IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA STATE BOARD OF ARCHITECTURE, INTERIOR DESIGN AND RESIDENTIAL DESIGN, Petitioner, vs. EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, DEPARTMENT 25, HONORABLE KATHLEEN DELANEY, and DENNIS RUSK, and Dennis E. Rusk, Architect, LLC Real Parties in Interest.	Supreme Court Case No.: 76792 District Court Case No.: A-17-758318

Real Parties in Interest's Brief in Opposition to Petitioner's Petition for Writ of Prohibition

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When an administrative agency by formal motion made and carried in the presence of the aggrieved party determines on the record:

1) That a prior decision of the agency stands;

2) That prior and now confirmed decision contains extensive findings of fact and conclusions of law; and

3) That a petition/motion to vacate is therefore denied;

does the time to file a Petition for Judicial Review on a motion to overturn that now confirmed decision commence running?

IV. BACKGROUND, FACTS, AND REPLY TO PETITIONER'S FACTS

A. HISTORY AND BACKGROUND FACTS

Respondents Dennis E. Rusk and his company, Dennis E. Rusk Architect, LLC, (hereafter referred to singularly as "Rusk"), have been practicing licensed architecture in Southern Nevada since 1980. The Nevada State Board of Architecture, Interior Design, and Residential Design ("Board"), instituted proceedings against Rusk claiming misconduct in design of a project known as Verge. Accord Petitioner's Appendix ("P. App."), p. 123. On September 27, 2011, an order issued stripping Rusk of his license and conditioning reinstatement on paying exorbitant fees which Rusk could not pay. See P. App., pp. 123-133.

The decision was based, in material part, on Rusk allegedly having: 1) failed to submit fire and life safety plans to the City; 2) Not coordinating his design of the Verge project with a fire and life safety engineer; 3) Submitting plans for approval lacking any fire and life safety engineering; and 4) A lack of credibility on his statements surrounding his submissions. Decision, Findings of Fact, Rusk Appendix, "R. App."), pp. R7-R9, ¶ 13: 25-4; ¶ 15; ¶ 16: 17-18. Rusk fought this finding through a Petition for Judicial Review, which he lost, and an appeal to this Court which was dismissed on the failure of his attorney to meet deadlines. See Rusk v. Nev. State Bd. of Architecture, 2013 Nev. Unpub. LEXIS 1180, *1, 2013 WL 3969678, (2013) and Case No. 61884 (2012).

After the conclusion of the appeal, Rusk and his new counsel discovered, for the first time, hard evidence that he had, in fact: 1) submitted fire and life safety plans with his submissions; 2) had coordinated his design of the Verge project with a fire and life safety engineer; and 3) had submitted plans for approval rife with fire and life safety engineering. Most importantly, it was discovered that the Board and its prosecutor were in exclusive possession of the timely submitted fire and life safety plans at the time of the hearing on Rusk's license, and the prosecutor went so far as to effectively inform the Board at the hearing that these plans were never submitted and did not exist. See Wiese Order of Remand, R. App., p. 54, ¶ 13.

As to the coordination and the failure to submit plans with fire and life safety engineering, the prosecutor's presentation at the original 2011 hearing included a presentation of the plans. Rusk originally submitted these as full size plans to the City, yet the prosecutor indisputably placed in evidence at the disciplinary proceedings these very plans reduced to an unreadable 8½" x 11," and he and his witnesses claimed that these plans lacked any fire and life safety components. Again, after the close of the appeals of the Decision, it was discovered by literally blowing up the prosecutor's exhibit to readable form that the assertion by the prosecutor and his hired expert that the plans lacked any fire and life safety components was patently and demonstrably false. Simply, the full size plans of the very same documents were teeming with the very fire and life safety engineering for which Rusk lost his license due to their alleged absence.[1]

One other item premised on hard evidence in the prosecutor's possession discovered following the hearing is that the prosecutor's expert either committed

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[1] This discovery was made by blowing up, to full size, the digital reduction undertaken by the prosecutor and presented as evidence at the original hearing resulting in the September 27, 2011 order at R. App. 4-14. That is, during the prosecutor's presentation, the very exhibits which the prosecutor claimed, and the Board found, lacked fire and life safety engineering, did, in fact, contain these elements, but they were hidden in plain sight due to the reduction in size. The blow-up was presented at the hearing on the present order.

perjury or was mistaken.[2] This expert affirmatively testified that the actual plans (submitted by the prosecutor) lacked fire and life safety engineering. As noted above, they did not, and the actual evidence presented showed the opposite, albeit in a shrunken and indecipherable form as submitted by the prosecutor. In this sense, it was also discovered that the prosecutor either suborned perjury or knowingly failed to correct false evidence presented in the prosecution of Rusk.

With this new evidence, Rusk brought a petition/motion to vacate before the Board. R. App., Doc. 3, pp. R1, pp. 2-28. It was denied on the basis of alleged lack of jurisdiction (apparently a favorite assertion of the prosecutor). Board Decision, Rusk's/ Respondent's Appendix ("R. App."), pp. 43-49. Rusk sought judicial review of this decision. The district court through Judge Weise granted the petition, determined that the petition/motion was properly before the Board, and remanded the matter back to the Board for further hearing. See Order granting writ issued by Judge Weise ("Weise Order"), R. App., Doc. 4, pp. R5o-R56.

On remand, a truncated proceeding at R. App., pp. 65-86 took place. Rusk was denied relief at this hearing. Transcript, R. App. p. 85 at pp. 67-68: 21-10. Rusk immediately ordered the transcript. On or about November 8, 2017, Petitioner received the transcript. Accord Transcript, R. App. p. 67. Having read

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[2] As to the possible mistake, this would be the result of the prosecutor hiding material evidence from the expert, while, if the actual evidence were provided, then the prosecutor's expert perjured himself with the knowledge of the prosecutor.

the transcript and seeing that the decision was issued at a formal hearing fulfilling the requirements of NRS 233B.125 by stating a decision "on the record,"[3] Rusk promptly filed his Petition for Judicial Review on November 9, 2018. P. App. 2-4.

To this point, the Board and the prosecutor have sought to strip Rusk of his right to have the matter of prosecutorial misconduct and due process violations in his conviction determined on the merits. There was the sua sponte determination of lack of jurisdiction. R. App., pp. R. 43-49 (reversed). The Board brought a bizarre motion before Judge Weise seeking to have him enter a post-remand order collaterally attacking and mooting the current proceeding (vacated as inappropriate by the court). R. App. pp. R. 58-62 and Minutes, R. App. pp. R.. 63-64. A motion for lack of jurisdiction predating this current motion was filed by the Board. R. App. pp. 87-91 (withdrawn). The motion at issue in this matter was filed claiming

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[3] In the hearing before the Board, the decision was made as follows, and exists in writing and was possessed by Rusk prior to filing the Petition for Judicial Review:

> MR. WAUGH: I'll make a motion. After reviewing the previous proceedings. After reviewing the previous proceedings, previous evidence, and after listening to both sides, I move that the Board uphold the September 27 [2011] order . . .."
> MR. ERNY: Second.
> MR. MICKEY: Any discussion, further discussion on the motion? I'll call for a vote. All those in favor?
> (All members join in ayes)

With this formal motion made and carried, the prior decision found at R. App. pp. 4-14 was expressly upheld and adopted. See P. App. p. 1 at pp. 67-68.

lack of jurisdiction. Petitioners Supplemental Appendix ("P.S. App.") pp. 15-25. It was denied. P. App. 5-11.

Against this, the Board has again (fifth time) challenged jurisdiction to have a tribunal review its actions and the actions of its prosecutor in the conviction of Rusk. The Board is apparently of the belief that there never exists a circumstance where Rusk's Petition/Motion to Vacate is ever subject to its own review or judicial review.

B. RESPONSE TO PETITIONER'S STATEMENT OF FACTS

The Board sets forth a history of the litigation implying that the matter has been litigated to death. The Board points out a prior appeal in this Court, yet omits the fact that the matter was never heard as it was dismissed due to Rusk's attorney's failures. See Rusk v. Nev. State Bd. of Architecture, 2013 Nev. Unpub. LEXIS 1180, *1, 2013 WL 3969678, (2013) and Case No. 61884 (2012). The Board also alludes that the present matter has already been heard and decided both here and in the earlier appealed proceedings. Board's Brief, pp. 2, 3-4. This is patently not the case. Rather, the matter before the Board was entirely divorced from prior proceedings and expressly premised on evidence hidden by the prosecutor and the Board in the earlier proceeding. As to the interminable nature of the proceedings, as shown above, and on the record below, the matter has been twice stayed and subject to five attempts by the Board to attack jurisdiction. It is a

curious course for the Board to do everything in their perceived power to delay resolution and strip the courts of jurisdiction, and then assert that it is Rusk causing the interminable litigation.

Most pointedly, the issues in the Petition/Motion to Vacate, which have only been determined by the Board on the remand, are the very issues subject to Rusk's Petition for Judicial Review. Compare Petition/Motion to Vacate, R. App. 15-42 with Petition for Judicial Review, P.S. App. 2-4. These issues have never been subject to judicial review as the evidence was hidden when the September 27, 2011 order issued, and as noted, all of these were secreted by the prosecutor in the prosecution of Rusk, all were discovered following the termination of the prior proceedings, and as will be shown by the determination of the Petition, the Board continues to ignore these contentions.

Specifically, in the present case Rusk filed a motion to vacate with the Board based entirely upon newly discovered and previously misrepresented and hidden evidence premised upon facts discovered after the decision in Rusk v. Nev. State Bd. of Architecture, 2013 Nev. Unpub. LEXIS 1180, *1, 2013 WL 3969678, (2013). See Order granting writ (first) issued by Judge Weise ("Weise Order"), R.. App. Doc. 4, p. R54, ¶ 13. Simply, the prosecutor used testimony he knew to be false, and secreted evidence in his possession from the Board in the prosecution of Rusk, and violated due process in taking Rusk's license. See Transcript, R. App.

pp. 71-72 at pp. 13-16. Thus, on the basis of prosecutorial misconduct, a petition to vacate was authorized and appropriate. See NRS 622A.390(1) (c); Weise Order, R. App. Doc. 4.

In the hearing before the Board on remand, the matter concluded with the following:

> MR. WAUGH: I'll make a motion. After reviewing the previous proceedings. After reviewing the previous proceedings, previous evidence, and after listening to both sides, I move that the Board uphold the September 27 [2011] order . . .."
> MR. ERNY: Second.
> MR. MICKEY: Any discussion, further discussion on the motion? I'll call for a vote. All those in favor?
> (All members join in ayes)

With this formal motion, the prior decision found at R. App. pp. 4-14 was "upheld" and thusly adopted. This is the ruling/decision upon which the Petition for Judicial Review at issue was filed.

Petitioner represented by the same prosecutor also downplays its delay in the timing of the written order. Respondent has thirty days to file a Petition for Judicial Review of the decision of the Board. NRS 233B.130(2)(d). From the date of the decision above, the alleged written order in this matter did not occur for thirty-six days following the rendering of the denial of Respondent's Motion to Vacate. The twenty-two days referenced by the Petitioner in its brief at page 6, is

an irrelevancy.[4] Rusk was faced with an oral denial of his motion without any extant writing for a period of time extending beyond the time during which he was required to file his Petition for Judicial Review if, as it appears, his motion had been denied by the Motion of Mr. Waugh discussed above, n. 3. That is, provided the oral decision was the "decision" of the Board, had the Petition for Judicial Review not been filed, the Respondent would have been without recourse and would have missed the very jurisdictional requirement upon which the Board relies.

V. ARGUMENT

A. UNDER FUNCTIONALLY ON POINT AUTHORITY TO BE APPLIED UNDER NEVADA LAW, RUSK'S PETITION FOR JUDICIAL REVIEW WAS TIMELY FILED AND NOT PREMATURE

The Administrative Procedure Act in Nevada is patterned after the Model State Administrative Procedure Act ("MSAPA") forwarded by the Uniform Law Commission. State HHS v. Samantha Inc., 407 P.3d 327, 330 (Nev. 2017). In the construction of an enacted uniform law, when there is no determination in the state's courts, proper construction is to look at the construction placed upon the uniform law in sister jurisdictions. That is, the uniform act "must be so construed as to effectuate its general purpose to make uniform the law of those states which

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[4] It appears that the Petitioner must be citing this occurrence to demonstrate that Rusk's filing of the Petition for Judicial Review was precipitous and without any pressing concern. As the failure to file would have placed the Petition at risk of

enact it." Smith v. Hall, 707 N.W.2d 247, 251 (N.D. 2005); Nathan v. Whittington, 408 S.W.3d 870, 873 (Tex. 2013); Lake Motor Freight, Inc. v. Randy Trucking, Inc., 118 Ill. App. 3d 626, 631, 455 N.E.2d 222, 226 (1983); accord Volvo Cars of N. Am., Inc. v. Ricci, 122 Nev. 746, 750, 137 P.3d 1161, 1164 (2006)("We may thus look to other states' interpretations of the Uniform Act in discerning what [the language] means."). Thus, Nevada Law looks to the decisions of sister states on adopted uniform laws as having some precedential effect, and not merely persuasive. Volvo, id.

Like Nevada, Connecticut has adopted the MSAPA. Compare NRS Ch. 233B with Conn. Gen. Stat. Title 4, Ch. 54. There are some inconsequential differences between the statutes as adopted.[5] The precise issue here arose under the MSAPA in Connecticut in Commission on Human Rights & Opportunities v. Windsor Hall Rest Home, 232 Conn. 181, 182, 653 A.2d 181, 182 (1995). In Windsor Hall the court determined that the oral decision rendered at the close of a hearing was the decision commencing the time for seeking judicial review of the decision.

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lacking jurisdiction, filing the Petition for Judicial Review when filed was reasoned and necessary for a party in Rusk's position.

[5] E.g., In Connecticut the procedure is referred to as an appeal rather than a petition for judicial review, and the period to file the request for judicial review is forty-five days rather than thirty.

Further, as to the board's claim in its brief at pp. 16-17, that there is no case finding that an oral ruling commences the running of the time to seek judicial review, Windsor Hill clearly shows that the Board's contention is false. In Windsor Hill the aggrieved party sought judicial review after the forty-five-day filing requirement, but within forty-five days of the only written decision.[6] The request for judicial review was dismissed on jurisdictional grounds. The claimant appealed, and on the appeal the claimant made the identical arguments made by the Board here.[7]

On Appeal, the Connecticut Supreme Court determined there was no jurisdiction over the petition because the request was too late as being filed over forty-five days following the earlier oral determination. In fact, review of

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[6] In Connecticut on the enactment of the MSAPA its legislature provided for forty-five days to seek judicial review. Conn. Gen. Stat. § 4-183. In contrast, in Nevada it is thirty days. NRS 233B.130(2)(d).

[7] The claimant argued:

> "The commission claims that its appeal was timely under § 4-183 because: (1) General Statutes § 46a-94acontemplates that a final decision of the commission be in writing; (2) under General Statutes § 46a-86 (e), a dismissal of a complaint must be in writing; (3) the commission's regulations are consistent with and support the construction that §§ 46a-94a and 46a-86 (e) mandate a written final decision; and (4) even if a final decision of the commission may be made orally, an oral decision is not final for purposes of appeal until it is reduced to writing, an event that did not take place until the presiding officer's written denial of the petition for reconsideration.

Id at 186, 653 A.2d at 184.

Windsor Hall evinces that its application commanded Rusk to file his Petition for Judicial Review following the determination made above at n. 3, and had he failed to do so, he would have been barred from seeking judicial review of the determination of the Board, as was the petitioner in Windsor Hall.[8] The Petition for Judicial Review was the proper petition, timely filed, and there is no basis upon which to claim lack of jurisdiction in the District Court.

To highlight, in Windsor Hall, the petitioner's claim was dismissed at the administrative hearing by oral ruling. No written order was forthcoming, but the petitioner promptly filed a request for reconsideration. The request for reconsideration was denied in a written order, and the petitioner promptly sought judicial review following this denial of rehearing. Citing to the corollary to NRS 233B.125 authorizing binding oral rulings on the record, the Windsor Hall court determined that the time to seek judicial review commenced running at the time of the oral decision.[9]

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[8] Note that had Rusk not filed his Petition for Judicial Review within thirty days of the referenced determination, the Board could have never filed a written decision, and under the extant case law, had Rusk later filed a Petition for Judicial Review, the Board could have successfully moved to dismiss the Petition for lack of jurisdiction stealing any opportunity for Rusk to seek judicial review under the Board's proposed analysis. Surely the statutes cannot be so construed, and were not meant to, give an administrative agency the opportunity to set such a trap.

[9] Also noted was the fact that the motion for reconsideration did not toll the time in which to seek judicial review under the MSAPA, and denied judicial review due to the tardy jurisdictional filing of the request for judicial review. Id at 187, 653 A.2d at 185.

In short, under statutes functionally identical to those here, it was determined that the time in which to seek judicial review was triggered by the oral ruling.[10]

This Court has addressed a similar situation in Department of Commerce v. Hyt, 96 Nev. 494 (1980), which directly supports the conclusion that the district court has jurisdiction. In Hyt, like here, this Court was faced with a petition from an oral ruling of an administrative body. An oral decision is statutorily effective. NRS 233B.125. Hyt determined that the oral ruling did not trigger the administrative agencies duties to proceed on the express basis that when the oral decision from the body is "informal," without "findings," and did not include an "effective date," the administrative body would not be held in default on a failure to proceed on the petition for judicial review initially filed. Id at 495. The direct implication from this ruling, which is also in direct accord with Windsor Hall, supra, is that a formal decision (as opposed to an informal decision) provided at a hearing with findings (as opposed to being silent on findings), and with an effective date (as opposed to having no effective date of the decision evident) commences the period in which to file a petition for judicial review. This is what

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[10] The Board contends that the language mandating service, etc., bely that only a written decision is effective. Board's Brief, p. 9. Windsor Hall addressed this, noting that it is effectively reconciled with the allowance of a decision on the record meeting these requirements in actuality. Windsor Hall, at 188-189; 653 A.2d at 185-186.

occurred here, and Rusk's Petition for Judicial Review vested jurisdiction in the District Court.

The Board's assertion as to the reasoning of Hyt has no application to this case, or if it does have an application, that application supports Rusk's position. The Board cites Hyt for the proposition that, "An administrative agency should not be penalized for announcing its decision at the end of a hearing." Board's Brief, p. 17. The Board is not penalized by rendering its final decision at the end of the hearing in any sense, as it can continue to present its position on judicial review. Contrarywise, Rusk, acting on the express language of the statute that a decision can be made "on the record," is penalized in two ways if the Board's position is accepted. First, the Board is authorized to delay the judicial review or even prevent it by never issuing a written order. Second, he is placed in an irreconcilable conundrum with no guidance as to when the decision is final. Third, as discussed below, a contrary ruling demands that Rusk ignore the express authorization for a decision "on the record." Note also, in this respect, that the Petition for Judicial Review was filed after receipt of the transcript providing a written determination as noted in n.2, supra. In Hyt this Court acted to avoid punishment to the state agency under the same alleged ambiguity under NRS 233B.125, present here. If the language of the statute was stretched, as it was, to protect the administrative agency in Hyt, there would be every reason to allow Rusk the same consideration

and mandate a decision on the merits in this case through hearing his timely Petition for Judicial Review following a decision which was final in every respect..

B. UNDER THE PLAIN LANGUAGE OF THE APPLICABLE STATUTES THE PETITION FOR JUDICIAL REVIEW FILED BY RUSK WAS FULLY EFFECTIVE TO ESTABLISH JURISDICTION IN THE DISTRICT COURT

The statute at issue, NRS 233B.125, provides in its entirety:

> A decision or order adverse to a party in a contested case must be in writing or stated in the record. Except as provided in subsection 5 of NRS 233B.12, a final decision must include findings of fact and conclusions of law, separately stated. Findings of fact and decisions must be based upon a preponderance of the evidence. Findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency regulations, a party submitted proposed findings of fact before the commencement of the hearing, the decision must include a ruling upon each proposed finding. Parties must be notified either personally or by certified mail of any decision or order. Upon request a copy of the decision or order must be delivered or mailed forthwith to each party and to the party's attorney of record.

First in this respect, the statute does not define a "final decision" as the Board maintains. Rather, the statute informs the Board of their unalterable duties when a final decision is made.

Here the final decision was to uphold the September 27, 2011 decision, and all the burdens and effects of that ruling were laid on Rusk when Member Waugh's motion carried as noted in n.2, supra. He's then done as the Board made

a final decision "on the record." The balance of the statute, at best, is a directive of that which the Board is required to include in a "final decision" when they make a final decision. Failing to do so at the time of the final decision is a failure of the Board to fulfill its duty, not a failure of Rusk. He filed a Petition for Judicial Review within thirty days of a decision which was a final decision precisely as the statutes dictate in order to vest jurisdiction in the district court.[11]

As to the Board's argument, it argues that NRS 233B.125, has five sentences requiring a written order. Board's Brief, p. 15. Nothing in this language requires a "written order." The Board argues that there is no such thing as a final order made "on the record," as NRS 233B.135 expressly authorizes. Per the statute, a decision made "on the record" supplants even the availability of a written order, as the decision has already occurred. If this were not the case, then the language allowing the rendering of a decision "on the record" would be surplusage an ineffectual.

Rules of statutory construction absolutely prohibit such a conclusion. All language in a statute must be given effect. All courts applying the common law have long recognized that they will invariably apply a statute "in a way that would

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[11] The Board's rigmarole concerning the statements about a forthcoming written order are irrelevant. The statutes are the statutes. The Board has no ability to transmogrify their meaning through saying that they will undertake an additional action before the ruling is effective. This only sets a trap for the unwary, and leaves Rusk with no choice but to follow the dictates of the statutes language as opposed to relying on bare promises made without authority. He could well have found

not render words or phrases superfluous or make a provision nugatory." S. Nev. Homebuilders Ass'n v. Clark County, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005); In re Estate of McKay, 43 Nev. 114, 116, 184 P. 305, 305 (1919). This goes so far as require that "there is a presumption that every word, phrase and provision in the enactment has meaning." Charlie Brown Constr. Co. v. Boulder City, 106 Nev. 497, 502-503, 797 P.2d 946, 949 (1990)(overruled on unrelated grounds in Calloway v. City of Reno, 116 Nev. 250, 267, 993 P.2d 1259, 1270 (2000). The Board argues affirmatively that a decision must be in writing while the statute provides the exact opposite with an express alternative to a decision being in writing being stated in the statute (made "on the record"). It seeks a ruling of this Court that the Nevada Legislature's inclusion of the words "on the record" in NRS 233B.125 are, simply, not present. But they are present. The only reconciliation between the law as mandated by the legislature and the Board's position is to soundly determine that the Board is in error in its analysis.

Moreover, application of NRS 233B.125, as to the decision on the record is in full accord with an oral decision being effective. The Board states that the five sentences (actually six) immediately following the allowance of a decision "on the record" under NRS 233B.125, mandate a separate written order to be effective. In

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himself in a position identical to the aggrieved party in Windsor Hall, supra, if he made such a calculation.

addition to this conclusion rendering the "on the record" language mere surplusage, these five sentences have no such effect.

As to the first sentence, it provides that a decision, "must include findings of fact and conclusions of law, separately stated." Id. Here, the decision expressly "upheld" the ruling of September 27, 2011. This order included findings of fact and conclusions of law, separately stated. See R. App. pp. 4-14. Clearly, findings of fact can be verbal and there is no prohibition on them being made by incorporation. The claim that they must be in writing is not found. And here the verbal ruling adopted findings of fact found in a separate part of the record. The first element does not have to be in writing, and was met in the decision.

The second sentence is a directive as to the burden of proof to be applied in making the decision, and has nothing to do with a decision being in, or not being in, writing. At best, it presents a presumption and a standard of review against the decision made, and obviously, there is no prohibition on a verbal ruling or even an application to the contents of any decision.

The third section requires that decisions base upon statutes must recite their basis. Like the first sentence, this is accomplished in the order upheld by Member Waugh in his motion, n. 3, supra. There was no, and is no, need for a writing.

The fourth sentence provides, "If, in accordance with agency regulations, a party submitted proposed findings of fact before the commencement of the

hearing, the decision must include a ruling upon each proposed finding." This is obviously inapplicable to this case as there were no proposed findings.

Under the fourth sentence, the party must be notified of the decision in writing "**or personally.**" Rusk was present by his attorney personally and himself personally when the ruling was made. See Speaker designations, R. App. p. R83 at p. 61: 3, and 6 (indicating that both Rusk and his attorney were present when the decision was rendered). There is no requirement whatsoever to be found in NRS 233B.125 that a decision must be in writing or that it is ineffective until reduced to writing (in conflict with the express language that it may be made on the record). Moreover, if being noticed "personally" suffices, then a fortieri the requirement of a writing is antithetical to the language. Further, it was reduced to writing regardless. R. App. p. R85 at pp. 67-68.[12]

Further, in its analysis the Board skips the sixth additional sentence of NRS 233B.125, which clearly shows that the legislature and the statute both contemplate an oral decision on the record being effective when made. The language provides: "Upon request a copy of the decision or order must be delivered or mailed forthwith to each party and to the party's attorney of record." Again, there is an

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[12] There also exists the fact that the Board could have made the decision outside the record of the proceedings and then issue a written decision. See NRS 233B.130(1)(a). The fact that it was made "on the record" in the presence of Rusk and his attorney, clearly bespeaks an intent that it be immediately effective and final on the motion before the Board.

alternative provided that either the "decision or order" must be provided. As noted in the earlier language, the decision may be made "on the record." This contemplates fulfilling the requirement through transcribing and forwarding the decision from the "record," and therefore, certainly validates the propriety of an oral determination being effective when made.

From a different perspective, it is inescapable that a decision was made, and was made on the record. That decision was to "uphold" the September 27, 2011 determination. Having deigned to make a decision "on the record," the balance of NRS 233B.125 are directives to the Board on the form of the decision, not an invalidation of the decision nor a declaration that absent the Board fulfilling the requirements, a decision has not been made. In this sense, the Board argues its failure to follow the dictates of NRS 233B.125, rather than the impropriety of the decision. It is also inescapable that the decision was effective when made on the motion, and not on the subsequent writing, because, at the time the motion carried, Rusk was completely denied any relief with absolute finality on his motion to vacate. How a decision to deny a motion when authorized "on the record" is not final as to the relief sought is never explained by the Board.[13] It was final, and Rusk's Petition for Judicial Review was appropriately filed.

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[13] As noted in, to make such a ruling it "would elevate form over substance to conclude, as the commission argues, that the oral decision was a nullity, and did not become final until the written decision on the petition for reconsideration."

C. UNDER NEVADA AUTHORITY, THE PETITION FOR JUDICIAL REVIEW WAS TIMELY FILED

The particular language of the applicable statute, NRS 233B.130(2)(d) provides: "Petitions for judicial review must: . . . [b]e filed within 30 days after service of the final decision of the agency." The Board misconstrues the word "after" in this statute.

This is not an appeal, but a special statutory proceeding which the legislature designated a petition for judicial review. The Nevada Rules of Appellate Procedure either do, or do not, apply to this proceeding. Under either construction, Rusk's Petition for Judicial Review was timely and sufficient to convey jurisdiction upon the District Court.

If the Nevada Rules of Appellate Procedure apply, then the Petition for Judicial Review is indisputably timely under NRAP 4. This Rule provides:

> If, however, a written order or judgment, or a written disposition of the last. remaining timely motion listed in Rule 4(a)(4), is entered before dismissal of the premature appeal, the notice of appeal shall be considered filed on the date of and after entry of the order, judgment or written disposition of the last-remaining timely motion.

Commission on Human Rights & Opportunities v. Windsor Hall Rest Home, 232 Conn. 181, 188, 653 A.2d 181, 185 (1995).

N.R.A.P. 4(a)(6). Under this rule, if the Board's arguments are correct, then the Petition for Judicial Review is deemed filed on December 1, 2018, and timely. Accord (Alleged) Decision, P. App., pp. 4-11.

If, alternatively, no such repose exists with respect to petitions for judicial review, then they must be filed "within 30 days after service of the final decision" under the statute. NRS 233B.130(2)(d). This Court has addressed and determined the identical type of statutory language in Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc., 124 Nev. 272, 278, 182 P.3d 764, 768 (2008). There the statute on costs, NRS 18.110, was being addressed, which statute provided that a memorandum of costs must be served, "within 5 days **after** the entry of judgment . . .." (Emphasis added). This presents a direct corollary to the language, "within 30 days after service of the decision"

The defendant in Ahern had filed its memorandum of costs prior to the entry of judgment in the same manner as here. That is, prior to the "entry of judgment" in Ahern, and prior to the "service of the final decision" here. In Ahern the plaintiff contended that no effective memorandum of costs had been filed and that the district court did not, therefore, have a valid memorandum of costs before it. That is, essentially, it held no jurisdiction to enter an award of costs as no valid memorandum of costs prerequisite to the award was filed. The language and effect are indistinguishable from the present matter.

This Court soundly disagreed with the claim that a filing before the event is ineffective under the language, and held:

> LVFF's interpretation of NRS 18.110 is too narrow. That statute plainly **sets a deadline** for an application of costs--*i.e.*, five days after the entry of judgment. The statute **does not**, as LVFF contends, **establish** a short, five-day **window** during which a prevailing party may file its memorandum. Although some parties may wait to file a memorandum of costs until after the district court enters judgment, **waiting is not a requirement**. Here, Ahern filed its memorandum of costs even before the district court had entered its judgment--well within NRS 18.110's deadline.

(Emphasis added). Applying the method of statutory construction adopted in Ahern, the result here is that Rusk filed a timely petition for judicial review well before the Board had issued its written decision.

Per the express holding in Ahern, the term "within 'X' days after" does not establish a "window," but rather, establishes a "deadline." This is the language in NRS 233B.130(2)(d), and it necessarily establishes a deadline. That deadline, if the oral ruling is a final decision is November 24, 2017, and if the written decision is accepted as the standard, is December 31, 2017. It is undisputed that the Petition for Judicial Review was filed on November 15, 2017, well before either "deadline." Per the decision in Ahern on the construction of statutory filing periods, the "deadline" for filing the Petition for Judicial Review was met prior to either date, and a valid Petition for Judicial Review is before the district court with such court fully vested of jurisdiction to hear the matter.

D. THE BOARDS LITANY OF ON POINT AUTHORITY IS NEITHER AUTHORITY NOR ON POINT

Concerning the cases cited by the Board which are allegedly on point, actually bear no relation to the issues here. See Board's Brief, pp. 9-11. Bd. of Review v. Second Judicial Dist. Court of Nev., 396 P.3d 795, 796 (Nev. 2017), and Washoe County v. Otto, 128 Nev. 424 (2012) addressed whether the proper naming or inclusion of parties was jurisdictional. That is not even close to the issue before this Court. Liberty Mut. v. Thomasson, 317 P.3d 831, 832 (Nev. 2014), Scott v. Nevada Employment Sec. Dep't, 70 Nev. 555, 557, 278 P.2d 602, 603 (1954), and Caruso v. Nevada Employment Sec. Dep't, 103 Nev. 75, 76, 734 P.2d 224, 224 (1987), addressed the statutory requirement of the place of filing of the petition. This bears no relation to the issues before this Court. And the Board's sixth case, Kame v. Employment Security Department, 105 Nev. 22, 23, 769 P.2d 66 (1989), involved a petition for judicial review indisputably filed after the time limit for filing a petition for judicial review, a circumstance inapposite to the case sub judice. Each of these had a failure to comply with the statute with the Petitioner seeking an excuse from compliance, while here Rusk claims compliance with the statutory prerequisites, and supports this compliance with applicable case law. The Board's case law is inapposite.

From a different perspective, does strict compliance with the rule require a petitioner to guess at which of two ambiguous outcomes trigger the filing of a

petition? There exists a bright-line rule for when a final decision is rendered in the district court; when the written order issues. Contrarywise, there is no bright-line rule regarding the finality of administrative decisions, and indeed, an arguably ambiguous rule appertains.[14] NRS 233B.125. Rusk was bound by that oral decision when rendered, and in any event, any confusion should be construed towards determining a matter on the merits. Rusk had no further recourse to apply while waiting for a written decision which may or may not ever be issued. The Petition for Judicial Review filed by Rusk established jurisdiction in this matter.

VI. CONCLUSION

Rusk's Petition for Judicial Review is fully consistent with the language of the applicable statutes. The Petition is in accord with case law under the uniform law adopted in Nevada for establishing jurisdiction. Moreover, through on-point Nevada analysis on the issue, "within 30 days after service of the decision" the language in the statute supplies a "deadline," and does not supply a "window" as the Board contends. Rusk's Petition for Judicial Review was timely, was as directed in the statutes, and establishes jurisdiction in the district court. The

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[14] In actuality, it is not ambiguous, and the ruling by the Board "on the record," supra n. 3, fulfills the prerequisite to filing a Petition for Judicial Review as it is a final decision.

Board's motion to dismiss is ill-founded, and should be denied.

Dated this 23d day of October, 2018

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VII. CERTIFICATE OF COMPLIANCE

1. I herby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirement of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced type face using Word 2010 in fourteen point Times New Roman.
2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP(a)(7)(C) it is proportionately spaced, has a typeface of 14 points or more and contains 12,099 words.
3. Finally, I hereby certify that I have read this answering brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief

complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23d day of October, 2018

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VIII. PROOF OF SERVICE

I hereby certify that on October 23, 2018, I caused to be served the above Real Parties in Interest's Brief in Opposition to Petitioner's Petition for Writ of Prohibition through the electronic filing system maintained by this court upon the following counsel for Petitioner:

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An employee of Nersesian & Sankiewicz