IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 71848

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

APPELLANT'S REPLY BRIEF

Eric B. Myers, Nevada Bar # 8588
Sarah Varela, Nevada Bar # 12886
David L. Barber, Nevada Bar # 14165
McCRACKEN, STEMERMAN & HOLSBERRY, LLP
1630 S. Commerce Street, Suite A-1
Las Vegas, NV 89102
Telephone: (702) 386-5107
ebm@msh.law, svarela@msh.law, dbarber@msh.law
Attorneys for Petitioner/Appellant

IN THE SUPREME COURT OF THE STATE OF NEVADA

HEAT & FROST INSULATORS AND ALLIED WORKERS LOCAL 16; Appellant, vs. LABOR COMMISSIONER OF THE STATE OF NEVADA; THE UNIVERSITY OF NEVADA, RENO; CORE CONSTRUCTION; and RENO TAHOE CONSTRUCTION, Respondents.	Supreme Court Case No. 71848 District Court Case No. CV16-00353 **DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1**

NRAP 26.1 Disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioner/Appellant Heat and Frost Insulators and Allied Workers Local 16 is an unincorporated association. It has no parent corporation or ownership by a publicly held company.

Local 16 is and has been represented in this matter, including in administrative proceedings, the district court, and in this appeal, by the law firm of

McCracken, Stemerman & Holsberry. No other law firm is expected to appear on behalf of Local 16 in this case.

Dated: July 24, 2017

Respectfully submitted,

McCRACKEN, STEMERMAN & HOLSBERRY

By: _____

David L. Barber
1630 S. Commerce Street, Suite A-1
Las Vegas, Nevada 89102
Tel: 702-386-5107
Fax: 702-386-9848

Attorneys for Appellant

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INTRODUCTION

The statutory text at issue here gives the district court the power to extend the 45-day period for service of a petition for judicial review. NRS 233B.130(5). The answering briefs filed by respondents do not provide any basis for reading that power out of the statutory text. Instead, the Labor Commissioner fails to explain how NRS 233B.130, read as a whole, can both *grant* the district court the power to extend the 45-day service period and yet also somehow *strip* the court of the power to make any decision whatsoever concerning a petition should a motion for extension of time be needed. The opinion below neglected even to discuss subpart (5) of the statute and its explicit grant of power to extend the time for service. The Labor Commissioner's answering brief does discuss that text, but it fails reconcile the statute's language with the Labor Commissioner's theory that the district court lacks jurisdiction to do what the statute plainly empowers it to do.

University of Nevada, Reno also filed an answering brief, focusing on whether there is good cause to extend the 45-day period in the peculiar circumstances of this case. UNR has misconstrued the appropriate legal standard by importing a standard of "good cause" from one limited case context, where in fact even UNR's citations make clear that "good cause" is a flexible grant of discretion that can encompass situations like this case.

For the reasons argued below, and in the opening brief, the district court's

dismissal of the petition for judicial review filed by Heat & Frost Insulators and Allied Workers Local 16 was in error and should be reversed.

A. The Labor Commissioner tries to construe NRS 233B.130(2) separately from NRS 233B.130(5), which results in a mistaken interpretation of the statute.

The central arguments in the Labor Commissioner's brief recapitulate, in various forms, the mistake made by the court below: interpreting one subsection without giving due consideration to another closely linked subsection. The requirements for service of a petition for judicial review on the Attorney General, the consequences for failure of such service, and the power of the court with respect to altering those requirements are distributed between subsections (2) and (5) of NRS 233B.130. Both subsections must be read together to arrive at the proper interpretation of the statute. Yet the Labor Commissioner focuses almost entirely on subpart (2) and fails to give a plausible account of the extension-of-time clause in subpart (5). The plain language of that clause renders the Labor Commissioner's position, and the opinion of the court below, untenable.

"A statute must be construed as to "'give meaning to all of [its] parts and language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.'" *V & S Ry. LLC v. White Pine Cty.*, 125 Nev. 233, 239, 211 P.3d 879, 882 (2009) (quoting *Harris Assocs. V. Clark County Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003).

Here, subsection (2) of NRS 233B.130 requires service of a petition for judicial review on the Attorney General, among other parties. Subsection (5) provides the time limit for such service—45 days—and permits the district court to extend that time "upon a showing of good cause."

The Labor Commissioner's chief argument is that, since *other aspects* of subpart (2) have been found to be "jurisdictional" in nature—that is, to deprive the court of the ability to excuse noncompliance—the 45-day time limit for service in subpart (5) must also be jurisdictional. The Labor Commissioner's brief leans heavily on the cases that interpret the requirements of subpart (2) as mandatory and jurisdictional. *See* Labor Commissioner Brief ("LC Brief") at 4-6. The Labor Commissioner then declares that the 45-day time limit in subpart (5) is "also jurisdictional." LC Brief at 7. To reach this conclusion, the Labor Commissioner cites *Washoe County v. Otto*, 282 P.3d 719 (2012), a case that focuses on subpart (2), not subpart (5). LC Brief at 8.

Nowhere does the Labor Commissioner seriously consider the *entire* relevant text of the statute. In particular, the Labor Commissioner effectively ignores the plain statement in subpart (5) that the 45-day time for service may be extended by the district court. (As will be discussed in the next two sections, the Labor Commissioner's hand-waving about this crucial portion of the text is not serious argument.)

To the extent the Labor Commissioner pays attention to subpart (5), she focuses on a single word, arguing that the "use of the term 'must' in the statute made service within the 45 day period mandatory and jurisdictional." LC Brief at 12. This claim fails to take into account the grant of authority to extend the 45-day period, which is also part of subpart (5).

When the statute is read as a whole, the conclusion must be that even if the requirements listed in subpart (2) are "mandatory and jurisdictional," subpart (5) plainly permits the court to extend the 45-day service period. Service on the Attorney General within 45 days of filing is a requirement that results from reading subparts (2) and (5) together, which is the proper way of reading two closely related parts of the same statute that clearly implicate one another. It is just as plain that the requirement of service on the Attorney General within 45 days may be *extended* by the district court upon a showing of good cause, as subpart (5) itself states.

By overemphasizing the "mandatory" language of subpart (2) while ignoring the grant of judicial authority in subpart (5), the Labor Commissioner violates a fundamental canon of interpretation and thereby misconstrues the statute.

B. The Labor Commissioner fails to distinguish clearly analogous cases in which statutory language grants the court the power to modify a procedural requirement.

Tellingly, the Labor Commissioner fails to grapple with or distinguish the

cases, cited in Local 16's opening brief, in which this Court interpreted other statutes that include an express grant of power to the courts to modify a procedural requirement. In such circumstances, this Court has held that a procedural requirement that is expressly modifiable by the court is not "jurisdictional" in the sense that the Labor Commissioner insists upon. This is because statutory grants of authority to modify a procedural requirement mean that the court has the power, or *jurisdiction*, to engage in that modification. *See* Opening Brief at 13-15; *Eberle v. State ex rel. Nell J. Redfield Trust*, 108 Nev. 587, 836 P.2d 67 (1992) (statutory deadline permitting "such further time as the court or judge may grant" is "by its own terms, not a jurisdictional requirement"); *Miles v. State*, 120 Nev. 383 (2004) (statute declaring "[n]o further pleadings may be filed except as ordered by the court" reserved to the court the power to order additional pleadings and rendered initial pleading failure "an amendable, not a jurisdictional, defect"). The Labor Commissioner has not rebutted this point.

The Labor Commissioner did not even discuss these cases because this Court's logic in these cases is sound. Following this logic in the present case renders the Labor Commissioner's position untenable.

C. The Labor Commissioner's analogies to appellate deadlines and trial deadlines are inapt.

Instead of distinguishing *Eberle* and *Miles*, the Labor Commissioner attempts to analogize NRS 233B.130(2) and (5) to procedural requirements in

statutes that *do not* grant courts the power to modify the requirement. These analogies are inapt, since the question in the present case turns on the express statutory language permitting the district court to extend the 45-day service period—that is, to modify the very procedural requirement that the Labor Commissioner contends is somehow outside the power of the court to address. The cases discussed by the Labor Commissioner involve statutes that do not grant discretion to the court to modify a procedural requirement. The cases and statutes cited by the Labor Commissioner are therefore not good guides to the resolution of the present case.

The Labor Commissioner cites *Plankington v. Fifth Judicial Dist. Court In and For Nye Cty.*, 93 Nev. 643, 64, 572 P.2d 525, 526 (1977). *Plankington* interpreted NRS 189.065, a procedural statute that by its own terms did not include a grant of authority to the court to extend the statutory 60-day time limit to appeal from a justice court decision. Thus, *Plankington* is not a good analogy by which to interpret NRS 233.130B(2) and (5), which *do* include such a grant of authority. (Moreover, as the Labor Commissioner herself points out, *Plankington* was effectively overruled or at least severely limited by *Thompson v. First Judicial Dist. Court, Storey Cty.*, 100 Nev. 352, 683 P.2d 17 (1984).)

Similarly, *Donner v. Superior Court of Los Angeles Cty.*, 82 Cal.App.165, 255 P. 272 (1927) construes a California statute governing certain justice-court

appeals, Code of Civil Procedure § 981a. That statute, at the time, provided a one-year trial deadline for such appeals, unless the deadline was "extended by a written stipulation by the parties to the action." The superior court dismissed two appeals that had not been tried within the year period. Although the parties to the appeals stipulated *after* the period had run that the one-year period would not bar the appeals, the court interpreted the relevant statute as requiring the court to dismiss the appeals on the very date the one-year period ran out. *Donner*, 82 Cal.App. at 166. Crucially, the statute in *Donner* did not grant the court any discretion in the matter. Because there was no grant of authority to the *court*, that court had no "authority to do any act except to direct a dismissal." *Id.* at 166-67.

By contrast to the cases to which the Labor Commissioner attempts analogies, the statute at issue in this case explicitly grants the district court the power to extend the 45-day service period. Nor does the statutory language place a limit on *when* that power may be exercised—either before or after the 45-day period has run.

The Labor Commissioner's brief mistakenly conflates service of the petition upon the Attorney General with the filing of a notice of appeal when it argues that "it is plain that Local 16 did not timely perfect its appeal when it failed to serve the Attorney General within 45 days." LC Brief at 12. In contradiction, just three pages before this, the brief takes pains to observe (correctly) that petitioning for

judicial review of an administrative decision is not an appeal of a court action. LC Brief at 9.

In addition, with no cited authority, the Labor Commissioner suggests that "[o]nce lost, jurisdiction cannot be revived by way of subsequent events." *Id.* This proposition is not supported by *Plankington*, which has been overruled in any event; nor is it supported by *Donner*, which is an old case about a specialized California statute that by its own terms gave no discretion to the court, unlike NRS 233B.130. Nor does this supposed legal proposition support the Labor Commissioner's position. It is not the case that the district court here lost jurisdiction which now stands to be "revived by way of subsequent events." Rather, the district court has always had the jurisdiction to extend the 45-day service requirement, because the Legislature expressly granted it that jurisdiction in subpart (5) of the statute. The Labor Commissioner's inaccurate starting premise, that the 45-day period is jurisdictional, is fatal to its argument.

The Labor Commissioner's cases and reasoning about statutes other than NRS 233B.130 fail to support the conclusion that the explicit grant of authority to the district court in subpart (5) should be read out of the statute.

D. Contrary to UNR's arguments, a finding of "good cause" to extend the 45-day time for service is appropriate in the circumstances of this case.

The University of Nevada, Reno (UNR) focuses its brief on whether "good cause" exists for Local 16's late service of the petition on the Attorney General.

UNR's central argument is that "good cause" is a more exacting standard than "excusable neglect." UNR Brief at 5-6. UNR further argues that Local 16 has demonstrated excusable neglect but not good cause. Both contentions are mistaken.

1. "Good cause" can, depending on the circumstances, be proven by a showing of "excusable neglect," and is a flexible standard.

While it is true that "good cause" and "excusable neglect" are distinct standards and are often used with different meanings, a showing of excusable neglect can provide good cause for a court's exercise of discretion. Moreover, UNR's construction of "good cause" relies too much on a single context—that of NRCP 4(i), governing service of a summons and civil complaint. The phrase "good cause" is in fact used in various statutes and rules to grant discretion in circumstances that the drafters might not have foreseen, and its application depends on the facts of each case and legal context.

UNR's authority for distinguishing the two standards comes from a footnote in *Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 688 n. 66, 188 P.3d 1136, 1146 n. 66 (2008). There, the Court considered an issue relating to a motion for extension of time under NRCP 6(b)(2), which the rule permits "where the failure to act was the result of excusable neglect." In footnote 66, the *Moseley* Court declines to follow a "good cause" standard analogous to NRCP 4(i) because, the Court suggests, "good cause" is in fact an easier standard to meet than "excusable neglect: "Rule 4(i) requires *only* a showing of 'good cause,' while Rule 6(b)(2)

specifically states that 'excusable neglect' is the standard for granting an extension after the applicable time period has expired." *Moseley*, 124 Nev. at 688 n. 66 (emphasis added). The Court continues by stating that the two are "distinct standards." It says that good cause "generally is established when it is shown that the circumstances causing the failure to act are beyond the individual's control" while "excusable neglect generally requires a showing that the party acted in good faith and had a reasonable basis for its failure to comply with the applicable limitations period." *Id.*

It would be a mistake to take as gospel the Court's dictum that good cause "generally" means that the circumstances were "beyond the individual's control." Rather, in footnote 66 of *Moseley*, the Court is making a distinction that is relevant to the case before it—since it was dealing with "excusable neglect" in the context of whether to extend time under Rule 6(b)(2). The Court drew a distinction that was proper for its consideration of that rule, but did not answer for all time the question of whether excusable neglect might, in some circumstance, constitute good cause.

In fact, the *Moseley* decision itself notes that there are circumstances where excusable neglect constitutes good cause. It notes that Federal Rule of Civil Procedure 6(b)(1)(B) provides that "the court may, for good cause, extend the time on motion made after the time has expired if the party failed to act because of

excusable neglect." *Moseley*, 124 Nev. at 643 n.21. Thus, in the federal rule, a showing of excusable neglect equates to a showing of good cause for a certain type of motion, and the *Moseley* court recognized that fact.

A broader survey shows that "good cause" is not a single legal standard that excludes excusable neglect, as UNR would have it, but is instead a flexible grant of discretion to courts. The standard for that discretion depends upon what the court is being asked to permit. Thus, in the context of NRCP 4(i) determinations of "good cause" to permit late service of a summons and complaint on a defendant, at least ten different factors—some focused on plaintiff's own diligence—are relevant. *Scrimer v. Eighth Judicial Dist. Ct.*, 116 Nev. 507, 998 P.2d 1190 (2000). In one of the two lawsuits considered together in *Scrimer*, plaintiff moved for an extension under NRCP 4(i) by claiming "excusable neglect." 116 Nev. at 510, 998 P.2d at 1193. The *Scrimer* court held that granting the extension under the "good cause" standard was within the district court's discretion. 116 Nev. at 517-18, 998 P.2d at 1197.

In the context of Rule 55(c), which governs the setting aside of an entry of default "for good cause shown," this Court has held that "the phrase 'good cause shown' . . . is broad in scope, and include the 'mistake, inadvertence, surprise or excusable neglect' referred to in Rule 60(b)(1)." *Intermountain Lumber & Builders Supply, Inc. v. Glens Falls Ins. Co.*, 83 Nev. 126, 129, 424 P.2d 884, 886 (1967).

Considering standards for extending the time to file an appeal, especially Federal Rule of Appellate Procedure 4(a) as well as state rules, a leading secondary source concludes that "excusable neglect" is the more demanding standard: "The standard for determining 'excusable neglect' in civil cases is a strict one," and "[t]he good-cause standard neither displaces nor overlaps the excusable-neglect analysis." 5 Am. Jur. 2d Appellate Review § 282.

UNR can offer no reason to follow its incorrect interpretation of Rule 4(i) "good cause" rather than Rule 55 (c) "good cause" or the standard as articulated in some other context. None of those rules is the same as the statute at issue here, and "good cause" is clearly a broader and more flexible standard than UNR wants to admit.

2. Local 16 has shown "good cause" for its delay in serving the Attorney General.

Even if UNR's dubious contention is accepted for the sake of argument and "good cause" must include circumstances beyond Local 16's control, per the *Moseley* footnote, the facts here still show good cause for an extension of time for serving the petition.

The statutory amendment at issue had occurred only the year before, and it was not yet reflected in the two official sources of Nevada statutory law that Local 16's attorneys consulted—the print and the online versions maintained by the Legislative Counsel Bureau. It was reasonable for counsel to rely on these official

sources of law. There is no question that the fact that the statute had been amended only seven months earlier is the cause of the delay in serving the Attorney General. This recent amendment and the absence of the new statute from either of the two official versions of the Nevada Revised Statutes constitute circumstances outside of Petitioner's control and constitute good cause even under *Moseley*. Certainly, no litigant is excused from *compliance* with a law just because the law was recently enacted and does not yet appear in the official statutory compilations. But such a circumstance does provide good cause for the exercise of the court's discretion, in this instance, to extend the time for the service of the petition for judicial review on the Attorney General.

In addition, if the NRCP 4(i) "good cause" factors from *Scrimer* are considered, several of those factors favor a finding of good cause here, and none run against finding good cause. *See* Opening Brief at 27-28. In particular, the factor of "defendant's knowledge of the existence of the lawsuit," *Scrimer*, 116 Nev. at 516, 998 P.2d at 1196, would by analogy apply to the Attorney General's knowledge of the petition here. The Attorney General clearly knew of the petition because, as counsel for the Labor Commissioner, the Attorney General filed the motion to dismiss here.

UNR is also mistaken when it contends that there is no good cause because Local 16 took 11 days, from April 15, 2016 to April 26, 2016 to file a motion for

extension of time. It was reasonable for Local 16, upon receipt of the Labor Commissioner's motion to dismiss, to take a few days to analyze the motion, research the law, and decide upon a course of action for meeting this unexpected development.

E. The District Court excused the "submission" procedure as to the motion to extend time for service.

Both the Labor Commissioner and UNR raise an issue in their briefs not raised at the court below, namely the lack of "submission" of Local 16's motion for an extension of time. *See* LC Brief at 13, UNR Brief at 11. "Normally an issue not raised below cannot be raised for the first time on appeal." *Nevada Power Co. v. Haggerty,* 115 Nev. 353, 365, 989 P.2d 870, 877 (1999). For this reason, the "submission" issue need not be considered here.

In addition, the issue is a red herring. The district court told the parties, at the hearing on the motion to dismiss, that it would first decide the issues raised by the motion to dismiss and that the motion for extension of time did not have to be submitted for decision. The court stated, "I know that you have not yet submitted the motion for an extension of time. And I'm not really sure that you should or you can, because the Court has to resolve this issue rather than the extension of time issue." JA 0112-13. The court noted that only one of the three responding parties had responded to the motion for extension of time, but did not ask for further briefing. JA 0113. Thus, there was no need, by the court's own statement, to

submit the motion for extension of time; nor was that motion relevant to a resolution of the motion to dismiss. It is likewise irrelevant to this appeal.

CONCLUSION

For the reasons discussed above and in Local 16's opening brief, the district court erred when it dismissed the petition for judicial review for lack of jurisdiction, despite the plain grant of jurisdiction in NRS 233B.130(5) that permits the court to extend the 45-day service period. Moreover, it is plain that there was good cause to extend that period in the unusual circumstances of this case. The dismissal should be vacated and the case returned to the district court for proceedings on the merits.

Dated: July 24, 2017

Respectfully submitted,
McCRACKEN, STEMERMAN & HOLSBERRY

By: _____

David L. Barber
1630 S. Commerce Street, Suite A-1
Las Vegas, Nevada 89102
Tel: 702-386-5107
Fax: 702-386-9848

Attorneys for Appellant

ATTORNEY'S CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

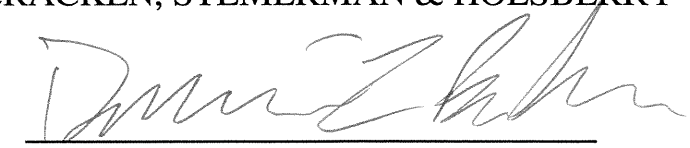
Proportionately spaced, has a typeface of 14 points or more, and contains 3670 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: July 24, 2017

Respectfully submitted,

McCRACKEN, STEMERMAN & HOLSBERRY

By: 

David L. Barber
1630 S. Commerce Street, Suite A-1
Las Vegas, Nevada 89102
Tel: 702-386-5107
Fax: 702-386-9848

Attorneys for Appellant

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I certify that I am an employee of McCracken, Stemerman & Holsberry and that on this 24th day of July 2017, I served a true copy of Appellant's Reply Brief on all parties in this action by E-filing through the E-Flex filing system to the parties registered in this action as follows:

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

Melissa L. Flatley
Deputy Attorney General
Nevada Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701
Counsel for Labor Commisioner of the State of Nevada

Eric D. Hone
DICKINSON WRIGHT PLLC
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113-2210
Counsel for Core Construction

Michael B. Springer
Reese Kintz Guinasso

190 W. Huffaker Ln., Suite 402
Reno, Nevada 89511
Counsel for Reno Tahoe Construction

Dated: July 24, 2017

Yien San Juan