection (c), the Court should
13 look and decide whether or not good cause exists to
14 give an extension of time?

15 MR. MYERS: That's absolutely a fair statement and
16 fair characterization.

17 THE COURT: I just want to make sure that when I
18 analyze it that I analyze it correctly.

19 Anything else on behalf the petitioners, Mr. Myers?

20 MR. MYERS: Nothing else, Your Honor.

21 THE COURT: Thank you.

22 Rebuttal argument, Ms. Flatley.

23 MS. FLATLEY: Yes, Your Honor.

24 I'll start with Civil Service Commission.

1 Mr. Myers said that the footnote addressing service
2 being different because the court has discretion to
3 enlarge the time. It's included in a footnote in that
4 case. At the time that all of those prior cases on NRS
5 233B were decided, this amendment hadn't been made. So
6 in 2015 they added service into this subsection with
7 the mandatory language must meet all of these
8 requirements.

9 THE COURT: So if I go back and look with both Otto
10 and with Carter, NRS 233B.130 only had three
11 requirements, not four, but it still had that
12 Subsection 5 in there.

13 MS. FLATLEY: That's correct. So in my motion I
14 show -- on page 3 of my motion I show the amendment to
15 the language. And, yes, the discretionary language is
16 still there, but the mandatory part has to be given
17 effect first. And because they haven't requested --
18 because their request to consider good cause has not
19 yet been submitted to the court, the consideration here
20 is only whether these requirements have been met.

21 And the attorney -- the service upon the attorney
22 general had not been completed at the time the motion
23 was made. And, yes, it was made later, but at the time
24 the time the motion was made, the service hadn't been

1 completed yet. The Attorney General's Office was
2 served on April 26th, the same day that they filed
3 their motion to enlarge time.

4 THE COURT: And if I remember correctly, you cite
5 to a case in your reply that supports the proposition
6 that when the legislature acts after the supreme court
7 acts, then we presume that the legislature was acting
8 with knowledge of the supreme court's decision.

9 MS. FLATLEY: That's correct.

10 THE COURT: So presumptively when the legislature
11 acted in 2015 to include now service on the Attorney
12 General's Office and that action took place after the
13 Nevada Supreme Court had issued its opinion in Otto,
14 the Court should presume that the legislature took that
15 decision in Otto into consideration and wanted it to be
16 part of that subsection.

17 MS. FLATLEY: Yes, Your Honor. And that's Northern
18 Nevada Association of Injured Workers versus Nevada
19 SIIS. And it's 107 Nevada 108, 1991.

20 Also, about the legislature, I agree the LCB was
21 incredibly slow this year in updating their online
22 statutes. However, in my opposition to their motion to
23 enlarge time, I included authority that the official
24 statement of Nevada law is the Statutes of Nevada. The

1 NRS may be presumed to be the statement, but it's
2 rebuttable presumption if it's demonstrated the
3 Statutes of Nevada are different. And that case is
4 Halverson versus Ross Miller, Secretary of State. And
5 it's 124 Nevada 484, 2008.

6 It was -- the legislature didn't act in secret. It
7 was not a bill I was involved in, but it was a bill I
8 tracked because I do petitions for judicial review. So
9 when I saw that 233B was being amended, it was
10 something I followed. And it was available for anybody
11 to follow.

12 So though it may not have been easy for the general
13 public, none of the parties here are the general
14 public, because we do petitions for judicial review as
15 part of the course of administrative law.

16 Mr. Myers also said this case should be determined
17 on its merits and that would be good cause to have the
18 time enlarged. However, the case has already been
19 determined on its merits by the labor commissioner.
20 This is a review of the labor commissioner's decision,
21 but the merits have already been reached. So I would
22 say that that goes against a finding of good cause.

23 And I don't have anything further. I guess I would
24 wrap up by saying the language is mandatory, the

1 legislature knew when they made this revision that that
2 section had been interpreted as mandatory and
3 jurisdictional and the failure to complete those acts
4 would mean the court hasn't met the legislature's
5 requirements to take jurisdiction of a petition for
6 judicial review.

7 THE COURT: How would you interpret Subsection 5,
8 Ms. Flatley? What is the meaning of Subsection 5? If
9 we're to assume that the legislature knew of the
10 supreme court's decision in Otto and then it acted in
11 2015 by including the requirements under Subsection
12 (c), how do you interpret Subsection 5 then? What does
13 it mean anymore?

14 Does it mean that the petitioner in any given case
15 would have an obligation to come in before the 45-day
16 period had lapsed and petition the court for an
17 expansion of that 45-day window and attempt to
18 demonstrate good cause? Is that what has to happen
19 from this point forward?

20 MS. FLATLEY: I believe that would be a valid
21 interpretation. That would give effect to all parts of
22 the statute.

23 THE COURT: Well, it would tend to make sense, but
24 the difficulty is -- it's not a difficulty. I

1 misspoke. So I apologize. I'll start again.

2 That makes sense to me, but then again, I'm not
3 quite sure what it would mean, because the parties that
4 need to be served under Subsection (c) are never
5 unknown. Oftentimes we see the extension or the good
6 cause, the use of an extension, being granted when a
7 party is unknown or it's a different entity, we don't
8 know who we're supposed to serve or it turns out at
9 some point down the road something happened and service
10 didn't occur. But here all we're talking about is the
11 attorney general and the person serving in the office
12 of administrative head of the named agency. Those two
13 people are pretty well known. So I'm not quite sure
14 under what circumstances Subsection 5 would ever come
15 into application.

16 MS. FLATLEY: Well, in the case of the agency head
17 and the Attorney General's Office, the moving party
18 would have to -- the petitioner would have to show good
19 cause. And as you've pointed out, it would be
20 difficult to show good cause for why service hadn't
21 been completed on a known party within 45 days.
22 However, every party that's named in the petition has
23 to be served within that 45 days. So there may be a
24 situation where a petitioner could show good cause for

1 failing to serve one of those parties.

2 THE COURT: Okay. Anything else on behalf of any
3 of the defendants, counsel?

4 MR. WRIGHT: Your Honor, Bryan Wright on behalf of
5 the University. I just want to address that last
6 question about how would good cause shown come into
7 play. I think an illustrative example, although this
8 did not happen in Otto -- in Otto the issue was they
9 failed to name all of the numerous parties to the case.
10 And I believe there was something to the tune of 800 or
11 so or 700.

12 THE COURT: They were unidentified and then they
13 took away the parenthetical "unidentified" and didn't
14 solve the problem.

15 MR. WRIGHT: Correct. Right. So that might be a
16 situation where you could have good cause, because you
17 don't know who it is or maybe they're so voluminous
18 that it's going to be difficult to serve that many
19 people within the 45 days. So that may be the
20 circumstance where this would come into play as to why
21 you might have good cause to not have met the 45 days.

22 THE COURT: Okay. Thank you, Mr. Wright.

23 Do you want to respond to that, Mr. Myers? I'm
24 going to give the defendants the last opportunity to

1 speak, because it is their motion, but it looked like
2 you wanted to say something. You don't have to, but
3 you can.

4 MR. MYERS: Two very brief points. I want to clean
5 up something I said and then respond briefly to a
6 couple things, if I may.

7 If the -- if it is the case that the legislature
8 when it passes -- amends statutes also is aware and
9 encompasses and sort of brings in prior supreme court
10 interpretations of those statutes, then the conclusion
11 must be that the legislature continued to incorporate
12 Otto's observations in the footnotes that I pointed
13 out, that it was not changing the service requirement.
14 Otto was very clear that it's not touching Civil
15 Service Commission with respect to the discretionary
16 nature of the service requirement, not a mandatory
17 subject.

18 And I guess the other way to sort of really make
19 that clear is that the legislature did not take a big
20 black marker and cross through Subsection 5, which is
21 what they would have done -- would had to have done to
22 eliminate the court's discretion.

23 Now, with respect to the good cause requirement and
24 it's good cause, I think if good cause applied to the

1 naming requirement, one might say, "Well, that's good
2 cause that you didn't name everybody and so forth," but
3 the point of Otto is that with all those unidentified
4 taxpayers, it didn't matter whether Washoe County had
5 good cause or not. They may have had wonderful cause.
6 But that was not relevant, because the good cause
7 requirement doesn't attach to that naming requirement.
8 It attaches to the service requirement. And I think
9 good cause in a sense is a more -- a broader concept.

10 Counsel has raised some arguments in his oral
11 argument that it's not the same as excusable neglect.
12 It is a concept that, I think, is deeply rooted in the
13 law, Your Honor. And it goes to the court's ability
14 going back to the time of the equity courts and the
15 developments of the ability of the courts to consider
16 fairness to take into account all of the circumstances.
17 And I think in this case reasonable reliance on the
18 published version of the statute gives rise to good
19 cause as does the fact that there is no demonstrable
20 harm to any of the parties involved in the petition.

21 I do want to clarify what I -- I said that perhaps
22 the 11 days was due in part to a mail service. I
23 looked and I saw that it, in fact, was electronically
24 served. The Court can take notice that it was served

1 on a Friday. That date, whatever the April date is, is
2 a Friday. We filed on the Tuesday, effectively eight
3 court days later. So there were two interceding
4 weekends.

5 We would submit, Your Honor, that in the scope of
6 things we acted diligently. And we did not -- we chose
7 to file the motion after we had accomplished service
8 upon the agency and prepared a motion and an argument
9 that accompanied it.

10 So within those respects -- of course, in the end
11 it's the Court's judgment, but we think we acted with
12 diligence. Thank you.

13 THE COURT: Thank you.

14 Ms. Flatley, I just want to give you the
15 opportunity to help me with some research, if you can.
16 We talked about the fact that three out of the four
17 requirements of NRS 233B.130, Subsection 2, have been
18 addressed by the Nevada Supreme Court. 2(a) is the
19 naming of the parties. The Nevada Supreme Court
20 addresses that in Otto. It says that it's strict
21 compliance and it's mandatory.

22 2(b) is the venue issue. And you've identified
23 Liberty Mutual as the case that is controlling on that,
24 the recent Nevada Supreme Court case that we talked

1 about.

2 And then 2(c) is what we're talking about today.

3 And you had said that 2(d), the filing within 30
4 days after service, has been resolved as well. Is
5 there a case that I'm missing?

6 MS. FLATLEY: That was the Civil Service
7 Commission.

8 THE COURT: Carter?

9 MS. FLATLEY: Yes. Civil Service Commission versus
10 Second Judicial District Court, 118 Nevada 186.

11 THE COURT: Okay. I just wanted to make sure.

12 Yeah, I keep referring to it as Carter, because
13 it's Civil Service Commission for the City of Reno
14 versus the Second Judicial District Court and David
15 Carter, the Assistant City Manager. So that's the one.
16 Okay.

17 All right, counsel. I'll take this under
18 advisement and issue a written order as quickly as I
19 can.

20 Court is in recess. Have a nice weekend.

21 We'll go back on the record.

22 Counsel, I know that we -- we're back on the
23 record. I know that you have not yet submitted the
24 motion for an extension of time. And I'm not really

1 sure that you should or you can, because the Court has
2 to resolve this issue rather than the extension of time
3 issue. I'm not quite sure how that procedure would
4 work if you now submitted the motion for the extension
5 of time. The time to file your reply has expired,
6 because it's five days and obviously we're well past
7 five days. So it's just out there.

8 I want the parties to know that I will look at that
9 probably and might look at the declaration that was
10 made part of that motion. I don't think anybody has
11 responded to it.

12 Mr. Wright, you didn't respond.

13 The State responded, Ms. Flatley.

14 Mr. Bustos, you didn't respond either.

15 MR. BUSTOS: Correct.

16 THE COURT: So I'll review the arguments at least
17 that were made by Mr. Wright today. And if I need to
18 consider them, I will. I guess I'll just leave it at
19 that. So the cases that were cited by Mr. Wright.

20 And, Mr. Myers, I don't think you need to be
21 concerned. I'll be able to research them myself. And
22 if I think they're in opposite to the current status of
23 the law, I'll be able to make a distinction in the
24 written order.

1 MR. MYERS: I appreciate that, Your Honor.

2 THE COURT: Court is in recess.

3 (The proceedings were concluded at 11:00 a.m.)

4 --o0o--

1 STATE OF NEVADA)
2) ss.
3 COUNTY OF WASHOE)

4 I, LORI URMSTON, Certified Court Reporter, in and
5 for the State of Nevada, do hereby certify:

6 That the foregoing proceedings were taken by me
7 at the time and place therein set forth; that the
8 proceedings were recorded stenographically by me and
9 thereafter transcribed via computer under my
10 supervision; that the foregoing is a full, true and
11 correct transcription of the proceedings to the best
12 of my knowledge, skill and ability.

13 I further certify that I am not a relative nor an
14 employee of any attorney or any of the parties, nor am
15 I financially or otherwise interested in this action.

16 I declare under penalty of perjury under the laws
17 of the State of Nevada that the foregoing statements
18 are true and correct.

19 DATED: At Reno, Nevada, this 6th day of
20 September, 2016.

21
22 LORI URMSTON, CCR #51

23 _____
24 LORI URMSTON, CCR #51

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

* * *

HEAT & FROST INSULATORS and
ALLIED WORKERS LOCAL 16,

Petitioners,

Case No.: CV16-00353

vs.

Dept. No.: 10

LABOR COMMISSIONER OF THE STATE
OF NEVADA; THE UNIVERSITY OF NEVADA,
RENO; CORE CONSTRUCTION; and RENO TAHOE
CONSTRUCTION,

Respondents.

ORDER

Presently before the Court is a MOTION TO DISMISS FOR LACK OF JURISDICTION PURSUANT TO NRCP 12(b)(1) ("the Motion"). The Motion was filed by Respondent LABOR COMMISSIONER OF THE STATE OF NEVADA ("the Commissioner") on April 15, 2016. Respondent UNIVERSITY OF NEVADA, RENO ("UNR") filed UNIVERSITY OF NEVADA, RENO'S JOINDER IN LABOR COMMISSIONER'S MOTION TO DISMISS FOR LACK OF JURISDICTION PURSUANT TO NRCP 12(b)(1) ("UNR's Joinder") on April 19, 2016. Respondent CORE CONSTRUCTION ("Core") filed RESPONDENT CORE CONSTRUCTION'S JOINDER TO RESPONDENT LABOR COMMISSIONER OF THE STATE OF NEVADA'S MOTION TO DISMISS ("Core's Joinder") on April 22, 2016. Petitioner HEAT & FROST INSULATORS AND ALLIED WORKERS LOCAL 16 ("the Petitioner") filed PETITIONER'S OPPOSITION TO MOTION TO DISMISS ("the Opposition") on April 26, 2016. The Commissioner filed the REPLY TO MOTION TO DISMISS FOR LACK OF JURISDICTION

1 PURSUANT TO NRCP 12(b)(1) (“the Reply”) on May 6, 2016, and contemporaneously submitted
2 the matter for the Court’s consideration. The Court heard oral argument on the Motion on August
3 19, 2016. This ORDER follows.

4 The Petitioner filed a PETITION FOR JUDICIAL REVIEW (“the PJR”) on February 18,
5 2016. The PJR seeks review, “of the final administrative determination by the Labor Commissioner
6 concerning the prevailing wage determination by [UNR] about prevailing wages for the installation
7 of Gilsulate insulation by [Core] and Reno Tahoe Construction.” The PJR 1:21-23.¹ The Motion
8 argues the Court must dismiss the PJR because the Court lacks jurisdiction over the proceedings due
9 to a failure to serve the appropriate parties. It is alleged the Petitioner failed to serve the Nevada
10 Attorney General (“the AG”) within the statutory 45 days mandated by NRS 233B.130(5), as
11 amended by the 2015 session of the Nevada Legislature.² The Motion contends the Court has never
12 been vested with jurisdiction over these proceedings given this procedural defect. The Opposition
13 does not dispute the AG was not timely served.³ The Opposition contends The Petitioner was
14 unaware of its responsibility to serve the AG given the recent passage of AB 53 and its lack of
15 publication; therefore, the procedural deficiency should be overlooked.⁴ The Opposition offers no
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21 ¹ RENO TAHOE CONSTRUCTION (“RTC”) is a named Respondent in these proceedings. It has been served with the
22 PJR. *See generally* AFFIDAVIT OF SERVICE filed March 18, 2016. RTC has failed to take any action regarding the
23 PJR.

24 ² AB 53, ch. 160, § 9, 2015 Nev. Stat. 709.

25 ³ The PJR had to be served on the AG by the close of business on April 4, 2016. *See generally* NRCP 6. It was not.
26 The Petitioner served the AG on April 25, 2016, well after the 45 day period prescribed in NRS 233B.130(5). *See*
27 AFFIDAVIT OF SERVICE ON OFFICE OF THE ATTORNEY GENERAL, NEVADA filed April 27, 2016. The
28 Petitioner filed a MOTION FOR EXTENSION OF TIME TO SERVE PETITION (“the Motion for Extension”) on
April 26, 2016. The Commissioner filed its OPPOSITION TO MOTION TO ENLARGE TIME (“the Opposition to
Extension”) on May 13, 2016. The Petitioner did not file a reply brief and the Motion for Extension was never
submitted to the Court for consideration; therefore, it will not be considered by the Court in deciding the issue raised in
the Motion. WDCR 12(4).

⁴ The amendments to NRS 233B.130 became effective July 1, 2015. AB 53, ch. 160, § 28, 2015 Nev. Stat. 722.

1 authority to support the lack of publication argument. The Court finds the Opposition unpersuasive.
2 The Motion must be granted.

3 A district court does not have inherent authority to consider petitions for judicial review.
4 “Generally, ‘[c]ourts have no inherent appellate jurisdiction over official acts of administrative
5 agencies except where the legislature has made some statutory provisions for judicial review.’ Thus,
6 ‘[w]hen the legislature creates a specific procedure for review of administrative agency decisions,
7 such procedure is controlling.’” *Washoe County v. Otto*, 128 Nev. Adv. Op. 40, 282 P.3d 719, 724
8 (2012) (citing *Crane v. Continental Telephone*, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989)). The
9 Nevada Legislature (“the Legislature”) enacted the Nevada Administrative Procedures Act (“the
10 APA”) to guide courts in determining when their appellate jurisdiction may be invoked. The
11 requirements of the APA are mandatory, and require strict compliance.⁵ The parties do not dispute
12 NRS 233B.130 is the statute that confers jurisdiction in the Court pursuant to the APA.

13 NRS 233B.130(2), as enacted at the time of the filing of the PJR, mandated four conditions
14 precedent to invoke the Court’s appellate review authority. The PJR was required to:

- 15 (a) Name as respondents the agency and all parties of record to the administrative
16 proceeding;
 - 17 (b) Be instituted by filing a petition in the district court in and for Carson City, in and for the
18 county in which the aggrieved party resides or in and for the county where the agency
19 proceeding occurred;
 - 20 (c) Be served on the Attorney General, or his designee, and the person serving in the office
21 of administrative head of the agency; and
 - 22 (d) Be filed within 30 days after service of the final decision of the agency.
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27 ⁵ “[A] court’s requirement for strict or substantial compliance may vary depending on the specific circumstances. In
28 general, ‘time and manner’ requirements are strictly construed, whereas substantial compliance may be sufficient for
‘form and content’ requirements.” *Einhorn v. BAC Home Loan Servicing, LP*, 128 Nev. Adv. Op. 61, 290 P.3d 249,
254 (2012) (citing *Leven v. Frey*, 123 Nev. 399, 407, 168 P.2d 712, 717 (2007)).

1
2 The Supreme Court of Nevada (“the Supreme Court”) has held failure to strictly comply with
3 conditions (a), (b), or (d) results in a failure to confer jurisdiction on a district court. These failures
4 have mandated dismissal of a petition for judicial review. *See generally Otto*, 128 Nev. Adv. Op.
5 40, 282 P.3d at 726 (failure to strictly comply with NRS 233B.130(2)(a) mandates dismissal of
6 petition for judicial review); *Liberty Mutual v. Thomasson*, 130 Nev. Adv. Op. 4, 317 P.3d 831
7 (2014) (failure to strictly comply with NRS 233B.130(2)(b) mandates dismissal of petition for
8 judicial review); *Bing Construction v. State of Nevada, Department of Taxation*, 107 Nev. 630, 632,
9 817 P.2d 710, 711 (1991) (finding NRS 233B.130(2)(d) is “jurisdictional in nature and designed to
10 place limits on the substantive rights of parties to seek review in a civil action commenced before an
11 agency...”)⁶ and *Civil Serv. Comm’n v. Second Judicial Dist. Court*, 118 Nev. 186, 189, 42 P.3d 268,
12 271 (2002). The *Otto* Court held, “[w]hen a party seeks judicial review of an administrative
13 decision, strict compliance with the statutory requirements for such review is a precondition to
14 jurisdiction by the court of judicial review,’ and ‘[n]oncompliance with the requirements is grounds
15 for dismissal.’” *Otto*, 282 P.3d at 725 (citing *Kame v. Emp’t Sec. Dep’t*, 105 Nev. 22, 25, 769 P.2d
16 66, 68 (1998)). The *Otto* Court further held the term “must” in NRS 233B.130(2) applies to all
17 conditions of the statute. *Id.*, 282 P.3d at 725.

18
19 *Otto* had been the law for approximately 33 months when the Legislature amended NRS
20 233B.130 to add the requirement the AG must be served. It must be assumed the Legislature knew
21 of, and agreed with, the Supreme Court’s interpretation of NRS 233B.130 when it added the service
22 of the AG requirement. *See City of Las Vegas Downtown Redevelopment Agency v. Crockett*, 117
23 Nev. 816, 825 fn. 15, 34 P.3d 553, 559 fn. 15 (2001) (“[L]egislative inaction following a
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⁶ The Court is using the current statutory rubric in referencing the cases, *supra*.

1 contemporaneous and practical interpretation is evidence that the legislature intends to adopt such an
2 interpretation.”); *Silvera v. Emp’rs Ins. Co. of Nev.*, 118 Nev. 105, 109, 40 P.3d 429, 432 (2002) (“It
3 is presumed that the legislature approved of the supreme court’s interpretation of statutory provision
4 when the legislature has amended the statute but did not change the provision’s language subsequent
5 to the court’s interpretation.”); *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 364 fn.
6 21, 184 P.3d 378, 385 fn. 21 (2008) (“When the Legislature has had ample opportunity to change
7 statutory law after this court has interpreted that law but does not do so, we presume that the
8 Legislature approves of our construction.”); *Northern Nev. Ass’n of Injured Workers v. Nev. State*
9 *Indus. Ins. Sys.*, 107 Nev. 108, 112, 807 P.2d 728, 730 (1991) (holding the Legislature presumably
10 knows of the Supreme Court’s interpretation of statutes when it amends a law: failure to modify the
11 statute imparts an approval of the Supreme Court’s interpretation).

14 The Opposition contends the failure to timely serve the AG is merely a “technical
15 dereliction;” therefore, dismissal is not mandatory. The Court is not persuaded. The Legislature
16 inserted the requirement at issue into a section of the statute with *mandatory* conditions. Had the
17 Legislature intended to confer “technical” status on the service of the AG, possibly opening the door
18 for a substantial compliance analysis, it could have done so by creating a separate subsection of NRS
19 233B.130. The Legislature did no such thing. The Court must conclude the Legislature acted
20 intentionally, with full knowledge of the consequences, when it added the service requirement to
21 NRS 233B.130(2).

24 The Opposition’s two additional arguments are also not persuasive. The Opposition
25 contends the AG knew of the PJR even though it was not served; therefore, the Commissioner has
26 suffered no prejudice. Notice of a suit is not a substitute for service of process. *See C.H.A. Venture*
27 *v. G.C. Wallace Consulting Eng’rs, Inc.*, 106 Nev. 381, 384, 794 P.2d 707, 709 (1990); *Abreu v.*
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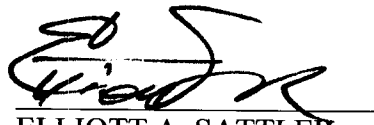
1 *Gilmer*, 115 Nev. 308, 314 fn. 5, 985 P.2d 746, 749 fn. 5 (1999). The Opposition also contends
2 strong public policy favors resolving cases on their merits. The Supreme Court acknowledged this
3 sentiment in *Kahn v. Orme*, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992). The *Kahn* Court noted
4 the policy has its limits, stating “[l]itigants and their counsel may not properly be allowed to
5 disregard process or procedural rules with impunity.” *Id.* (citing *Lentz v. Boles*, 84 Nev. 197, 200,
6 438 P.2d 254, 256 (1968)). The Supreme Court recently held the sound public policy of resolving
7 issues on their merits is not boundless. In *Huckabay Prop., Inc. v. NC Auto Parts, LLC*, 130 Nev.
8 Adv. Op. 23, 322 P.3d 429, 433 (2014), the Supreme Court acknowledged other interests come into
9 consideration. These interests include: the court’s ability to manage its docket, the prejudice to the
10 opposing party, and the public’s need for expeditious judicial process. The *Huckabay* Court
11 concluded, “... a party cannot rely on the preference for deciding cases on the merits to the exclusion
12 of all other policy considerations....” *Id.* The Court cannot simply ignore the jurisdictional
13 requirements established by the Legislature so the Petitioner can have their “day in court.”
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16 CONCLUSION

17
18 The Motion notes the dismissal of the PJR is a “harsh” result. The Motion, 2:9. The Court
19 agrees; however, the Court finds it has no alternative other than to dismiss. NRS 233B.130(2)
20 creates the framework by which jurisdiction is conferred in a petition for judicial review. A
21 petitioner *must* comply with all four requirements codified in that statute. The Petitioner did not
22 serve the AG prior to the filing of the Motion, and it failed to file and submit a timely motion for
23 extension.
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2 It is hereby ORDERED the MOTION TO DISMISS FOR LACK OF JURISDICTION
3 PURSUANT TO NCRP 12(b)(1) is GRANTED. The PETITION FOR JUDICIAL REVIEW is
4 DISMISSED.

5
6 DATED this 3 day of November, 2016.

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9 ELLIOTT A. SATTLER
10 District Judge
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1 **CERTIFICATE OF MAILING**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court
3 of the State of Nevada, County of Washoe; that on this 3 day of November, 2016, I deposited in
4 the County mailing system for postage and mailing with the United States Postal Service in Reno,
5 Nevada, a true copy of the attached document addressed to:

6 MICHAEL SPRINGER
7 9460 DOUBLE R BLVD., SUITE 103
8 RENO, NV 89521
9

10 **CERTIFICATE OF ELECTRONIC SERVICE**

11 I hereby certify that I am an employee of the Second Judicial District Court of the State of
12 Nevada, in and for the County of Washoe; that on the 3 day of November, 2016, I
13 electronically filed the foregoing with the Clerk of the Court by using the ECF system which will
14 send a notice of electronic filing to the following:

15
16 MELISSA FLATLEY, ESQ.

17 SARAH VARELA, ESQ.

18 ERIC HONE, ESQ.

19 BRYAN WRIGHT, ESQ.
20

21 
22 SHEILA MANSFIELD
23 Judicial Assistant
24
25
26
27
28

1 **\$2515**

2 ERIC B. MYERS, SBN 8588
3 SARAH VARELA, SBN 12886
4 McCRACKEN, STEMERMAN & HOLSBERRY
5 1630 S. Commerce St., Suite A-1
6 Las Vegas, NV 89102
7 Telephone: (702) 386-5107
8 Fax: (702) 386-9848
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10 ebm@dcbsf.com

11 *Attorneys for Petitioner*

12
13 **IN THE SECOND JUDICIAL DISTRICT COURT OF**
14 **THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE**

15 HEAT & FROST INSULATORS AND ALLIED
16 WORKERS LOCAL 16;

17 Petitioner,

18 vs.

19 LABOR COMMISSIONER OF THE STATE OF
20 NEVADA; THE UNIVERSITY OF NEVADA,
21 RENO; CORE CONSTRUCTION; and RENO
22 TAHOE CONSTRUCTION,

23 Respondents.

CASE NO.: CV16-00353

DEPT. NO.: 10

NOTICE OF APPEAL

24
25 Notice is hereby given that HEAT AND FROST INSULATORS AND ALLIED
26 WORKERS LOCAL 16, plaintiff above named, hereby appeals to the Supreme Court of Nevada
27 from the order dismissing the action for lack of jurisdiction pursuant to NRCP 12(b)(1), entered in
28 this action on the 3rd day of November, 2016.

1 Dated: December 1, 2016

Respectfully submitted,

2 McCracken, Stemerman & Holsberry

3
4 By: 

Eric B. Myers

1630 S. Commerce Street, Suite A-1

Las Vegas, Nevada 89102

5 Tel: 702-386-5107

6 Fax: 702-386-9848

7
8 *Attorneys for Petitioner*

1 **AFFIRMATION PURSUANT TO NRS 239B.030**

2

3 The undersigned hereby affirms that this document does not contain the social security

4 number of any person.

5

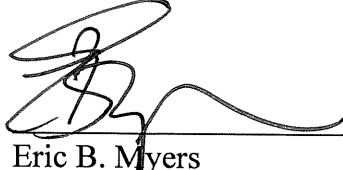
6 Dated: December 1, 2016

McCRACKEN, STEMERMAN & HOLSBERRY

7

8

9 By:


Eric B. Myers
Attorneys for Petitioner

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCp 5(b), I certify that I am an employee of McCracken, Stemerman &
3 Holsberry, and that on the 1st day of December 2016, I served a true copy of **NOTICE OF**
4 **APPEAL** on all parties to this action by E-Filing through the E-Flex filing system addressed as
5 follows:

6 **By Electronic Service Through E-Flex:**

7
8 Bryan L. Wright
9 Assistant General Counsel
10 University of Nevada, Reno
11 1664 N. Virginia Street, MS 550
12 Reno, Nevada 89557-0550
13 *Counsel for University of Nevada, Reno*

14 Melissa L. Flatley
15 Deputy Attorney General
16 Nevada Office of the Attorney General
17 100 North Carson Street
18 Carson City, Nevada 89701
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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I certify that I am an employee of McCracken, Stemerman & Holsberry and that on this 11th day of April 2017, I served a true copy of Joint Appendix on all parties in this action by E-filing through the E-Flex filing system to the parties registered in this action as follows:

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