

**PTJR**

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THOMAS J. VOLLBRECHT (MN Bar No. 17886X)  
Fabyanske, Westra, Hart & Thomson, P.A.  
333 South Seventh Street  
Suite 2600  
Minneapolis, MN 55402  
*Requesting Admission Pro Hac Vice*

*Attorneys for Petitioner Spar Business Services, Inc.*

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

SPAR BUSINESS SERVICES, INC.

Petitioner,

v.

EMPLOYMENT SECURITY DIVISION,  
STATE OF NEVADA and RENEE OLSON  
in her capacity as Administrator of the  
EMPLOYMENT SECURITY DIVISION;  
KATIE JOHNSON, in her capacity as  
Chairperson of the EMPLOYMENT  
SECURITY DIVISION BOARD OF  
REVIEW, and MICHAEL DEBOARD as  
employee,

Respondents.

Case No.: A-17-755501-J

Dept. No.: Department 32

**PETITION FROM BOARD OF  
REVIEW DECISION**

Pursuant to NRS 612.525, Spar Business Services, Inc. hereby petitions and appeals from the decision by the Board of Review of the State of Nevada, Department of Employment, Training and Rehabilitation, Employment Security Division that became final on May 5, 2017 in the Matter of Spar Business Services, Inc. and Michael DeBoard, Docket Number V-17-B-00243 (V-17-A-00727). The grounds in support of said Petition are as follows:

1 **Parties**

2 1. Spar Business Services, Inc. ("SBS") is a Nevada corporation with its  
3 principal place of business at 7711 N. Military Trail, Suite 1000, W. Palm Beach, Florida  
4 33410.

5 2. Upon information and belief, Renee Olson is the Administrator of the State of  
6 Nevada, Department of Employment, Training and Rehabilitation, Employment Security  
7 Division ("ESD") with her office at 500 E. Third Street, Carson City, NV 89713.

8 3. Upon information and belief, Michael DeBoard ("DeBoard") is a resident of  
9 the State of Nevada, with a last known address of 5026 River Glenn #158, Las Vegas, NV  
10 89103.

11 **Factual Background**

12 4. In 2006, DeBoard filed a claim for unemployment insurance benefits with the  
13 ESD and named SBS<sup>1</sup> as his employer. The ESD investigated and eventually issued a  
14 determination, dated October 20, 2006, that DeBoard, along with other similarly employed  
15 individuals, was an SBS employee when he performed merchandising services under  
16 contract with SBS ("DeBoard Determination").

17 5. SBS initially appealed from the DeBoard Determination; however, SBS  
18 voluntarily withdrew that appeal one day prior to the scheduled administrative hearing.

19 6. In 2007, the ESD conducted an audit of individuals providing merchandising  
20 services in Nevada under contract with SBS. As part of that audit, SBS provided to the ESD  
21 1099 information for those individuals for the audit period (March 31, 2004 through March  
22 31, 2007).

23 7. At the conclusion of the audit, on or about September 11, 2007, the ESD  
24 filed a Notice of Levy Assessment in the amount of \$7,480.58 against SBS for the audit  
25 period. The Notice specifically informed SBS that it was entitled to file a Petition for  
26 Readjustment within 15 days if it disagreed with the assessment.

27  
28 \_\_\_\_\_  
<sup>1</sup> He specifically named Spar Marketing Services, Inc. which is the former name of SBS.

1           8.       On or about September 26, 2007, SBS filed a timely Petition for  
2 Readjustment and posted the amount assessed as security in compliance with the statute. In  
3 its Petition, SBS alleged that all individuals included in the assessment, other than DeBoard,  
4 were not similarly employed and were independent contractors not subject to assessment  
5 under Nevada law. The Petition requested a hearing pursuant to NRS 612.670(2) and (3).

6           9.       SBS, through counsel, inquired of the ESD as to the status of its Petition and  
7 its hearing request. In November 2007, the ESD directed SBS' counsel to Christa Williams  
8 as the ESD employee assigned to the matter. SBS, through counsel, thereafter  
9 communicated with Ms. Williams as the ESD's stated representative regarding its Petition  
10 through telephone calls and correspondence. Neither Ms. Williams nor anyone else at the  
11 ESD alleged or informed SBS that Ms. Williams lacked authority to resolve the Petition for  
12 Readjustment on behalf of the ESD.

13          10.       In January 2008, SBS, through counsel, reached an agreement with the  
14 ESD, through Ms. Williams, resolving the Petition for Readjustment. The material terms of  
15 that resolution were: (a) the ESD accepted the Petition for Readjustment and agreed that all  
16 individuals providing merchandising services to SBS, other than Mr. DeBoard, were not  
17 similarly employed and were, instead, independent contractors; (b) the ESD would retain the  
18 assessed contributions, interest and penalties for Mr. DeBoard; (c) the ESD would return the  
19 assessed contributions, interest and penalties for all other individuals to SBS, thereby finally  
20 resolving the Petition for Readjustment.

21          11.       SBS also confirmed to the ESD that Mr. DeBoard no longer performed  
22 services for SBS, meaning that there was no individual employed by SBS in Nevada and no  
23 need to file reports with the ESD. The ESD confirmed (and reaffirmed in later  
24 communications) that SBS' account with the ESD would be and was closed following  
25 resolution of the Petition for Readjustment.

26          12.       The ESD, through Ms. Williams, inquired whether SBS wished to maintain  
27 a credit balance of the assessed contributions for all individuals other than Mr. DeBoard or  
28

whether SBS wished to have those monies returned to it. SBS stated that it wished to have the monies returned to it.

13. SBS sent a letter to the ESD, through Ms. Williams, on January 15, 2008 confirming the agreed resolution of its Petition for Readjustment and confirming its request that the entire statutory security for its Petition for Readjustment (less the amount directly related to Mr. DeBoard) be returned to it. SBS also specifically requested that the ESD inform it immediately if there was any question or dispute regarding the terms of the agreement to resolve the Petition for Readjustment.

14. In response, the ESD returned SBS' statutory security for its Petition for Readjustment and expressed no disagreement with the terms as set forth by SBS. The ESD also never scheduled or held any subsequent proceedings on SBS' Petition for Readjustment.

15. In sum, the ESD made a final determination in January 2008 accepting SBS' Petition for Readjustment, i.e., agreeing that all individuals other than Mr. DeBoard were independent contractors, refunding all amounts assessed regarding those other individuals, and closing all proceedings on SBS' Petition for Readjustment. By law, ESD would have had to provide SBS with a hearing if the ESD had not agreed to accept that Petition for Readjustment and had not modified its assessment by returning all amounts assessed (including interest and penalties) for every individual with whom SBS contracted other than Mr. DeBoard. NRS 612.670 (3).

16. By law, ESD's acceptance of the Petition for Readjustment and modification of its assessment (retaining the assessed amount for Mr. DeBoard and refunding the assessed amounts for all other individuals) is final and binding. NRS 612.670(5).

17. Nevertheless, the ESD subsequently and wrongfully made further assessments against SBS, expressly and wrongfully based those assessments on the DeBoard Decision and wrongfully ignored and failed to honor its final determination accepting SBS' Petition for Readjustment that established that all individuals who contracted with SBS to

1 provide merchandising services, other than Mr. DeBoard, were independent contractors and  
2 not SBS employees.

3 18. SBS consistently and timely objected to all such assessments, and the ESD  
4 withdrew or failed to act further on some assessments following SBS' objections. However,  
5 the ESD eventually persisted in an assessment in which it, again, wrongfully asserted—  
6 based expressly on the DeBoard Decision—that all individuals with whom SBS contracted  
7 to perform merchandising services were SBS employees.

8 19. In response, SBS formally requested that the ESD Administrator issue a  
9 formal determination that: (a) the ESD was bound by its acceptance of SBS' Petition and  
10 modification of the assessment in which it agreed that all individuals other than Mr.  
11 DeBoard were independent contractors; and (b) in any event, the evidence demonstrated that  
12 those other individuals were not similarly employed to Mr. DeBoard and were independent  
13 contractors. That procedure was agreed to by and between SBS and Senior Counsel for the  
14 ESD.

15 20. The ESD Administrator entered a determination that SBS was obligated to  
16 report all individuals as employees and pay contributions to ESD.

17 21. SBS filed a timely appeal from that determination.

18 22. A hearing on SBS' appeal was held on July 16, 2015 and July 27, 2016. At  
19 that hearing, SBS presented substantial evidence confirming the final resolution of its  
20 Petition for Readjustment and substantial evidence confirming that the individuals with  
21 whom it contracts for merchandising services in Nevada are independent contractors and not  
22 SBS employees similar to Mr. DeBoard. The ESD presented no substantial contrary  
23 evidence on either issue.

24 23. On January 27, 2017, the Decision of the Referee was issued. That  
25 Decision held in material part that: (a) the ESD was not bound by its actions in response to  
26 SBS' Petition for Readjustment; (b) the ESD breached its statutory obligations by failing to  
27 provide SBS with a hearing on its Petition for Readjustment; (c) SBS did not establish that  
28 individuals with whom it contracts are not similarly employed to Mr. DeBoard; (d) as such,

1 SBS must report those individuals as employees and pay contributions to ESD; (e) however,  
2 the ESD is not entitled to any contributions, interest or penalties from SBS with respect to  
3 any of those individuals for any time prior to the quarter ending March 31, 2017.

4 24. SBS filed a timely appeal/request for review with the Office of Appeals on  
5 February 3, 2017.

6 25. The Board of Review, in a decision that became final on May 5, 2017,  
7 affirmed the Decision of the Referee in all respects.

8 26. SBS now timely brings this petition and appeal from that Board of Review  
9 Decision.

#### 10 **Claim for Relief**

11 27. Paragraphs 1 through 26 are realleged and incorporated herein.

12 28. Pursuant to the requirements of NRS 612.670, the ESD is bound by its  
13 decision to accept and end all further proceedings on SBS' validly-filed Petition for Review,  
14 modify its assessment to remove any SBS obligation to pay assessments for any individual  
15 other than Mr. DeBoard who performed merchandising services under contract with SBS,  
16 and return the statutory security for SBS' Petition for Review regarding all of those  
17 individuals. There is no basis in law, equity, or fact for the ESD's attempt to disavow those  
18 final and binding actions several years later.

19 29. Pursuant to the doctrines of res judicata and collateral estoppel, the ESD is  
20 bound by its final determination on SBS' Petition for Readjustment in which it determined  
21 that all individuals other than Mr. DeBoard were not similarly employed to him and were  
22 independent contractors not subject to assessment by the ESD, and its final determination to  
23 modify its assessment to specifically remove any assessment for those individuals.

24 30. Furthermore, the very substantial weight of the record evidence confirmed  
25 that all individuals other than Mr. DeBoard were not similarly employed to him and were  
26 independent contractors under Nevada law. The contrary determinations by the  
27 Administrator, the Referee, and the Board of Review are not supported by the record and, as  
28

1 such, constitute abuses of discretion or arbitrary and capricious actions that should be  
2 overturned.

3 31. For all of the above-stated reasons, the determination by the Administrator,  
4 the Decision of the Referee, and the Decision of Board of Review are erroneous as matters  
5 of law and not based on substantial evidence, thereby entitling SBS to reversal of the  
6 Decision of the Board of Review and entry of an Order that SBS is not obligated to list or  
7 report those individuals as employees and is not obligated to pay contributions to the ESD  
8 regarding those individuals' services.

9 WHEREFORE, Spar Business Services, Inc. respectfully requests entry of judgment  
10 as follows:

- 11 1. Reversing the Decision of the Board of Review;
- 12 2. Granting full res judicata/collateral estoppel effect to the ESD's granting of  
13 SBS' Petition for Readjustment in 2008;
- 14 3. Ordering that SBS is not obligated to list or report any individual, other than  
15 Mr. DeBoard, who performs merchandising services under contract to SBS as  
16 an SBS employee and that SBS is not obligated to pay contributions to the  
17 ESD regarding those individuals' services; and
- 18 4. Awarding and directing such other relief as the Court finds fair and equitable.

19 DATED this 15<sup>th</sup> day of May, 2017

20  
21 Respectfully submitted by:

22 /s/ Gina Bongiovi  
23 Gina Bongiovi, Esq., Nevada Counsel of Record  
24 Nevada Bar No. 10667  
25 2620 Regatta Drive, Suite 102  
26 Las Vegas, NV 89128  
27 Telephone: (702) 485-1200  
28 Fax: (702) 485-1202  
E-mail: [gina@bongiovilaw.com](mailto:gina@bongiovilaw.com)

1  
2 **CERTIFICATE OF SERVICE**

3 Pursuant to NRCP 5(b), I certify that I am an employee of the BONGIOVI LAW  
4 FIRM, LLC, and that, on this 15<sup>th</sup> day of May, 2017, I caused the above and foregoing  
5 document entitled **PETITION FROM BOARD OF REVIEW DECISION** to be served as  
6 follows:

7 ☒ [X] by placing two copies of the same to be deposited for mailing in the United  
8 States mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas,  
9 Nevada. Pursuant to NRS 612.530, the second copy is being left with the Administrator for  
10 mailing to defendant Zicarelli; and/or

11 ☐ [ ] pursuant to EDCR 7.26, to be sent **via facsimile**; and/or

12 ☐ [ ] to be hand-delivered; to the attorneys listed below at the address and/or facsimile  
13 number indicated below:

14  
15 Renee Olson, Administrator  
16 Employment Security Division  
17 State of Nevada  
500 E. Third St.  
Carson City, NV 89713

Laurie Trotter, Esq.  
Senior Legal Counsel  
Employment Security Division  
State of Nevada  
1340 So. Curry Street  
Carson City, NV 89703

18  
19  
20 /s/ Kristina Blair  
An employee of Bongiovi Law Firm, LLC  
21  
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25  
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27  
28



**SUMM**

GINA BONGIOVI (10667)  
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333 South Seventh Street  
Suite 2600  
Minneapolis, MN 55402  
*Requesting Admission Pro Hac Vice*

*Attorneys for Petitioner Spar Business Services, Inc.*

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

SPAR BUSINESS SERVICES, INC.

Petitioner,

v.

EMPLOYMENT SECURITY DIVISION,  
STATE OF NEVADA and RENEE OLSON  
in her capacity as Administrator of the  
EMPLOYMENT SECURITY DIVISION;  
KATIE JOHNSON, in her capacity as  
Chairperson of the EMPLOYMENT  
SECURITY DIVISION BOARD OF  
REVIEW, and MICHAEL DEBOARD as  
employee,

Respondents.

A-17-755501-J

Case No.: \_\_\_\_\_

Dept. No.: Department 32

**SUMMONS - CIVIL**

**TO THE DEFENDANTS:** PLEASE TAKE NOTE THAT A PETITION FOR JUDICIAL  
REVIEW HAS BEEN FILED IN THE ABOVE-REFERENCED CASE.

1. If you intend to defend this lawsuit, within 45 days after this Summons is served  
on you, exclusive of the day of service, you must do the following:

1 (a) File with the Clerk of this Court, whose address is shown below, a formal  
2 written response to the Complaint in accordance with the rules of the Court, with the appropriate  
3 filing fee.

4 (b) Serve a copy of your response upon the attorney whose name and address are  
5 shown below.

6 2. Unless you respond, your default will be entered upon application of the  
7 Appellant and failure to so respond will result in a judgment of default against you for the relief  
8 demanded in the Petition, which could result in the taking of money or property or other relief  
9 requested in the Petition.

10 3. If you intend to seek the advice of an attorney in this matter, you should do so  
11 promptly so that your response may be filed on time.

12 4. The State of Nevada, its political subdivisions, agencies, officers, employees,  
13 board members, commission members, and legislators each have 45 days after service of this  
14 Summons within which to file an Answer or other responsive pleading to the Complaint.

15 Submitted by:

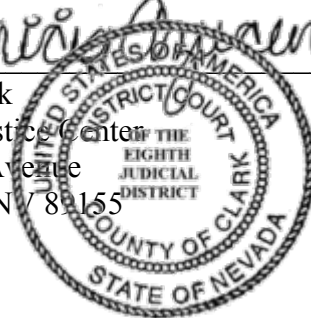
STEVEN D. GRIERSON

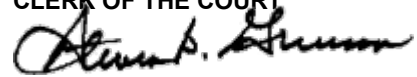
16 BONGIOVI LAW FIRM, LLC

CLERK OF THE COURT

17 By: /s/ Gina Bongiovi  
18 Gina Bongiovi, Esq.  
19 Local Counsel for Plaintiff  
20 2620 Regatta Drive, Suite 102  
21 Las Vegas, NV 89128  
(702) 485-1200  
gina@bongiovilaw.com

By: Patricia Santana Date 5/15/2017  
Deputy Clerk  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, NV 89155





**MASS**

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*Requesting Admission Pro Hac Vice*

*Attorneys for Appellant Spar Business Services, Inc.*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

SPAR BUSINESS SERVICES, INC.

Petitioner,

v.

RENEE OLSON, ADMINISTRATOR,  
STATE OF NEVADA, DEPARTMENT OF  
EMPLOYMENT, TRAINING AND RE-  
HABILITATION, EMPLOYMENT SECU-  
RITY DIVISION, and MICHAEL DE-  
BOARD,

Respondents.

Case No.: A-17-755501-J

Dept. No.: 32

**MOTION TO ASSOCIATE  
COUNSEL**

**MOTION TO ASSOCIATE COUNSEL**

Petitioner SPAR BUSINESS SERVICES, INC. hereby moves the Court for an order permitting THOMAS JAMES VOLLBRECHT, Esq. to practice in Nevada pursuant to Nevada Supreme Court Rule 42 (SCR 42). This motion is supported by the attached “Verified Application for Association of Counsel” (Exhibit A), “Certificate of Good Standing” from THOMAS J. VOLLBRECHT, Esq. (Exhibit B), and the State Bar of Nevada Statement (Exhibit

1 C).

2 Dated this 31<sup>st</sup> day of May, 2017.

3  
4 Respectfully submitted by:

5 /s/ Gina Bongiovi  
6 Gina Bongiovi, Esq., Nevada Counsel of Record  
7 Nevada Bar No. 10667  
8 2620 Regatta Drive, Suite 102  
9 Las Vegas, NV 89128  
10 Telephone: (702) 485-1200  
11 Facsimile: (702) 485-1202

12 **NOTICE OF MOTION**

13 TO: All Interested Parties; and

14 TO: All Counsel of Record

15 PLEASE TAKE NOTICE that Petitioner SPAR BUSINESS SERVICES, INC. will bring  
16 the foregoing MOTION TO ASSOCIATE COUNSEL on for decision on the 18 day of  
17 July in Department 32 of the above-entitled Court. at 9:30 AM

18 Dated this \_\_\_\_\_ day of May, 2017.

19 Submitted by:

20  
21 /s/ Gina Bongiovi  
22 Gina Bongiovi, Esq., Nevada Counsel of Record  
23 Nevada Bar No. 10667  
24 2620 Regatta Drive, Suite 102  
25 Las Vegas, NV 89128  
26 Telephone: (702) 485-1200  
27 Facsimile: (702) 485-1202  
28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of BONGIOVI LAW FIRM,  
3 LLC, and that on this 31<sup>st</sup> day of May 2017, I caused the above and foregoing document entitled:  
4 **MOTION TO ASSOCIATE COUNSEL** to be served as follows:

5 ☒ by placing same to be deposited for mailing in the United States mail, in a sealed  
6 envelope upon which first class postage was prepaid in Las Vegas, Nevada; and or

7 ☐ pursuant to EDCR 7.26, to be sent **via facsimile**; and/or

8 ☐ to be hand-delivered; to the attorneys listed below at the address and/or facsimile  
9 number indicated below:

10 Renee Olson, Administrator  
11 Employment Security Division  
12 State of Nevada  
13 500 E. Third Street  
Carson City, NV 89713

Michael DeBoard  
5026 River Glenn #158  
Las Vegas, NV 89103

14  
15  
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17 \_\_\_\_\_  
18 An employee of the Bongiovi Law Firm, LLC  
19  
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23  
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27  
28

# EXHIBIT A

**VAPP**

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*Requesting Admission Pro Hac Vice*

*Attorneys for Appellant Spar Marketing Services, Inc.*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

SPAR BUSINESS SERVICES, INC.

Petitioner,

v.

RENEE OLSON, ADMINISTRATOR,  
STATE OF NEVADA, DEPARTMENT OF  
EMPLOYMENT, TRAINING AND RE-  
HABILITATION, EMPLOYMENT SECU-  
RITY DIVISION, and MICHAEL DE-  
BOARD,

Respondents.

Case No.: A-17-755501-J

Dept. No.: 32

**VERIFIED APPLICATION FOR  
ASSOCIATION OF COUNSEL  
UNDER NEVADA SUPREME  
COURT RULE 42**

THOMAS JAMES VOLLBRECHT, Petitioner, respectfully represents:

1. Petitioner resides at 4585 Weston Lane North, City of Plymouth, County of Hennepin, State of Minnesota, 55446, telephone (763) 577-0679.

2. Petitioner is an attorney at law and a shareholder of the law firm of FABYANSKE WESTRA HART & THOMSON, P.A. with offices at 333 South Seventh Street, Suite 2600, City of Minneapolis, County of Hennepin, State of Minnesota, 55402, telephone 612-359-7659.

3. Petitioner has been retained as a member of the above-named law firm by SPAR

1 BUSINESS SERVICES, INC., to provide legal representation in connection with the above-  
2 entitled matter now pending before the above referenced court.

3 4. Since October of 1986, petitioner has been and presently is, a member of good  
4 standing of the bar of the highest court of the State of Minnesota where petitioner regularly  
5 practices law.

6 5. Petitioner was admitted to practice before the following United States District  
7 Courts, United States Circuit Courts of Appeal, the Supreme Court of the United States, and/or  
8 courts of other states on the dates indicated for each, and is presently a member in good standing  
9 of the bars of said Courts: UNITED STATES DISTRICT COURT FOR THE DISTRICT OF  
10 MINNESOTA (10/03/86); U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT  
11 (12/1986).

12 6. Petitioner is not currently suspended or disbarred in any court except as  
13 hereinafter provided. N/A

14 7. Petitioner is not currently subject to any disciplinary proceedings by any  
15 organization with authority at law except as hereinafter provided. N/A

16 8. Petitioner has never received public discipline including, but not limited to,  
17 suspension or disbarment, by any organization with authority to discipline attorneys at law except  
18 as hereinafter provided. N/A

19 9. Petitioner has never had any certificate or privilege to appear and practice before  
20 any regulatory administrative body suspended or revoked except as hereinafter provided. N/A

21 10. Petitioner, either by resignation, withdrawal, or otherwise, has never terminated or  
22 attempted to terminate Petitioner's office as an attorney in order to avoid administrative,  
23 disciplinary, disbarment, or suspension proceedings except as hereinafter provided. N/A

24 11. Petitioner has filed the following applications to appear as counsel under Supreme  
25 Court Rule 42 during the past three (3) years in the following matters: N/A

26 12. Nevada Counsel of Record for Petition in this matter is GINA BONGIOVI, who  
27 has offices at 2620 Regatta Drive, Suite 102, City of Las Vegas, County of Clark 89128, phone  
28 (702) 485-1200.



1           13.    The following accurately represents the names and addresses of each party in this  
2 matter, WHETHER OR NOT REPRESENTED BY COUNSEL, and the names and addresses of  
3 each counsel of record who appeared for said parties:

4  
5           Renee Olson, Administrator  
6           Employment Security Division  
7           State of Nevada  
8           500 E. Third Street  
9           Carson City, NV 89713

          Michael DeBoard  
          5026 River Glenn #158  
          Las Vegas, NV 89103

10           14.    Petitioner agrees to comply with the provisions of Nevada Supreme Court Rule  
11 42(3) and (13) and Petitioner consents to the jurisdiction of the courts and disciplinary boards of  
12 the State of Nevada in accordance with provisions as set forth in SCR 42(3) and (13). Petitioner  
13 respectfully requests that Petitioner be admitted to practice in the above-entitled court FOR THE  
14 PURPOSES OF THIS MATTER ONLY.

15           15.    Petitioner has disclosed in writing to the client that the applicant is not admitted to  
16 practice in this jurisdiction and that the client has consented to such representation.

17           I, THOMAS JAMES VOLLBRECHT, do hereby swear/affirm under penalty of perjury  
18 that the assertions of this application and the following statements are true:

19           1)    That I am the Petitioner.  
20           2)    That I have read Supreme Court Rule (SCR) 42 and meet all requirements contained  
21 therein, including, without limitation, the requirements set forth in SCR 42(2), as follows:

22                   (A) I am not a member of the State Bar of Nevada;

23                   (B) I am not a resident of the State of Nevada;

24                   (C) I am not regularly employed as a lawyer in the State of Nevada;

25                   (D) I am not engaged in substantial business, professional, or other activities in the  
26 State of Nevada;

27                   (E) I am a member in good standing and eligible to practice before the bar of any  
28

**jurisdiction of the United States; and**

(F) I have associated a lawyer who is an active member in good standing of the State Bar of Nevada as counsel of record in this action or proceeding.

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

That I further certify that I am subject to the jurisdiction of the Courts and disciplinary boards of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of Nevada; that I understand and shall comply with the standards of professional conduct required by members of the State Bar of Nevada; and that I am subject to the disciplinary jurisdiction to the State Bar of Nevada with respect to any of my actions occurring in the course of such appearance.

DATED this 11th day of May, 2017

**FABYANSKE WESTRA HART & THOMSON, P.A.**

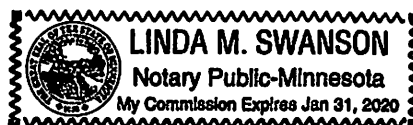
**By:**

THOMAS JAMES VOLLBRECHT, Esq.  
333 South Seventh Street, Suite 2600  
Minneapolis, Minnesota 55402

STATE OF MINNESOTA )  
 ) ss  
COUNTY OF HENNEPIN )

Subscribed and sworn to before me  
this 11th day of may, 2017.

Lidia M. Kruze  
Notary Public



1 I, GINA BONGIOVI, hereby consent as Nevada Counsel of Record to the designation of  
2 Petitioner to associate in this cause pursuant to SCR 42.

3 DATED this 15<sup>th</sup> day of May, 2017

5 BONGIOVI LAW FIRM, LLC

6 By: \_\_\_\_\_

7 GINA BONGIOVI, Esq.

8 Counsel of Record

9 Nevada State Bar No. 10667

10 2620 Regatta Drive, Suite 102

11 Las Vegas, Nevada 89128

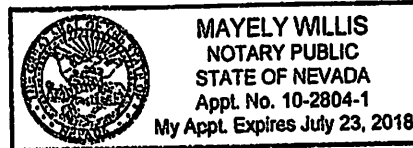
12 STATE OF NEVADA )

13 ) ss

14 COUNTY OF CLARK )

15 Subscribed and sworn to before me  
16 this 16 day of May, 2017.

17 \_\_\_\_\_  
18 Notary Public



# EXHIBIT B

# STATE OF MINNESOTA IN SUPREME COURT

## *Certificate of Good Standing*

This is to certify that the following lawyer is in good standing.

THOMAS JAMES VOLLBRECHT

was duly admitted to practice as a lawyer and counselor at law in all the courts of this state on

October 03, 1986

Given under my hand and seal of this court on

May 08, 2017

*Emily J. Eschweiler*

Emily J. Eschweiler, Director  
Office of Lawyer Registration



# EXHIBIT C

1 STAT

2 DISTRICT COURT  
3 CLARK COUNTY, NEVADA

4 Case No. A-17-755501-J  
5 Dept. No. XXXII

6 Spar Business Services, Inc.

7 vs.

8 Renee Olson

9 \_\_\_\_\_/  
10 STATE BAR OF NEVADA STATEMENT PURSUANT TO SUPREME COURT RULE  
11 42 (3) (b)

12  
13 THE STATE BAR OF NEVADA, in response to the application of  
14 Petitioner, submits the following statement pursuant to SCR42(3):

15 SCR42(6)**Discretion.** The granting or denial of a motion to associate  
16 counsel pursuant to this rule by the court is discretionary. The  
17 court, arbitrator, mediator, or administrative or governmental  
18 hearing officer may revoke the authority of the person permitted to  
19 appear under this rule. Absent special circumstances, repeated  
20 appearances by any person or firm of attorneys pursuant to this rule  
21 shall be cause for denial of the motion to associate such person.

22 (a) **Limitation.** It shall be presumed, absent special  
23 circumstances, and only upon showing of good cause, that  
24 more than 5 appearances by any attorney granted under  
25 this rule in a 3-year period is excessive use of this  
26 rule.

27 (b) **Burden on applicant.** The applicant shall have the  
28 burden to establish special circumstances and good cause  
for an appearance in excess of the limitation set forth  
in subsection 6(a) of this rule. The applicant shall set  
forth the special circumstances and good cause in an  
affidavit attached to the original verified application.

1. DATE OF APPLICATION: May 18, 2017

2. APPLYING ATTORNEY: Thomas James Vollbrecht, Esq.

3. FIRM NAME AND ADDRESS: Fabyanske Westrahart & Thomson, P.A.,  
333 South Seventh Street, Suite 2600, City of Minneapolis, MN  
55402

1 4. NEVADA COUNSEL OF RECORD: Gina J. Bongiovi, Esq., Bongiovi Law  
2 Firm, LLC, 2620 Regatta Dr., Suite 102, Las Vegas, NV 89128

3 5. There is no record of previous applications for appearance by  
4 petitioner within the past three (3) years.

5  
6 DATED this May 24, 2017

7  
8 Suzy Moore  
9 Suzy Moore  
10 Member Services Admin.  
11 Pro Hac Vice Processor  
12 STATE BAR OF NEVADA  
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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Other Nevada State Agency  
Appeal**

**COURT MINUTES**

**July 11, 2017**

---

A-17-755501-J      Spar Business Services Inc, Petitioner(s)  
vs.  
Nevada Employment Security Appeals Division, Respondent(s)

---

**July 11, 2017      11:12 AM      Minute Order Re: Motion to Associate Counsel,  
Thomas Vollbrecht, Esq.**

**HEARD BY:** Bare, Rob

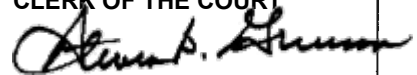
**COURTROOM:** Chambers

**COURT CLERK:** April Watkins

**JOURNAL ENTRIES**

- Having examined the Motion to Associate Counsel for Thomas Vollbrecht Esq., noting no Opposition filed, and good cause appearing pursuant to Supreme Court Rule 42, the Motion to Associate Counsel is GRANTED. Pursuant to EDCR 2.23, the hearing on this matter set for July 18, 2017, is advanced and VACATED. Moving party to prepare and submit proposed order to chambers within 10 days.

CLERK'S NOTE: The above minute order has been distributed to: Gina Bongiovi, Esq., (gina@bongiovilaw.com), Renee Olson, Administrator, Employment Security Division, State of Nevada, 500 E. Third Street, Carson City, NV 89713 and Michael DeBoard, 5026 River Glenn #158, Las Vegas, NV 89103. aw



1 **MDSM**  
2 LAURIE L. TROTTER, ESQ.  
3 Nevada State Bar No. 8696  
4 STATE OF NEVADA, Department of  
5 Employment, Training & Rehabilitation (DETR)  
6 Employment Security Division (ESD)  
7 1340 South Curry Street  
8 Carson City, NV 89703  
9 Telephone No.: (775) 684-6317  
10 Facsimile No.: (775) 684-6344  
11 *Attorney for DETR/ESD*

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 SPAR BUSINESS SERVICES, INC.,

15 Petitioner,

16 vs.

17 RENEE OLSON, ADMINISTRATOR,  
18 STATE OF NEVADA, DEPARTMENT OF  
19 EMPLOYMENT, TRAINING AND  
20 REHABILITATION, EMPLOYMENT  
21 SECURITY DIVISION; and MICHAEL  
22 DEBOARD,

23 Respondents.

CASE NO.: A-17-755501-J

DEPT. NO.: XXXII

24 **MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW**

25 **COMES NOW**, Respondent, Administrator, State of Nevada, Employment  
26 Security Division (ESD), by and through counsel, Laurie L. Trotter, Esq., and respectfully moves  
27 this Honorable Court for an Order Dismissing the Petition for Judicial Review based upon  
28 Petitioner's failure to serve the Petition for Judicial Review within the time allowed by law,  
29 pursuant to NRS 612.530(2); NRS 233B.130(5).

30 ///

31 ///

1           This Motion is made and based upon all pleadings and papers on file herein; the  
2 supporting Points and Authorities and Affidavit of counsel attached hereto; and upon such other  
3 and further evidence as may be adduced at the time of hearing on this Motion, if any.

4           **DATED** this 20<sup>th</sup> day of July, 2017.

5             
6           \_\_\_\_\_  
7           LAURIE L. TROTTER, ESQ.  
8           Attorney for Nevada ESD Respondents  
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1                                   **POINTS AND AUTHORITIES IN SUPPORT OF**  
2                                   **MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW**

3                   This action was commenced by Petitioner with the filing a Petition for Judicial  
4 Review on May 15, 2017. Under the provisions of NRS 612.530(2) the Petition **must** be served  
5 upon the Administrator of ESD. Under the provisions of NRS 233B.130(5), the Petition **must** be  
6 served within 45 days of its filing with the District Court. Accordingly, if service is not timely  
7 completed, then the case **must** be dismissed. Pursuant to NRCP 12(b)(4), dismissal for  
8 insufficiency of service of process may be made by motion.

9                   Petitioner did not serve the ESD Administrator with a copy of the Petition for  
10 Judicial Review until July 14, 2017. Service upon the ESD Administrator must have been  
11 accomplished by Thursday, June 29, 2017, pursuant to NRS 233B.130(5) and NRS 612.530(2),  
12 and thus the Petition was served fifteen (15) days *after* the statutory deadline.

13                  The Nevada Supreme Court has repeatedly held that the procedural requirements  
14 of the Administrative Procedures Act must be strictly followed before a district court may review  
15 an administrative decision. *Washoe Cty. v. Otto*, 128 Nev. Adv. Op. 40, 282 P.3d 719, 725,  
16 (2012). “When a party seeks judicial review of an administrative decision, strict compliance with  
17 the statutory requirements for such review is a precondition to jurisdiction by the court of  
18 judicial review,” and “[n]oncompliance with the requirements is grounds for dismissal.” *Id.*;  
19 citing *Kame v. Employment Security Dep’t*, 105 Nev. 22, 25, 760 P.2d 66, 68 (1989); *see also*,  
20 *Bd. of Review, Nevada Dep’t of Employment, Training & Rehab., Employment Sec. Div. v.*  
21 *Second Judicial Dist. Court of State in & for Cty. of Washoe*, 396 P.3d 795, 797 (Nev.  
22 2017)(holding that “[w]e have consistently held that the requirements of the statute are  
23 jurisdictional and mandatory); *see Kame v. Emp’t Sec. Dep’t*, 105 Nev. 22, 24, 769 P.2d 66, 68  
24 (1989) (holding that the time limit for filing a petition for judicial review is jurisdictional and

1 mandatory); *Scott v. Nev. Emp't Sec. Dep't*, 70 Nev. 555, 559, 278 P.2d 602, 604 (1954)  
2 (affirming dismissal of a petition for judicial review where petitioner had failed to file in the  
3 proper district court).

4 Here, the Clark County District Court's Register of Actions provides that on May  
5 15, 2015, the Summons was electronically issued, the same day that the Petition for Judicial  
6 Review was filed. The undersigned received a voice mail message from Gina Bongiovi, Esq., on  
7 July 13, 2017, fourteen (14) days *after* the statutory deadline had passed, requesting that the  
8 undersigned accept service of the Petition for Judicial Review on behalf of ESD. Counsel's  
9 voice mail message was absent any good cause for failure to timely serve the Petition for Judicial  
10 Review. Since counsel did not request that the undersigned accept service of the Petition for  
11 Judicial Review before the statutory deadline, ESD declined to stipulate to Petitioner's request.

12 On January 11, 2012, a similar Petition for Judicial Review in Case No. A652992  
13 was personally served upon the ESD Administrator on behalf of Spar Marketing Services, Inc.  
14 (Petitioner's former name), in which Gina Bongiovi, Esq. was also counsel of record and  
15 Thomas Vollbrecht, Esq. was also out-of-state associate counsel. Given their previous  
16 compliance with the service requirements in Case No. A652992, Ms. Bongiovi and Mr.  
17 Vollbrecht are clearly very familiar with such requirements. Good cause, therefore, for failing to  
18 timely file the Petition for Judicial Review cannot be established.

19 **WHEREFORE**, Respondent ESD respectfully requests the Court dismiss the  
20 instant Petition for Judicial Review with prejudice based upon Petitioner's failure to effect  
21 service of process within the time allowed by law.

22 **RESPECTFULLY SUBMITTED** this 20<sup>th</sup> day of July, 2017.

23   
24 LAURIE L. TROTTER, ESQ.

*Attorney for Nevada ESD Respondents*

**AFFIDAVIT OF LAURIE L. TROTTER, ESQ.**  
**IN SUPPORT OF MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW**

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

Laurie L. Trotter, Esq., after first being duly sworn, deposes and avers under penalty of perjury the assertions of this Affidavit are true as follows:

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

2. That I am employed as Senior Legal Counsel to the Nevada Employment Security Division of the Department of Employment, Training and Rehabilitation.

3. That I prepared the attached Motion to Dismiss Petition for Judicial Review.

4. That the undersigned received a voice mail message from Gina Bongiovi, Esq. on July 13, 2017, fourteen (14) days after the statutory deadline for service of process had passed, requesting that the undersigned accept service of the Petition for Judicial Review on behalf of ESD. Counsel's voice mail message was absent any good cause for failure to timely serve the Petition for Judicial Review.

5. That on January 11, 2012, a similar Petition for Judicial Review in Case No. A652992 was personally served upon the ESD Administrator on behalf of Spar Marketing Services, Inc. (Petitioner's former name), in which Gina Bongiovi, Esq. was also counsel of record and Thomas Vollbrecht, Esq. was also out-of-state associate counsel.

///

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///

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1                   6.       That the information contained in the attached Motion to Dismiss Petition  
2 for Judicial Review is true and correct, based upon my information and belief.

3                   FURTHER YOUR AFFIANT SAYETH NAUGHT.

4                   DATED this 21 day of July, 2017.

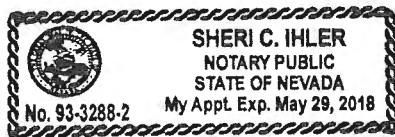
5                   *Laurie Trotter*

6                   LAURIE L. TROTTER, ESQ.  
7                   Attorney for Respondent ESD

8                   Subscribed and Sworn to before me

9                   this 21<sup>st</sup> day of July, 2017

10                   *Sheri C. Ihler*  
11                   NOTARIAL OFFICER



1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of the State of  
3 Nevada, over the age of 18 years; and that on the date hereinbelow set forth, I served a true and  
4 correct copy of the foregoing MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW, *by*  
5 *either* electronic means (N.E.F.C.R. Administrative Order 14-2), as indicated by an email  
6 address set forth below, *and/or* by placing the same within an envelope and depositing said  
7 envelope with the State of Nevada Mail for postage and mailing from Carson City, Nevada,  
8 addressed for delivery as follows:

9  
10 Gina Bongiovi, Esq.  
11 *Bongiovi Law Firm, LLC*  
12 2620 Regatta Drive, Suite 102  
13 Las Vegas, Nevada 89128  
14 [gina@bongiovilaw.com](mailto:gina@bongiovilaw.com)

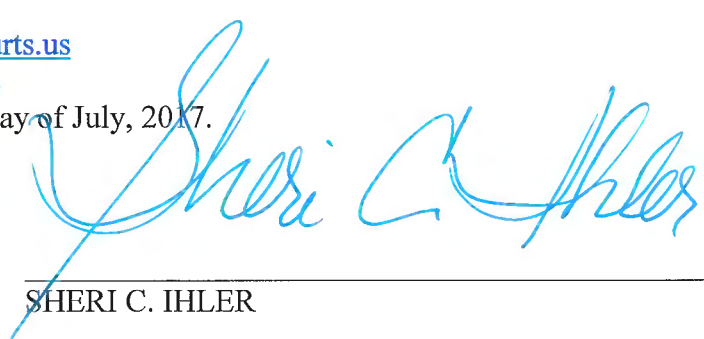
15 Thomas J. Vollbrecht, Esq.  
16 *Fabyanske, Westra, Hart, et al.*  
17 333 South Seventh St., Suite 2600  
18 Minneapolis, MN 55402  
19 [tvollbrecht@fwhtlaw.com](mailto:tvollbrecht@fwhtlaw.com)

20 Michael DeBoard  
21 5026 River Glen #158  
22 Las Vegas, NV 89103

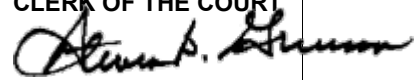
23 *And via e-file Courtesy Copy to:*

24 [Dept32LC@clarkcountycourts.us](mailto:Dept32LC@clarkcountycourts.us)

DATED this 21<sup>st</sup> day of July, 2017.

  
\_\_\_\_\_  
SHERI C. IHLER





**OMD**

GINA BONGIOVI (10667)  
Bongiovi Law Firm, LLC  
2620 Regatta Drive, Suite 102  
Las Vegas, NV 89128  
Telephone: (702) 485-1200  
Fax: (702) 485-1202  
E-mail: [gina@bongiovilaw.com](mailto:gina@bongiovilaw.com)

THOMAS J. VOLLBRECHT (MN Bar No. 17886X)  
Fabyanske, Westra, Hart & Thomson, P.A.  
333 South Seventh Street  
Suite 2600  
Minneapolis, MN 55402  
E-mail: [tvollbrecht@fwhtlaw.com](mailto:tvollbrecht@fwhtlaw.com)  
*Admitted Pro Hac Vice*

*Attorneys for Petitioner Spar Business Services, Inc.*

**EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA**

SPAR BUSINESS SERVICES, INC.

Petitioner,

v.

EMPLOYMENT SECURITY DIVISION,  
STATE OF NEVADA and RENEE OLSON  
in her capacity as Administrator of the  
EMPLOYMENT SECURITY DIVISION;  
KATIE JOHNSON, in her capacity as  
Chairperson of the EMPLOYMENT  
SECURITY DIVISION BOARD OF  
REVIEW, and MICHAEL DEBOARD as  
employee,

Respondents.

Case No.: A-17-755501-J  
Dept. No.: 32

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

**Introduction**

COMES NOW, Petitioner Spar Business Services, Inc., by and through its counsel of record, Gina Bongiovi of Bongiovi Law Firm; and Thomas Vollbrecht of Fabyanske, Westra, Hart & Thomson, P.A., and submits this Opposition to the Motion to Dismiss Petition for Judicial Review of Respondent, Administrator, State of Nevada, Employment Security Division.

1 Respondents' Motion to Dismiss should be denied for two reasons: (1) because service of  
2 the Petition for Judicial Review was not untimely; or (2) because, even if service is ruled untimely,  
3 there is good cause for this Court to deny the Motion in its sound discretion.

#### 4 5 **Factual Background**

6 Petitioner filed its Petition for Judicial Review ("PJR") from a Board of Review decision by  
7 the Employment Security Division, Department of Employment, Training, and Rehabilitation on  
8 May 15, 2017. It is undisputed that the Petition was filed timely. As such, this Court has subject  
9 matter jurisdiction over this matter.

10 On May 31, 2017, Petitioner filed with this Court its Motion to Associate Mr. Vollbrecht, its  
11 out-of-state counsel. The hearing was set for July 18, 2017. To ensure Mr. Vollbrecht was properly  
12 associated prior to the PJR proceeding with this Court, and believing in good faith it had 120 days  
13 under NRCP 4(i) to effectuate service of the already-filed PJR, Petitioner waited until early July to  
14 contact Respondents' counsel regarding acceptance of service. When Respondents' counsel  
15 thereafter declined to accept service, Petitioner promptly effectuated service on all Respondents on  
16 July 14, 2017.

17 Thereafter, on or about July 21, 2017, Respondents filed their Motion to Dismiss, asserting  
18 that service was required to be completed on or before June 29, 2017 (45 days after filing of the  
19 action).

#### 20 21 **Argument**

#### 22 **I. BECAUSE THE PETITION WAS TIMELY FILED, THIS COURT HAS SUBJECT** 23 **MATTER JURISDICTION OVER THIS MATTER.**

24 As an initial matter, it is undisputed that this Court has subject matter jurisdiction over this  
25 timely-filed action. Although it is true that failure by Petitioner to file its PJR within the time period  
26 prescribed by statute or rule would have deprived this Court of subject matter jurisdiction, *see*  
27 *Washoe County v. Otto*, 282 P.3d 719, 726 (Nev. 2012); *Kame v. Employment Sec. Dept.*, 769 P.2d  
28 66, 68 (Nev. 1989), it is undisputed that Petitioner did timely file its PJR. Consequently, the *Kame*

1 and *Washoe County* decisions are not on point and fail to support Respondents' Motion to  
2 Dismiss. Respondents' Motion fails to cite any cases supporting dismissal for belated service of a  
3 timely-filed action.

4       Untimely filing is jurisdictional and mandates dismissal. Untimely service, on the other  
5 hand, is not jurisdictional. If there is untimely service, the question of whether dismissal is an  
6 appropriate sanction is left to the sound discretion of the trial court. *See Whale v. U.S.*, 792 F.2d  
7 951, 953 (9th Cir. 1986), cited in *Domino v. Gaughin*, 747 P.2d 236, 237 (Nev. 1987). In this case,  
8 even if the Court should determine that service was untimely, it should not dismiss the PJR. Indeed,  
9 as noted in *Domino* (and as discussed later in this Opposition), to do so would constitute reversible  
10 error, as there was a good faith basis for the allegedly untimely service, and no prejudice has been  
11 suffered by any Respondent.

12  
13 **II. SERVICE IS TIMELY SO LONG AS EFFECTUATED WITHIN 120 DAYS**  
14 **(NOT 45 DAYS) AFTER FILING. PETITIONER COMPLIED WITH THIS**  
15 **REQUIREMENT.**

16       Respondents premise their Motion to Dismiss on NRS 233B.130(5) which dictates that a PJR  
17 must be served within 45 days of its filing with the District Court. To comply with this provision,  
18 the PJR, which was filed on May 15, 2017, should have been served by June 29, 2017. However,  
19 Respondents ignore NRS 233B.039 which makes Chapter 233B inapplicable to certain  
20 administrative matters. NRS 233B.039(3) specifically provides that: "the special provisions of (a)  
21 Chapter 612 of NRS for the distribution of regulations by and the judicial review of decisions of the  
22 Employment Security Division of the Department of Employment, Training and Rehabilitation...  
23 prevail over the general provisions of this chapter."

24       As such, Petitioner looked to and relied upon the provisions of Chapter 612 to determine  
25 filing and service deadlines. NRS 612.530(1) dictated an accelerated timeline for proceedings,  
26 requiring a petitioner to file its action in district court within 11 days of the Board of Review's  
27 finalized decision. Petitioner complied with that accelerated timeline and timely filed its action.

28       With respect to service, Chapter 612 is silent on the time for service. NRS 612.530(2)

1 provides that the Petition “must be served upon the Administrator” but does not mandate a time by  
2 which said service must be completed. Petitioners therefore looked to the Nevada Rules of Civil  
3 Procedure (“NRCP”) for guidance. Not incidentally, Respondents similarly looked to, and rely  
4 upon, the NRCP in their Motion to Dismiss. NRCP 4(i) provides:

5  
6 If service of the summons and complaint is not made upon a defendant within 120  
7 days after the filing of the complaint, the action shall be dismissed as to that defendant  
8 without prejudice ... unless the party ... shows good cause why service was not made  
9 within that period ... Upon a showing of good cause, the court shall extend the time  
for service and set a reasonable date by which service should be made.

10 Petitioner respectfully suggests that, given that Chapter 612 provided accelerated filing  
11 requirements with which Petitioner complied, and given that Chapter 612 requires service but is  
12 silent on when service must be effectuated, that time of service should be determined pursuant to the  
13 NRCP. Service was therefore sufficient so long as effectuated within 120 days after filing of the  
14 PJR. Consequently, since it is admitted that service was effectuated well within 120 days, dismissal  
15 is inappropriate, and Respondent’s Motion to Dismiss should be denied.

16  
17 **III. EVEN IF SERVICE WAS TECHNICALLY UNTIMELY, DISMISSAL IS**  
18 **INAPPROPRIATE AND WOULD CONSTITUTE REVERSIBLE ERROR.**

19 Even if the Court should find that Respondents’ interpretation of the time for service (45  
20 days) is correct as opposed to Petitioner’s interpretation (120 days), dismissal of Petitioner’s PJR  
21 would still be unwarranted. As noted above, Respondents rely entirely on cases involving untimely  
22 filing of an action. Petitioner does not disagree that untimely filing deprives the Court of subject  
23 matter jurisdiction and mandates dismissal--just as provided in all of the cases cited by  
24 Respondents. But the same is not true for untimely service of an action. In that instance, the Court  
25 retains subject matter jurisdiction, so dismissal is anything but mandatory. Instead, as held in  
26 *Domino v. Gaughin*, 747 P.2d 236, 237 (Nev. 1987), dismissal following untimely service constitutes  
27 an abuse of the trial court’s discretion and reversible error if there is good cause for the late service  
28 and no prejudice is suffered by the other parties.

1 In *Domino*, the Nevada Supreme Court reversed a trial court dismissal of an action where the  
2 Supreme Court found good cause (issues with separate counsel, illness of counsel, etc.) and also  
3 found that the other parties were not prejudiced--but the plaintiff would have been severely  
4 prejudiced, as its claims would time-barred before a new action could be filed.

5 Similar circumstances are found here. Petitioner had (and has) a good faith belief that service  
6 would be timely so long as effectuated within 120 days. Petitioner has demonstrated timeliness in  
7 all other aspects of this matter. Its PJR was timely filed in compliance with the accelerated Chapter  
8 612 requirements. Its Verified Application for Association of Counsel was filed immediately  
9 thereafter (on May 16, 2017) and was approved on May 24, 2017. Petitioner effectuated service on  
10 the Respondents immediately after being informed that counsel for Respondents were not authorized  
11 to accept service. And that service was accomplished prior to the date set by the Court to consider  
12 the pro hac vice application of Petitioner's co-counsel, Mr. Vollbrecht. It is therefore clear that there  
13 has been no attempt by Petitioner to delay the proceedings, and that it has proceeded in complete  
14 good faith following the timely filing of this action.

15 It is similarly clear that Respondents will suffer no undue prejudice from denial of the Motion  
16 to Dismiss. The alleged 15-day delay in service does nothing to interfere with Respondents' ability  
17 to respond to the PJR. In point of fact, Petitioner is the only party who can legitimately complain  
18 about delay in this matter--which originated with Petitioner's filing of a Petition for Readjustment  
19 in 2007. Petitioner did not receive the administrative evidentiary hearing on that Petition to which  
20 it was unambiguously entitled for approximately eight (8) years.

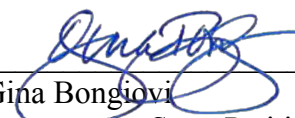
21 Finally, it is clear that, in contrast to Respondents, Petitioner would be severely prejudiced if  
22 the Court chose to grant Respondents' Motion to Dismiss. Although that dismissal would technically  
23 be without prejudice, it would in fact be with prejudice. Although Petitioner met its obligation to file  
24 its PJR within eleven (11) days, that time is now expired, which precludes Petitioner's ability to  
25 accomplish a second timely filing.

### 26 27 **Conclusion**

28 Petitioner timely filed this action, meaning that this Court has full subject matter

1 jurisdiction. Petitioner also believes that it satisfied the applicable 120-day requirement for service  
2 of its PJR. Moreover, even if the Court should determine to the contrary, finding a 45-day  
3 requirement (which Petitioner missed through its good faith contrary interpretation by 15 days),  
4 dismissal is inappropriate and would constitute reversible error. As noted, there is good cause for  
5 the slightly delayed service; Respondents suffered no prejudice; and Petitioner would suffer  
6 irreparable prejudice from dismissal. Petitioner therefore respectfully requests that the Court deny  
7 Respondents' Motion to Dismiss such that this matter can move forward to a decision on the merits.

8 Dated this \_\_ day of July, 2017.

9   
10 \_\_\_\_\_  
11 Gina Bongiovi  
12 Attorney for Spar, Petitioner  
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1 **AFFIDAVIT OF GINA BONGIOVI, ESQ. IN SUPPORT OF OPPOSITION TO MOTION**  
2 **TO DISMISS PETITION FOR JUDICIAL REVIEW**

3 STATE OF NEVADA )

4 : ss.

5 COUNTY OF CLARK )

6 Gina Bongiovi, Esq., after first being duly sworn, deposes under penalty of perjury the  
7 assertions contained in this Affidavit are true as follows:

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

9 2. That I have been retained by Petitioner Spar Business Services, Inc. to serve as local  
10 counsel with Thomas Vollbrecht, a duly licensed attorney in Minnesota.

11 3. That I prepared the Opposition to Motion to Dismiss Petition for Judicial Review.

12 4. That, in calculating time for service of the Petition for Judicial Review on  
13 Respondents, I relied on NRCP 4(i) because NRS 612, which governs matters arising out of the  
14 Employment Security Division, Department of Employment, Training, and Rehabilitation, is silent  
15 on a timeline for service.

16 5. That I therefore believed that Petitioner had 120 days within which to serve the  
17 Respondents.

18 6. That, following the filing of the Petition for Judicial Review, I filed the Motion to  
19 Associate and waited to serve the Respondents in an effort to ensure Mr. Vollbrecht was properly  
20 associated.

21 7. That, shortly after this Court issued a minute order admitting Mr. Vollbrecht to  
22 practice, I contacted Respondents' counsel, Ms. Laurie Trotter, to request that she accept service of  
23 the Petition.

24 8. That Ms. Trotter declined to accept service on behalf of Respondents and I shortly  
25 thereafter effectuated service on all Respondents.

26 9. That the information contained in the attached Opposition to Motion to Dismiss  
27 Petition for Judicial Review is true and correct, based upon my information and belief.

28 FURTHER YOUR AFFIANT SAYETH NAUGHT.

1 DATED this 31<sup>st</sup> day of July, 2017

2  
3 

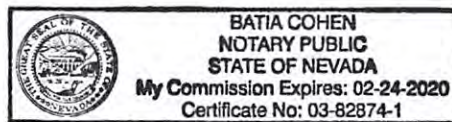
4 Gina Bongiovi, Esq., Nevada Counsel of Record  
5 Attorney for Petitioner Spar Business Services, Inc.  
6 Nevada Bar No. 10667  
7 2620 Regatta Drive, Suite 102  
8 Las Vegas, NV 89128  
9 Telephone: (702) 485-1200  
10 Fax: (702) 485-1202  
11 E-mail: [gina@bongiovilaw.com](mailto:gina@bongiovilaw.com)

12 Subscribed and Sworn to before me this

13 31 day of July, 2017

14 

15 Notary Public



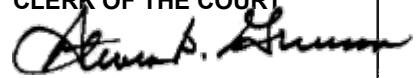


1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the BONGIOVI LAW FIRM, LLC,  
3 and that, on this \_\_\_\_ day of July, 2017, I caused the above and foregoing document entitled  
4 **OPPOSITION TO MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW** to be  
5 served by either electronic means as indicated by an email address set forth below, and/or by placing  
6 the same in an envelope upon which first class postage was prepaid to be deposited for mailing in  
7 the United States mail, from Las Vegas, Nevada.

8  
9 Laurie Trotter, Esq.  
10 Senior Legal Counsel  
11 Employment Security Division  
12 State of Nevada  
13 1340 So. Curry Street  
14 Carson City, NV 89703  
15 l-trotter@nvdetr.org  
16  
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27  
28

/s/ Kristina Blair  
An employee of Bongiovi Law Firm, LLC



1 **ROPP**

2 LAURIE L. TROTTER, ESQ.

3 Nevada State Bar No. 8696

4 STATE OF NEVADA, Department of

5 Employment, Training & Rehabilitation (DETR)

6 Employment Security Division (ESD)

7 1340 South Curry Street

8 Carson City, NV 89703

9 Telephone No.: (775) 684-6317

10 Facsimile No.: (775) 684-6344

11 *Attorney for* **DETR/ESD**

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 SPAR BUSINESS SERVICES, INC.,

15 Petitioner,

16 vs.

17 RENEE OLSON, ADMINISTRATOR,  
18 STATE OF NEVADA, DEPARTMENT OF  
19 EMPLOYMENT, TRAINING AND  
20 REHABILITATION, EMPLOYMENT  
21 SECURITY DIVISION; and MICHAEL  
22 DEBOARD,

23 Respondents.

CASE NO.: A-17-755501-J

DEPT. NO.: XXXII

24 **ESD'S REPLY TO OPPOSITION TO**  
**MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW**

25 **COMES NOW**, the State of Nevada, Department of Employment, Training and  
26 Rehabilitation, Employment Security Division (ESD) and its Administrator, by and through  
27 counsel, Laurie L. Trotter, Esq., and hereby replies to the Opposition to the Motion to Dismiss  
28 Petition for Judicial Review on file herein as follows.

29 ESD moved to dismiss the Petition for Judicial Review as this Court lacks  
30 jurisdiction of this case; Petitioner failed to serve the ESD Administrator with the Petition before  
31 the statutory deadline expired. Petitioner concedes that it was required to serve ESD's

1 Administrator with the Petition for Judicial Review, pursuant to NRS 612.530(2), and Petitioner  
2 also concedes it did not serve the ESD Administrator within 45 days of filing the Petition for  
3 Judicial Review.

4           Petitioner makes three flawed arguments in its opposition: (1) failure to timely  
5 serve the Petition does not deprive this Court of subject matter jurisdiction; (2) NRCP 4(i)  
6 prevails over NRS 233B.039(5) giving Petitioner 120 days after filing to serve the Petition for  
7 Judicial Review upon ESD's Administrator; and (3) even if Petitioner only had 45 days after  
8 filing in which to serve the Administrator, pursuant to NRS 233B.130(5), dismissal is  
9 unwarranted pursuant to *Domino v. Gaughin*, 103 Nev. 583, 747 P.2d 236 (1987). In addition to  
10 failing to show good cause for Petitioner's untimely service of the Petition for Judicial Review,  
11 all three of Petitioner's arguments fail, as more particularly set forth below.

- 12           1. This Court lacks jurisdiction to hear this case because the statutory  
13           requirements for this Court's jurisdiction over this administrative  
              proceeding were not satisfied.

14           Subject matter jurisdiction is absent from this special statutory proceeding.  
15 Petitioner failed to meet the mandatory statutory requirements necessary to confer jurisdiction  
16 upon this Court. Petitioner is incorrect in its contention that upon timely filing the Petition for  
17 Judicial Review, this Court has acquired subject matter jurisdiction over this administrative case.  
18 Petitioner's jurisdictional responsibilities did not end after the Petition for Judicial Review was  
19 merely filed.

20           In order to obtain judicial review of a decision issued by ESD's Board of Review,  
21 as in any other special statutory proceeding under Chapter 612 of NRS, a petitioner must take  
22 several steps before jurisdiction is conferred upon the district court. *See*, "**NRS 612.530 –**  
23 **Judicial review of decision of Board of Review: Commencement of action in district court;**  
24 **parties; service of petition;**" *see also*, NRS Chapter 233B. For example, petitioner must timely

1 file the petition for judicial review, the petition must be filed in the appropriate district court, the  
2 petition must name all parties to the proceedings below, and the petition must be timely *served*  
3 upon the Administrator, *inter alia*. NRS 612.530 §§ (1)&(2).<sup>1</sup>

4 Because this is a special statutory proceeding and not a general civil action, *timely*  
5 *service* of the *petition for judicial review* is a mandatory precondition to this Court's jurisdiction  
6 for judicial review. NRS 612.530(2); NRS 233B.130(5); *See, Washoe Cty. v. Otto*, 128 Nev.  
7 Adv. Op. 40, 282 P.3d 719, 725, (2012)(noncompliance with statutory requirements necessitates  
8 dismissal; “[c]ourts have no inherent appellate jurisdiction over official acts of administrative  
9 agencies except where the legislature has made some statutory provision for judicial review.’  
10 Thus, [w]hen the legislature creates a specific procedure for review of administrative agency  
11 decisions, such procedure is controlling.”)(internal citations omitted); *see also, Bd. of Review,*  
12 *Nevada Dep’t of Employment, Training & Rehab., Employment Sec. Div. v. Second Judicial Dist.*  
13 *Court of State in & for Cty. of Washoe*, 396 P.3d 795, 797 (Nev. 2017)(reversing the denial of  
14 ESD’s motion to dismiss because petitioner failed to properly name a party as required by NRS  
15 612.530(1), holding that “[w]e have consistently held that the requirements of the statute [NRS  
16 612.530] are jurisdictional and mandatory”); *see also, Scott v. Nev. Emp’t Sec. Dep’t*, 70 Nev.  
17 555, 559, 278 P.2d 602, 604 (1954)(affirming dismissal of a petition for judicial review where  
18 petitioner had failed to file petition in the proper district court); *Caruso v. Nevada Emplom’t Sec.*  
19 *Dept.*, 103 Nev. 75, 76, 734 P.2d 224, 225 (1987)(affirming the dismissal of petition for lack of  
20 subject matter jurisdiction for failing to file in the appropriate district court; holding that “[t]he  
21 legislature has, by explicit language, directed claimants to file their petitions for judicial review  
22 in the county wherein the appealed claim was filed. While this legislative mandate may

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23 <sup>1</sup> Provisions of Nevada’s Administrative Procedure Act (Ch. 233B of NRS) apply absent special  
24 provisions in Chapter 612 of NRS to the contrary. NRS 233B.039(3)(a). NRS 612.530(2) is  
silent as to when the Petition must be served upon ESD’s Administrator. Accordingly, Chapter  
233B of NRS requires it to be served within 45 days of filing.

1 occasionally result in hardship, it is not the function of this court to substitute is judgment for  
2 that of the legislature.”).

3 A district court is deprived of subject matter jurisdiction when a petition for  
4 judicial review is not properly *served* within 45-days. *See*, NRS 612.530(3); NRS 233B.130(5).  
5 An examination of NRS 612.530(2) provides that “a petition ... must be served upon the  
6 Administrator.” NRS 233B.130(5) provides that a “petition for judicial review ... must be served  
7 upon the agency ... within 45 days after the filing of the petition.” Petitioner’s failure to timely  
8 serve ESD’s Administrator with the Petition within the 45-day statutory deadline divested this  
9 Court of subject matter jurisdiction to hear this administrative appeal. This Court has no other  
10 option than to dismiss the Petition for Judicial Review. *See, Scott, supra*, (“if the court did not  
11 have jurisdiction it could not have made an effective order of any kind except the order of  
12 dismissal”). This Court must grant the motion to dismiss because this Court lacks subject matter  
13 jurisdiction to hear this case.

14 2. NRCP 4(i) cannot work to extend jurisdiction of this administrative  
15 case. NRS 233B.039 controls concerning the 45-day deadline to serve  
the Petition for Judicial Review.

16 Since the instant matter is a special statutory proceeding, NRS 233B.039(5)  
17 prevails over NRCP 4(i) concerning the 45-day statutory deadline for service of the Petition for  
18 Judicial Review upon ESD’s Administrator. *See also*, NRCP 81(a). Petitioner’s reliance upon  
19 NRCP 4(i) for the service deadline is misplaced and not supported by Nevada law. NRCP 81(a)  
20 explains that the Nevada Rules of Civil Procedure “do not govern procedure and practice in any  
21 special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and  
22 practice provided by applicable statute.” As such, because NRS 233B.130(5) contains a specific  
23 statutory provision regarding the 45-day deadline for service of a petition for judicial review,  
24 NRS 233B.130 clearly prevails over NRCP 4(i). *See* fn 1, *supra*; *see also, Crane v. Continental*

1 *Tel. Co. of Ca.*, 105 Nev. 399, 401, 775 P.2d 705, 707 (1989)(holding that “when the legislature  
2 creates a specific procedure for review of administrative agency decisions, such procedure is  
3 controlling.”)

4           The provisions of NRS Chapter 233B apply to the review of unemployment  
5 insurance cases except where specific provisions of NRS Chapter 612 regarding judicial review  
6 conflict with NRS Chapter 233B. NRS 233B.039(3)(a) provides, in pertinent part: “[t]he  
7 special provisions of Chapter 612 of NRS for the distribution of regulations by and the judicial  
8 review of decisions of the Employment Security Division of the Department of Employment,  
9 Training and Rehabilitation . . . prevail over the general provisions of this chapter.” Since the  
10 statutory provisions contained in NRS Chapter 612.530(2) and NRS Chapter 233B.130(5)  
11 control, and are in conflict with NRCP 4(i), this Court must grant the instant motion to dismiss.

12           Moreover, NRCP 4(i) has no application to this case because NRCP 4(i) only  
13 applies to the service of a *summons* and *complaint* in a civil action. Petitioner untimely served  
14 its *Petition for Judicial Review* in this administrative matter. *See, Crane, supra* (holding that the  
15 district court had no jurisdiction over a complaint, when a complainant should have filed a  
16 petition for judicial review). It would be reversible error for this Court to find that NRCP 4(i)  
17 may work to extend jurisdiction in this special statutory proceeding. This Court must therefore  
18 dismiss the Petition for Judicial Review.

19           3. Petitioner inaccurately relies upon *Domino v. Gaughin* in a misguided  
20 attempt to extend this Court’s jurisdiction in this administrative matter.

21           *Domino v. Gaughin, supra*, provides this Court with no authority to extend  
22 jurisdiction in this matter after defective service of the Petition for Judicial Review. As such, it  
23 would be reversible error for this Court to deny ESD’s Motion to Dismiss and consider the  
24 merits of this administrative proceeding. The facts and law in *Domino* are clearly distinguished

1 from this case. *Domino* involved a personal injury action. *Domino v. Gaughin*, 103 Nev. at 583,  
2 747 P.2d. at 237. The appellant in *Domino* failed to effect service of a summons and a *complaint*  
3 within 120 days. *Id.* Because *Domino* involved a personal injury action and not an  
4 administrative proceeding, the Supreme Court's analysis regarding the extension of time for  
5 service of a *complaint* under NRCP 4(i) has no application to this case. A civil complaint is  
6 radically different from a petition for judicial review of an administrative decision; the two  
7 pleadings are not interchangeable. As the Supreme Court held in *Crane, supra*, "Instead of filing  
8 a *petition* for judicial review . . . [the appellant] filed a new *complaint*. Therefore, the district  
9 court lacked jurisdiction and properly dismissed . . . the complaint." The *Crane* Court went on  
10 to explain that "[t]he time for taking an administrative appeal, as prescribed by statute, is  
11 jurisdictional and delay beyond the statutory time is fatal." (internal citations omitted)(emphasis  
12 added). Here, Petitioner's misguided attempt to apply NRCP 4(i) and *Domino* to this case  
13 obviously fails, as *Domino* and NRCP 4(i) only apply to a civil action, rather than an  
14 administrative action; a plaintiff has different legal responsibilities than a petitioner. This Court  
15 would act contrary to Nevada law if it were to apply NRCP 4(i), as in *Domino*, to extend  
16 jurisdiction in this case. This Court must decline to consider *Domino*, as it has no relevance  
17 whatsoever to the facts and law in this case.

18 4. Petitioner failed to meet its burden to show good cause for failing to  
19 timely serve the Petition for Judicial Review.

20 Since Petitioner failed to serve the Petition for Judicial Review before expiration  
21 of the 45-day deadline, Petitioner has the burden to show it has good cause for serving the  
22 Petition 15 days after the statutory deadline. *See*, NRS 233B.130(5). Petitioner cannot meet its

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1 burden to show good cause for its failure. The only reason proffered by Petitioner for serving the  
2 Petition late is that Petitioner's counsel failed to properly comply with NRS 233B.130(5)  
3 because counsel mistakenly relied upon *Domino, supra*. See, Opposition, p. 5.

4 While *Domino* clearly does not apply in this case, as NRCP 4(i) cannot be used to  
5 extend the service deadline to cure this jurisdictional defect, it is worth noting that *Domino* cites  
6 to only one case: *Whale v. United States*, 792 F.2d 951 (9<sup>th</sup> Cir. 1986). The *Whale* Court held  
7 that the “*defect in service* in the case at bar was *due solely* to the failure of Whale’s counsel to  
8 *pay attention* to the requirements of Rule 4(d)(4).” *Id.* (emphasis added). “The district court did  
9 not abuse its discretion when it concluded that Whale had failed to demonstrate justifiable  
10 excuse” for defective service. Just as in *Whale*, Petitioner’s counsel cannot demonstrate good  
11 cause for untimely service based solely on the failure to pay attention to the statutory deadlines  
12 for service. Opposition, p. 5. Petitioner’s alleged “justification” for defective service is  
13 especially unreasonable since Petitioner’s counsel timely effectuated service of a Petition for  
14 Judicial Review upon ESD’s Administrator in Case No. A652992 on January 11, 2012. See,  
15 *Spar v. Zicarelli*, A-11-652992-J, Dept. 18.

16 Petitioner’s counsel inappropriately attempts to examine the definition of good  
17 cause based upon the analysis in *Domino, supra*. This Court must refrain from considering the  
18 “good cause analysis” in *Domino*, as it only relates to the failure to timely serve a complaint in a  
19 personal injury action. The circumstances of serving a complaint in a civil action are dissimilar  
20 to the service of a Petition for Judicial Review in an NRS Chapter 612 administrative case: In an  
21 administrative case, the parties are known, the contact information for the parties have been  
22 known for some time as the parties most likely participated in the administrative proceedings  
23 before the Administrative Tribunal and the Board of Review. Hence, it is logical that the



1 legislature would set a 45-day statutory deadline for service of a petition in an administrative  
2 matter. *See*, NRS 712.530(2) and NRS 233B.130(5).

3 This Court must also reject the *Domino* analysis concerning whether the delay in  
4 service occasioned prejudice to Respondents. Whether Respondents suffered prejudice was not  
5 dispositive in *Whale*. Indeed, in light of the forgoing, the appropriate issue is whether Petitioner  
6 demonstrated a justifiable excuse for failure to timely serve the Petition, not whether  
7 Respondents suffered prejudice from the 15-day delay. *See, Whale, supra*.

8 The analysis in *Arnold v. Kip* is persuasive and supports the contention that the  
9 moving party is not required to show prejudice for the delay in service, given that Petitioner  
10 carries the burden of showing good cause for the delay. *Arnold v. Kip*, 123 Nev. 410, 168 P.3d  
11 1050 (2007). The *Arnold* Court held that the district court did not abuse its discretion by failing  
12 to consider whether Dr. Kip had been prejudiced by appellant's delay in filing the NRCP 16.1  
13 case conference report. The *Arnold* Court held that "a party moving for dismissal under NRCP  
14 16.1(e)(2) is not required to demonstrate prejudice, and the district court is not required to  
15 consider whether the defendant has suffered prejudice because of the delay in filing the case  
16 conference report." *Id.* 123 Nev. at 415, 168 P.3d at 1053.

17 NRS 233B.130(5) is similarly absent any language which requires that the party  
18 seeking dismissal show prejudice. NRS 233B.130(5) states, "[a] petition for judicial review . . .  
19 must be served upon the agency . . . within 45 days after filing of the petition, unless, upon  
20 *showing of good cause*, the district court extends the time for such service." *Arnold*, too,  
21 explains that "[n]othing in the language of NRCP 16.1 (e)(2). . . requires the defendant to  
22 demonstrate prejudice or the district court to determine whether the defendant has suffered  
23 prejudice as a condition to granting a dismissal . . . To hold otherwise would largely eviscerate

1 the rule because it would allow plaintiffs to exceed the deadline for filing a case conference  
2 report so long as the defendant could not demonstrate prejudice.” *Id.*

3 That being said, while Respondents carry no burden of proof to show prejudice  
4 for defective service, Petitioner incorrectly argues that Respondents were not prejudiced from the  
5 delay in service of the Petition in this case. Respondents, as any other party, have an interest in  
6 finality of actions. Here, the Administrative Tribunal and the Board of Review held that  
7 Petitioner is required to pay unemployment insurance taxes for Petitioner’s merchandisers  
8 (deemed employees) that work in Nevada. (*See*, Exhibit 1, Administrative Determination) If  
9 Respondent ESD were deprived of finality in this action, it would have an adverse effect on the  
10 unemployment trust fund as Petitioner is not paying its share of unemployment taxes while this  
11 appeal is pending. The effect of paying benefits to Petitioner’s merchandisers does not provide  
12 an immediate effect on Petitioner. It will only result in Petitioner, at some future date, having an  
13 adjustment to its experience rating. Subsidies paid to Petitioner’s workers will be borne by the  
14 unemployment trust fund and will deplete its reserves, possibly resulting in the State of Nevada  
15 having to borrow money from the federal government at interest thereby affecting the tax rate for  
16 all Nevada employers.

17 Petitioner inappropriately suggests that it is “the only party that can legitimately  
18 complain about delay in this matter – which originated with Petitioner’s filing of a Petition for  
19 Readjustment in 2007.” Opposition, p. 5. Any alleged delay in this matter is attributable to  
20 Petitioner. Petitioner failed to mention that on January 23, 2007, Petitioner withdrew its  
21 administrative appeal of the determination issued on October 20, 2006, finding that Michael  
22 DeBoard, and other similarly situated individuals working for Petitioner were employees and  
23 therefore Petitioner was subject to pay unemployment tax for its merchandisers. (*See*, Exhibit 1)

24

1 The October 20, 2006, determination was upheld by the Appeal Tribunal (referee) and affirmed  
2 by the Board of Review. Petitioner now appeals the Board's decision to this Court.

3 The remaining analysis in *Domino* is not relevant to the facts of this case; but  
4 even if this Court were to hold that *Domino* applies (it does not), the Petitioner nonetheless fails  
5 to show good cause for its delay in serving the Petition. The following facts in *Domino* are  
6 clearly distinguished from this case: plaintiff's out-of-state counsel was unable to arrange for  
7 substitution of counsel, counsel was an inexperienced attorney with only two years of  
8 experience, plaintiff's counsel suffered difficulty with the summons and difficulty in  
9 communication with co-counsel, counsel was absent from the office due to illness, service of the  
10 complaint was repeatedly attempted within the NRCP 4(i) timeline, counsel continued to attempt  
11 service until service was effectuated after the deadline. None of the foregoing factors was  
12 present in the instant case.

13 Most importantly, no attempt was made to serve ESD's Administrator within the  
14 statutory deadline. No request for an extension of time to serve ESD's Administrator was  
15 presented to Respondent ESD before the expiration of the statutory deadline. Petitioner was not  
16 proceeding *pro per*, was not misled by a court official, and cannot attribute the delay in service  
17 to anyone but Petitioner's counsel. *See, Whale, supra*. Even assuming, *arguendo*, this Court  
18 could consider the *Domino* analysis (it cannot) Petitioner nonetheless fails to show good cause  
19 for failing to serve the Petition within the statutory deadline. This Court must therefore grant the  
20 Motion To Dismiss this case.

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1                   **WHEREFORE**, ESD Respondents respectfully request this Court dismiss the  
2 instant Petition for Judicial Review with prejudice as this Court lacks subject matter jurisdiction.  
3 The Court's only option is to enter an Order Dismissing the Petition for Judicial Review. *See*,  
4 *Scott, supra*.

5                   **RESPECTFULLY SUBMITTED** this 4<sup>th</sup> day of August, 2017.

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7 LAURIE L. TROTTER, ESQ.

8 *Attorney for Respondent DETR/ESD*  
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of the State of  
3 Nevada, over the age of 18 years; and that on the date hereinbelow set forth, I served a true and  
4 correct copy of the foregoing ESD'S REPLY TO OPPOSITION TO MOTION TO DISMISS  
5 PETITION FOR JUDICIAL REVIEW, *by either* electronic means (N.E.F.C.R. Administrative  
6 Order 14-2), as indicated by an email address set forth below, *and/or* by placing the same within  
7 an envelope and depositing said envelope with the State of Nevada Mail for postage and mailing  
8 from Carson City, Nevada, addressed for delivery as follows:

9 Gina Bongiovi, Esq.  
10 *Bongiovi Law Firm, LLC*  
2620 Regatta Drive, Suite 102  
Las Vegas, NV 89128

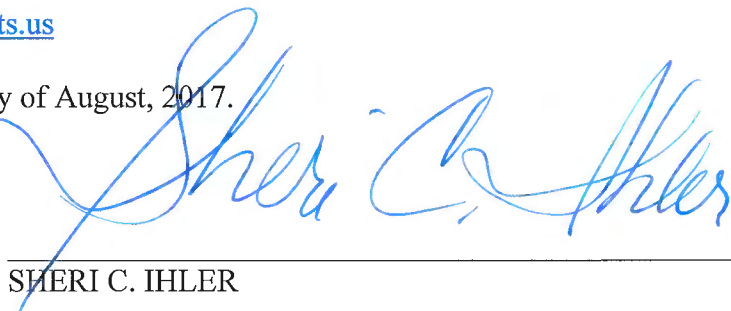
11 Thomas J. Vollbrecht, Esq.  
12 *Fabyanske, Westra, Hart, et al.*  
333 South Seventh St., Suite 2600  
13 Minneapolis, MN 55402

14 Michael DeBoard  
5026 River Glen #158  
15 Las Vegas, NV 89103

16 *And via e-file Courtesy Copy to:*

17 [Dept32LC@clarkcountycourts.us](mailto:Dept32LC@clarkcountycourts.us)

18 DATED this 4th day of August, 2017.

19   
20 \_\_\_\_\_  
21 SHERI C. IHLER  
22  
23  
24

# EXHIBIT 1

**BEFORE THE ADMINISTRATOR  
OF THE EMPLOYMENT SECURITY DIVISION OF THE NEVADA  
DEPARTMENT OF EMPLOYMENT, TRAINING AND REHABILITATION**

--o o O o o--

SPAR MARKETING SERVICES, INC.

Petitioner,

**ADMINISTRATIVE  
DETERMINATION**

vs.

STATE OF NEVADA, DEPARTMENT  
OF EMPLOYMENT, TRAINING AND  
REHABILITATION, EMPLOYMENT  
SECURITY DIVISION,

\_\_\_\_\_  
Respondent. \_\_\_\_\_/

Appellant Spar Marketing Services, Inc. (hereinafter "Spar"), through its attorney, Thomas Vollbrecht, Esq., filed a request under NRS 612.245 for the Administrator to make a formal determination as to whether its Nevada merchandisers are similarly situated to Michael DeBoard, a merchandiser who was previously determined to be an employee of Spar.

NRS 612.245(1) states: "The Administrator may, upon his or her own motion or upon application of an employing unit, and after notice and opportunity for the employing unit to submit facts, make determinations with respect to whether an employing unit constitutes an employer and whether services performed for or in connection with the business of an employing unit constitute employment for that employing unit." (Emphasis Supplied)

The provisions of NRS 612.246(1) give the Administrator discretion to decline the request for a determination. The Administrator in this case, however, agrees to make the determination contemplated by NRS 612.246(1) regarding the application of Spar.

In its submissions and affidavits attached thereto, Spar acknowledges that it now has and has had workers performing services in the State of Nevada called "merchandisers" since at least 2004. Spar also admits that it has continually and is currently using merchandisers to conduct business in Nevada to support its business services in the State of Nevada.

Spar is a Nevada corporation; but its offices, according to its submissions, are located in West Palm Beach, Florida. Spar is in the business of providing "merchandising services" to other companies and businesses. Spar's business includes supplying services to third parties for the purpose of increasing awareness of its clients' products. The services performed by Spar generally include sending workers to retail stores for the purpose of building displays, resetting sections of products and other services to enhance the sale of its clients' products. These workers are called "merchandisers" by Spar.

In 2006, one of Spar's merchandisers filed a claim for unemployment insurance benefits in the State of Nevada naming Spar as his employer. This claimant, Michael A. DeBoard, worked as a merchandiser at various retail stores in Nevada for Spar. Mr. DeBoard was responsible for moving and setting up displays, reorganizing merchandise and other assigned tasks using programs and instructions provided by Spar.

Upon examination of the ESD database in 2006, it was discovered that Spar had not reported wages nor paid contributions for Mr. DeBoard. This created an "obstructed or blocked claim" because there were no reported wage credits to support the claim. As a



result, the claim was referred to the Contributions Investigation Unit in order to determine if Mr. DeBoard and the other merchandisers were employees of Spar under NRS 612.085.

The case was assigned to Compliance Audit Investigator Carol Larry for investigation. Investigator Larry conducted a complete investigation, including discussions with the employer and the claimant. Spar told Investigator Larry that its merchandisers were not its employees because they were actually "independent contractors" and thus Spar was not subject to the requirements of NRS Chapter 612 regarding its merchandisers. After completing her investigation, a formal Determination under NRS 612.485 was issued by Investigator Carol Larry on October 20, 2006, finding that Mr. DeBoard and other similarly situated employed individuals are reportable by Spar to the State of Nevada for unemployment insurance purposes under NRS Chapter 612. In the Determination, Spar was specifically notified that it had the right to appeal the Determination under NRS 612.485. In the absence of an appeal, the Determination would become final and conclusive as a matter of law. NRS 612.485.

At the time of the investigation and Determination concerning the employment status of its merchandisers, Spar was represented by Scott Feldman, Esq., an attorney working for Troutman Sanders, LLP, 405 Lexington Avenue, New York, New York 10174. Spar filed a timely appeal from the Determination and the matter was sent to the Administrative Tribunal so a hearing could be set before an Administrative Judge (referee). The hearing was set for January 24, 2007, to commence at 10:00 A.M. Prior to the hearing, the referee received a letter from Debbie Chaffee, Human Resources Benefits Administrator for Spar. In this letter, Ms. Chaffee informed the referee that Spar was withdrawing its appeal. The letter was dated January 23, 2007, and was faxed to the referee

on January 23, 2007, by Spar. The letter contained no stated reason for the withdrawal of the appeal. The letter did not state that Spar felt that Mr. DeBoard was "unique" nor did it state that Spar did not intend to report and pay contributions for its other merchandisers who worked in Nevada.

On January 23, 2007, the Administrative Tribunal entered an order signed by Referee Kelly Nguyen, permitting the withdrawal of the appeal under NRS 612.495. The withdrawal of the appeal resulted in the Determination issued by Investigator Larry becoming final and conclusive per NRS 612.485.

In support of its application under NRS 612.245, Spar has submitted various affidavits contending that Spar's merchandisers since 2004 are not now nor ever were similarly situated to the claimant, Mr. DeBoard, and therefore are not subject to the 2006 Determination.

Under NRS 612.485, any determination which has not been appealed is final. Thus, all of Spar's workers similarly situated to Mr. DeBoard are employees under NRS Chapter 612. Spar requests that a determination be made under NRS 612.245 as to whether its other merchandisers, past and present, are similarly situated to Mr. DeBoard. The burden of proving that its merchandisers are not similarly situated to Mr. DeBoard lies with the employer. Nevada law presumes that all workers are covered by the provisions of NRS Chapter 612. Thus, Spar is required to prove by a preponderance of the evidence that its other merchandisers are not similarly situated to Mr. DeBoard.

After reviewing the affidavits and arguments submitted by Spar the Administrator finds that Spar has failed to present substantial evidence to prove by a preponderance of the evidence that its merchandisers were not and are not similarly situated

to Mr. DeBoard. The Administrator finds that the workers described in the submissions and affidavits are similarly situated to Mr. DeBoard under NRS 612.085 and that the 2006 Determination applies to them as well as Mr. DeBoard.

Spar also argues that ESD "agreed" after the 2006 Determination that its "merchandisers" were not its employees. The Administrator has reviewed Spar's arguments and affidavits and hereby finds that ESD at no time "agreed" that Spar's "merchandisers" are not subject to the 2006 Determination.

Spar claims that by refunding a portion of the assessments issued by ESD and suspending Spar's account pursuant to requests for readjustment, ESD agreed that Spar's merchandisers were not its employees. The decision to suspend the account and refund some money was not a determination or redetermination as defined in NRS Chapter 612. Further, since a determination had already been made on the status of the merchandisers, the only appropriate procedure for Spar to follow was to properly appeal the 2006 Determination or request a redetermination by the Administrator under NRS 612.480. Spar made no such request and withdrew its appeal. Thus, the 2006 Determination was never statutorily challenged by Spar through the appropriate appeal procedures and, as a consequence, remains valid to this day.

The decision of ESD staff to modify an assessment under a petition for readjustment pursuant to NRS 612.670 only applies to the assessment involved. The decision to modify does not amount to a redetermination or an appellate decision to invalidate a final determination.

Spar's assertion that its letter of January 15, 2008 amounts to an official waiver by ESD of Spar's legal obligation to report its employees and pay unemployment contributions is found by the Administrator to be meritless.

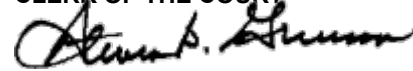
IT IS THEREFORE DETERMINED under NRS 612.245 that Spar remains legally obligated to report its merchandisers as employees and to pay contributions to the Nevada Employment Security Division for all of its merchandisers pursuant to the unappealed 2006 Determination.

In accordance with NRS 612.245(3), Spar may appeal this Administrative Determination in the manner prescribed by NRS 612.495.

DATED this 9<sup>th</sup> day of December, 2013.

STATE OF NEVADA, Department of  
Employment, Training & Rehabilitation  
EMPLOYMENT SECURITY DIVISION

  
\_\_\_\_\_  
RENEE L. OLSON, ADMINISTRATOR



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*Attorneys for Appellant Spar Business Services, Inc.*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

SPAR BUSINESS SERVICES, INC.

Petitioner,

v.

RENEE OLSON, ADMINISTRATOR,  
STATE OF NEVADA, DEPARTMENT OF  
EMPLOYMENT, TRAINING AND REHA-  
BILITATION, EMPLOYMENT SECURITY  
DIVISION, and MICHAEL DEBOARD,

Respondents.

Case No.: A-17-755501-J

Dept. No.: 32

**ORDER ADMITTING TO  
PRACTICE**

**THOMAS J. VOLLBRECHT, ESQ.**, having filed his Motion to Associate Counsel under Nevada Supreme Court Rule 42, together with a Verified Application for Association of Counsel, a Certificate of Good Standing for the state of Minnesota, and the State Bar of Nevada Statement; said application having been noticed, no objections having been made, and the Court being fully apprised in the premises, and good cause appearing, it is hereby

**ORDERED**, that said application is hereby granted, and **THOMAS J. VOLLBRECHT, ESQ.** is hereby admitted to practice in the above entitled Court for the purposes of the above

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1 entitled matter only.

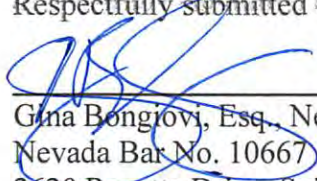
2 Dated this 16 day of Aug, 2017

3  
4  
5   
6

DISTRICT JUDGE

7 Respectfully submitted by:

ROB BARE  
JUDGE, DISTRICT COURT, DEPARTMENT 32

8   
9 \_\_\_\_\_  
10 Gina Bongiovi, Esq., Nevada Counsel of Record  
11 Nevada Bar No. 10667  
12 2620 Regatta Drive, Suite 102  
13 Las Vegas, NV 89128  
14 Telephone: (702) 485-1200  
15 Facsimile: (702) 485-1202  
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**DISTRICT COURT  
CLARK COUNTY, NEVADA****Other Nevada State Agency Appeal****COURT MINUTES****October 10, 2017**

---

A-17-755501-J      Spar Business Services Inc, Petitioner(s)  
vs.  
Nevada Employment Security Appeals Division, Respondent(s)

---

**October 10, 2017      09:30 AM      Respondent's Notice of Motion and Hearing Re: Motion to Dismiss**

**HEARD BY:**      Bare, Rob      **COURTROOM:** RJC Courtroom 03C

**COURT CLERK:** Duron, Denise

**RECORDER:**      Pruchnic, Sandra

**REPORTER:**

**PARTIES PRESENT:**

**Gina Bongiovi      Attorney for Petitioner**

**Thomas J. Vollbrecht      Attorney for Petitioner**

**Laurie L. Trotter      Attorney for Respondent**

**JOURNAL ENTRIES**

Court gave preliminary thoughts on the matter. Argument by Ms. Trotter in support of the motion, noting there was no good cause in the delay in service. Argument by Mr. Vollbrecht in opposition. COURT ORDERED, matter UNDER ADVISEMENT.

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Other Nevada State Agency  
Appeal**

**COURT MINUTES**

**October 12, 2017**

A-17-755501-J      Spar Business Services Inc, Petitioner(s)  
vs.  
Nevada Employment Security Appeals Division, Respondent(s)

**October 12, 2017      8:00 AM      Minute Order**

**HEARD BY:** Bare, Rob

**COURTROOM:** Chambers

**COURT CLERK:** Denise Duron

**RECORDER:**

**REPORTER:**

**PARTIES**      None – Minute Order Issued from Chambers  
**PRESENT:**

**JOURNAL ENTRIES**

- This matter came before the Court on October 10, 2017 for Respondent s Motion to Dismiss, and Court took the matter under advisement. After carefully considering the evidence submitted and hearing arguments, Court issued its Decision this 12th day of October, 2017. COURT ORDERED, Respondent s Motion to Dismiss is GRANTED.

Generally, [c]ourts have no inherent appellate jurisdiction over official acts of administrative agencies except where the legislature has made some statutory provision for judicial review. *Crane v. Cont'l Tel. Co. of California*, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989). Thus, [w]hen the legislature creates a specific procedure for review of administrative agency decisions, such procedure is controlling. *Id.* In Nevada, the Legislature enacted the APA to govern judicial review of many administrative decisions, permitting an aggrieved party to petition the district court for judicial review of a final agency decision in a contested case. *Washoe Cty. v. Otto*, 128 Nev. Adv. Op. 40, 282 P.3d 719, 724 (2012). Because the underlying proceeding involved a petition for judicial review of an administrative decision, this matter is governed by the APA, codified in NRS Chapter 233B. *Id.* When a party seeks judicial review of an administrative decision, strict compliance with the statutory requirements for such review is a precondition to jurisdiction by the court of judicial review, and

PRINT DATE: 10/17/2017

Page 1 of 2

Minutes Date: October 12, 2017



[n]oncompliance with the requirements is grounds for dismissal. *Kame v. Employment Sec. Dep't*, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989).

NRS 233B codifies the NV Administrative Procedure Act which governs administrative adjudications of all agencies of the Executive Departments of the State Government and for judicial review of both functions. NRS 233B.020. NRS 233B.039 governs the applicability of this NRS Chapter. NRS 233B.039(3), which Petitioner relies upon for this argument provides that the special provisions of (a) Chapter 612 of NRS for the distribution of regulations by and the judicial review of decisions of the Employment Security Division of the Department of Employment, Training and Rehabilitation prevail over the general provisions of this chapter.

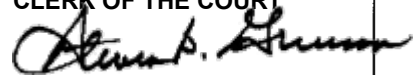
NRS 233B.130 provides for the service requirements of Petition for Judicial Review. NRS 233B.130(2) provides that Petitions for judicial review must be served upon the person serving in the office of administrative head of the named agency. NRS 233B.130(5) provides that The petition for judicial review 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.

Given that the provisions of NRS Chapter 612 are silent as to a service deadline, the service provision of NRS 233B.130(5) controls. There is no service deadline provision within NRS Chapter 612 to prevail over the general provisions of Chapter NRS 233B. As such, the 45 day requirement for service of a Petition for Judicial Review applies in this case.

Here, the Petition was filed on May 15, 2017. There was no request or motion to extend the time for service prior to the expiration of the 45 days. As such, the deadline for service of the Petition would have been June 29, 2017. It is undisputed that service of the Petition was not effectuated until July 14, 2017. Thus, the Petition was not timely served upon the Respondent as required by NRS 233B.130(5). Accordingly, the Motion to Dismiss is granted.

Counsel for Respondent is directed to submit a proposed Order regarding this motion, consistent with this Minute Order, the submitted briefing, and oral argument. Counsel may add language to or further supplement the proposed Order in accordance with the Court's findings and any submitted arguments. A Status Check: Order is set for December 20, 2017 in chambers. Parties need not appear.

CLERK'S NOTE: A copy of this minute order was placed in the attorney folder(s) of: Gina Bongiovi, Esq. / (dd-10/17/17)



1 **NEOJ**  
2 LAURIE L. TROTTER, ESQ.  
3 Nevada State Bar No. 8696  
4 STATE OF NEVADA, Department  
5 of Employment, Training & Rehabilitation (DETR)  
6 Employment Security Division (ESD)  
7 1340 South Curry Street  
8 Carson City, NV 89703  
9 Telephone: (775) 684-6317  
10 Facsimile: (775) 684-6344  
11 *Attorney for DETR/ESD*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 SPAR BUSINESS SERVICES, INC.,

10 Petitioner,

11 vs.

12 RENEE OLSON, ADMINISTRATOR,  
13 STATE OF NEVADA, DEPARTMENT OF  
14 EMPLOYMENT, TRAINING AND  
15 REHABILITATION, EMPLOYMENT  
16 SECURITY DIVISION; and MICHAEL  
17 DEBOARD,

18 Respondents.

CASE NO. A-17-755501-J

DEPT. NO. XXXII

17 **NOTICE OF ENTRY OF ORDER**  
18 **GRANTING MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW**

19 **PLEASE TAKE NOTICE** that on the 14<sup>th</sup> day of November, 2017, the Court  
20 entered its Order Granting Motion to Dismiss Petition for Judicial Review in the above-entitled  
21 action. A copy of said Order is attached hereto.

22 **DATED** this 15<sup>th</sup> day of November, 2017.

23 

24 LAURIE L. TROTTER, ESQ.

*Attorney for Nevada ESD Respondents*

1 **CERTIFICATE OF SERVICE**


2 Pursuant to NRCP 5(b), I certify that I am an employee of the State of Nevada,  
3 over the age of 18 years; and that on the date hereinbelow set forth, I served a true and correct  
4 copy of the foregoing NOTICE OF ENTRY OF ORDER GRANTING MOTION TO DISMISS  
5 PETITION FOR JUDICIAL REVIEW, *by either* electronic means (N.E.F.C.R. Administrative  
6 Order 14-2), as indicated by an email address set forth below, *and/or* by placing the same within  
7 an envelope which was thereafter sealed and deposited for postage and mailing with the State of  
8 Nevada Mail at Carson City, Nevada, addressed for delivery as follows:

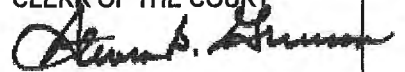
9 Gina Bongiovi, Esq.  
10 *Bongiovi Law Firm, LLC*  
2620 Regatta Drive, Suite 102  
Las Vegas, NV 89128

11 Thomas J. Vollbrecht, Esq.  
12 *Fabyanske, Westra, Hart, et al.*  
333 South Seventh St., Suite 2600  
13 Minneapolis, MN 55402

14 Michael DeBoard  
5026 River Glen #158  
15 Las Vegas, NV 89103

16 **DATED** this 15<sup>th</sup> day of November, 2017.

17   
18 SHERI C. IHLER  
19  
20  
21  
22  
23  
24



1 **OGM**

2 LAURIE L. TROTTER, ESQ.

3 Nevada State Bar No. 8696

4 STATE OF NEVADA, Department of

5 Employment, Training & Rehabilitation (DETR),

6 Employment Security Division (ESD)

7 1340 South Curry Street

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10 Facsimile No.: (775) 684-6344

11 *Attorney for DETR/ESD*

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 SPAR BUSINESS SERVICES, INC.,

15 Petitioner,

16 vs.

17 RENEE OLSON, ADMINISTRATOR, STATE  
18 OF NEVADA, DEPARTMENT OF  
19 EMPLOYMENT, TRAINING AND  
20 REHABILITATION, EMPLOYMENT  
21 SECURITY DIVISION; and MICHAEL  
22 DEBOARD,

23 Respondents.

CASE NO.: A-17-755501-J

DEPT. NO.: XXXII

24 **ORDER GRANTING MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW**

**THIS MATTER** came before the Court on the 10<sup>th</sup> day of October, 2017, for a duly-noticed hearing on Respondent ESD's Motion to Dismiss Petition for Judicial Review. Petitioner, Spar Business Services, Inc., was represented by Thomas Vollbrecht, Esq., and Gina Bongiovi, Esq. The Respondents, State of Nevada, Department of Employment, Training and Rehabilitation, Employment Security Division, Renee Olson, Administrator of the Employment Security Division (collectively "ESD") were represented by Laurie L. Trotter, Esq. The former

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1 employee, Respondent Michael DeBoard, did not appear and has not otherwise participated in  
2 these proceedings. After having heard oral argument from the parties, the Court took the matter  
3 under advisement.

4 NOW, THEREFORE, this Court has carefully considered the Motion to Dismiss  
5 Petition for Judicial Review filed by Respondent ESD on July 21, 2017; the Petitioner's  
6 Opposition to the Motion to Dismiss, filed on August 1, 2017; and ESD's Reply to Opposition to  
7 Motion to Dismiss Petition for Judicial Review, filed on August 4, 2017; as well as the  
8 arguments of the parties; and accordingly, this Court issues its Decision this 12<sup>th</sup> day of October,  
9 2017.

10 The Court ORDERS that Respondent ESD's Motion to Dismiss Petition for  
11 Judicial Review is GRANTED. The Court makes the following Findings of Fact and  
12 Conclusions of Law:

13 Generally, "[c]ourts have no inherent appellate jurisdiction over official acts of  
14 administrative agencies except where the legislature has made some statutory provision for  
15 judicial review." *Crane v. Cont'l Tel. Co. of California*, 105 Nev. 399, 401, 775 P.2d 705, 706  
16 (1989). Thus, "[w]hen the legislature creates a specific procedure for review of administrative  
17 agency decisions, such procedure is controlling." *Id.* In Nevada, the Legislature enacted the  
18 Administrative Procedures Act (APA) to govern judicial review of many administrative  
19 decisions, permitting an aggrieved party to petition the district court for judicial review of a final  
20 agency decision in a contested case. *Washoe Cty. v. Otto*, 128 Nev.Adv.Op. 40, 282 P.3d 719,  
21 724 (2012). Because the underlying proceeding involved a petition for judicial review of an  
22 administrative decision, this matter is governed by the APA, codified in NRS Chapter 233B. *Id.*  
23 "When a party seeks judicial review of an administrative decision, strict compliance with the  
24 statutory requirements for such review is a precondition to jurisdiction by the court of judicial

1 review, and [n]oncompliance with the requirements is grounds for dismissal.” *Kame v.*  
2 *Employment Sec. Dep’t*, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989).

3           NRS 233B codifies the APA which governs administrative adjudications of all  
4 agencies of the Executive Departments of the State Government and for judicial review of both  
5 functions. NRS 233B.020. NRS 233B.039 governs the applicability of this NRS Chapter. NRS  
6 233B.039(3) which Petitioner relies upon for this argument, provides that the special provisions  
7 of (a) Chapter 612 of NRS for the distribution of regulations by, and the judicial review of,  
8 decisions of the Employment Security Division of the Department of Employment, Training and  
9 Rehabilitation prevail over the general provisions of this chapter. NRS 233B.130 provides for  
10 the service requirements of petitions for judicial review. NRS 233B.130(2) provides that  
11 petitions for judicial review must be served upon the person serving in the office of  
12 administrative head of the named agency.<sup>1</sup> NRS 233B.130(5) provides that the “petition for  
13 judicial review and any cross-petitions for judicial review must be served upon the agency and  
14 every party within 45 days after the filing of the petition, unless, upon a showing of good cause,  
15 the district court extends the time for such service.”

16           Given that the provisions of NRS Chapter 612 are silent as to a service deadline,  
17 the service provision within NRS 233B.130(5) controls. There is no service deadline provision  
18 within NRS Chapter 612 to prevail over the general provisions of NRS Chapter 233B. As such,  
19 the 45-day requirement for service of a Petition for Judicial Review applies in this case.

20           Petitioner contends that NRCP 4(i) prevails over NRS 233B.130(5) and that a  
21 120-day deadline applies to service of a petition for judicial review. Petitioner’s reliance upon  
22 NRCP 4(i) is misplaced. NRCP 81(a) explains that the Nevada Rules of Civil Procedure “do not  
23 govern procedure and practice in a special statutory proceeding insofar as they are inconsistent or

24  

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<sup>1</sup> NRS 612.530(2) provides that the petition for judicial review must be served upon the ESD  
Administrator.

1 in conflict with the procedure and practice provided by applicable statute.” Furthermore, NRCP  
2 82 provides that “these rules shall not be construed to extend or limit jurisdiction of the district  
3 courts.” Because NRCP 4(i) clearly conflicts with NRS 233B.130(5) regarding the deadline for  
4 service of a petition for judicial review, NRS 233B.130(5) prevails over NRCP 4(i) as to the 45-  
5 day deadline for service of a petition for judicial review.

6 Here, the Petition was filed on May 15, 2017. There was no request or motion to  
7 extend the time for service prior to the expiration of the 45 days. As such, the deadline for  
8 service of the Petition would have been June 29, 2017. It is undisputed that service of the  
9 Petition was not effectuated until July 14, 2017. Thus, the Petition was not timely served upon  
10 the Respondent as required by NRS 233B.130(5). Petitioner failed to make a showing of good  
11 cause for effectuating service of the Petition for Judicial Review after the statutory deadline in  
12 this case.

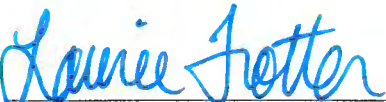
13 Based upon the above findings and GOOD CAUSE APPEARING THEREFOR,  
14 **IT IS HEREBY ORDERED** that the Motion to Dismiss Petition for Judicial  
15 Review be, and the same hereby is, GRANTED and the Petition for Judicial Review is  
16 DISMISSED.

17 DATED this 6 day of Nov, 2017.

18  
19   
HONORABLE ROB BARE  
DISTRICT JUDGE

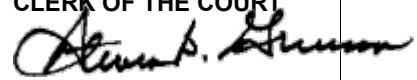
20 ROB BARE  
21 JUDGE, DISTRICT COURT, DEPARTMENT 32

22 Prepared and Submitted by:

23 

24 LAURIE L. TROTTER, ESQ.  
*Attorney for ESD Respondents*





MRCN

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*Admitted Pro Hac Vice*

*Attorneys for Petitioner Spar Business Services, Inc.*

**EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA**

SPAR BUSINESS SERVICES, INC.

Petitioner,

v.

EMPLOYMENT SECURITY DIVISION,  
STATE OF NEVADA and RENEE OLSON  
in her capacity as Administrator of the  
EMPLOYMENT SECURITY DIVISION;  
KATIE JOHNSON, in her capacity as  
Chairperson of the EMPLOYMENT  
SECURITY DIVISION BOARD OF  
REVIEW, and MICHAEL DEBOARD as  
employee,

Respondents.

Case No.: A-17-755501-J

Dept. No.: XXXII

**PETITIONER'S MOTION TO  
RECONSIDER PURSUANT TO  
NRCP 59(e) AND NRCP 60(b)**

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COMES NOW, Petitioner Spar Business Services, Inc. ("Spar" or "Petitioner"), by and through its counsel of record, Gina Bongiovi of Bongiovi Law Firm, LLC and Thomas Vollbrecht of Fabyanske, Westra, Hart & Thomson, P.A., and submits this Motion for Relief Pursuant to Rule 59(e) and NRC 60(b).

DATED this 20th day of November, 2017.

/s/ Gina Bongiovi  
Gina Bongiovi  
Attorney for Spar, Petitioner

**NOTICE OF MOTION**

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that the undersigned will bring the foregoing **MOTION TO RECONSIDER** on for hearing on the 25 day of January 2018, 201\_, at the hour of 9:30 am .m., or as soon thereafter as counsel may be heard in Department 32 in the above-referenced court.

DATED this \_\_\_\_ day of November, 2017.

/s/ Gina Bongiovi  
Gina Bongiovi  
Attorney for Spar, Petitioner

**DECLARATION OF GINA BONGIOVI, ESQ.**

I, Gina Bongiovi, Esq., depose under penalty of perjury that the assertions contained in this Declaration are true as follows:

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

2. I am retained by Petitioner Spar Business Services, Inc. (hereinafter “Spar” or “Petitioner”) to serve as local counsel with Thomas Vollbrecht, a duly licensed attorney in Minnesota with respect to Spar’s Petition for Judicial Review (“PJR”).

3. In calculating time for service of the PJR on Respondents, I relied on NRCP 4(i) in good faith and in error. My logic was as follows: NRS 233B dictates timelines for Petitions for Judicial Review. However, NRS 612 governs matters arising out of the Employment Security Division, Department of Employment, Training, and Rehabilitation and is silent on a timeline for service. Because the PJR was properly filed in the Eighth Judicial District Court, I believed its rules, specifically NRCP 4(i), must apply.

4. I, in good faith, believed that Petitioner had 120 days within which to serve the Respondents.

5. Following the filing of the PJR, I filed the Motion to Associate and waited to serve the Respondents in an effort to ensure Mr. Vollbrecht was properly associated before the case proceeded.

6. Shortly before this Court issued a minute order admitting Mr. Vollbrecht to practice, I contacted Respondents’ counsel, Ms. Laurie Trotter, to request that she accept service of the Petition.

7. Ms. Trotter declined to accept service on behalf of Respondents and I immediately thereafter effectuated service on all Respondents.

8. Ms. Trotter filed a motion to dismiss the PJR with the singular basis being that the PJR was served upon her office fourteen days late.

9. Respondents advised the Court erroneously that the Court had no option but to dismiss the PJR, with prejudice.

10. Specifically, Respondents argued the untimely service robbed the Court of jurisdiction to consider good cause for delayed service, an assertion that is expressly contrary to Nevada law.

1           11.    This matter came before the Court for hearing on October 10, 2017 and a Journal Entry  
2 Decision was issued via Minute Order on October 12, 2017.

3           12.    The Journal Entry Decision directed Respondents to submit a proposed Order.

4           13.    Respondents counsel never presented my office with a proposed Order.

5           14.    Having only a Journal Entry Order, I filed a Motion to Reconsider. On the same day I  
6 filed a Motion to Reconsider, over a month after the hearing, I received the Order Granting Motion to  
7 Dismiss Petition for Judicial Review (“Order”) and the Notice of Entry of Order Granting Motion to  
8 Dismiss Petition for Judicial Review.

9           15.    Given a final Order was formally Entered on November 20, 2017, I withdrew the Motion  
10 to Reconsider which was based upon EDCR 2.24 and NRCP 60(b) alone.

11          16.    I am now submitting a Motion to Reconsider pursuant to NRCP 59(e) as well as NRCP  
12 60(b).

13          17.    At the hearing on the merits, the Court was unaware of at least one key case which directly  
14 contradicts Respondents’ position and the Order, *Fitzpatrick adv. State of Nevada*, 107 Nev. 486 (1991).

15          18.    Respondents misled the Court, whether intentionally or unintentionally, to understand that  
16 under the provisions of NRS 233B.130(5), the “Petition **must** be served within 45 days of its filing with  
17 the District Court. Accordingly, if service is not timely completed, then the case **must** be  
18 dismissed.” *See* Respondents’ Motion to Dismiss, pg. 3, ll. 5-7.

19          19.    Respondents then cite *Washoe Cty. v. Otto* for the proposition that, because the PJR was  
20 served after the forty-five (45) day deadline, it **must**, as a matter of law, be dismissed. *Id.*; *see also*  
21 *Washoe Cty. v. Otto*, 128 Nev. Adv. Op. 40 (2012).

22          20.    The Court was not made aware of *Fitzpatrick adv. State of Nevada* which holds that if a  
23 PJR is timely filed, the Court has jurisdiction to consider other matters as articulated within the  
24 statute. In *Fitzpatrick*, the issue was a late filed memorandum of points and authorities.

25          21.    The statute at issue in *Fitzpatrick* has identical language to the statute at bar. NRS  
26 233B.133 regarding filing of memorandum of points and authorities states that the court “for good  
27 cause may extend the times allowed in this section for filing memoranda.” *Id.* NRS 233B.130(5)  
28 regarding service of process, the issue at bar, states that the court can “extend the time for service” upon

1 a showing of good cause.

2 22. In error, this Court, respectfully, failed to consider good cause at bar as evidenced by the  
3 lack of findings in the Order.

4 23. In error, this Court, respectfully, determined that Petitioner was required to bring a motion  
5 to enlarge time for extending the deadline for service prior to the expiration of the 45-day deadline.

6 24. While the existence, or lack thereof, of good cause should have been the focus of the  
7 hearing, the focus of the hearing and the ultimate Order clearly shows that the court misconstrued  
8 Nevada law with respect to service of a Petition for Judicial Review under the rules herein.

9 25. Additionally, Respondent inaccurately represented to the Court that the State of Nevada  
10 was prejudiced as Spar would not be paying unemployment insurance taxes pending appeal. This  
11 assertion was inaccurate as NRS 612.530(9) only relieves a petitioner of the obligation to continue its  
12 payment obligations if the Board of Review decision so states, which it does not. Indeed, Spar  
13 continues to pay its employment taxes during the pendency of this matter.

14 Executed this 20th day of November, 2017 at Las Vegas, Nevada.

15 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true  
16 and correct to the best of my knowledge.

17  
18   
19 Gina Bongiovi, Esq.  
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## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

Respondents' motion to dismiss was premised on the faulty notion that Spar's failure to timely serve its PJR must result in dismissal. Through clever sleight of hand, Respondents managed to blur the statutory requirements for *filing* with the statutory requirements for *service*. In doing so, Respondent misrepresented Nevada's procedural rules and supporting case law regarding PJRs and further took advantage of Spar's counsel's admission regarding a good faith confusion surrounding the rules for service. Specifically, Respondent argued that the Nevada Administrative Procedure Act, which strictly construes a deadline for the *filing* of a PJR, applies with equal severity to the *service* of a PJR. It does not.

In actuality, NRS 233B.130(5) expressly contemplates extending the deadline for service of a PJR. It specifically allows Courts to exercise discretion in forgiving delayed service where good cause is established. Interpreting Nevada law to require dismissal with prejudice if a PJR is not timely served would fly in the face of the express legislative intent of NRS 233B.130(5), century-old, cemented Nevada law regarding due process, and the overarching principle of hearing cases on their merits. Thus, in the interest of fairness, due process, and pursuing this principle, Spar respectfully requests this Court reconsider its Decision of October 12, 2017, entered on November 14, 2017, and enlarge the time for service of the PJR to the date it was actually served, July 14, 2017, and allow this matter to proceed on the merits.

### **II. FACTS AND PROCEDURAL HISTORY**

On May 15, 2017 Petitioner filed its PJR from a Board of Review decision by the Employment Security Division, Department of Employment, Training, and Rehabilitation. It is undisputed that Petitioner strictly complied with the applicable NRS 612.530(1) filing requirements.

On May 31, 2017, Petitioner filed with this Court its Motion to Associate Mr. Vollbrecht, its out-of-state counsel. The hearing was set for July 18, 2017. Believing in good faith it had 120 days under NRCP 4(i) to effectuate service of the already-filed PJR, and to ensure Mr. Vollbrecht was properly associated before the proceedings were substantially underway, Petitioner waited until early July to contact Respondents' counsel regarding acceptance of service. When Respondents' counsel

1 thereafter declined to accept service, Petitioner promptly effectuated service on all Respondents on  
2 July 14, 2017.

3       Thereafter, on or about July 21, 2017, Respondents filed their Motion to Dismiss, asserting  
4 that service was required to be completed on or before June 29, 2017 (45 days after filing of the  
5 action). Respondents stated:

6             Under the provisions of NRS 233B.130(5), the Petition **must** be served within 45  
7 days of its filing with the District Court. Accordingly, if service is not timely  
8 completed, then the case **must** be dismissed. *See* Respondents' Motion to Dismiss,  
pg. 3, lln. 5-7.

9       Respondents went on to cite *Washoe Cty. v. Otto* for the proposition that, because the PJR was  
10 served after the forty-five (45) day deadline, it must be dismissed as a matter of law. *Id.*; *see also*  
11 *Washoe Cty. v. Otto*, 128 Nev. Adv. Op. 40 (2012). The same argument was presented by Respondents  
12 in the Reply as the Respondents reiterate this incorrect notion that service “must” be made within  
13 forty-five (45) days or it must be dismissed. The Respondents cite additional case law, but each case  
14 construes NRS 612.530(1) which applies only to the mandatory requirements for effective ***filing*** of  
15 the PJR.

16       In fact, Respondents further this false idea in their reply brief by stating:

17             A district court is deprived of subject matter jurisdiction when a petition for judicial  
18 review is not properly served within 45 days. *See* NRS 612.530(3); NRS  
19 233B.130(5). An examination of NRS 612.530(2) provides that “a petition...**must**  
20 be served upon the Administrator.” NRS 233B.130(5) provides that “a petition for  
21 judicial review...**must** be **served** upon the agency ....within 45 days after the filing  
22 of the petition.” Petitioner’s failure to timely serve ESD’s Administrator with the  
23 Petition within the 45-day statutory deadline divested this Court of subject matter  
24 jurisdiction to hear this administrative appeal. This Court has no other option that to  
dismiss the Petition for Judicial Review. ...this Court must grant the motion to  
dismiss because this Court lacks subject matter jurisdiction to hear this case. *See*  
Respondents’ Reply in Support of Motion to Dismiss, pg. 4, lln. 5-13.

25       Respondents omit reference to the “good cause” exception to NRS 233B.130(5). Moreover,  
26 Respondents are so adamant about the State’s position that they repeatedly use bold typeface and  
27 underline words such as “must” throughout their pleadings to the Court. In spite of the Respondents’  
28 representations and repeated efforts to guide the Court to the conclusion that the Court lacked

1 jurisdiction to consider the issues in Spar’s opposition brief regarding good cause for the late service,  
2 NRS 233B.130(5) expressly allows for and contemplates that this Court can, in fact, consider late  
3 service and extend the deadline for service. The portion of NRS 233B.130 which was omitted in  
4 Respondents’ briefing is key: NRS 233B.130(5) states that the district court **can extend the time for**  
5 **service upon a showing of good cause.** See NRS 233B.130(5) (emphasis added). If service was  
6 itself jurisdictional, then the Court could never enlarge the time for service, rendering this provision  
7 worthless.

8 In its Opposition, Spar attempted to argue good cause for delayed service, and did so in the  
9 context of the Nevada Rules of Civil Procedure and Nevada law construing the same. On October 12,  
10 2017, this Court entered a Journal Entry Decision from which it is clear the Court declined to consider  
11 “good cause.” Respondent never presented Spar’s counsel with a proposed Order, however one was  
12 presented to the Court and the Court signed the Order. On November 15, 2017 Defendant filed a  
13 Notice of Entry of Order of Order Granting Motion to Dismiss Petition for Judicial Review and  
14 emailed a “courtesy copy” to Spar’s counsel. See NOE and Order attached hereto collectively as  
15 **Exhibit 1.** The Order provides a history of the procedural rules and a roadmap for their framework,  
16 then concludes, without analysis, among other things:

17 “Here, the Petition was filed on May 15, 2017. There was no request or motion to extend  
18 the time for service prior to the expiration of the 45 days. As such, the deadline for  
19 service of the Petition would have been June 29, 2017. It is undisputed that service of  
20 the Petition was not effectuated until July 14, 2017. Thus, the Petition was not timely  
21 served upon the Respondent as required by NRS 233B.130(5). Petitioner failed to make  
a showing of good cause for effectuating service of the Petition for Judicial Review after  
the statutory deadline in this case.” *Id.*

22 Respectfully, the Court’s Order is in error, likely due to adopting the Respondents’ erroneous  
23 representation that the Court lacked jurisdiction to consider the matter, as the PJR was served after the  
24 expiration of the forty-five (45) day deadline articulated at NRS 233B.130(5). The only mention in  
25 the Order of the standard for good cause is in this concluding paragraph. However, contrary to the  
26 Order, there is no requirement that a motion to enlarge must be filed prior to the expiration of the  
27 deadline. As Spar noted, the timeframe in which the PJR was served did not evidence excessive  
28 delay. To the contrary, Spar’s counsel immediately effectuated service when Respondents’ counsel

1 declined to accept.

2 As this matter has been in the Employment Security Division's hands for approximately eight  
3 years, a dismissal based on a fourteen-day delay in service of the PJR is a disproportionate  
4 consequence that robs Petitioner of an opportunity to be heard and without doubt represents error at  
5 law. Further, and notably, the Respondents insisted in their Reply and during oral argument that they  
6 were, in fact, prejudiced by the delay in service, because Spar had been relieved of paying its share of  
7 unemployment taxes during the pendency of the appeal. On the contrary, Spar has, to this day,  
8 continued to pay these taxes; Respondents' written and verbal assertions to the contrary are patently  
9 false.

### 10 **III. LEGAL ARGUMENT**

#### 11 **A. Standard of Review**

12 A court has the inherent authority to reconsider its prior orders. *Trail v. Faretto*, 91 Nev. 401,  
13 403, 536 P.2d 1026, 1027 (1975). Reconsideration is also permitted by EDCR 2.24:

14 A party seeking reconsideration of a ruling of the court, other than any order which may  
15 be addressed by motion pursuant to N.R.C.P. 50(b), 52(b), 59 or 60, must file a motion  
16 for such relief within 10 days after service of written notice of the order or judgment  
17 unless the time is shortened or enlarged by order. A motion for rehearing or  
18 reconsideration must be served, noticed, filed and heard as is any other motion. A motion  
for reconsideration does not toll the 30-day period for filing a notice of appeal from a  
final order or judgment. EDCR 2.24(b).

19 The Nevada Supreme Court has held that "[a] district court may reconsider a previously decided issue  
20 if substantially different evidence is subsequently introduced or the decision is clearly  
21 erroneous." *Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev.  
22 737, 741, 941 P.2d 486, 489 (1997). The Journal Entry Decision at bar is clearly erroneous as the  
23 Court accepted as true the faulty position put forth by the Respondents that the Court must dismiss the  
24 PJR without further review as the PJR was served untimely. Moreover, the Court's finding that Spar  
25 should have filed a motion to enlarge time is further in error, as articulated more fully below.

26 Additionally, NRCP 59(e), provides a remedy that, where the issues have been litigated and  
27 resolved, a motion may be made to alter or amend a judgment. Rule 59(e) "provides an opportunity,  
28 within a severely limited time, to seek correction at the trial court level of an erroneous order or



1 judgment, thereby initially avoiding the time and expense of appeal.” *See Chiara v. Belaustegui*, 86  
2 Nev. 856, 859, 477 P.2d 857 (1979). A motion to alter and amend a judgment is not limited in scope,  
3 as long as it is timely, in writing and complies with procedural requirements, and request substantive  
4 alteration or vacation of a judgment, not merely a correction of a clerical error or relief that is wholly  
5 collateral to the judgment. *See AA Primo Builders, L.L.C. v. Washington*, 126 Nev. Adv. Op. 53, 245  
6 P.3d 1190 (2010). Among grounds for such a motion are correcting manifest error of law or fact,  
7 newly discovered or previously unavailable evidence, or a need to prevent a manifest injustice. *Id.*  
8 As described more fully below, this Court should vacate the Order as manifest error at law, as well as  
9 to prevent manifest injustice in the face of well-cemented Nevada policy that Courts must adjudicate  
10 matters on the merits.

11 Lastly, pursuant to NRCPP 60(b), upon motion a court may relieve a party from a final order due  
12 to a party’s mistake, inadvertence, or excusable neglect. Petitioner did not discover dispositive case  
13 law regarding the matter until after the hearing. The Court was not made aware of *Fitzpatrick adv.*  
14 *State of Nevada* which holds that if a PJR is timely filed, the Court has jurisdiction to consider other  
15 matters as articulated within the statute. *See Fitzpatrick adv. State of Nevada*, 107 Nev. 486  
16 (1991). More expressly, the Nevada Supreme Court held that the District Judge erred when he  
17 concluded the Court “was without jurisdiction to consider the merits of Fitzpatrick’s claim that he had  
18 good cause for filing a tardy memorandum of points and authorities in support of the timely filed  
19 petition for judicial review.” *Fitzpatrick* is directly on point and mandates that this court consider the  
20 good cause for Petitioner’s delayed service of the PJR upon Respondents.

21 **B. This Court’s Decision is Erroneous as NRS 222B.130(5) Expressly Contemplates**  
22 **Delayed Service and Nevada Law Requires Cases be Heard on the Merits.**

23 Respondents’ Motion to dismiss the PJR was based on a false notion that the Court had no  
24 choice but to dismiss the PJR. Specifically, Respondents stated, “under the provisions of NRS  
25 222B.130(5), the Petition must be served within 45 days of its filing with the District  
26 Court. Accordingly, if service is not timely completed, then the case must be dismissed.” *See*  
27 Respondents’ Motion to Dismiss, pg. 3, ll. 5-7. However, in insisting that “the Nevada Supreme Court  
28 has repeatedly held that the procedural” requirements of the Nevada Administrative Procedure Act

1 must be followed, Respondents relied upon case law that construed the statutory requirements for  
2 filing, not service.

3 In further support, Respondents relied upon *Washoe Cty. v. Otto* holding strict compliance is  
4 a precondition of the district court's jurisdiction. *Washoe Cty. v. Otto*, 128 Nev. Adv. Op. 40  
5 (2012). What was lost on the Respondents and the Court is the fact that Petitioner did, in fact, strictly  
6 comply with the superseding filing requirements of NRS 612.530(1) and thus each of the Respondents'  
7 arguments were irrelevant. The issue before the Court was timely service, not timely filing and timely  
8 service is dictated by NRS 233B.130(5).

9 Unlike the strict compliance provisions for filing a PJR found at NRS 612.530(1), NRS  
10 233B.130(5) specifically contemplates delayed service of process, expressly granting the Court  
11 discretion to enlarge the time. NRS 233B.130(5) states:

12  
13 The petition for judicial review and any cross-petitions for judicial review must be served  
14 upon the agency and every party within 45 days after the filing of the petition, **unless,**  
15 **and upon a showing of good cause the district court extends the time for such**  
**service.** See NRS 233B.130(5) (emphasis added).

16 In a case directly on point, the Nevada Supreme Court reversed the district court's refusal to  
17 analyze good cause for the late filing of a memorandum of points and authorities. See *Fitzpatrick adv.*  
18 *State of Nevada*, 107 Nev. 486 (1991). In *Fitzpatrick*, the Petitioner filed its memorandum of points  
19 and authorities outside the deadline articulated at NRS 233B.133 which required the memorandum of  
20 points and authorities be filed and served within 40 days. *Id.*; see also NRS 233B.133. The State of  
21 Nevada, exactly like in the case at bar, moved to dismiss arguing that the Petitioner must strictly  
22 comply with the administrative procedure or the district court is divested of jurisdiction to hear the  
23 matter. *Id.* Exactly like the case at bar, the State of Nevada moved to dismiss and Petitioner responded  
24 that he had good cause for filing late. *Id.* Exactly like the case at bar, NRS 233B.133(6) provided that  
25 the court may extend the deadline for filing the memorandum of points and authorities for good cause  
26 shown. *Id.*; see also NRS 233B.133(6). In reversing the district court, the Nevada Supreme Court  
27 held:

28 ...the time allotted by statute for taking an administrative appeal is jurisdictional, and to  
invoke the appellate jurisdiction of the district court, a petition for judicial review must

1 be timely filed. However if the petition for judicial review is timely filed, NRS 233B.133  
2 allows the district court to accept a tardy memorandum of points and authorities in  
3 support of the petition. **Accordingly the district court erred when it concluded it was**  
4 **without jurisdiction to consider the merits of Fitzpatrick’s claim that he has good**  
5 **cause for filing a tardy memorandum of points and authorities in support of the**  
6 **timely filed petition for judicial review.** *Id.* (emphasis added).

7 The “good cause” language at NRS 233B.133(6) is identical to the language at NRS  
8 233B.130(5). Notably, Fitzpatrick did not seek leave to file his memorandum of points and authorities  
9 before the expiration of the proscribed period; rather, the issue arose as it has in the case at bar – in  
10 response to a motion to dismiss. Thus, the Court’s holding, that Petitioner was required to file a motion  
11 to extend before the expiration of the 45-day period, is without support and is contrary to *Fitzpatrick*.

12 Perhaps the statutory scheme at NRS 233B.130 could more artfully distinguish its separate and  
13 distinct requirements, as certain of its provisions are superseded by NRS 612, notably the statutory  
14 deadline for the filing of this kind of PJR, while itself containing guidelines for timeliness of service.  
15 While this statute, and others that partially supersede it, invite confusion, especially for practitioners  
16 who do not work for the State of Nevada, review of its plain language in the context of Nevada law  
17 requires the conclusion that filing of the PJR and service of process are separate and distinct acts with  
18 separate and distinct rules [NRS 612.530(1) and NRS 233B.130(5), respectively]. As soon as Spar  
19 timely and strictly complied with the filing requirements of NRS 612.530(1), this Court obtained and  
20 maintained jurisdiction to consider Spar’s good cause for delayed service and was, in fact, required to  
21 consider good cause.

22 For these reasons, the Court should consider the good cause detailed in Petitioner’s opposition  
23 to the motion to dismiss as well as again in the Declaration of Gina Bongiovi, Esq. herein and  
24 reconsider and vacate its ruling pursuant to NRCP 59(e). Failure to do so is manifest error of law and  
25 will result in manifest injustice for Spar in the face of Nevada policy dictating that cases be heard on  
26 the merits, as more fully addressed below. *See AA Primo Builders, L.L.C. v. Washington*, 126 Nev.  
27 Adv. Op. 53, 245 P.3d 1190 (2010).

### 28 **C. Nevada Law Requires Matters Be Heard on the Merits.**

In addition to vacating the Order pursuant to NRCP 59(e), this Court could vacate the Order  
based on NRCP 60(b). The Nevada Supreme Court has reiterated its position that, absent blatant

disregard for the rules of civil procedure, “good public policy dictates that cases be adjudicated on their merits.” *Kahn v. Orme*, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992) (citing *Hotel Last Frontier v. Frontier Prop.*, 79 Nev. 150, 155-56, 380 P.2d 293, 295 (1963)). The record at bar reflects Spar’s counsel’s good faith effort to promptly comply with the procedural rules – there is absolutely no evidence of any “blatant disregard.” This Court’s granting of the State’s motion falls squarely outside this principle. Further, a dismissal of this case would effectively be with prejudice, as the eleven-day deadline provided by NRS 612.530(1) for filing of a PJR expired on May 16, 2017. A dismissal at this juncture would preclude Spar from refileing its PJR and would represent an egregious denial of Spar’s opportunity to be heard, especially because this particular matter has been winding its way through the state’s administrative labyrinth for approximately eight years.

To dismiss this matter eight years in the making for a fourteen-day delay in service would be a grossly disproportionate result that would fly in the face of the Nevada Supreme Court’s repeated admonitions that cases should be heard on their merits. *Hotel Last Frontier Corp. v. Frontier Properties, Inc.*, 79 Nev. 150, 155, 380 P.2d 293, 295 (1963), “Finally we mention a proper guide to the exercise of discretion, to basic underlying policy to have each case decided on the merits.” *Banks v. Heater*, 95 Nev. 610, 612, 600 P.2d 245, 246 (1979); “[T]he policy of this court is that each case be decided upon the merits whenever possible. Second, a factor of importance is the party’s lack of knowledge as to procedural requirements. *Id.* at 154, 380 P.2d at 295. It is clear that a trial court could find from this record a lack of knowledge of procedural requirements; inadvertence or excusable neglect; no bad faith or an intent to delay; and the presentation of a meritorious defense.

It should be noted that in its Motion to Dismiss, the Respondents insist that Petitioner knew of the rules because it complied with them back in 2012 with a different PJR. Petitioner asserts that, had it known of the 45-day deadline, it would have complied. The party in a better position to know and understand the procedural rules is the State of Nevada. Respondents should therefore have advised the Court of the *Fitzpatrick* decision, emphasized the need for the Court to analyze good cause, and frankly never should have brought the motion to dismiss in the first place.

///

///

1 **IV. CONCLUSION**

2 Contrary to Respondents' prior assertions, Spar fully and strictly complied with the mandatory  
3 filing requirements of NRS 612.530(1). Spar has further satisfied the good cause requirements of NRS  
4 233B.130(5) for delayed service of the PJR upon the Respondent. This Court, respectfully, failed to  
5 consider Petitioner's good cause for the nominal delay and, as such, the Court must reconsider and  
6 vacate its Order pursuant to NRCP 59(e) and/or NRCP 60(b).

7 DATED this 21st day of November, 2017.

8  
9 Respectfully submitted by:

10 /s/ Gina Bongiovi

11 Gina Bongiovi, Esq., Nevada Counsel of Record

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of the BONGIOVI LAW FIRM, LLC, and that I served a true and correct copy of the foregoing **NOTICE OF WITHDRAWAL OF PETITIONER'S MOTION TO RECONSIDER** by either electronic means (NEFCR Administrative Order 14-2), as indicated by an e-mail address as set forth below, and/or by:

X	BY E-FILING SERVICE: via Odyssey eFile NV
X	BY MAIL: Pursuant to NRCP 5(b), I placed a true and correct copy thereof enclosed in a sealed envelope addressed to the parties as indicated below.
	BY FACSIMILE: Pursuant to EDCR 7.26, I transmitted a copy of the foregoing document via telecopy to the facsimile number(s) indicated below.
X	BY ELECTRONIC MAIL: Pursuant to EDCR 7.26, I transmitted a copy of the foregoing document via electronic mail to the electronic mail address(es) listed below.
	BY HAND DELIVERY

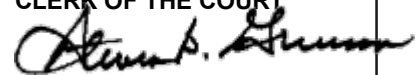
Renee Olson, Administrator  
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State of Nevada  
500 E. Third St.  
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Laurie Trotter, Esq.  
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Employment Security Division  
State of Nevada  
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l-trotter@nvdetr.org

And via e-file Courtesy Copy to: [Dept32LC@clarkcountycourts.us](mailto:Dept32LC@clarkcountycourts.us)

Dated this 20<sup>th</sup> day of November, 2017.

/s/ Kristina Blair  
An employee of Bongiovi Law Firm, LLC



1 **OPPS**

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3 Nevada State Bar No. 8696

4 STATE OF NEVADA, Department of

5 Employment, Training & Rehabilitation (DETR),

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12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 SPAR BUSINESS SERVICES, INC.,

15 Petitioner,

16 vs.

17 RENEE OLSON, ADMINISTRATOR,  
18 STATE OF NEVADA, DEPARTMENT OF  
19 EMPLOYMENT, TRAINING AND  
20 REHABILITATION, EMPLOYMENT  
21 SECURITY DIVISION; and MICHAEL  
22 DEBOARD,

23 Respondents.

CASE NO.: A-17-755501-J

DEPT. NO.: XXXII

24 **ESD'S OPPOSITION TO PETITIONER'S MOTION TO RECONSIDER**  
**PURSUANT TO NRCP 59(e) AND NRCP 60(b)**

25 **COMES NOW**, Respondent Administrator, Employment Security Division  
26 (hereinafter ESD), by and through counsel, Laurie L. Trotter, Esq., and hereby moves this  
27 Honorable Court for an Order Denying Petitioner's November 21, 2017, Motion to Reconsider  
28 this Court's Order entered November 14, 2017, which granted ESD's Motion To Dismiss this  
29 case. Specifically, Petitioner requests this Court either alter or amend its judgment, pursuant to  
30 NRCP 59(e) or in the alternative, amend the Order due to excusable neglect, pursuant to NRCP  
31 60(b). The Motion To Reconsider must be denied for the following reasons:

1                   1)       There is no basis for the Court to grant reconsideration under NRCP 59(e)  
2 or NRCP 60(b), or under the EDCR 2.24 requirements for such motion, as this Court's Order  
3 was legally and factually appropriate, supported by Nevada law, and did not work a "manifest  
4 injustice," was not "clearly erroneous" nor was any "substantially different evidence"  
5 introduced. Petitioner is also incorrect in contending that this Court erred when it found that  
6 Petitioner should have filed a Motion to Enlarge Time. This Court's Order contained no such  
7 finding. And finally, *Fitzpatrick v. State ex rel., Dept. of Commere, Ins. Div.*, 107 Nev. 486, 813  
8 P.2d 1004 (1991), lends Petitioner no legal support for the instant Motion To Reconsider, as it is  
9 distinguished legally and factually.

10                   2)       Petitioner is patently false in its contention that the NRS 612.530(1)  
11 requirement for filing the Petition for Judicial Review (Petition) is the *only* requirement  
12 necessary to properly invoke this Court's jurisdiction in this case. *See*, Motion To Dismiss, p.  
13 11. This argument is contrary to Nevada's statutory and case law.

14                   3)       This Court clearly considered whether Petitioner showed good cause for  
15 its late service of the Petition upon the Administrator, and appropriately concluded that Petitioner  
16 failed to show good cause as indicated in its Order. Similarly, ESD clearly argued the relevant  
17 law and factual analysis regarding whether Petitioner met its burden to demonstrate good cause  
18 for serving the Petition after the NRS 233B.130(5) statutory deadline. Petitioner is patently false  
19 in contending that ESD failed to apprise this Court of the requirement that Petitioner must show  
20 good cause pursuant to NRS 233B.130(5) – good cause is mentioned no less than **14 times** in  
21 ESD's Motion to Dismiss, ESD's Reply, and attached Affidavit of ESD's counsel.

22                   4)       Petitioner's counsel incorrectly argues that counsel's alleged confusion  
23 about whether the deadline for serving the Petition for Judicial Review upon the Administrator is  
24 120 days pursuant to NRCP 4(i) or 45 days pursuant to NRS 612.530(2) and NRS 233B.130(5),



1 and whether this alleged misapprehension or failure to pay attention to the law is sufficient to  
2 demonstrate good cause. Counsel's alleged confusion regarding the statutory deadline for  
3 service of the Petition cannot satisfy good cause; and, as ESD detailed in ESD's Motion to  
4 Dismiss and Reply to Opposition to Motion to Dismiss, the same counsel for Petitioner actually  
5 satisfied the 45-day deadline for service in Case No. A-11-652992-J on January 11, 2012. *See,*  
6 *Spar v. Zicarelli; et al.*, A-11-652992-J, Dept. 18 [reassigned to Dept. 24 on 01/05/2015].

7           5) This Court's Order is absent any language that the Petition was dismissed  
8 with prejudice. That said, any attempt to refile and serve the Petition upon the Administrator  
9 within the statutory deadline would have been futile as the deadline to file and serve have long  
10 since passed. *See, Liberty Mut. v. Thomasson*, 130 Nev. Adv. Op. 4, 317 P.3d 831, 836  
11 (2014)(explaining that "the period for filing such a petition in the proper county has passed, and  
12 thus the petition cannot be amended to correct the error.")

13           6) Moreover, Petitioner's Motion To Reconsider contains nothing more than  
14 a rehash of its previous arguments. Petitioner has not shown any law or fact that would warrant  
15 the Court reconsidering or altering its Order.

16           This Opposition is made and based upon the attached supporting Points and  
17 Authorities; the attached Affidavit of Counsel; and upon all documents and pleadings on file  
18 herein, including ESD's Motion to Dismiss and Reply to Opposition to Motion to Dismiss, as  
19 well as any oral argument which may be presented at the time of hearing.

20           **DATED** this 4<sup>th</sup> day of December, 2017.

21   
22 LAURIE L. TROTTER, ESQ.  
23 Attorney for Respondent ESD  
24

1 **POINTS AND AUTHORITIES**

2 **A. PROCEDURAL FACTS**

3 ESD adopts and incorporates the Court's findings of fact as set forth in its  
4 November 14, 2017, Order and the Notice of Entry of Order filed on November 15, 2017. On  
5 May 15, 2017, Petitioner filed the Petition for Judicial Review (Petition) in this matter, and on  
6 that same day, the Summons was electronically issued. On May 31, 2017, Petitioner filed a  
7 Motion to Associate out-of-state counsel. The statutory deadline for serving the Petition came  
8 and went, as service of the Petition upon the ESD Administrator was due by June 29, 2017. On  
9 July 13, 2017, fourteen (14) days after the statutory deadline had passed, counsel for Petitioner  
10 requested that the undersigned accept service of the Petition on behalf of the Administrator.  
11 Counsel's request contained no good cause explanation for the untimely service. On July 14,  
12 2017, **fifteen (15) days after** the deadline, the Administrator was finally served with the Petition.

13 ESD filed its Motion To Dismiss on July 21, 2017. This Court should deny  
14 Petitioner's instant motion. This Court appropriately found that Petitioner failed to show good  
15 cause for failing to timely serve the Petition upon the Administrator, pursuant to the  
16 requirements of NRS 612.530(2) and NRS 233B.130(5).

17 **B. ARGUMENT**

18 **1. THIS MOTION TO RECONSIDER SHOULD BE DENIED.**

19 On November 14, 2017, this Court properly entered the Order Granting Motion to  
20 Dismiss Petition for Judicial Review. Nevada law generally disfavors the renewal of matters  
21 once heard and decided, as in this case. EDCR 2.24 provides that "[n]o motions once heard and  
22 disposed of may be renewed in the same cause, nor may the same matters therein be reheard." A  
23 motion to set aside a judgment is governed by NRCP 60(b). "The district court has wide  
24 discretion in such matters and, barring an abuse of discretion, its determination will not be

1 disturbed.” *Union Petrochemical Corp. of Nevada v. Scott*, 96 Nev. 337, 338, 609 P.2d 323, 323  
2 (1980). NRCF Rule 60(b) states in relevant part as follows:

3 **RULE 60. RELIEF FROM JUDGMENT OR ORDER**

4 **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered**  
5 **Evidence; Fraud, Etc.** On motion and upon such terms as are just, the  
6 court may relieve a party or a party’s legal representative from a final  
7 judgment, order, or proceeding for the following reasons: (1) mistake,  
8 inadvertence, surprise, or excusable neglect; (2) newly discovered  
9 evidence which by due diligence could not have been discovered in time  
10 to move for a new trial under Rule 59(b); (3) fraud (whether heretofore  
11 denominated intrinsic or extrinsic), misrepresentation or other misconduct  
12 of an adverse party; (4) the judgment is void; or, (5) the judgment has  
13 been satisfied, released, or discharged, or a prior judgment upon which it  
14 is based has been reversed or otherwise vacated, or it is no longer  
equitable that an injunction should have prospective application. The  
motion shall be made within a reasonable time, and for reasons (1), (2),  
and (3) not more than 6 months after the proceeding was taken or the date  
that written notice of entry of the judgment or order was served. A motion  
under this subdivision (b) does not affect the finality of a judgment or  
suspend its operation. This rule does not limit the power of a court to  
entertain an independent action to relieve a party from a judgment, order,  
or proceeding, or to set aside a judgment for fraud upon the court. . . . ,  
and the procedure for obtaining any relief from a judgment shall be by  
motion as prescribed in these rules or by an independent action.

15 EDCR Rule 2.24 states as follows:

16 **Rule 2.24. Rehearing of motions.**

17 (a) No motions once heard and disposed of may be renewed in the same  
18 cause, nor may the same matters therein embraced be reheard, unless by  
leave of the court granted upon motion therefor, after notice of such  
motion to the adverse parties.

19 (b) A party seeking reconsideration of a ruling of the court, other than any  
20 order which may be addressed by motion pursuant to N.R.C.P. 50(b),  
52(b), 59 or 60, must file a motion for such relief within 10 days after  
21 service of written notice of the order or judgment unless the time is  
shortened or enlarged by order. A motion for rehearing or reconsideration  
must be served, noticed, filed and heard as is any other motion. A motion  
22 for reconsideration does not toll the 30-day period for filing  
a notice of appeal from a final order or judgment.

23 (c) If a motion for rehearing is granted, the court may make a final  
disposition of the cause without reargument or may reset it for reargument  
24 or resubmission or may make such other orders as are deemed appropriate  
under the circumstances of the particular case.

1 Here, this Court's November 14, 2017, Order is appropriate in all respects. There  
2 is no clear error, manifest injustice, or substantially different evidence that was subsequently  
3 introduced which could cause this Court to reconsider its Order. *See*, Motion to Reconsider, pp.  
4 9-10. Thus, NRCP 60(b) and NRCP 59(e) do not apply under the circumstances of this case.  
5 Petitioner, while not entirely clear, appears to argue that this Court should reconsider its Order  
6 for the following reasons: (a) Petitioner apparently contends that it excusably neglected to bring  
7 *Fitzpatrick v. State ex rel., Dept. of Commerce, Ins. Div.*, 107 Nev. 486, 813 P.2d 1004 (1991) to  
8 this Court's attention in its opposition to ESD's motion to dismiss and again failed to do so  
9 during oral argument; (b) Petitioner's failure to serve the Petition within the mandatory NRS  
10 612.530(2) and NRS 233B.130(5) deadline due to counsel's alleged confusion with the NRCP  
11 4(i) constituted excusable neglect (or good cause) on Petitioner's part; (c) "the Court should  
12 consider the good cause detailed in Petitioner's opposition to motion to dismiss . . . and  
13 reconsider and vacate its ruling pursuant to NRCP 59(c)"; and, (d) that the Court allegedly erred  
14 when it found that Petitioner should have filed a motion for enlargement of time to serve the  
15 Petition. All of Petitioner's arguments clearly fail.

16 a) This Court Should Deny the Motion to Reconsider as *Fitzpatrick*  
17 Provides No Legal Support for This Court to Reconsider its Order.

18 NRCP 59(e) and NRCP 60(b) do not apply in this case. The Court did not err,  
19 there was no manifest injustice, and there was no excusable neglect under the circumstances of  
20 this case. *See*, NRCP 60(b)(1). Petitioner's argument is flawed for multiple reasons. *Fitzpatrick*  
21 lends this Court no relevant legal support under the circumstance of this case. The simple fact  
22 that Petitioner conducted additional research *after* the hearing on the Motion To Dismiss and  
23 belatedly found a case that is not relevant, cannot constitute excusable neglect. *Fitzpatrick* is  
24 clearly distinguishable from this case as it does not contain any law or analysis regarding NRS

1 612.530(2) and NRS 233B.130(5), the statutory requirement for timely service of a Petition for  
2 Judicial Review. *Fitzpatrick* only explains that a court may consider the late filing of *Points and*  
3 *Authorities* (or Opening Brief), pursuant to NRS 233B.130(2) (which is an entirely different  
4 statutory reference). *Fitzpatrick* is clearly distinguished from the circumstances of this case as  
5 no Points and Authorities (or Opening Brief) has been filed or has been attempted to be filed in  
6 this matter. As such, *Fitzpatrick* provides this Court no legal support for reconsidering its Order.

7 b) Counsel's Failure to Pay Attention to the Statutory Deadlines for  
8 Service Does Not Constitute Excusable Neglect or Good Cause.

9 Petitioner inaccurately contends that counsel's alleged confusion of the 120-day  
10 NRCP 4(i) deadline amounted to excusable neglect or is somehow sufficient to demonstrate  
11 good cause for untimely service of the Petition. Petitioner repeats the same argument in its  
12 Opposition to Motion to Dismiss, which this Court has already considered and rejected.  
13 Petitioner ineffectively restates this same argument another way: "lack of knowledge of  
14 procedural requirements" justifies this Court's extension of the statutory deadline. *See*, Motion  
15 to Reconsider, p. 13. This argument clearly fails.

16 The Court in *Whale v. United States*, 792 F.2d 951 (9<sup>th</sup> Cir. 1986) held that the  
17 "defect in service in the case at bar was *due solely* to the failure of Whale's counsel to pay  
18 *attention* to the requirements of Rule 4(d)(4)." *Id.* (emphasis added). "The district court did not  
19 abuse its discretion when it concluded that Whale had failed to demonstrate justifiable excuse"  
20 for defective service. Just as in *Whale*, Petitioner's counsel cannot demonstrate good cause for  
21 untimely service based solely on the failure to pay attention to the statutory deadlines for service.  
22 Petitioner's alleged "justification" for defective service is especially unreasonable and appears to  
23 lack good faith since Petitioner's counsel timely effectuated service of a Petition for Judicial  
24 Review upon ESD's Administrator in Case No. A652992 on January 11, 2012. *See, Spar v.*

1 *Zicarelli*, A-11-652992-J, Dept. 18. ESD invites this Court to review ESD's Reply to Opposition  
2 to Motion to Dismiss (hereinafter "Reply") filed July 21, 2017, pages 4-10, in response to  
3 Petitioner's flawed argument. This Court did not abuse its discretion in finding that Petitioner  
4 failed to meet its burden to show good cause.

5 As for Petitioner's erroneous contention that ESD excluded the legal argument  
6 that Petitioner must show good cause for untimely service of the Petition, *see* Motion to  
7 Reconsider, pp. 6 & 8, ESD respectfully refers this Court to ESD's Reply. A review of the legal  
8 analysis contained in ESD's Reply, pages 4-10, clearly demonstrates that the issue of whether  
9 Petitioner met its burden to show good cause was properly *before this Court for consideration*  
10 (and was discussed in the Motion To Dismiss, p. 4, ll. 17-18, as well as during the hearing on the  
11 Motion). Further, there is no doubt that this Court specifically considered this issue and  
12 concluded that Petitioner failed to meet its burden when the Court stated: "Petitioner failed to  
13 make a showing of good cause for effectuating service of the Petition for Judicial Review after  
14 the statutory deadline in this case. *Order Granting Motion to Dismiss*, p. 4. filed November 14,  
15 2017. Accordingly, this argument also fails.

16 To the extent that Petitioner attempts to rehash the argument that ESD is required  
17 to show it suffered prejudice by Petitioner's delay in serving the Petition, ESD refers this Court  
18 to its analysis in the Reply, pp. 7-9, and restates that NRS 612.530(2) and NRS 233B.130(5) are  
19 absent any language that the party seeking dismissal need show any prejudice.<sup>1</sup> ESD carries no  
20 burden to show prejudice for defective service. ESD, as any other party, has an interest in  
21 finality of actions. Any alleged delay in this matter is attributable to Petitioner. As ESD  
22 emphasized in its Reply, Petitioner failed to mention that on January 23, 2007, Petitioner

23 <sup>1</sup> It is true that Petitioner (formerly Spar Marketing Services, Inc., an out-of-state business) did not pay  
24 any unemployment taxes or report any wages for its Nevada-based merchandisers from at least 2004 –  
2011, reported 2 employees through 2012, and 1 employee through 2014; but (under a new name, Spar  
Business Services, Inc.) Petitioner began reporting Nevada-based merchandiser wages for approximately  
50 employees and paying Nevada unemployment taxes in January 2017.

1 withdrew its administrative appeal of the determination issued on October 20, 2006, finding that  
2 Michael DeBoard, and other similarly situated individuals working for Petitioner were  
3 employees and therefore Petitioner was subject to pay unemployment tax for its merchandisers.

4 c) Petitioner Inaccurately Contends that This Court Made a Finding  
5 that Petitioner Should Have Filed A Motion to Enlarge Time For  
6 Service. This Court Made No Such Finding.

7 Petitioner incorrectly complains that this Court erred when it “determined that  
8 Petitioner was required to bring a motion to enlarge time for extending the deadline for service  
9 prior to the expiration of the 45-day deadline,” Declaration of Gina Bongiovi, Esq., ¶23, p. 5,  
10 Motion to Reconsider. Petitioner repeated this inaccurate charge: “Moreover, the Court’s finding  
11 that Spar should have filed a motion to enlarge time is further in error, ...” Motion to  
12 Reconsider, p. 9, ll. 24-25. Petitioner’s argument is clearly misplaced. In its Order, this Court  
13 simply observed that Petitioner did not take any of the following reasonable (but not required)  
14 steps to safeguard timely service; *for example*: Petitioner did not ask ESD to stipulate to an  
15 extension of time before the expiration of the deadline, nor did Petitioner file a motion for  
16 extension of time before the 45-day service deadline expired. It is obvious that the Court made  
17 these observations as part of its chronological analysis of whether Petitioner met its burden to  
18 show good cause for untimely service of the Petition. In its Order, the Court appropriately  
19 remarked:

20 Here, the Petition was filed on May 15, 2017. There was no request or  
21 motion to extend the time for service prior to the expiration of the 45 days.  
22 As such, the deadline for service of the Petition would have been June 29,  
23 2017. It is undisputed that service of the Petition was not effectuated until  
24 July 14, 2017. Thus, the Petition was not timely served upon the  
Respondent as required by NRS 233B.130(5). Petitioner failed to make a  
showing of good cause for effectuating service of the Petition for Judicial  
Review after the statutory deadline in this case. *Order Granting Motion to  
Dismiss*, p. 4. filed November 14, 2017.

///



1 There is no basis upon which any reasonable person would believe that the above paragraph  
2 would be construed as the Court making a finding that "Petitioner was required to bring a motion  
3 to enlarge time for extending the deadline for service." Petitioner's argument, therefore, clearly  
4 fails to support Petitioner's motion to reconsider as the Court did not err.

5 d) NRCP 60(b) Provides No Legal Support for this Motion to  
6 Reconsider.

7 In addition to Petitioner's unsuccessful argument that NRCP 60(b)(1) supports its  
8 motion due to counsel's excusable neglect, while unclear, it appears Petitioner also attempts to  
9 suggest that NRCP 60(b)(2) provides support for its motion to reconsider. NRCP 60(b)(2) lends  
10 no support to Petitioner's motion to reconsider.

11 NRCP 60(b)(2) provides that a court may reconsider an order if there is "newly  
12 discovered evidence which by due diligence could not have been discovered in time to move for  
13 a new trial under Rule 59(b)." Here, Petitioner pointed out no new evidence which could have  
14 been discovered by Petitioner in time to move for a new trial (or perhaps before the Court  
15 rendered its decision). Neither NRCP 60(b) nor NRCP 59(e) relate to the instant case.

16 e) The NRS 612.530(2) and NRS 233B.130(5) Statutory  
17 Requirements for Service of the Petition are Mandatory and  
18 Jurisdictional.

19 Petitioner incorrectly suggests that the single act of timely filing of a Petition for  
20 Judicial Review is sufficient for this Court to obtain jurisdiction, and that a Petitioner must fulfill  
21 no other obligation to confer jurisdiction upon the district court in an NRS Chapter 612  
22 administrative case. *See*, Motion to Reconsider, pp. 10-11, 14. This contention is legally  
23 deficient.

24 The Nevada Supreme Court has long held that "when a party seeks judicial  
review of an administrative decision, strict compliance with the statutory requirements for



1 [judicial] review is a precondition to jurisdiction by the court.” *Kame v. Employment Sec. Dep’t*,  
2 105 Nev. 22, 25, 769 P.2d 66, 68 (1989). “Noncompliance with the requirements is grounds for  
3 dismissal of the appeal.” *Id.* While dismissal of an appeal may cause hardship, “the legislature  
4 is the parent of unemployment benefits.” *Kame*, 105 at 26, 769 P.2d at 68. “The legislature may  
5 enact any reasonable and nondiscriminatory conditions regarding eligibility and procedure.” *Id.*  
6 “[I]t is not the function of this Court to substitute its judgment for that of the legislature.” *Id.*  
7 Similarly, the *Otto* Court explained that “to invoke a district court’s jurisdiction to consider a  
8 petition for judicial review, the petitioner must strictly comply with the APA’s procedural  
9 requirements.” *Washoe Cty. v. Otto*, 128 Nev. Adv. Op. 40, 282 P.3d 719, 725 (2012).

10 In order to invoke the jurisdiction of the Court in this special statutory proceeding,  
11 several steps must be followed. *See*, “**NRS 612.530 Judicial review of decision of Board of**  
12 **Review: Commencement of action in district court; parties; service of petition.**” NRS  
13 612.530(2) and NRS 233B.130(5) require the following steps be taken: **(1)** a party must timely  
14 file the Petition in the district court, **(2)** the Petition must be filed in the appropriate county; *See*,  
15 *Caruso v. Nevada Employment Sec. Dep’t*, 103 Nev. 75, 76, 734 P.2d 224, 225 (1987)(holding,  
16 “[t]he legislature has, by explicit language, directed claimants to file their petitions for judicial  
17 review in the county wherein the appealed claim was filed” for the court to obtain subject matter  
18 jurisdiction) *see also*, *Scott v. Nevada Employment Sec. Dep’t*, 70 Nev. 555, 558, 278 P.2d 602,  
19 603 (1954)(“We see no hardship or unfairness in requiring court review in the judicial district  
20 where the claim is first filed with the Employment Security Department”); **(3)** the Petition must  
21 specifically name all parties; *Bd. of Review, Nevada Dep’t of Employment, Training & Rehab.*,  
22 *Employment Sec. Div. v. Second Judicial Dist. Court in & for Cty. of Washoe*, 396 P.3d 795, 797  
23 (Nev. 2017)(“ESD filed a motion to dismiss, on the ground that the caption failed to identify [the  
24 claimant], rendering the petition . . . defective. McDonald’s failed to follow the statutory

1 requirements . . . thus depriving the district court of jurisdiction . . . We have consistently held that  
2 the requirements of the statute are jurisdictional and mandatory”)(emphasis added); *see also*,  
3 *Washoe Cty. v. Otto*, 128 Nev. Adv. Op. 40, 282 P.3d 719, 725 (2012), which held that all parties  
4 must be named in the petition; (4) the Petition “must be served upon the Administrator,” NRS  
5 612.130(2)(emphasis added); and “must be served . . . within 45 days.”<sup>2</sup> NRS 233B.130(5); *see*  
6 *also, Otto*, 128 Nev. Adv. Op. 40, 282 P.3d at 725 (“When interpreting a statute, we first look to  
7 its language,” and when the language used has a certain and clear meaning, we will not look  
8 beyond it (internal citations omitted)). Consequently, Petitioner’s argument that a party *only*  
9 needs to timely *file* the Petition to invoke jurisdiction clearly fails as a matter of law.

10 Counsel’s admitted reliance upon NRCP 4(i) for the service deadline is misplaced  
11 and not supported by Nevada law (and therefore NRCP 4(i) cannot constitute good cause for the  
12 service delay). NRCP 82 provides that “these rules shall not be construed to extend or limit  
13 jurisdiction of the district courts.” NRCP 1 explains that the “rules govern procedure in district  
14 court . . .with the exceptions stated in Rule 81.” NRCP 81(a) articulates that the Nevada Rules of  
15 Civil Procedure “do not govern procedure and practice in any special statutory proceeding  
16 insofar as they are inconsistent or in conflict with the procedure and practice provided by  
17 applicable statute.” Here, NRS 233B.130(5) contains a specific statutory provision regarding the  
18 45-day deadline for service of a petition for judicial review, NRS 233B.130(5) clearly prevails  
19 over NRCP 4(i). *See* fn. 1, *supra*; *see also, Crane v. Continental Tel. Co. of Ca.*, 105 Nev. 399,  
20 401, 775 P.2d 705,707 (1989)(holding that “when the legislature creates a specific procedure for  
21 review of administrative agency decisions, such procedure is controlling.”)

22 ///

23 \_\_\_\_\_  
24 <sup>2</sup> Provisions of Nevada’s Administrative Procedure Act (Ch. 233B of NRS) apply absent special provisions  
in Chapter 612 of NRS to the contrary. NRS 233B.039(3)(a). NRS 612.530(2) is silent as to when the  
Petition must be served upon ESD’s Administrator. Accordingly, Chapter 233B of NRS requires it to be  
served within 45 days of filing.

1           The service deadline outlined in NRS 233B.130(5) is jurisdictional and  
2 mandatory. ““Courts have no inherent appellate jurisdiction over official acts of administrative  
3 agencies except where the legislature has made some statutory provision for judicial review.’  
4 Accordingly, [w]hen the legislature creates a specific procedure for review of administrative  
5 agency decisions, such procedure is controlling.”)(internal citations omitted); *see also, Bd. of*  
6 *Review, Nevada Dep’t of Employment, Training & Rehab., Employment Sec. Div. v. Second*  
7 *Judicial Dist. Court of State in & for Cty. of Washoe*, 396 P.3d 795, 797 (Nev. 2017)(reversing  
8 the denial of ESD’s motion to dismiss because petitioner failed to properly name a party as  
9 required by NRS 612.530(1), explaining “[w]e have consistently held that the requirements of  
10 the statute [NRS 612.530] are jurisdictional and mandatory.” Even if NRS 233B.130(5) is not  
11 jurisdictional (and it is jurisdictional), NRS 233B.130(5) states that the Petition “must be served  
12 . . . within 45 days.” The word “must” signifies that the statute is mandatory “unless, upon a  
13 showing of good cause.” Petitioner has supplied no other law that controls the deadline for  
14 service of a Petition for Judicial Review. As explained above, NRCP 4(i) is inapplicable to this  
15 administrative proceeding. *See, e.g.,* NRCP 81(a). Since Petitioner failed to show good cause  
16 for its **15-day** belated service of the Petition (see above), this Court appropriately granted ESD’s  
17 Motion To Dismiss. This Court must therefore deny the motion to reconsider.

18           f) The Cases Petitioner Cited are Obviously Distinguished and  
19           Should be Disregarded.

20           While this Court has authority to entertain a motion to reconsider under  
21 appropriate circumstances, this is not the appropriate case to grant such motion. *AA Primo*  
22 *Builders, LLC v. Washington*, 236 Nev. 587, 582, 245 P.3d 1190, 1193 (2010), a case involving a  
23 civil action rather than a special statutory proceeding and is clearly distinguished from the facts  
24 of this case. *Washington* supplies the reasons for granting an NRCP 59(e) motion: to “prevent

1 manifest injustice,” to “change controlling law,” or correct “manifest errors of law or fact.” *Id.*  
2 None of these situations apply here, as this Court did not commit an error of law or fact, this  
3 Court’s Order was not unjust, and Petitioner did not suggest that controlling law be changed.  
4 Further, *Washington* interpreted an unrelated statute, NRS 86.276, regarding the reinstatement of  
5 a revoked charter, which has no relevance to this case.

6 Likewise, *Hotel Last Frontier Corp. v. Frontier Properties, Inc.*, 79 Nev. 150,  
7 380 P.2d 293 (1963) involved a declaratory judgment action regarding a lease and agreement  
8 executed between the parties, and the grant of default judgment. *Hotel Last Frontier Corp.*, a  
9 civil action, is obviously distinguished from this special statutory proceeding. Similarly, *Kahn v.*  
10 *Orme*, 108 Nev. 510, 835 P.2d 790 (1992) is distinguishable as a civil action; Kahn was sued for  
11 battery, defamation and malicious prosecution, in which a default judgment was entered. *See, Id.*  
12 And finally, *Banks v. Heater*, 95 Nev. 610, 600 P.2d 245 (1979) also involved a civil action for  
13 specific performance, and conveyance of free and clear title to real estate. *Banks*, a civil action  
14 involving the grant of a default judgment does not apply under the circumstances of this special  
15 statutory proceeding.

16 C. CONCLUSION

17 For all the reasons set forth above, as well as based upon the statutory and case  
18 law discussed in detail hereinabove, Respondent ESD respectfully requests this Court deny the  
19 Petitioner’s Motion to Reconsider.

20 **RESPECTFULLY SUBMITTED** this 4<sup>th</sup> day of December, 2017.

21   
22 \_\_\_\_\_  
23 LAURIE L. TROTTER, ESQ.  
Attorney for Respondent ESD

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

Laurie L. Trotter, Esq., after first being duly sworn, deposes and avers under penalty of perjury the assertions of this Affidavit are true as follows:

1. That I am an attorney duly licensed to practice law in the State of Nevada.
2. That I am Senior Legal Counsel to the Nevada Employment Security Division of the Department of Employment, Training and Rehabilitation.
3. That I prepared the attached Opposition to Petitioner's Motion to Reconsider pursuant to NRCP 59(e) and NRCP 60(b) (Motion to Reconsider) and make this Affidavit in support thereof.
4. That the information contained in the Opposition to Motion to Reconsider is true and correct, based upon my information and belief.
5. It is therefore prayed that this Honorable Court issue an Order denying Petitioner's Motion to Reconsider.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

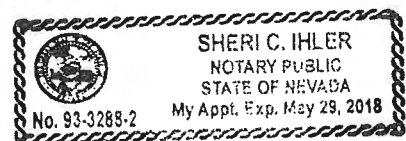
**DATED** this 4th day of December, 2016.

  
LAURIE L. TROTTER, ESQ.  
*Attorney for Respondent ESD*

**Subscribed and Sworn to before me**

this day of December, 2017.

**NOTARIAL OFFICER**



1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of the State of  
3 Nevada, over the age of 18 years; and that on the date hereinbelow set forth, I served a true and  
4 correct copy of the foregoing ESD'S OPPOSITION TO PETITIONER'S MOTION TO  
5 RECONSIDER PURSUANT TO NRCP 59(e) AND NRCP 60(b), *by either* electronic means  
6 (N.E.F.C.R. Administrative Order 14-2), as indicated by an email address set forth below, *and/or*  
7 by placing the same within an envelope, which was thereafter sealed and deposited for postage  
8 and mailing with the State of Nevada Mail, Carson City, Nevada, addressed for delivery as  
9 follows:

10 Gina Bongiovi, Esq.  
11 *Bongiovi Law Firm, LLC*  
12 2620 Regatta Drive, Suite 102  
13 Las Vegas, NV 89128

14 Thomas J. Vollbrecht, Esq.  
15 *Fabyanske, Westra, Hart, et al.*  
16 333 South Seventh St., Suite 2600  
17 Minneapolis, MN 55402

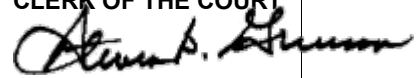
18 Michael DeBoard  
19 5026 River Glen #158  
20 Las Vegas, NV 89103

21 *And via e-file Courtesy Copy to:*

22 [Dept32LC@clarkcountycourts.us](mailto:Dept32LC@clarkcountycourts.us)

23 DATED this 14<sup>th</sup> day of December, 2017.

24   
SHERI C. IHLER



**ROPP**

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*Admitted Pro Hac Vice*

*Attorneys for Petitioner Spar Business Services, Inc.*

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

SPAR BUSINESS SERVICES, INC.

Petitioner,

v.

EMPLOYMENT SECURITY DIVISION,  
STATE OF NEVADA and RENEE OLSON  
in her capacity as Administrator of the  
EMPLOYMENT SECURITY DIVISION;  
KATIE JOHNSON, in her capacity as  
Chairperson of the EMPLOYMENT  
SECURITY DIVISION BOARD OF  
REVIEW, and MICHAEL DEBOARD as  
employee,

Respondents.

Case No.: A-17-755501-J

Dept. No.: XXXII

**PETITIONER'S REPLY IN SUPPORT  
OF MOTION TO RECONSIDER  
PURSUANT TO NRCP 59(e)  
AND NRCP 60(b)**

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COMES NOW, Petitioner Spar Business Services, Inc. (“Spar” or “Petitioner”), by and through its counsel of record, Gina Bongiovi of Bongiovi Law Firm, LLC and Thomas Vollbrecht of Fabyanske, Westra, Hart & Thomson, P.A., hereby submits this Reply in Support of Petitioner’s Motion to Reconsider Pursuant to Rule 59(e) and NRCP 60(b).

DATED this 18<sup>th</sup> day of January, 2018.

/s/ Gina Bongiovi  
Gina Bongiovi  
Attorney for Spar, Petitioner

### **MEMORANDUM OF POINTS AND AUTHORITIES**

#### **I. INTRODUCTION**

There is one simple issue before the Court that entirely controls whether the Court has jurisdiction to determine this matter should proceed – whether the timely filing of Spar’s Petition for Judicial Review was enough to invoke the Court’s jurisdiction over Petitioner’s appeal. The Court previously ruled it was not, in large part due to Respondents’ staunch, though entirely incorrect, insistence that Petitioner’s failure to comply with *other* deadlines somehow barred the Court from invoking jurisdiction. After the Court’s prior order was filed, which, notably, Respondents failed to send to Petitioner to review, Petitioner discovered direct, controlling Nevada Supreme Court precedent which flat-out rejects Respondents’ position. *See Fitzpatrick adv. State of Nevada*, 107 Nev. 486 (1991), attached hereto as **Exhibit 1**.

In *Fitzpatrick*, the Nevada Supreme Court is plain: the deadline dictated by statute for filing a Petition for Judicial Review (“PJR”) is what confers jurisdiction; therefore, the district court’s jurisdiction is properly invoked once a party timely files its PJR. *See Id.* at 488, “the time allotted by statute for taking an administrative appeal is jurisdictional, and to invoke the appellate jurisdiction of the district court, a petition for judicial review must be timely filed.” Moreover, the Court in *Fitzpatrick* then ruled that the district court erred in finding that it did not have jurisdiction due to a petitioner’s failure to meet other deadlines, despite those



1 deadlines also being specifically delineated in the same statute. See *Id.* at 489, “the district  
2 court erred when it concluded it was without jurisdiction to consider the merits of Fitzpatrick's  
3 claim that he had good cause for filing a tardy memorandum of points and authorities in  
4 support of the timely filed petition for judicial review.”

5 To summarize the Court’s ruling in Fitzpatrick, a timely filed petition invokes the district  
6 court’s jurisdiction and the district court erred in finding the petitioner’s failure to meet other  
7 deadlines barred it from invoking jurisdiction over the matter. *Fitzpatrick* is fundamentally  
8 identical to the case at bar - Spar timely filed its PJR and Respondents moved to dismiss based  
9 solely on Spar’s failure to meet a different deadline, namely, service of the subject petition on  
10 Respondents. Moreover, just as in *Fitzpatrick*, the deadline not met could have been extended  
11 by the Court. Therefore, also just as in *Fitzpatrick*, the court erred in ruling that it did not have  
12 jurisdiction due to Spar’s failure to timely serve the PJR. Spar timely filed the PJR and as  
13 Fitzpatrick makes clear, that is enough to invoke this Court’s jurisdiction.

14 Respondents’ fourteen-page Opposition to Petitioner’s Motion is nothing more than a  
15 transparent attempt to divert the Court’s attention from the straightforward application of  
16 *Fitzpatrick*, a decision of which Respondents were certainly aware and, in fact, should have  
17 brought to the Court’s attention. Of course, if Respondents actually thought *Fitzpatrick* was  
18 distinguishable, it would have made the same clear in its Opposition.

19 Thus, contrary to Respondents’ statement that Spar is “patently false in its contention”  
20 that timely filing of the Petition is the only requirement necessary to properly invoke  
21 jurisdiction, *Fitzpatrick* is clear that once the Petition is filed, the District Court does, in fact,  
22 have jurisdiction.

23 Additionally, given this Court did, in fact, have jurisdiction at the October 10, 2017  
24 hearing to consider the untimely service, the Court was then required to review whether Spar  
25 had good cause for the late filing. The Order issued by the Court is completely silent as to any  
26 facts or circumstances surrounding Spar’s good cause because the Court, believing it had no  
27 jurisdiction to hear the matter in the first place, never meaningfully considered good cause.  
28 See NOE and Order attached to the Motion to Reconsider as **Exhibit 2**. Rather, the focus was

1 entirely centered around whether the Court had jurisdiction to hear the matter. The issue of  
2 good cause was treated by Respondents in the Order they prepared as merely an afterthought  
3 when it should have taken center stage. If the reverse is true, and good cause was considered,  
4 where in the Order are Spar's facts and arguments by Spar relating to good cause? They are  
5 absent because they were dismissed as irrelevant to the analysis. The Court was force-fed  
6 Respondents' position that the Court truly lacked jurisdiction to even hear the matter.

7 Lastly, because the Court has jurisdiction and the power to consider good cause,  
8 Nevada's overriding policy is to hear cases on their merits. For these reasons, it was error to  
9 dismiss this case, effectively with prejudice.

## 10 **II. FACTS AND PROCEDURAL HISTORY**

11 While Respondents "adopt the findings" in the November 14, 2017 Order, Respondents  
12 fail to acknowledge that there is not a single finding regarding good cause. Moreover, contrary  
13 to the statement that "counsel made no good cause explanation for the untimely service," Spar  
14 expressly argued good cause in its opposition to the motion to dismiss and at the hearing.

15 Additionally, the Court should be reminded that Respondents never submitted a  
16 proposed Order to Spar. It was not until Respondents served Spar with a Notice of Entry of  
17 Order that Spar had an opportunity to review what had already been entered by the Court. It is  
18 unheard of that counsel would fail to give opposing counsel the opportunity to review and  
19 revise or, at a minimum, approve an Order as to form.

## 21 **III. LEGAL ARGUMENT**

### 22 **A. Standard of Review**

23 Respondents take issue with Spar's reliance on NRCP 60(b) and 59(e) by stating they  
24 "do not apply." Again, ignoring Spar's arguments, Respondents then insist that the only basis  
25 for consideration is failure to bring *Fitzpatrick* to the Court's attention (which Respondent  
26 should have done). While that is one error, it is not the only basis upon which to reconsider  
27 the Order. Rule 59(e) "provides an opportunity, within a severely limited time, to seek  
28 correction at the trial Court level of an erroneous order or judgment, thereby initially avoiding

1 the time and expense of appeal.” *See Chiara v. Belaustegui*, 86 Nev. 856, 859, 477 P.2d 857  
2 (1979). Among grounds for such a motion are correcting ***manifest error of law or fact***, newly  
3 discovered or previously unavailable evidence, ***or a need to prevent a manifest injustice***. *See*  
4 *AA Primo Builders, L.L.C. v. Washington*, 126 Nev. 578, 245 P.3d 1190 (2010)(emphasis  
5 added). While it is true that the Court should have relied upon *Fitzpatrick* as the only Nevada  
6 Supreme Court case directly on point, it was additionally manifest error for the Court to fail to  
7 make any findings regarding good cause. This Court should vacate the Order as manifest error  
8 at law, ***as well as to prevent manifest injustice*** in the face of well-cemented Nevada policy  
9 that Courts must adjudicate matters on their merits.

10 Additionally, pursuant to NRCP 60(b), upon motion a Court may relieve a party from a  
11 final order due to a party’s mistake, inadvertence, or excusable neglect. In addition to  
12 Petitioner’s good faith efforts to comply with the varied rules that apply to cases of this type,  
13 Petitioner did not discover dispositive case law regarding the matter until after the October 10  
14 hearing. Notably, neither did Respondents make the Court aware of *Fitzpatrick adv. State of*  
15 *Nevada* which holds that if a PJR is timely filed, the Court has jurisdiction to consider other  
16 matters as articulated within the statute, including good cause. *See Fitzpatrick adv. State of*  
17 *Nevada*, 107 Nev. 486 (1991). Therefore, *Fitzpatrick* is directly on point and mandates that  
18 this Court consider t;he good cause for Petitioner’s delayed service of its Petition upon  
19 Respondents.

20 **B. Fitzpatrick is Controlling Legal Authority.**

21 Respondent argues that *Fitzpatrick* does not control because the missed deadline in  
22 *Fitzpatrick* was the deadline to file the Memorandum of Points and Authorities, where the  
23 missed deadline here was for service. Respondents’ analysis is wrong. *Fitzpatrick* is directly  
24 on point.

25 In *Fitzpatrick*, the State of Nevada, exactly like in the case at bar, moved to dismiss  
26 arguing that the Petitioner must strictly comply with all aspects of administrative procedure, or  
27 the District Court is divested of jurisdiction to hear the matter. *Id.* Exactly like the case at bar,  
28 the State of Nevada moved to dismiss and Petitioner responded that he had good cause for

1 filing late. *Id.* Exactly like the case at bar, NRS 233B.133(6) provided that the Court may  
2 extend the deadline for filing the memorandum of points and authorities for good cause  
3 shown. *Id.*; *see also* NRS 233B.133(6). In reversing the District Court, the Nevada Supreme  
4 Court held:

5  
6 ... the time allotted by statute for taking an administrative appeal is  
7 jurisdictional, and **to invoke the appellate jurisdiction of the district  
8 court, a petition for judicial review must be timely filed.** *Id.*

9 ...

10 Accordingly, **the district court erred** when it concluded it was without  
11 jurisdiction to consider the merits of Fitzpatrick’s claim that he had good  
12 cause for filing a tardy memorandum of points and authorities in support of  
13 the timely filed petition for judicial review. We reverse and remand this  
14 matter back to the district court for further consideration. *See Fitzpatrick*  
15 *adv. State of Nevada*, 107 Nev. 486, 489 (1991) attached hereto as **Exhibit**  
16 **1.**

17 Moreover, just like in *Fitzpatrick*, Spar did not seek leave of Court to enlarge the  
18 statutory deadline until its opposition to the State of Nevada’s Motion to Dismiss. Herein,  
19 (although wrongfully characterized by Respondent as “remarks”) the Order expressly states  
20 that the Court makes the following “**Findings of Fact and Conclusions of Law**,” which  
21 included the finding that Spar made “no request or motion to extend the time for service prior  
22 to the expiration of the 45 days.” *See* Order, pg. 2, lln. 11-12; pg. 4, lln. 6-7. Thus, the Court’s  
23 holding at bar, that Petitioner was required to file a motion for leave to serve late in advance of  
24 service, is without support and is contrary to *Fitzpatrick*.

25 *Fitzpatrick* is controlling. While Spar was not aware of the *Fitzpatrick* case prior to the  
26 hearing, the State of Nevada should have been aware and should have presented the case to the  
27 Court. Regardless, the Court was made aware that NRS 233B.130(5) provides that the District  
28 Court may extend time for service upon a showing of good cause. The Court failed to consider  
good cause even under NRS 233B.130(5), as evidenced by the Order and contrary to the plain  
language in the statute. The statute, coupled with the controlling language of *Fitzpatrick*,  
shows the Court’s Order contains manifest error at law. For these reasons, the Court should

1 consider the good cause detailed in Petitioner’s opposition to the motion to dismiss as well as  
2 in the Declaration of Gina Bongiovi, Esq. on file herein and reconsider and vacate its dismissal  
3 pursuant to NRCp 59(e). Failure to do so is manifest error of law and will result in manifest  
4 injustice for Spar in the face of solid Nevada policy dictating that cases be heard on the merits,  
5 as more fully addressed below. *See AA Primo Builders, L.L.C. v. Washington*, 126 Nev. 578  
6 (2010).

7 **C. The Outdated 9<sup>th</sup> Circuit Opinion Does Not Apply.**

8 Much like the Respondents’ efforts to misguide the Court to rely on *Washoe Cty. v. Otto*,  
9 128 Nev. Adv. Op. 40, 282 P.3d 719, 725 (2012), Respondents attempt to argue a 9<sup>th</sup> Circuit  
10 case construing outdated Federal Rules of Civil Procedure. *See Whale v. United States*, 792  
11 F.2d 951 (9<sup>th</sup> Cir. 1986). The Respondents’ reliance on an (outdated) Federal case law  
12 construing “good cause” is ironic given Respondents argue Spar is prohibited from relying  
13 upon Nevada State cases such as *AA Primo Builders* as those cases do not involve special  
14 statutory proceedings...” *See* Opposition, pg. 13, lln. 20-23. If the Respondents are correct on  
15 this point, the Court need look no further than *Fitzpatrick*, the only Nevada Supreme Court  
16 case that is controlling. Regardless, *Whale* is distinguishable and otherwise does not control.  
17 First, unlike the interplay at bar between NRS 233B.130(b) and NRS 612.530(2), *Whale*  
18 involves the standard deadline of 120 days for service of a federal civil complaint upon the  
19 United States of America found at FRCP 4(j). *Id.* at 952. Unlike the statutory scheme at bar,  
20 the time for service upon the US was the same as any other Defendant – 120 days. In *Whale*,  
21 the Plaintiff exhibited blatant disregard for the Court and the Rules of Civil Procedure. The  
22 Plaintiff failed to file a proof of service within the deadline and the Federal District Court  
23 issued an Order to Show Cause as to why the complaint should not be dismissed. *Id.* On  
24 February 6, 1995 the Court then, *sua sponte*, dismissed the complaint because the Plaintiff  
25 failed to file a Response to the Order to Show Cause. *Id.* Five months after the case was  
26 dismissed, the Plaintiff filed a motion to reconsider pursuant to FRCP 60(b). *Id.* Additionally,  
27 in that case the Plaintiff was reading the proper rule, FRCP 4, but substituted his “assumption”  
28 about proper service over the text of the Rule. *Id.* at 953. Thus, the only applicable holding in

1 *Whale* is that a mistaken assumption does not necessarily establish good cause. Notably, the  
2 Court in *Whale* made express findings. Unlike in *Whale*, Spar made no assumptions about the  
3 Rule for service, as clearly articulated in the Affidavit of Gina Bongiovi, Esq. Rather, Ms.  
4 Bongiovi worked diligently to ensure Mr. Vollbrecht was properly associated as early as  
5 possible, sought guidance from other counsel, carefully reviewed the rules, and made a  
6 judgment call which, given the complex nature of the Rules, and the shuttling between NRS  
7 233B and NRS 612, all exhibit good cause.

8 *Whale* is outdated as FRCP 4 has changed. FRCP 4 was amended in 1993 making the  
9 Rule discretionary in nature, allowing a judge to excuse the 120-day requirement even if the  
10 party responsible “for service could not establish good cause for its failure.” See *In re Casey*,  
11 193 B.R. 942, 35 Collier Bankr. Cas. 2d 1106 (1996). In fact, the Rule now requires that the  
12 court must extend the time for service for an appropriate if good cause is shown. *Id.*, see also  
13 FRCP 4(m). The Rule further states that if the Court dismisses the action it must be dismissed  
14 “without prejudice.” See FRCP 4(m).

15 Contrary to the Respondents’ efforts to rely upon an outdated 9<sup>th</sup> Circuit opinion, Nevada  
16 Supreme Court has repeatedly reiterated its position that, absent blatant disregard for the rules  
17 of civil procedure, “good public policy dictates that cases be adjudicated on their  
18 merits.” *Kahn v. Orme*, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992) (citing *Hotel Last*  
19 *Frontier v. Frontier Prop.*, 79 Nev. 150, 155-56, 380 P.2d 293, 295 (1963)). The record at bar  
20 reflects Spar’s counsel’s good faith effort to promptly comply with the procedural rules – there  
21 is absolutely no evidence of any “blatant disregard” or intent to delay proceedings. This  
22 Court’s granting of the State’s motion falls squarely outside this principle. Further, a dismissal  
23 of this case would effectively be with prejudice, as the eleven-day deadline provided by NRS  
24 612.510(2) for filing of a PJR expired on May 16, 2017. A dismissal at this juncture would  
25 preclude Spar from refiling its PJR and would represent an egregious denial of Spar’s  
26 opportunity to be heard, especially because this particular matter has been awaiting a final  
27 agency decision for several years.

1 To dismiss a matter years in the making for a fourteen-day delay in service would be a  
2 grossly disproportionate outcome that would fly in the face of the Nevada Supreme Court's  
3 repeated admonitions that cases must be heard on their merits, absent a blatant disregard for  
4 the rules or an intent to delay proceedings, neither of which is present here. *Hotel Last*  
5 *Frontier Corp. v. Frontier Properties, Inc.*, 79 Nev. 150, 155, 380 P.2d 293, 295 (1963),  
6 "Finally we mention a proper guide to the exercise of discretion, to basic underlying policy to  
7 have each case decided on the merits." *Banks v. Heater*, 95 Nev. 610, 612, 600 P.2d 245, 246  
8 (1979); "[T]he policy of this Court is that each case be decided upon the merits whenever  
9 possible. Second, a factor of importance is the party's lack of knowledge as to procedural  
10 requirements." *Id.* at 154, 380 P.2d at 295. It is clear that a trial Court could find from this  
11 record a lack of knowledge of procedural requirements; inadvertence or excusable neglect; no  
12 bad faith or an intent to delay; and the presentation of a meritorious defense.

#### 13 **IV. CONCLUSION**

14 This Court, respectfully, and in light of the Respondents' failure to reveal relevant case  
15 law, failed to consider Petitioner's good cause for the nominal delay, but now has the  
16 opportunity to reconsider its Order in light of the good cause arguments it had jurisdiction to  
17 consider all along, and in light of Nevada's well-settled public policy that cases be heard on  
18 their merits. As such, the Court must reconsider and vacate its Order pursuant to NRCP 59(e)  
19 and/or NRCP 60(b) and allow this matter to proceed.

20 DATED this 18<sup>th</sup> day of January, 2018.

21 Respectfully submitted by:

22 /s/ Gina Bongiovi

23 Gina Bongiovi, Esq., Nevada Counsel of Record

24 Nevada Bar No. 10667

25 2620 Regatta Drive, Suite 102

26 Las Vegas, NV 89128

27 Telephone: (702) 485-1200

28 Fax: (702) 485-1202

E-mail: [gina@bongiovilaw.com](mailto:gina@bongiovilaw.com)

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of the BONGIOVI LAW FIRM, LLC, and that I served a true and correct copy of the foregoing **PETITIONER'S REPLY IN SUPPORT OF MOTION TO RECONSIDER PURSUANT TO NRCP 59(e) AND NRCP 60(b)** by either electronic means (NEFCR Administrative Order 14-2), as indicated by an e-mail address as set forth below, and/or by:

X	BY E-FILING SERVICE: via Odyssey eFile NV
X	BY MAIL: Pursuant to NRCP 5(b), I placed a true and correct copy thereof enclosed in a sealed envelope addressed to the parties as indicated below.
	BY FACSIMILE: Pursuant to EDCR 7.26, I transmitted a copy of the foregoing document via telecopy to the facsimile number(s) indicated below.
X	BY ELECTRONIC MAIL: Pursuant to EDCR 7.26, I transmitted a copy of the foregoing document via electronic mail to the electronic mail address(es) listed below.
	BY HAND DELIVERY

Renee Olson, Administrator  
Employment Security Division  
State of Nevada  
500 E. Third St.  
Carson City, NV 89713

Laurie Trotter, Esq.  
Senior Legal Counsel  
Employment Security Division  
State of Nevada  
1340 So. Curry Street  
Carson City, NV 89703  
l-trotter@nvdetr.org

And via e-file Courtesy Copy to: [Dept32LC@clarkcountycourts.us](mailto:Dept32LC@clarkcountycourts.us)

Dated this 18<sup>th</sup> day of January 2018.

/s/ Kristina Blair  
An employee of Bongiovi Law Firm, LLC



# EXHIBIT 1

## 813 P.2d 1004 (1991)

Patrick M. FITZPATRICK, Appellant,

v.

The STATE of Nevada, ex rel., DEPARTMENT OF COMMERCE, INSURANCE DIVISION, Respondent.

No. 21356.

Supreme Court of Nevada.

July 2, 1991.

Jeffrey Friedman, Reno, for appellant.

Frankie Sue Del Papa, Atty. Gen. and Melanie Foster, Deputy Atty. Gen., Carson City, for respondent.

## OPINION

PER CURIAM:

The appellant, Patrick Fitzpatrick, began working for respondent State of Nevada Department of Commerce, Insurance Division (Insurance Division) on May 10, 1985.<sup>[1]</sup> He received "above-standard" and "standard" work performance evaluations from the Insurance Division in 1985, 1986 and the first half of 1987. However, on November 10, 1987, the Insurance Division charged Fitzpatrick with inexcusable neglect of duty and discourteous treatment of the public, and  
1005 suspended him for three \*1005 days without pay.<sup>[2]</sup> See NAC 284.650(7); NAC 284.650(4).

Approximately one year later, on November 8, 1988, the Insurance Division charged Fitzpatrick with insubordinate and disobedient behavior arising from an unauthorized, unreported two hour and twenty minute absence from work. See NAC 284.650(6); NAC 284.650(15). For this violation, Fitzpatrick's unauthorized leave time was deducted from his paycheck and he was suspended for four hours without pay. Fitzpatrick appealed this suspension to an administrative hearing officer.

Finally, on January 6, 1989, the Insurance Division charged Fitzpatrick with: (1) disgraceful personal conduct that impaired job performance or caused discredit to the Insurance Division; (2) discourteous treatment of the public or fellow employees while on duty; (3) incompetence or inefficiency; (4) inexcusable neglect of duty; and (5) unauthorized absence from duty or abuse of leave privileges. The discipline Fitzpatrick received for these infractions was termination. See NAC 284.650(2); NAC 284.650(4); NAC 284.650(5); NAC 284.650(7); NAC 284.650(15). A second appeal was taken to an administrative hearing officer who consolidated both of Fitzpatrick's pending appeals in one action. A three day administrative hearing was held in November, 1989 and on February 9, 1990, the administrative hearing officer affirmed the Insurance Division's decision to terminate Fitzpatrick.

A petition for judicial review was timely filed with the district court pursuant to the requisites of NRS 233B.130(2)(c).<sup>[3]</sup> Thereafter, the Insurance Division filed a motion to dismiss the petition based upon Fitzpatrick's undisputed failure to timely file a memorandum of points and authorities in support of the petition. Fitzpatrick responded to the motion to dismiss with an assertion that he had good cause for filing his memorandum of points and authorities beyond the filing deadline. The matter was submitted to the district court judge who concluded that Fitzpatrick's failure to timely file the memorandum of points and authorities deprived the district court of jurisdiction to consider the timely filed petition for judicial review. We disagree with the district court's reasoning and, accordingly, we reverse.

In *Crane v. Continental Telephone*, 105 Nev. 399, 775 P.2d 705 (1989) we held that "[c]ourts have no inherent appellate jurisdiction over official acts of administrative agencies except where the legislature has made some statutory provision for judicial review." *Id.* at 401, 775 P.2d at 706. Therefore, the time allotted by statute for taking an administrative appeal is jurisdictional, and to invoke the appellate jurisdiction of the district court, a petition for judicial review must be timely filed. *Id.* However, if the petition for judicial review is timely filed, NRS 233B.133 allows the district court to accept a tardy  
1006 memorandum of points and authorities in support of the petition.<sup>[4]</sup> Accordingly, the district \*1006 court erred when it concluded it was without jurisdiction to consider the merits of Fitzpatrick's claim that he had good cause for filing a tardy

memorandum of points and authorities in support of the timely filed petition for judicial review. We reverse and remand this matter back to the district court for further consideration.

MOWBRAY, C.J., SPRINGER, STEFFEN, and YOUNG, JJ., and LANE, District Justice,<sup>[5]</sup> concur.

[1] Prior to this time, Fitzpatrick had worked for various state agencies since 1972.

[2] Specifically, Fitzpatrick allegedly failed to promptly and appropriately respond to a private party's request for an advisory opinion.

[3] NRS 233B.130(2)(c) provides:

2. Petitions for judicial review must:

.....

(c) Be filed within 30 days after service of the final decision of the agency. Cross-petitions for judicial review must be filed within 10 days after service of a petition for judicial review.

[4] NRS 233B.133 provides in relevant part:

233B.133 Memoranda of points and authorities: Time for filing memorandum and reply; request for hearing; required form.

1. A petitioner or cross-petitioner who is seeking judicial review must serve and file a memorandum of points and authorities within 40 days after the agency gives written notice to the parties that the record of the proceeding under review has been filed with the court.

.....

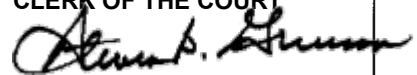
6. *The court, for good cause, may extend the times allowed in this section for filing memoranda.*

(Emphasis added.) In deference to the district court's ruling, we note that counsel for both parties failed to direct the district court's attention to the referenced paragraph (6) which is obviously dispositive concerning the jurisdiction issue.

[5] The Honorable Mills Lane, Judge of the Second Judicial District Court, was designated by the Governor to sit in place of the Honorable Robert E. Rose, Justice. NEV. CONST art. VI, § 4.

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# EXHIBIT 2



1 **NEOJ**  
2 LAURIE L. TROTTER, ESQ.  
3 Nevada State Bar No. 8696  
4 STATE OF NEVADA, Department  
5 of Employment, Training & Rehabilitation (DETR)  
6 Employment Security Division (ESD)  
7 1340 South Curry Street  
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9 Telephone: (775) 684-6317  
10 Facsimile: (775) 684-6344  
11 *Attorney for DETR/ESD*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 SPAR BUSINESS SERVICES, INC.,

10 Petitioner,

11 vs.

12 RENEE OLSON, ADMINISTRATOR,  
13 STATE OF NEVADA, DEPARTMENT OF  
14 EMPLOYMENT, TRAINING AND  
15 REHABILITATION, EMPLOYMENT  
16 SECURITY DIVISION; and MICHAEL  
17 DEBOARD,

18 Respondents.

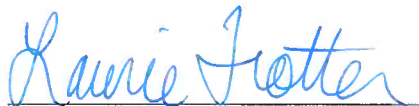
CASE NO. A-17-755501-J

DEPT. NO. XXXII

17 **NOTICE OF ENTRY OF ORDER**  
18 **GRANTING MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW**

19 **PLEASE TAKE NOTICE** that on the 14<sup>th</sup> day of November, 2017, the Court  
20 entered its Order Granting Motion to Dismiss Petition for Judicial Review in the above-entitled  
21 action. A copy of said Order is attached hereto.

22 **DATED** this 15<sup>th</sup> day of November, 2017.

23 

24 LAURIE L. TROTTER, ESQ.

*Attorney for Nevada ESD Respondents*

1 **CERTIFICATE OF SERVICE**


2 Pursuant to NRCP 5(b), I certify that I am an employee of the State of Nevada,  
3 over the age of 18 years; and that on the date hereinbelow set forth, I served a true and correct  
4 copy of the foregoing NOTICE OF ENTRY OF ORDER GRANTING MOTION TO DISMISS  
5 PETITION FOR JUDICIAL REVIEW, *by either* electronic means (N.E.F.C.R. Administrative  
6 Order 14-2), as indicated by an email address set forth below, *and/or* by placing the same within  
7 an envelope which was thereafter sealed and deposited for postage and mailing with the State of  
8 Nevada Mail at Carson City, Nevada, addressed for delivery as follows:

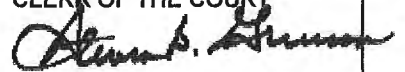
9 Gina Bongiovi, Esq.  
10 *Bongiovi Law Firm, LLC*  
2620 Regatta Drive, Suite 102  
Las Vegas, NV 89128

11 Thomas J. Vollbrecht, Esq.  
12 *Fabyanske, Westra, Hart, et al.*  
333 South Seventh St., Suite 2600  
13 Minneapolis, MN 55402

14 Michael DeBoard  
5026 River Glen #158  
15 Las Vegas, NV 89103

16 **DATED** this 15<sup>th</sup> day of November, 2017.

17   
18 SHERI C. IHLER  
19  
20  
21  
22  
23  
24



1 **OGM**

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11 *Attorney for DETR/ESD*

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 SPAR BUSINESS SERVICES, INC.,

15 Petitioner,

16 vs.

17 RENEE OLSON, ADMINISTRATOR, STATE  
18 OF NEVADA, DEPARTMENT OF  
19 EMPLOYMENT, TRAINING AND  
20 REHABILITATION, EMPLOYMENT  
21 SECURITY DIVISION; and MICHAEL  
22 DEBOARD,

23 Respondents.

CASE NO.: A-17-755501-J

DEPT. NO.: XXXII

24 **ORDER GRANTING MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW**

**THIS MATTER** came before the Court on the 10<sup>th</sup> day of October, 2017, for a duly-noticed hearing on Respondent ESD's Motion to Dismiss Petition for Judicial Review. Petitioner, Spar Business Services, Inc., was represented by Thomas Vollbrecht, Esq., and Gina Bongiovi, Esq. The Respondents, State of Nevada, Department of Employment, Training and Rehabilitation, Employment Security Division, Renee Olson, Administrator of the Employment Security Division (collectively "ESD") were represented by Laurie L. Trotter, Esq. The former

OCT 26 2017

JA00119

1 employee, Respondent Michael DeBoard, did not appear and has not otherwise participated in  
2 these proceedings. After having heard oral argument from the parties, the Court took the matter  
3 under advisement.

4 NOW, THEREFORE, this Court has carefully considered the Motion to Dismiss  
5 Petition for Judicial Review filed by Respondent ESD on July 21, 2017; the Petitioner's  
6 Opposition to the Motion to Dismiss, filed on August 1, 2017; and ESD's Reply to Opposition to  
7 Motion to Dismiss Petition for Judicial Review, filed on August 4, 2017; as well as the  
8 arguments of the parties; and accordingly, this Court issues its Decision this 12<sup>th</sup> day of October,  
9 2017.

10 The Court ORDERS that Respondent ESD's Motion to Dismiss Petition for  
11 Judicial Review is GRANTED. The Court makes the following Findings of Fact and  
12 Conclusions of Law:

13 Generally, "[c]ourts have no inherent appellate jurisdiction over official acts of  
14 administrative agencies except where the legislature has made some statutory provision for  
15 judicial review." *Crane v. Cont'l Tel. Co. of California*, 105 Nev. 399, 401, 775 P.2d 705, 706  
16 (1989). Thus, "[w]hen the legislature creates a specific procedure for review of administrative  
17 agency decisions, such procedure is controlling." *Id.* In Nevada, the Legislature enacted the  
18 Administrative Procedures Act (APA) to govern judicial review of many administrative  
19 decisions, permitting an aggrieved party to petition the district court for judicial review of a final  
20 agency decision in a contested case. *Washoe Cty. v. Otto*, 128 Nev.Adv.Op. 40, 282 P.3d 719,  
21 724 (2012). Because the underlying proceeding involved a petition for judicial review of an  
22 administrative decision, this matter is governed by the APA, codified in NRS Chapter 233B. *Id.*  
23 "When a party seeks judicial review of an administrative decision, strict compliance with the  
24 statutory requirements for such review is a precondition to jurisdiction by the court of judicial



1 review, and [n]oncompliance with the requirements is grounds for dismissal.” *Kame v.*  
2 *Employment Sec. Dep’t*, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989).

3 NRS 233B codifies the APA which governs administrative adjudications of all  
4 agencies of the Executive Departments of the State Government and for judicial review of both  
5 functions. NRS 233B.020. NRS 233B.039 governs the applicability of this NRS Chapter. NRS  
6 233B.039(3) which Petitioner relies upon for this argument, provides that the special provisions  
7 of (a) Chapter 612 of NRS for the distribution of regulations by, and the judicial review of,  
8 decisions of the Employment Security Division of the Department of Employment, Training and  
9 Rehabilitation prevail over the general provisions of this chapter. NRS 233B.130 provides for  
10 the service requirements of petitions for judicial review. NRS 233B.130(2) provides that  
11 petitions for judicial review must be served upon the person serving in the office of  
12 administrative head of the named agency.<sup>1</sup> NRS 233B.130(5) provides that the “petition for  
13 judicial review and any cross-petitions for judicial review must be served upon the agency and  
14 every party within 45 days after the filing of the petition, unless, upon a showing of good cause,  
15 the district court extends the time for such service.”

16 Given that the provisions of NRS Chapter 612 are silent as to a service deadline,  
17 the service provision within NRS 233B.130(5) controls. There is no service deadline provision  
18 within NRS Chapter 612 to prevail over the general provisions of NRS Chapter 233B. As such,  
19 the 45-day requirement for service of a Petition for Judicial Review applies in this case.

20 Petitioner contends that NRCP 4(i) prevails over NRS 233B.130(5) and that a  
21 120-day deadline applies to service of a petition for judicial review. Petitioner’s reliance upon  
22 NRCP 4(i) is misplaced. NRCP 81(a) explains that the Nevada Rules of Civil Procedure “do not  
23 govern procedure and practice in a special statutory proceeding insofar as they are inconsistent or

24 <sup>1</sup> NRS 612.530(2) provides that the petition for judicial review must be served upon the ESD  
Administrator.

1 in conflict with the procedure and practice provided by applicable statute.” Furthermore, NRCP  
2 82 provides that “these rules shall not be construed to extend or limit jurisdiction of the district  
3 courts.” Because NRCP 4(i) clearly conflicts with NRS 233B.130(5) regarding the deadline for  
4 service of a petition for judicial review, NRS 233B.130(5) prevails over NRCP 4(i) as to the 45-  
5 day deadline for service of a petition for judicial review.

6 Here, the Petition was filed on May 15, 2017. There was no request or motion to  
7 extend the time for service prior to the expiration of the 45 days. As such, the deadline for  
8 service of the Petition would have been June 29, 2017. It is undisputed that service of the  
9 Petition was not effectuated until July 14, 2017. Thus, the Petition was not timely served upon  
10 the Respondent as required by NRS 233B.130(5). Petitioner failed to make a showing of good  
11 cause for effectuating service of the Petition for Judicial Review after the statutory deadline in  
12 this case.

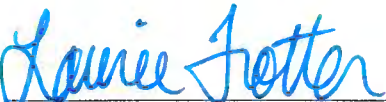
13 Based upon the above findings and GOOD CAUSE APPEARING THEREFOR,  
14 **IT IS HEREBY ORDERED** that the Motion to Dismiss Petition for Judicial  
15 Review be, and the same hereby is, GRANTED and the Petition for Judicial Review is  
16 DISMISSED.

17 DATED this 6 day of Nov, 2017.

18  
19   
HONORABLE ROB BARE  
DISTRICT JUDGE

20 ROB BARE  
21 JUDGE, DISTRICT COURT, DEPARTMENT 32

22 Prepared and Submitted by:

23 

24 LAURIE L. TROTTER, ESQ.  
*Attorney for ESD Respondents*

A-17-755501-J

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Other Nevada State Agency  
Appeal**

**COURT MINUTES**

**January 23, 2018**

---

A-17-755501-J      Spar Business Services Inc, Petitioner(s)  
vs.  
Nevada Employment Security Appeals Division, Respondent(s)

---

**January 23, 2018      8:00 AM      Minute Order**

**HEARD BY:** Bare, Rob      **COURTROOM:** Chambers

**COURT CLERK:** Denise Duron

**RECORDER:**

**REPORTER:**

**PARTIES**      None – Minute Order Issued from Chambers  
**PRESENT:**

**JOURNAL ENTRIES**

- Pursuant to EDCR 2.24(a), the Motion for Reconsideration currently scheduled for January 25, 2018, is VACATED. Parties need not appear. The Court is to decide the matter in chambers and issue a decision. Status Check: Decision set for February 14, 2018 in chambers.

CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Denise Duron, to all registered parties for Odyssey File & Serve. (dd-1/23/18)

PRINT DATE: 01/23/2018

Page 1 of 1

Minutes Date: January 23, 2018

**JA00123**

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A-17-755501-J Spar Business Services Inc, Petitioner(s)  
vs.  
Nevada Employment Security Appeals Division, Respondent(s)

---

February 14, 2018 03:00 AM STATUS CHECK: DECISION

HEARD BY: Bare, Rob COURTROOM:

COURT CLERK: Tapia, Michaela

RECORDER:

REPORTER:

PARTIES PRESENT:

### JOURNAL ENTRIES

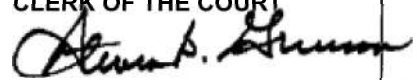
This matter came before the Court for Petitioner s Motion to Reconsider. After considering the submitted pleadings and the applicable standard of law, COURT ORDERED, Petitioner s Motion to Reconsider is DENIED and the Status Check: Decision set for February 14, 2018 is VACATED.

EDCR 2.24 (a) states, No motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties. A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous. *Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 941 P.2d 486 (1997). Only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted. *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). [P]oints or contentions not raised, or passed over in silence on the original hearing, cannot be maintained or considered on petition rehearing. *Belanger v. Leonard*, 68 Nev. 258, 262, 229 P.2d 153, 155 (1951). [O]ur established practice does not allow a litigant to raise new legal points for the first time on rehearing. *Cannon v. Taylor*, 88 Nev. 89, 92, 493 P.2d 1313, 1314 (1972).

Petitioner s basis for this Motion to Reconsider is case law which was not raised in the original briefing or hearing: *Fitzpatrick v. State ex rel., Dep't of Commerce, Ins. Div.*, 107 Nev. 486, 487, 813 P.2d 1004, 1004 (1991). It is the Petitioner s argument that under that case, if a Petition for Judicial Review is timely filed, then the Court has jurisdiction to consider other matters so long as good cause is established, and this Court erred in dismissing the Petition for Judicial Review, which was not timely served. This Court finds that the Petitioner has failed to establish that this Court s decision was clearly erroneous. The *Fitzpatrick* decision is not directly on point. Instead, it primarily addresses the requisite deadline for the points and authorities pursuant to NRS 233B.133. Although *Fitzpatrick* does provide guidance to district courts in this area of the law, this case law does not mandate reconsideration of this distinct issue, service of the Petition per NRS 612.530(2) and NRS 233B.130(5). Furthermore, this Court finds that any such case law which could have bene utilized at the prior hearing should have been raised at that time. Therefore, the Motion to Reconsider is DENIED.

Counsel for Respondent is directed to submit a proposed Order consistent with this Minute Order, the submitted briefing, and oral argument. Counsel may add language to or further supplement the proposed Order in accordance with the Court s findings and any submitted arguments. Counsel is directed to have the proposed Order submitted to chambers within 10 days.

CLERK'S NOTE: A copy of this minute order was placed in the attorney folder(s) of: Gina Bongiovi, Esq., and Laurie Trotter, Esq.



1 **ODM**  
2 LAURIE L. TROTTER, ESQ.  
3 Nevada State Bar No. 8696  
4 STATE OF NEVADA, Department of  
5 Employment, Training & Rehabilitation (DETR),  
6 Employment Security Division (ESD)  
7 500 E. Third Street  
8 Carson City, NV 89713  
9 Telephone No.: (775) 684-3996  
10 Facsimile No.: (775) 684-3992  
11 *Attorney for DETR/ESD*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

10 SPAR BUSINESS SERVICES, INC.,

11 Petitioner,

12 vs.

13 RENEE OLSON, ADMINISTRATOR, STATE  
14 OF NEVADA, DEPARTMENT OF  
15 EMPLOYMENT, TRAINING AND  
16 REHABILITATION, EMPLOYMENT  
17 SECURITY DIVISION; and MICHAEL  
18 DEBOARD,

19 Respondents.

CASE NO.: A-17-755501-J

DEPT. NO.: XXXII

18 **ORDER DENYING MOTION TO RECONSIDER**

19 **THIS MATTER** came before the Court on the 14<sup>th</sup> day of February, 2018, for a  
20 decision In Chambers on Petitioner's Motion for Reconsideration. The parties were not present.  
21 Petitioner, Spar Business Services, Inc., is represented by Thomas Vollbrecht, Esq., and Gina  
22 Bongiovi, Esq. The Respondents, State of Nevada, Department of Employment, Training and  
23 Rehabilitation, Employment Security Division, Renee Olson, Administrator of the Employment

MAR 26 2018

JA00125

1 Security Division (collectively "ESD") are represented by Laurie L. Trotter, Esq. The former  
2 employee, Respondent Michael DeBoard, has not participated in these proceedings.

3 NOW, THEREFORE, this Court has carefully considered the submitted  
4 pleadings: *Petitioner's Motion to Reconsider Pursuant to NRCP 50(e) And NRCP 60(b)*, *ESD's*  
5 *Opposition to Petitioner's Motion to Reconsider Pursuant to NRCP 59(e) And NRCP 60(b)*, and  
6 *Petitioner's Reply in Support of Motion to Reconsider Pursuant to NRCP 59(e) and NRCP(b)*;  
7 and the applicable standard of law. The COURT ORDERED, Petitioner's Motion to Reconsider  
8 is DENIED, and the Status Check: Decision set for February 14, 2018 is VACATED.

9 The Court makes the following Findings of Fact and Conclusions of Law:

10 EDCR 2.24(a) states, "[n]o motions once heard and disposed of may be renewed  
11 in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the  
12 court granted upon motion therefor, after notice of such motion to the adverse parties." A district  
13 court may reconsider a previously decided issue if substantially different evidence is  
14 subsequently introduced or the decision is clearly erroneous. *Masonry & Tile Contractors Ass'n*  
15 *of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 941 P.2d 486 (1997). Only in rare  
16 instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling  
17 already reached should a motion for rehearing be granted. *Moore v. City of Las Vegas*, 92 Nev.  
18 402, 405, 551 P.2d 244, 246 (1976). "[P]oints or contentions not raised, or passed over in  
19 silence on the original hearing, cannot be maintained or considered on petition rehearing."  
20 *Balanger v. Leonard*, 68 Nev. 258, 262, 229 P.2d 153, 155 (1951). "Our established practice  
21 does not allow a litigant to raise new legal points for the first time on rehearing." *Cannon v.*  
22 *Taylor*, 88 Nev. 89, 92, 493 P.2d 1313, 1314 (1972).

23 Petitioner's basis for this Motion to Reconsider is case law which was not raised  
24 in the original briefing or hearing: *Fitzpatrick v. State ex rel., Dep't of Commerce, Ins. Div.*, 107

1 Nev. 486, 487, 813 P.2d 1004, 1004 (1991). It is the Petitioner's argument that under that case,  
2 if a Petition for Judicial Review is timely filed, then the Court has jurisdiction to consider other  
3 matters so long as good cause is established, and this Court erred in dismissing the Petition for  
4 Judicial Review, which was not timely served. This Court finds that the Petitioner has failed to  
5 establish that this Court's decision was clearly erroneous. The *Fitzpatrick* decision is not  
6 directly on point. Instead, it primarily addresses the requisite deadline for the points and  
7 authorities pursuant to NRS 233B.133. Although *Fitzpatrick* does provide guidance to district  
8 courts in this area of law, this case does not mandate reconsideration of this distinct issue, service  
9 of the Petition per NRS 612.530(2) and NRS 233B.130(5). Furthermore, this Court finds that  
10 any such case law which could have been utilized at the prior hearing should have been raised  
11 that that time. Therefore, the Motion for Reconsideration is DENIED.

12 Based upon the above findings and GOOD CAUSE APPEARING THEREFOR,

13 **IT IS HEREBY ORDERED** that the Motion to Dismiss Petition for Judicial  
14 Review be, and the same hereby is, GRANTED and the Petition for Judicial Review is  
15 DISMISSED.

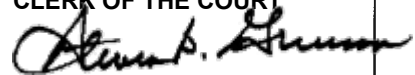
16 DATED this 3 day of April, 2018.

17  
18   
HONORABLE ROB BARE  
DISTRICT JUDGE

19 RCB BARE  
JUDGE, DISTRICT COURT, DEPARTMENT 32

20 Prepared and Submitted by:

21   
22 LAURIE L. TROTTER, ESQ.  
23 Attorney for ESD Respondents  
24



1 **NEOJ**  
2 LAURIE L. TROTTER, ESQ.  
3 Nevada State Bar No. 8696  
4 STATE OF NEVADA, Department  
5 of Employment, Training & Rehabilitation (DETR)  
6 Employment Security Division (ESD)  
7 500 East Third Street  
8 Carson City, NV 89713  
9 Telephone: (775) 684-3996  
10 Facsimile: (775) 684-3992  
11 *Attorney for DETR/ESD*

7 **DISTRICT COURT**  
8 **CLARK COUNTY, NEVADA**

9 SPAR BUSINESS SERVICES, INC.,

10 Petitioner,

11 vs.

12 RENEE OLSON, ADMINISTRATOR,  
13 STATE OF NEVADA, DEPARTMENT OF  
14 EMPLOYMENT, TRAINING AND  
15 REHABILITATION, EMPLOYMENT  
16 SECURITY DIVISION; and MICHAEL  
17 DEBOARD,

18 Respondents.

CASE NO. A-17-755501-J

DEPT. NO. XXXII

17 **NOTICE OF ENTRY OF ORDER DENYING MOTION TO RECONSIDER**

18 **PLEASE TAKE NOTICE** that on the 10<sup>th</sup> day of April, 2018, the Court entered  
19 its Order Denying Motion to Reconsider in the above-entitled action. A copy of said Order is  
20 attached hereto.

21 **DATED** this 11<sup>th</sup> day of April, 2018.

22   
23 LAURIE L. TROTTER, ESQ.  
24 *Attorney for Nevada ESD Respondents*



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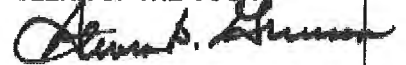
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**DATED** this 17<sup>th</sup> day of April, 2018.

**LAURIE L. TROTTER, ESQ.**  
Division Sr. Legal Counsel  
STATE OF NEVADA DETR/ESD  
500 East Third Street  
Carson City, NV 89713  
(775) 684-3996  
(775) 684-3992 (Fax)



1 **ODM**  
2 LAURIE L. TROTTER, ESQ.  
3 Nevada State Bar No. 8696  
4 STATE OF NEVADA, Department of  
5 Employment, Training & Rehabilitation (DETR),  
6 Employment Security Division (ESD)  
7 500 E. Third Street  
8 Carson City, NV 89713  
9 Telephone No.: (775) 684-3996  
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11 *Attorney for DETR/ESD*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

10 SPAR BUSINESS SERVICES, INC.,

11 Petitioner,

12 vs.

13 RENEE OLSON, ADMINISTRATOR, STATE  
14 OF NEVADA, DEPARTMENT OF  
15 EMPLOYMENT, TRAINING AND  
16 REHABILITATION, EMPLOYMENT  
17 SECURITY DIVISION; and MICHAEL  
18 DEBOARD,

19 Respondents.

CASE NO.: A-17-755501-J

DEPT. NO.: XXXII

18 **ORDER DENYING MOTION TO RECONSIDER**

19 **THIS MATTER** came before the Court on the 14<sup>th</sup> day of February, 2018, for a  
20 decision In Chambers on Petitioner's Motion for Reconsideration. The parties were not present.  
21 Petitioner, Spar Business Services, Inc., is represented by Thomas Vollbrecht, Esq., and Gina  
22 Bongiovi, Esq. The Respondents, State of Nevada, Department of Employment, Training and  
23 Rehabilitation, Employment Security Division, Renee Olson, Administrator of the Employment

MAR 26 2018

1 Security Division (collectively "ESD") are represented by Laurie L. Trotter, Esq. The former  
2 employee, Respondent Michael DeBoard, has not participated in these proceedings.

3 NOW, THEREFORE, this Court has carefully considered the submitted  
4 pleadings: *Petitioner's Motion to Reconsider Pursuant to NRCP 50(e) And NRCP 60(b)*, *ESD's*  
5 *Opposition to Petitioner's Motion to Reconsider Pursuant to NRCP 59(e) And NRCP 60(b)*, and  
6 *Petitioner's Reply in Support of Motion to Reconsider Pursuant to NRCP 59(e) and NRCP(b)*;  
7 and the applicable standard of law. The COURT ORDERED, Petitioner's Motion to Reconsider  
8 is DENIED, and the Status Check: Decision set for February 14, 2018 is VACATED.

9 The Court makes the following Findings of Fact and Conclusions of Law:

10 EDCR 2.24(a) states, "[n]o motions once heard and disposed of may be renewed  
11 in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the  
12 court granted upon motion therefor, after notice of such motion to the adverse parties." A district  
13 court may reconsider a previously decided issue if substantially different evidence is  
14 subsequently introduced or the decision is clearly erroneous. *Masonry & Tile Contractors Ass'n*  
15 *of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 941 P.2d 486 (1997). Only in rare  
16 instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling  
17 already reached should a motion for rehearing be granted. *Moore v. City of Las Vegas*, 92 Nev.  
18 402, 405, 551 P.2d 244, 246 (1976). "[P]oints or contentions not raised, or passed over in  
19 silence on the original hearing, cannot be maintained or considered on petition rehearing."  
20 *Balanger v. Leonard*, 68 Nev. 258, 262, 229 P.2d 153, 155 (1951). "Our established practice  
21 does not allow a litigant to raise new legal points for the first time on rehearing." *Cannon v.*  
22 *Taylor*, 88 Nev. 89, 92, 493 P.2d 1313, 1314 (1972).

23 Petitioner's basis for this Motion to Reconsider is case law which was not raised  
24 in the original briefing or hearing: *Fitzpatrick v. State ex rel., Dep't of Commerce, Ins. Div.*, 107

1 Nev. 486, 487, 813 P.2d 1004, 1004 (1991). It is the Petitioner's argument that under that case,  
2 if a Petition for Judicial Review is timely filed, then the Court has jurisdiction to consider other  
3 matters so long as good cause is established, and this Court erred in dismissing the Petition for  
4 Judicial Review, which was not timely served. This Court finds that the Petitioner has failed to  
5 establish that this Court's decision was clearly erroneous. The *Fitzpatrick* decision is not  
6 directly on point. Instead, it primarily addresses the requisite deadline for the points and  
7 authorities pursuant to NRS 233B.133. Although *Fitzpatrick* does provide guidance to district  
8 courts in this area of law, this case does not mandate reconsideration of this distinct issue, service  
9 of the Petition per NRS 612.530(2) and NRS 233B.130(5). Furthermore, this Court finds that  
10 any such case law which could have been utilized at the prior hearing should have been raised  
11 that that time. Therefore, the Motion for Reconsideration is DENIED.

12 Based upon the above findings and GOOD CAUSE APPEARING THEREFOR,

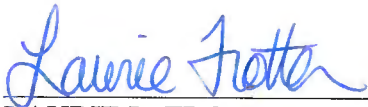
13 **IT IS HEREBY ORDERED** that the Motion to Dismiss Petition for Judicial  
14 Review be, and the same hereby is, GRANTED and the Petition for Judicial Review is  
15 DISMISSED.

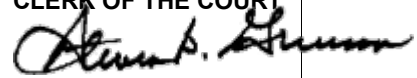
16 DATED this 3 day of April, 2018.

17  
18   
HONORABLE ROB BARE  
DISTRICT JUDGE

19 RCB BARE  
JUDGE, DISTRICT COURT, DEPARTMENT 32

20 Prepared and Submitted by:

21   
22 LAURIE L. TROTTER, ESQ.  
23 Attorney for ESD Respondents  
24



**NOAS**

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2620 Regatta Drive, Suite 102  
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Telephone: (702) 485-1200  
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THOMAS J. VOLLBRECHT (MN Bar No. 17886X)  
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333 South Seventh Street, Suite 2600  
Minneapolis, MN 55402  
[tvollbrecht@fwhtlaw.com](mailto:tvollbrecht@fwhtlaw.com)  
*Admitted Pro Hac Vice*

*Attorneys for Petitioner Spar Business Services, Inc.*

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

SPAR BUSINESS SERVICES, INC.

Petitioner,

v.

EMPLOYMENT SECURITY DIVISION,  
STATE OF NEVADA and RENEE OLSON  
in her capacity as Administrator of the  
EMPLOYMENT SECURITY DIVISION;  
KATIE JOHNSON, in her capacity as  
Chairperson of the EMPLOYMENT  
SECURITY DIVISION BOARD OF  
REVIEW, and MICHAEL DEBOARD as  
employee,

Respondents.

Case No.: A-17-755501-J

Dept. No.: XXXII

**NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that Petitioner SPAR BUSINESS SERVICES, INC., by  
and through its attorneys of record, Gina Bongiovi, Esq., of the Bongiovi Law Firm, LLC, and  
Thomas J. Vollbrecht, Esq., of Fabyanske, Westra, Hart & Thomson, P.A., hereby appeals to the  
Supreme Court of Nevada from:

\\

\\

1. Order Granting Motion to Dismiss Petition for Judicial Review entered on November 15, 2017. A copy of Notice of Entry of Order Granting Motion to Dismiss Petition for Judicial Review is attached hereto as Exhibit 1; and

2. Order Denying Motion to Reconsider entered April 11, 2018. A copy of Notice of Entry of Order Denying Motion to Reconsider is attached hereto as Exhibit 2.

DATED this 30th day of April, 2018.

Respectfully submitted by:

/s/ Gina Bongiovi

Gina Bongiovi, Esq., Nevada Counsel of Record

Nevada Bar No. 10667

2620 Regatta Drive, Suite 102

Las Vegas, NV 89128

Telephone: (702) 485-1200

Fax: (702) 485-1202

E-mail: [gina@bongiovilaw.com](mailto:gina@bongiovilaw.com)

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## CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the BONGIOVI LAW FIRM, LLC, and that I served a true and correct copy of the foregoing **CASE APPEAL STATEMENT** by either electronic means (NEFCR Administrative Order 14-2), as indicated by an e-mail address as set forth below, and/or by:

X	BY E-FILE SERVICE: via Odyssey eFile NV
X	BY MAIL: Pursuant to NRCP 5(b), I placed a true and correct copy thereof enclosed in a sealed envelope addressed to the parties as indicated below.
	BY FACSIMILE: Pursuant to EDCR 7.26, I transmitted a copy of the foregoing document via telecopy to the facsimile number(s) indicated below.
X	BY ELECTRONIC MAIL: Pursuant to EDCR 7.26, I transmitted a copy of the foregoing document via electronic mail to the electronic mail address(es) listed below.
	BY HAND DELIVERY

Renee Olson, Administrator  
Employment Security Division  
State of Nevada  
500 E. Third St.  
Carson City, NV 89713

Laurie Trotter, Esq.  
Senior Legal Counsel  
Employment Security Division  
State of Nevada  
1340 So. Curry Street  
Carson City, NV 89703  
l-trotter@nvdetr.org

And via e-file Courtesy Copy to: [Dept32LC@clarkcountycourts.us](mailto:Dept32LC@clarkcountycourts.us)

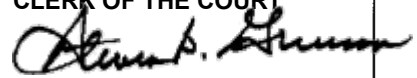
Dated this 30th day of April, 2018.

/s/ Kristina Blair

An employee of Bongiovi Law Firm, LLC

# EXHIBIT 1





1 **NEOJ**  
2 LAURIE L. TROTTER, ESQ.  
3 Nevada State Bar No. 8696  
4 STATE OF NEVADA, Department  
5 of Employment, Training & Rehabilitation (DETR)  
6 Employment Security Division (ESD)  
7 1340 South Curry Street  
8 Carson City, NV 89703  
9 Telephone: (775) 684-6317  
10 Facsimile: (775) 684-6344  
11 *Attorney for DETR/ESD*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 SPAR BUSINESS SERVICES, INC.,

10 Petitioner,

11 vs.

12 RENEE OLSON, ADMINISTRATOR,  
13 STATE OF NEVADA, DEPARTMENT OF  
14 EMPLOYMENT, TRAINING AND  
15 REHABILITATION, EMPLOYMENT  
16 SECURITY DIVISION; and MICHAEL  
17 DEBOARD,

18 Respondents.

CASE NO. A-17-755501-J

DEPT. NO. XXXII

17 **NOTICE OF ENTRY OF ORDER**  
18 **GRANTING MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW**

19 **PLEASE TAKE NOTICE** that on the 14<sup>th</sup> day of November, 2017, the Court  
20 entered its Order Granting Motion to Dismiss Petition for Judicial Review in the above-entitled  
21 action. A copy of said Order is attached hereto.

22 **DATED** this 15<sup>th</sup> day of November, 2017.

23 

24 LAURIE L. TROTTER, ESQ.

*Attorney for Nevada ESD Respondents*

1 **CERTIFICATE OF SERVICE**


2 Pursuant to NRCP 5(b), I certify that I am an employee of the State of Nevada,  
3 over the age of 18 years; and that on the date hereinbelow set forth, I served a true and correct  
4 copy of the foregoing NOTICE OF ENTRY OF ORDER GRANTING MOTION TO DISMISS  
5 PETITION FOR JUDICIAL REVIEW, *by either* electronic means (N.E.F.C.R. Administrative  
6 Order 14-2), as indicated by an email address set forth below, *and/or* by placing the same within  
7 an envelope which was thereafter sealed and deposited for postage and mailing with the State of  
8 Nevada Mail at Carson City, Nevada, addressed for delivery as follows:

9 Gina Bongiovi, Esq.  
10 *Bongiovi Law Firm, LLC*  
2620 Regatta Drive, Suite 102  
Las Vegas, NV 89128

11 Thomas J. Vollbrecht, Esq.  
12 *Fabyanske, Westra, Hart, et al.*  
333 South Seventh St., Suite 2600  
13 Minneapolis, MN 55402

14 Michael DeBoard  
5026 River Glen #158  
15 Las Vegas, NV 89103

16 **DATED** this 15<sup>th</sup> day of November, 2017.

17   
18 SHERI C. IHLER  
19  
20  
21  
22  
23  
24

*Steven D. Grierson*

1 **OGM**

2 LAURIE L. TROTTER, ESQ.

3 Nevada State Bar No. 8696

4 STATE OF NEVADA, Department of

5 Employment, Training & Rehabilitation (DETR),

6 Employment Security Division (ESD)

7 1340 South Curry Street

8 Carson City, NV 89703

9 Telephone No.: (775) 684-6317

10 Facsimile No.: (775) 684-6344

11 *Attorney for DETR/ESD*

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 SPAR BUSINESS SERVICES, INC.,

15 Petitioner,

16 vs.

17 RENEE OLSON, ADMINISTRATOR, STATE  
18 OF NEVADA, DEPARTMENT OF  
19 EMPLOYMENT, TRAINING AND  
20 REHABILITATION, EMPLOYMENT  
21 SECURITY DIVISION; and MICHAEL  
22 DEBOARD,

23 Respondents.

CASE NO.: A-17-755501-J

DEPT. NO.: XXXII

24 **ORDER GRANTING MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW**

**THIS MATTER** came before the Court on the 10<sup>th</sup> day of October, 2017, for a duly-noticed hearing on Respondent ESD's Motion to Dismiss Petition for Judicial Review. Petitioner, Spar Business Services, Inc., was represented by Thomas Vollbrecht, Esq., and Gina Bongiovi, Esq. The Respondents, State of Nevada, Department of Employment, Training and Rehabilitation, Employment Security Division, Renee Olson, Administrator of the Employment Security Division (collectively "ESD") were represented by Laurie L. Trotter, Esq. The former

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1 employee, Respondent Michael DeBoard, did not appear and has not otherwise participated in  
2 these proceedings. After having heard oral argument from the parties, the Court took the matter  
3 under advisement.

4 NOW, THEREFORE, this Court has carefully considered the Motion to Dismiss  
5 Petition for Judicial Review filed by Respondent ESD on July 21, 2017; the Petitioner's  
6 Opposition to the Motion to Dismiss, filed on August 1, 2017; and ESD's Reply to Opposition to  
7 Motion to Dismiss Petition for Judicial Review, filed on August 4, 2017; as well as the  
8 arguments of the parties; and accordingly, this Court issues its Decision this 12<sup>th</sup> day of October,  
9 2017.

10 The Court ORDERS that Respondent ESD's Motion to Dismiss Petition for  
11 Judicial Review is GRANTED. The Court makes the following Findings of Fact and  
12 Conclusions of Law:

13 Generally, "[c]ourts have no inherent appellate jurisdiction over official acts of  
14 administrative agencies except where the legislature has made some statutory provision for  
15 judicial review." *Crane v. Cont'l Tel. Co. of California*, 105 Nev. 399, 401, 775 P.2d 705, 706  
16 (1989). Thus, "[w]hen the legislature creates a specific procedure for review of administrative  
17 agency decisions, such procedure is controlling." *Id.* In Nevada, the Legislature enacted the  
18 Administrative Procedures Act (APA) to govern judicial review of many administrative  
19 decisions, permitting an aggrieved party to petition the district court for judicial review of a final  
20 agency decision in a contested case. *Washoe Cty. v. Otto*, 128 Nev.Adv.Op. 40, 282 P.3d 719,  
21 724 (2012). Because the underlying proceeding involved a petition for judicial review of an  
22 administrative decision, this matter is governed by the APA, codified in NRS Chapter 233B. *Id.*  
23 "When a party seeks judicial review of an administrative decision, strict compliance with the  
24 statutory requirements for such review is a precondition to jurisdiction by the court of judicial

1 review, and [n]oncompliance with the requirements is grounds for dismissal.” *Kame v.*  
2 *Employment Sec. Dep’t*, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989).

3           NRS 233B codifies the APA which governs administrative adjudications of all  
4 agencies of the Executive Departments of the State Government and for judicial review of both  
5 functions. NRS 233B.020. NRS 233B.039 governs the applicability of this NRS Chapter. NRS  
6 233B.039(3) which Petitioner relies upon for this argument, provides that the special provisions  
7 of (a) Chapter 612 of NRS for the distribution of regulations by, and the judicial review of,  
8 decisions of the Employment Security Division of the Department of Employment, Training and  
9 Rehabilitation prevail over the general provisions of this chapter. NRS 233B.130 provides for  
10 the service requirements of petitions for judicial review. NRS 233B.130(2) provides that  
11 petitions for judicial review must be served upon the person serving in the office of  
12 administrative head of the named agency.<sup>1</sup> NRS 233B.130(5) provides that the “petition for  
13 judicial review and any cross-petitions for judicial review must be served upon the agency and  
14 every party within 45 days after the filing of the petition, unless, upon a showing of good cause,  
15 the district court extends the time for such service.”

16           Given that the provisions of NRS Chapter 612 are silent as to a service deadline,  
17 the service provision within NRS 233B.130(5) controls. There is no service deadline provision  
18 within NRS Chapter 612 to prevail over the general provisions of NRS Chapter 233B. As such,  
19 the 45-day requirement for service of a Petition for Judicial Review applies in this case.

20           Petitioner contends that NRCP 4(i) prevails over NRS 233B.130(5) and that a  
21 120-day deadline applies to service of a petition for judicial review. Petitioner’s reliance upon  
22 NRCP 4(i) is misplaced. NRCP 81(a) explains that the Nevada Rules of Civil Procedure “do not  
23 govern procedure and practice in a special statutory proceeding insofar as they are inconsistent or

24  

---

<sup>1</sup> NRS 612.530(2) provides that the petition for judicial review must be served upon the ESD  
Administrator.

1 in conflict with the procedure and practice provided by applicable statute.” Furthermore, NRCP  
2 82 provides that “these rules shall not be construed to extend or limit jurisdiction of the district  
3 courts.” Because NRCP 4(i) clearly conflicts with NRS 233B.130(5) regarding the deadline for  
4 service of a petition for judicial review, NRS 233B.130(5) prevails over NRCP 4(i) as to the 45-  
5 day deadline for service of a petition for judicial review.

6 Here, the Petition was filed on May 15, 2017. There was no request or motion to  
7 extend the time for service prior to the expiration of the 45 days. As such, the deadline for  
8 service of the Petition would have been June 29, 2017. It is undisputed that service of the  
9 Petition was not effectuated until July 14, 2017. Thus, the Petition was not timely served upon  
10 the Respondent as required by NRS 233B.130(5). Petitioner failed to make a showing of good  
11 cause for effectuating service of the Petition for Judicial Review after the statutory deadline in  
12 this case.

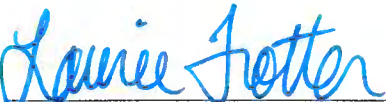
13 Based upon the above findings and GOOD CAUSE APPEARING THEREFOR,  
14 **IT IS HEREBY ORDERED** that the Motion to Dismiss Petition for Judicial  
15 Review be, and the same hereby is, GRANTED and the Petition for Judicial Review is  
16 DISMISSED.

17 DATED this 6 day of Nov, 2017.

18  
19   
HONORABLE ROB BARE  
DISTRICT JUDGE

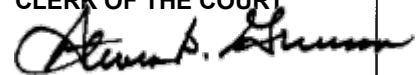
20 ROB BARE  
21 JUDGE, DISTRICT COURT, DEPARTMENT 32

22 Prepared and Submitted by:

23 

24 LAURIE L. TROTTER, ESQ.  
*Attorney for ESD Respondents*

# EXHIBIT 2



1 **NEOJ**  
2 LAURIE L. TROTTER, ESQ.  
3 Nevada State Bar No. 8696  
4 STATE OF NEVADA, Department  
5 of Employment, Training & Rehabilitation (DETR)  
6 Employment Security Division (ESD)  
7 500 East Third Street  
8 Carson City, NV 89713  
9 Telephone: (775) 684-3996  
10 Facsimile: (775) 684-3992  
11 *Attorney for DETR/ESD*

7 **DISTRICT COURT**  
8 **CLARK COUNTY, NEVADA**

9 SPAR BUSINESS SERVICES, INC.,

10 Petitioner,

11 vs.

12 RENEE OLSON, ADMINISTRATOR,  
13 STATE OF NEVADA, DEPARTMENT OF  
14 EMPLOYMENT, TRAINING AND  
15 REHABILITATION, EMPLOYMENT  
16 SECURITY DIVISION; and MICHAEL  
17 DEBOARD,

18 Respondents.

CASE NO. A-17-755501-J

DEPT. NO. XXXII

17 **NOTICE OF ENTRY OF ORDER DENYING MOTION TO RECONSIDER**

18 **PLEASE TAKE NOTICE** that on the 10<sup>th</sup> day of April, 2018, the Court entered  
19 its Order Denying Motion to Reconsider in the above-entitled action. A copy of said Order is  
20 attached hereto.

21 **DATED** this 11<sup>th</sup> day of April, 2018.

22   
23 LAURIE L. TROTTER, ESQ.  
24 *Attorney for Nevada ESD Respondents*



1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the State of Nevada,  
3 over the age of 18 years; and that on the date hereinbelow set forth, I served a true and correct  
4 copy of the foregoing NOTICE OF ENTRY OF ORDER DENYING MOTION TO  
5 RECONSIDER, *by either* electronic means (N.E.F.C.R. Administrative Order 14-2), as indicated  
6 by an email address set forth below, *and/or* by placing the same within an envelope which was  
7 thereafter sealed and deposited for postage and mailing with the State of Nevada Mail at Carson  
8 City, Nevada, addressed for delivery as follows:

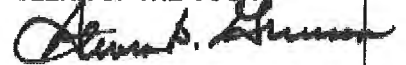
9 Gina Bongiovi, Esq.  
10 *Bongiovi Law Firm, LLC*  
2620 Regatta Drive, Suite 102  
Las Vegas, NV 89128

11  
12 Thomas J. Vollbrecht, Esq.  
*Fabyanske, Westra, Hart, et al.*  
333 South Seventh St., Suite 2600  
13 Minneapolis, MN 55402

14 Michael DeBoard  
5026 River Glen #158  
15 Las Vegas, NV 89103

16 DATED this 14<sup>th</sup> day of April, 2018.

17   
18 SHERI C. IHLER  
19  
20  
21  
22  
23  
24



1 **ODM**  
2 LAURIE L. TROTTER, ESQ.  
3 Nevada State Bar No. 8696  
4 STATE OF NEVADA, Department of  
5 Employment, Training & Rehabilitation (DETR),  
6 Employment Security Division (ESD)  
7 500 E. Third Street  
8 Carson City, NV 89713  
9 Telephone No.: (775) 684-3996  
10 Facsimile No.: (775) 684-3992  
11 *Attorney for DETR/ESD*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

10 SPAR BUSINESS SERVICES, INC.,

11 Petitioner,

12 vs.

13 RENEE OLSON, ADMINISTRATOR, STATE  
14 OF NEVADA, DEPARTMENT OF  
15 EMPLOYMENT, TRAINING AND  
16 REHABILITATION, EMPLOYMENT  
17 SECURITY DIVISION; and MICHAEL  
18 DEBOARD,

16 Respondents.

CASE NO.: A-17-755501-J

DEPT. NO.: XXXII

18 **ORDER DENYING MOTION TO RECONSIDER**

19 **THIS MATTER** came before the Court on the 14<sup>th</sup> day of February, 2018, for a  
20 decision In Chambers on Petitioner's Motion for Reconsideration. The parties were not present.  
21 Petitioner, Spar Business Services, Inc., is represented by Thomas Vollbrecht, Esq., and Gina  
22 Bongiovi, Esq. The Respondents, State of Nevada, Department of Employment, Training and  
23 Rehabilitation, Employment Security Division, Renee Olson, Administrator of the Employment

MAR 26 2018

1 Security Division (collectively "ESD") are represented by Laurie L. Trotter, Esq. The former  
2 employee, Respondent Michael DeBoard, has not participated in these proceedings.

3 NOW, THEREFORE, this Court has carefully considered the submitted  
4 pleadings: *Petitioner's Motion to Reconsider Pursuant to NRCP 50(e) And NRCP 60(b)*, *ESD's*  
5 *Opposition to Petitioner's Motion to Reconsider Pursuant to NRCP 59(e) And NRCP 60(b)*, and  
6 *Petitioner's Reply in Support of Motion to Reconsider Pursuant to NRCP 59(e) and NRCP(b)*;  
7 and the applicable standard of law. The COURT ORDERED, Petitioner's Motion to Reconsider  
8 is DENIED, and the Status Check: Decision set for February 14, 2018 is VACATED.

9 The Court makes the following Findings of Fact and Conclusions of Law:

10 EDCR 2.24(a) states, "[n]o motions once heard and disposed of may be renewed  
11 in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the  
12 court granted upon motion therefor, after notice of such motion to the adverse parties." A district  
13 court may reconsider a previously decided issue if substantially different evidence is  
14 subsequently introduced or the decision is clearly erroneous. *Masonry & Tile Contractors Ass'n*  
15 *of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 941 P.2d 486 (1997). Only in rare  
16 instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling  
17 already reached should a motion for rehearing be granted. *Moore v. City of Las Vegas*, 92 Nev.  
18 402, 405, 551 P.2d 244, 246 (1976). "[P]oints or contentions not raised, or passed over in  
19 silence on the original hearing, cannot be maintained or considered on petition rehearing."  
20 *Balanger v. Leonard*, 68 Nev. 258, 262, 229 P.2d 153, 155 (1951). "Our established practice  
21 does not allow a litigant to raise new legal points for the first time on rehearing." *Cannon v.*  
22 *Taylor*, 88 Nev. 89, 92, 493 P.2d 1313, 1314 (1972).

23 Petitioner's basis for this Motion to Reconsider is case law which was not raised  
24 in the original briefing or hearing: *Fitzpatrick v. State ex rel., Dep't of Commerce, Ins. Div.*, 107

1 Nev. 486, 487, 813 P.2d 1004, 1004 (1991). It is the Petitioner's argument that under that case,  
2 if a Petition for Judicial Review is timely filed, then the Court has jurisdiction to consider other  
3 matters so long as good cause is established, and this Court erred in dismissing the Petition for  
4 Judicial Review, which was not timely served. This Court finds that the Petitioner has failed to  
5 establish that this Court's decision was clearly erroneous. The *Fitzpatrick* decision is not  
6 directly on point. Instead, it primarily addresses the requisite deadline for the points and  
7 authorities pursuant to NRS 233B.133. Although *Fitzpatrick* does provide guidance to district  
8 courts in this area of law, this case does not mandate reconsideration of this distinct issue, service  
9 of the Petition per NRS 612.530(2) and NRS 233B.130(5). Furthermore, this Court finds that  
10 any such case law which could have been utilized at the prior hearing should have been raised  
11 that that time. Therefore, the Motion for Reconsideration is DENIED.

12 Based upon the above findings and GOOD CAUSE APPEARING THEREFOR,

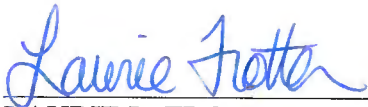
13 **IT IS HEREBY ORDERED** that the Motion to Dismiss Petition for Judicial  
14 Review be, and the same hereby is, GRANTED and the Petition for Judicial Review is  
15 DISMISSED.

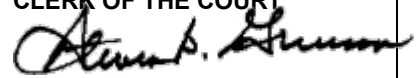
16 DATED this 3 day of April, 2018.

17  
18   
HONORABLE ROB BARE  
DISTRICT JUDGE

19 RCB BARE  
JUDGE, DISTRICT COURT, DEPARTMENT 32

20 Prepared and Submitted by:

21   
22 LAURIE L. TROTTER, ESQ.  
23 Attorney for ESD Respondents  
24



TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

\* \* \* \* \*

SPAR BUSINESS SERVICES, INC., )

Petitioner, )

vs. )

NEVADA EMPLOYMENT SECURITY )

APPEALS DIVISION, ET AL., )

Respondents. )

CASE NO. A-17-755501

DEPT. NO. XXXII

**Transcript of Proceedings**

BEFORE THE HONORABLE ROB BARE, DISTRICT COURT JUDGE

**RESPONDENTS' NOTICE OF MOTION AND HEARING REGARDING MOTION  
TO DISMISS**

TUESDAY, OCTOBER 10, 2017

**APPEARANCES:**

For the Petitioner: GINA BONGIOVI, ESQ.  
THOMAS J. VOLLBRECHT, ESQ.

For the Respondents: LAURIE TROTTER, ESQ.

RECORDED BY: SANDRA PRUCHNIC, DISTRICT COURT  
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording, transcript  
produced by transcription service.

1 TUESDAY, OCTOBER 10, 2017 AT 9:41 A.M.

2

3 THE LAW CLERK: A755501.

4 MS. TROTTER: Good morning, Your Honor. Laurie  
5 Trotter on behalf of the Employment Security Division.

6 MS. BONGIOVI: Good morning, Your Honor. Gina  
7 Bongiovi on behalf of Spar Business Services.

8 MR. VOLLBRECHT: And Tom Vollbrecht on behalf of  
9 Spar Business.

10 THE COURT: Okay. This is a Motion to Dismiss a  
11 Petition for Judicial Review. All right. I do have the  
12 entire procedural history and most of the time I put things  
13 in context by reciting relevant facts and all, but just  
14 without -- I don't really want to do that because it's kind  
15 of a longer procedural history and, rather than doing that,  
16 I see that we're here today, Ms. Trotter, as the position  
17 that you take is that the Petition for Judicial Review  
18 should be dismissed for failure to serve under 612.530 and  
19 233B.130 section 5.

20 The bottom line is I would share with everyone at  
21 least my preliminary thoughts. Of course, I'll hear from  
22 you. Is that, you know, typically when there's a set of  
23 statutes specific to an area of law that outlines  
24 specifically a process in that area, typically that  
25 specific statutory scheme is the one that has to be

1 followed, particularly when there's a body of case law in  
2 the same area that talks about the idea of timing being  
3 important to the extent of being jurisdictional and  
4 mandatory, as the cases say. So, I do think, going into  
5 this, unless Ms. Bongiovi or Mr. Vollbrecht, unless you can  
6 convince me otherwise that I'm pretty steadfast in the  
7 thought that NRS 233B governs petitions for judicial review  
8 and statutes having to do with that have timelines.

9           This petition is filed May 15<sup>th</sup>, 2017. I didn't  
10 see that there was any effort or formalization of some sort  
11 of extension of time, whether it was a motion or  
12 stipulation or anything, to serve. So, it's a 45-day rule.  
13 That would put us at June 29<sup>th</sup> of 2017, we think, as to the  
14 45-day timeline and it looks like the service was  
15 effectuated on July 14<sup>th</sup>, which puts it, you know, a couple  
16 of weeks out.

17           I did see your NRCP 4 sort of 120-day argument and  
18 also your good cause argument, but, just going into this,  
19 it does seem to me that we're just dealing with a specific  
20 area. And if you're around here a lot, on these types of  
21 things, which I've dealt with for, you know, six and a half  
22 years now, I can tell you my mindset consistent with the  
23 Eighth Judicial District Court's policy and philosophy is  
24 to try to find a way to allow cases to be decided on the  
25 merits. There's another thing about being a judge that's

1 kind of interesting. You know, we don't make law. The  
2 Legislature does. So, the fact is, when there's something  
3 that -- by way of statute is what I'm talking about.  
4 There's a statute right on point, even if I don't agree  
5 with it, you know, the idea is to follow it. And, so, --  
6 what I'm saying to you is I think you guys are a little bit  
7 behind the eight ball on this one as far as I'm concerned  
8 in that it's a 45-day rule, a lot of cases say that's  
9 important and, in fact, jurisdictional.

10 And, so, -- but, anyway, it's -- Ms. Trotter, I  
11 should start with you anyway.

12 MS. TROTTER: Thank you, Your Honor.

13 This Court must dismiss this case for lack of  
14 subject matter jurisdiction. This is a special statutory  
15 proceeding and the statutes apply to the timelines or  
16 service for the Petition for Judicial Review and here the  
17 service of the Petition was untimely. As the Supreme Court  
18 explained this year, in 2017, in *Board of Review versus the*  
19 *Second Judicial District Court* [phonetic], when the  
20 Legislature creates a procedure of review of an  
21 administrative agency decision, such procedure is  
22 controlling.

23 And, here, the Court understands that it was NRS  
24 233B.130 section 5, which explains that service must be --  
25 the Petition must be served on the administrator of the



1 agency within 45 days. NRS 612.530 described: It must be  
2 personally served on the administrator.

3 Because this is a statutory proceeding, the  
4 statute prevails over other statutes and then NRS 612  
5 always prevails unless silent and then the administrative  
6 procedure Act under NRS 233B would prevail and not silent.

7 The petitioner believes that NRCP 4 section I  
8 applies as to the service timeline. NRCP 4 does not apply  
9 for two reasons. NRCP 82 explains that the Rules of Civil  
10 Procedure cannot be used to extend jurisdiction. So, NRCP  
11 4 fails because there's a statute that controls on that  
12 issue.

13 Also, the second reason is that NRCP 81A explains  
14 that the rules don't control when there's any statutory  
15 proceedings when the statutes -- when in conflict with  
16 statutes. And, here, NRCP 4 is in conflict with the 45-day  
17 rule and NRCP --

18 THE COURT: All right. Well, obviously, I agree  
19 with everything that you've put forth. Really -- I don't  
20 have any music to play, but I'm sure he's wondering what,  
21 if anything, they could do to change your opinion and what  
22 is now my opinion. So, you're welcome to make further  
23 record, but --

24 MS. TROTTER: Thank you, Your Honor.

25 THE COURT: -- I think you did a good job. It's

1 all here.

2 MS. TROTTER: Thank you, Your Honor.

3 THE COURT: But I am interested to see what they  
4 would do to distinguish the situation.

5 MS. TROTTER: thank you.

6 I -- if I may, Your Honor, there was no good cause  
7 for this -- the delay in service. They cannot justify the  
8 delay in service based on a misapprehension of the law.  
9 They cite to the *Domino* case, which doesn't support the  
10 facts in this particular situation. The fact was that  
11 there was a misapprehension of NRCP 4 apparently.

12 But, according to the *Whale* [phonetic] case, which  
13 *Domino* cites, *Whale* [phonetic] specifically explained that  
14 the counsel's mistake in the interpretation of the service  
15 statute does not provide a justifiable excuse or good cause  
16 for failure to properly or timely serve. In that case it  
17 was properly served.

18 That -- what is particularly egregious in this  
19 case is that in 2012 in a predecessor proceeding to this  
20 case, both counsel were appearing on behalf of the  
21 petitioner -- same petitioner, same counsel, and the  
22 administrator was personally served with Petition for  
23 Judicial Review within the timeline. And I cited in my  
24 brief that specific -- that case and I have -- as you can -  
25 - if you pull up that record, you can see that it was

1 personally served and I have a copy of that actual document  
2 showing personal service if the Court is inclined to accept  
3 it to show that the statute was met by both counsel on  
4 behalf of the same client in 2012. So the statute was  
5 clearly understood at some point. And, so, to claim now  
6 there's a misunder -- misapprehension of the law is not  
7 good faith.

8 THE COURT: Okay. Understood.

9 MS. TROTTER: Thank you, Your Honor.

10 THE COURT: All right. All right. Mr.  
11 Vollbrecht, are you going to argue this one?

12 MR. VOLLBRECHT: I think [indiscernible], Your  
13 Honor.

14 THE COURT: Okay.

15 MR. VOLLBRECHT: No attempt to, I guess, take on  
16 pretty much frontily, you know, --

17 THE COURT: Yeah.

18 MR. VOLLBRECHT: -- what we're saying and the  
19 first is I think if you look at the statute, our reading of  
20 the statute is actually appropriate. We've got 233B.039  
21 which provides that the statute that Ms. Trotter is relying  
22 on and that you've accepted applies except 612 applies --  
23 will prevail over the general provision with respect to  
24 judicial review of ESD decisions, which is what this is.

25 And if you look and compare 612.530 and 233B.130,

1 they both cover the exact same thing. 233B.130 provides  
2 everything with respect to judicial review. It says  
3 here's how you commence an action, here's how you file an  
4 action, here's how you serve an action, here's how action's  
5 taken care of. That is exactly what 612.530 provides,  
6 which shows that, in fact, it meets the requirements of  
7 233B.039 in that it prevails over general provisions.  
8 These are special provisions. 612.530 provides everything  
9 with respect to judicial review of an ESD decision, such as  
10 the one we're here on. It provides how you commence the  
11 action. It provides how you file it, how you serve it, how  
12 hearings are heard, and how appeals are heard on it. It  
13 covers a lot of -- completely covers the field and it  
14 provides specifically with respect to filing that one must  
15 file within 11 days. There's no question on it.

16 THE COURT: I don't think there's a dispute as to  
17 filing here.

18 MR. VOLLBRECHT: No, but --

19 THE COURT: Filing was timely. We're talking  
20 about service.

21 MR. VOLLBRECHT: Indeed. And I understand that,  
22 Your Honor. And I'll -- and there's -- there actually are  
23 two points with respect to that. One is Ms. Trotter  
24 continues to argue that you don't have subject matter  
25 jurisdiction. You do. The provision provides specifically

1 that the action is commenced in District Court upon filing  
2 within 11 days of decision being provided. No one  
3 disputes that we filed it timely. You have subject matter  
4 jurisdiction. There is no rule that I'm aware of or any  
5 authority that I'm aware of that once you get subject  
6 matter jurisdiction attached here upon timely filing that  
7 it somehow links out later out. That's just not -- no  
8 authority has been provided for that and there is no  
9 authority for that. Once you get subject matter  
10 jurisdiction attached, it attaches.

11           Every case cited by the Department and the cases  
12 that you talk about as well that say timing is important,  
13 jurisdictional timing is important, every single one of  
14 those cases talks about filing. None of them, none of them  
15 talk about service following satisfactory filing. There is  
16 not a single case that provides that. You can go through  
17 every one of them. It's not there.

18           And, then, you're right. The next issue under 5 -  
19 - under 612.530, which is the specific provisions which  
20 apply over the general provisions, with respect to this  
21 decision, also [indiscernible] what we had to do for  
22 service and provides everything that you have to do for  
23 service. The Legislature chose not to include, for  
24 whatever reason, a timeframe under which service has to be  
25 provided, but it is -- this does occupy the field, Your

1 Honor. This covers everything that's required here. So,  
2 the Legislature has provided that you commence an action,  
3 at which point your jurisdiction applies, as long as you  
4 file within 11 days. We did that.

5           It then says: Subsequently, you've got to serve  
6 it. We're not laying out any particular time frame for  
7 when you have to serve it, but you do have to serve it. In  
8 that circumstance, you're in a position where you've got to  
9 make a decision as to when service has to be provided  
10 because I certainly will acknowledge that service -- there  
11 has to be -- some time limit on service. You've got two  
12 directions that you can look. You can look to the general  
13 rules, which apply to this Court once matters come in front  
14 of it, which provides the 120-day limit, unless it's  
15 otherwise specified, or, I guess, you can do what the ESD  
16 is suggesting which is that even though 612.530 occupies  
17 the field, which under 039 says that prevails over the  
18 general provisions that they're looking at and that you've  
19 looked at, you still somehow go back and pick up a piece of  
20 what was there. There is nothing that I'm aware of,  
21 certainly in the statute or in any of the record that  
22 anybody's provided, that the Legislature intended that  
23 result. If the Legislature wanted to put a specific time  
24 frame for service, it could have done it. It certainly  
25 knows how to do it. It put a specific 11-day time frame

1 with respect to filing. It chose, for whatever reason, not  
2 to include a time frame for service.

3 THE COURT: Well, what about 233B.130 section 5  
4 which says that:

5 The Petition for Judicial Review must be served  
6 upon the agency and every party within 45 days after  
7 filing unless upon showing of good cause the District  
8 Court extends that time.

9 MR. VOLLBRECHT: That would apply, Your Honor,  
10 except 233B.130 does not apply at all because 233B.039  
11 (3) (a) provides that 612 controls.

12 THE COURT: 233 what? I'm sorry. I have it in  
13 front of me, so I'm --

14 MR. VOLLBRECHT: Sure. 233B.039.

15 THE COURT: Right.

16 MR. VOLLBRECHT: If you go to sec -- part 3.

17 THE COURT: Right.

18 MR. VOLLBRECHT: The special provisions of Chapter  
19 612 of NRS for distribution of regulations by and the  
20 judicial review of decisions of the Security Employment  
21 Division of the Department of Employment, Training, and  
22 Rehabilitation prevail over the general provisions of  
23 this chapter.

24 The general provisions of this chapter include  
25 533B.130 [sic]. 533B.130 [sic] are the general provisions

1 for judicial review of administrative action. 612.530 are  
2 the specific provisions for judicial review of decisions of  
3 the ESD and it laid out everything that you have to do.

4           There's nothing that I'm aware of in the statute.  
5 There's nothing I'm aware of in any decision that I've been  
6 able to find interpreting these statutes that say once the  
7 Legislature does what is required under 039 and lays out  
8 specific provisions, that you then use those provisions to  
9 then can -- if you don't like what it says and what it says  
10 is: Serve. It doesn't serve within 45 days. It does not.  
11 It says file within 11. It does not say serve within 45  
12 days. But you then ratchet back to that general statute as  
13 opposed to, in this circumstance, 612.530 specifically sets  
14 out that the action has been commenced when it's been  
15 filed. It's then in front of you. Then this Court has its  
16 own rules with respect to when filing -- excuse me, when  
17 service has to be provided if it's not otherwise provided  
18 in the statute. 612.530 doesn't say when the service has  
19 to be provided. You then default to 4, which says within  
20 120 days.

21           THE COURT: All right.

22           MR. VOLLBRECHT: And I -- there is nothing  
23 contrary to that, Your Honor. The cases that you talked  
24 about are --

25           THE COURT: I'll just tell you --



1 MR. VOLLBRECHT: -- on timing --

2 THE COURT: -- I took notes --

3 MR. VOLLBRECHT: Sure.

4 THE COURT: -- argument. Argument does have  
5 utility. At a minimum, it's caused me to want to look at  
6 it again. Okay?

7 MR. VOLLBRECHT: Okay. Well, I appreciate that,  
8 Your Honor.

9 THE COURT: All right. So, Ms. Trotter, any last  
10 word on the Motion?

11 MS. TROTTER: Yes. I just wanted to respond to  
12 that last argument, Your Honor.

13 THE COURT: Sure. It's your Motion, so you, of  
14 course, get the last word.

15 MS. TROTTER: Thank you, Your Honor.

16 So, this is a jurisdictional issue and the Supreme  
17 Court explained that in *Board of Review versus the Second*  
18 *Judicial District Court* [phonetic] this year that the  
19 statute must be specifically followed and it's for -- as  
20 for the suggestion that NRS 612 is the only one that  
21 applies and the Administrative Procedure Act under 233B  
22 doesn't apply, it -- that doesn't fly because NRS 612  
23 doesn't provide deadlines for every single situation that  
24 the agency even has to follow. So, under NRS 612.530,  
25 section 3 talks about the administrator shall certify on

1 file with the Court originals or true copies of documents  
2 [indiscernible] transcript of testimony taken in the  
3 matter. That deadline for that filing is found in 233B  
4 because NRS 612 is silent. So, the default is the  
5 Administrative Procedures Act and the Legislature -- the  
6 Legislature set it up that way so that specific deadlines  
7 that are not continued in 612 then refer to NRS 233B for  
8 those deadlines.

9 THE COURT: Okay.

10 MS. TROTTER: And, so, that argument does not --  
11 is not logical because there's other deadlines that are  
12 missing from 612.

13 And, also, as I mentioned previously, NRCP 82 says  
14 specifically that Rules of Civil Procedure cannot be used  
15 to extend jurisdiction.

16 THE COURT: Okay.

17 MS. TROTTER: And the statutes prevail in NRCP  
18 [indiscernible]. Thank you, Your Honor.

19 THE COURT: All right. Well, there's a lot of  
20 people in the room. Most of them are lawyers. One or two  
21 of them are going to have to take a civil procedure exam  
22 having to do with the civil procedure to be used and  
23 service issues having to do with Nevada Employment Security  
24 Appeals Division, judicial review petitions that they deal  
25 with. That should be my marshal because she's in law

1 school, but it's going to be me and my law clerk as it  
2 turns out. So, I'll figure it out.

3 I took notes of what was said. I mean, obviously,  
4 I shared our preliminary thoughts, but court has utility  
5 and I took notes of what you said. It's just a matter of  
6 going through it and now figuring it out to the best of our  
7 ability and entering an order that definitively then  
8 decides it. We'll do it within a week.

9 MS. TROTTER: Thank you, Your Honor.

10 THE COURT: Take it under advisement.

11 MR. VOLLBRECHT: Thank you, Your Honor.

12

13 PROCEEDING CONCLUDED AT 10:01 A.M.

14 \* \* \* \* \*

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1 **CERTIFICATION**

2

3

4 I certify that the foregoing is a correct transcript from

5 the audio-visual recording of the proceedings in the

6 above-entitled matter.

7

8 **AFFIRMATION**

9

10 I affirm that this transcript does not contain the social

11 security or tax identification number of any person or

12 entity.

13

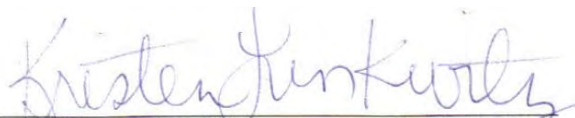
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20 KRISTEN LUNKWITZ

21 INDEPENDENT TRANSCRIBER

22

23

24

25

**REGISTER OF ACTIONS****CASE NO. A-17-755501-J****Spar Business Services Inc, Petitioner(s) vs. Nevada Employment Security Appeals Division, Respondent(s)**§  
§  
§  
§  
§  
§  
§

Case Type: **Other Nevada State Agency Appeal**  
 Date Filed: **05/15/2017**  
 Location: **Department 32**  
 Cross-Reference Case Number: **A755501**  
 Supreme Court No.: **75783**

**PARTY INFORMATION****Petitioner Spar Business Services Inc**

**Lead Attorneys**  
**Gina Bongiovi**  
*Retained*  
 7024851200(W)

**Respondent Nevada Employment Security Appeals Division**

**Laurie L. Trotter**  
*Retained*  
 775-684-3996(W)

**EVENTS & ORDERS OF THE COURT****DISPOSITIONS**

- 11/14/2017 **Order of Dismissal** (Judicial Officer: Bare, Rob)  
 Debtors: Spar Business Services Inc (Petitioner)  
 Creditors: Nevada Employment Security Appeals Division (Respondent), Renee Olson (Respondent), Katie Johnson (Respondent), Michael Deboard (Respondent)  
 Judgment: 11/14/2017, Docketed: 11/14/2017
- 04/10/2018 **Order Granting Judicial Review** (Judicial Officer: Bare, Rob)  
 Debtors: Spar Business Services Inc (Petitioner)  
 Creditors: Nevada Employment Security Appeals Division (Respondent)  
 Judgment: 04/10/2018, Docketed: 04/11/2018

**OTHER EVENTS AND HEARINGS**

- 05/15/2017 **Petition for Judicial Review**  
*Petition for Judicial Review*
- 05/15/2017 **Summons Electronically Issued - Service Pending**  
*Summons*
- 05/15/2017 **Initial Appearance Fee Disclosure**  
*Initial Appearance Fee Disclosure*
- 05/31/2017 **Motion to Associate Counsel**  
*Motion to Associate Counsel*
- 07/11/2017 **Minute Order** (11:12 AM) (Judicial Officer Bare, Rob)  
*Minute Order Re: Motion to Associate Counsel, Thomas Vollbrecht, Esq.*  
[Minutes](#)  
 Result: Minute Order - No Hearing Held
- 07/18/2017 **CANCELED Motion to Associate Counsel** (9:30 AM) (Judicial Officer Bare, Rob)  
*Vacated - per Law Clerk*
- 07/21/2017 **Motion to Dismiss**  
*Motion to Dismiss Petition for Judicial Review*
- 07/24/2017 **Affidavit of Service**  
*Affidavit of Service*
- 07/25/2017 **Notice of Hearing**  
*Notice of Motion and Hearing*
- 07/28/2017 **Certificate of Service**  
*Certificate of Service (Notice of Motion and Hearing)*
- 08/01/2017 **Opposition to Motion to Dismiss**  
*Petitioner's Opposition to Motion to Dismiss*
- 08/04/2017 **Reply to Opposition**  
*ESD's Reply to Opposition to Motion to Dismiss Petition for Judicial Review*
- 08/21/2017 **Order Admitting to Practice**  
*Order Admitting to Practice*
- 08/22/2017 **Order**  
*Order Rescheduling Hearing*
- 08/30/2017 **Order**  
*Order Rescheduling Hearing*
- 10/10/2017 **Motion to Dismiss** (9:30 AM) (Judicial Officer Bare, Rob)

**JA00165**

Respondent's Notice of Motion and Hearing Re: Motion to Dismiss  
[Parties Present](#)  
[Minutes](#)  
 09/19/2017 Reset by Court to 10/03/2017  
 10/03/2017 Reset by Court to 10/10/2017  
 10/10/2017 Reset by Court to 10/10/2017

10/12/2017 Result: Granted  
**Minute Order** (8:00 AM) (Judicial Officer Bare, Rob)  
[Minutes](#)

11/14/2017 Result: Minute Order - No Hearing Held  
**Order Granting Motion**  
*Order Granting Motion to Dismiss Petition for Judicial Review*

11/15/2017 **Notice of Entry of Order**  
*Notice of Entry of Order Granting Motion to Dismiss Petition for Judicial Review*

11/15/2017 **Motion to Reconsider**  
*(11/20/17 Withdrawn) Petitioner's Motion to Reconsider*

11/20/2017 **Notice of Withdrawal of Motion**  
*Notice of Withdrawal of Petitioner's Motion to Reconsider*

11/21/2017 **Motion to Reconsider**  
*Petitioner's Motion to Reconsider Pursuant to NRCP 59(e) and NRCP 60(b)*

12/04/2017 **Opposition**  
*ESD's Opposition to Petitioner's Motion to Reconsider Pursuant to NRCP 59(e) and NRCP 60(b)*

12/20/2017 **CANCELED Status Check** (3:00 AM) (Judicial Officer Bare, Rob)  
*Vacated - per Stipulation and Order*  
*Status Check: Order*

01/16/2018 **CANCELED Motion to Reconsider** (9:30 AM) (Judicial Officer Bare, Rob)  
*Vacated - per Secretary*  
*Petitioner's Motion to Reconsider*

01/18/2018 **Reply to Opposition**  
*Petitioner's Reply in Support of Motion to Reconsider Pursuant to NRCP 59(e) and NRCP 60(b)*

01/23/2018 **Minute Order** (8:00 AM) (Judicial Officer Bare, Rob)  
[Minutes](#)

01/25/2018 Result: Minute Order - No Hearing Held  
**CANCELED Motion** (9:30 AM) (Judicial Officer Bare, Rob)  
*Vacated*  
*Petitioner's Motion to Reconsider Pursuant to NRCP 59(e) and NRCP 60(b)*

02/14/2018 **Status Check** (3:00 AM) (Judicial Officer Bare, Rob)  
*STATUS CHECK: DECISION*  
[Minutes](#)

04/10/2018 Result: Vacate  
**Order**  
*Order Denying Motion to Reconsider*

04/11/2018 **Notice of Change of Address**  
*Notice of Change of Address and Telephone Numbers*

04/11/2018 **Notice of Entry of Order**  
*Notice of Entry of Order Denying Motion to Reconsider*

04/30/2018 **Notice of Appeal**  
*Notice of Appeal*

04/30/2018 **Case Appeal Statement**  
*Case Appeal Statement*

06/11/2018 **Recorders Transcript of Hearing**  
*Recorder's Transcript RE: Respondents' Notice of Motion and Hearing Regarding Motion to Dismiss*

06/25/2018 **Request**  
*Request for Transcript of Proceedings*

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**FINANCIAL INFORMATION**


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	<b>Petitioner Spar Business Services Inc</b>		
	Total Financial Assessment		294.00
	Total Payments and Credits		294.00
	<b>Balance Due as of 09/19/2018</b>		<b>0.00</b>
05/15/2017	Transaction Assessment		270.00
05/15/2017	Efile Payment	Receipt # 2017-44046-CCCLK	(270.00)
04/30/2018	Transaction Assessment		24.00
04/30/2018	Efile Payment	Receipt # 2018-29193-CCCLK	(24.00)

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

SPAR BUSINESS SERVICES, INC.

Appellant,

v.

RENEE OLSON, ADMINISTRATOR  
OF THE EMPLOYMENT SECURITY  
DIVISION; STATE OF NEVADA,  
DEPARTMENT OF EMPLOYMENT,  
TRAINING & REHABILITATION,  
EMPLOYMENT SECURITY  
DIVISION; and KATIE JOHNSON, in  
her capacity as Chairperson of the  
EMPLOYMENT SECURITY  
DIVISION BOARD OF REVIEW,

Respondents.

**Supreme Court Case No. 75783**

Electronically Filed  
Sep 24 2018 02:29 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**APPEAL**

From the Eight Judicial District Court, Clark County  
The Honorable Rob Bare, District Judge  
District Court Case No.: A-17-755501-J

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**JOINT APPENDIX VOLUME I**

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Training and Rehabilitation,  
Employment Security Division, and  
Renee Olson, Administrator of the  
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Attorneys for Appellants  
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<b>Document</b>	<b>Vol.</b>	<b>Date Filed</b>	<b>Page No.</b>
Petition from Board of Review Decision	I	05/15/2017	JA00001-JA00008
Summons Electronically Issued	I	05/15/2017	JA00009-JA00010
Motion to Associate Counsel	I	05/31/2017	JA00011-JA00024
Minute Order re: Motion to Associate Counsel, Thomas Vollbrecht, Esq.	I	07/11/2017	JA00025
Employment Security Division Motion to Dismiss Petition for Judicial Review	I	07/21/2017	JA00026-JA00032
Petitioner's Opposition to Motion to Dismiss	I	08/01/2017	JA00033-JA00041
Employment Security Division Reply to Opposition to Motion to Dismiss Petition for Judicial Review	I	08/04/2017	JA00042-JA00060
Order Admitting to Practice	I	08/21/2017	JA00061-JA00062
Court Minutes re: Respondent's Notice of Motion and Hearing Re: Motion to Dismiss	I	10/10/2017	JA00063
Minute Order Issued from Chambers re: Motion to Dismiss	I	10/12/2017	JA00064-JA00065
Notice of Entry of Order Granting Motion to Dismiss Petition for Judicial Review	I	11/15/2017	JA00066-JA00071
Petitioner's Motion to Reconsider Pursuant to NRCP 59(e) and NRCP 60(b)	I	11/21/2017	JA00072-JA00086
Employment Security Division's Opposition to Petitioner's Motion to Reconsider Pursuant to NRCP 59(e) and NRCP 60(b)	I	12/04/2017	JA00087-JA00102
Petitioner's Reply in Support of Motion to Reconsider Pursuant to NRCP 59(e) and NRCP 60(b)	I	01/18/2018	JA00103-JA00122
Court Minutes Issued from Chambers re: Motion for Reconsideration	I	01/23/2018	JA00123
Minute Order re: Motion to Reconsider	I	02/14/2018	JA00124
Order Denying Motion to Reconsider	I	04/10/2018	JA00125-JA00127

Notice of Entry of Order Denying Motion to Reconsider	I	04/11/2018	JA00128-JA00132
Notice of Appeal	I	04/30/2018	JA00133-JA00148
Transcript of Proceedings of October 10, 2017	I	06/11/2018	JA00149-JA00164
Register of Actions for Case No. A-17-755501-J	I	as of 09/19/2018	JA00165-JA00166