IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, *ex rel.* its
DEPARTMENT OF CORRECTIONS,

Appellant,

v.

PATRICIA DEROSA,

Respondent.
_____/

Supreme Court Case No. 77704

Dist. Court Case No. 18 OC 00150 1B

ANSWERING BRIEF OF RESPONDENT PATRICIA DEROSA

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that there is no corporation as described in NRAP 26.1 that must be disclosed. The law firms that have appeared for the Respondent in this Court, the district court or before the administrative agency are:

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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 2nd day of August, 2019.

DYER LAWRENCE, LLP

By: _____

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRS 233B.150 which provides that an aggrieved party may obtain review of a final judgment of the district court held pursuant to NRS chapter 233B. On November 27, 2019, the District Court's final Order Dismissing with Prejudice the State of Nevada, Department of Corrections' ("NDOC") Petition for Judicial Review was entered, JA 100-02, and NDOC filed a timely Notice of Appeal on December 14, 2019. JA 108-11.

ROUTING STATEMENT

Nevada Rule of Appellate Procedure ("NRAP") 17 addresses which matters are retained in the Supreme Court and which matters are presumptively assigned to the Court of Appeals. Pursuant to NRAP 17(b)(10), "[a]dministrative agency appeals" that are not tax, water, or public utilities commission determinations, are presumptively assigned to the Court of Appeals. This matter is an appeal of an administrative agency. It is, therefore, presumptively assigned to the Court of Appeals.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court appropriately dismiss NDOC's Petition for Judicial Review with Prejudice for failing to comply with NRS 233B.130 and NRCP 4(d)(6) which required timely, personal service on the Respondent Patricia DeRosa?

2. Did the District Court appropriately exercise its discretion when it refused NDOC's request for an extension to serve Respondent personally from the forty-five (45) days that is set forth in NRS 233B.130(5) to more than one hundred and fifty-four (154) days, which would have more than tripled the statutory limitation?

STATEMENT OF THE CASE

The District Court applied NRS Chapter 233B and applicable court rules to dismiss a petition for judicial review that was not timely or properly served on Respondent Patricia DeRosa ("Employee" or "Respondent") pursuant to NRS 233B.130 and Nevada Rule of Civil Procedure ("NRCP") 4(d)(6).[1] Employee had successfully appealed her termination from employment with the NDOC to the Division of Hearings and Appeals within the Department of Administration pursuant to NRS chapter 284. Joint Appendix ("JA") 6-17. Pursuant to NRS 233B.130, NDOC filed for district court review of the Hearing Officer's decision by filing a timely petition for judicial review ("the Petition" or "NDOC's Petition") in the First Judicial District Court ("District Court") JA 1-4. However, NDOC did not serve its

[1] As stated in NDOC's opening brief, subsequent to the underlying events in this case, the NRCP have been amended and substantively identical language to what was contained in NRCP 4(d)(6) is now contained in new NRCP 4.2(a). For purposes of consistency with the briefing below and with NDOC's opening brief, Respondent will also continue to refer to old NRCP 4(d)(6) in this brief.

Petition on Employee within the forty-five (45) days required by NRS 233B.130. In fact, NDOC did not even mail the Petition to Employee until one hundred and twenty-one (121) days after filing its Petition and never personally served it on Employee. JA 97. Employee filed a motion to dismiss the Petition pursuant to NRCP 12(b)(4) for insufficiency of service of process, and the District Court agreed that service was insufficient because service of petitions for judicial review require personal service on the respondent within forty-five (45) days after the filing of the petition. JA 96-99. Additionally, the District Court found that NDOC had not demonstrated good cause for its failure to effect such personal service. *Id.* Therefore, the District exercised its discretion to deny NDOC's request for an extension of time to effect such personal service and granted Employee's motion to dismiss with prejudice on November 21, 2018.[2] *Id.*

STATEMENT OF THE FACTS

After working for the Nevada Division of Parole and Probation (P&P) for nearly twenty-five (25) years, most recently as a Parole and Probation Specialist III (Grade 33), Employee started working at NDOC on August 10, 2015, as a Correctional Caseworker Specialist II (Grade 38). JA 8. All of Employee's

[2] November 21, 2018 was one hundred and fifty-four (154) days after NDOC filed its Petition.

performance evaluations from P&P were overall "meets" and "exceeds standards." *Id.* NDOC has never conducted a formal evaluation of Employee's work performance. *Id.*

Effective July 15, 2016, NDOC rejected Employee from probation and she returned to P&P. *Id.* However, NDOC subsequently rehired her as a Program Officer I (Grade 31) on December 26, 2016, with a promise of reinstating her to a Correctional Caseworker II as soon as a vacancy occurred because the rejection from probation was erroneous. *Id.* To date, NDOC has not fulfilled this promise. JA 55.

Employee was assigned to the non-custody Programs Division at Northern Nevada Correctional Center (NNCC) in Carson City, but was working on a critical project (to reduce NDOC's inmate population state-wide) at NDOC's Casa Grande Transitional Center in Las Vegas at the time of her termination. JA 8. Both Employee and Steve Suwe, her significant-other since 2010, who retired from NDOC in 2012 after over twenty-six (26) years of service, resided in Carson City. *Id.*

After being placed on administrative leave for over six and one-half (6½) months, Employee received a Specificity of Charges (NPD-41) on February 28, 2018, recommending her termination for computer usage violations (Class 5), neglect of duty (Class 5) and unbecoming conduct (Class 4). JA 9-10. The termination was based solely upon Employee sending four (4) email messages from her NDOC

computer to Mr. Suwe on March 2, April 18, May 3 and May 4, 2017. JA 10. NDOC alleged that the messages contained "official" and "confidential" information. *Id.* Employee admitted to sending the messages to Mr. Suwe out of frustration and for his advice, but did not believe that the information was "confidential" since she was not required to sign an acceptable computer usage policy when she was hired by NDOC. *Id.* The recommendation was upheld through the Pre-Disciplinary Hearing process (by another NDOC administrator) and imposed on March 14, 2018. Employee filed a timely appeal of the termination on March 19, 2018. JA 11-12.

The Hearing Officer conducted a hearing on May 1, 2018, and subsequently issued her Decision dated May 23, 2018. JA 7-18. The Hearing Officer determined:

> Ms. DeRosa technically violated AR 339.07.14(B) [computer usage] and AR 339.07.15(SS) [neglect of duty], however consideration of the facts, the lack of harm to NDOC, the State and fellow employees or inmates, and the history of NDOC punishment in similar circumstances mandate that dismissal is not warranted in this specific case and is not for the good of the public service.

JA 16 at lines 21-24. Ultimately, the Hearing Officer ordered:

> That the preponderance of the evidence establishes that the dismissal of Ms. DeRosa from State service has not been shown to be for the good of the public service, and that the decision of [NDOC] to terminate Employee is REVERSED.

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> This matter is REMANDED to [NDOC] to restore Ms. DeRosa to her prior position with full back pay and benefits, subject to any appropriate disciplinary penalties, other than dismissal, for the aforementioned violations of AR 339.07.14(B) and AR 339.07.15(SS) as discussed above.

JA 17 at lines 5-11. The final paragraph of the Decision also contained the following footnote:

> NDOC may impose any disciplinary penalty it chooses except for dismissal.

Id., fn. 8.

NDOC subsequently reinstated Employee and retroactively demoted her to an Administrative Assistant IV (Grade 29) at NNCC effective March 14, 2018. Employee received back pay at the Grade 29 rate, rather than the Grade 31 (Program Officer I) rate. Employee timely appealed her demotion, which was subsequently affirmed by Hearing Officer Ward in a second decision dated October 1, 2018. JA 56.

On or about June 20, 2018, NDOC filed its Petition for Judicial Review of the Hearing Officer's Decision pursuant to NRS 284.390(9) and NRS 233B.130. JA 1-4. According to the Certificate of Service attached to the Petition, NDOC mailed copies of the Petition to Thomas J. Donaldson at Dyer Lawrence, LLP, the Department of Administration, State of Nevada Personnel Commission, and the Hearing Office, but

did not mail a copy to Employee or personally deliver it to her or someone of suitable age at her residence. JA 4. The District Court issued its Order for Briefing Schedule dated June 21, 2018. JA 56 The Order reiterated the procedural requirements of NRS 233B.130 and 233B.133, specifically noting that "Petitioner must serve the Petition for Judicial Review upon the agency and every party ***within 45 days after the filing*** of the Petition for Judicial Review." (Emphasis added.) JA 56 & 91. NDOC did not mail the Petition to Employee; NDOC did not personally deliver the petition to Employee or any of Employee's family. NDOC did not serve the petition on Employee. JA 97.

On or about June 27, 2018, Employee filed her Notice of Intent to Participate in Judicial Review Proceeding, reserving all rights and privileges pursuant to NRS 233B.130 *et seq.* and the Nevada Rules of Civil Procedure. JA 19-21. On or about September 21, 2018, NDOC filed its opening brief in the District Court. JA 25-52.

On October 17, 2018, Employee filed her Motion to Dismiss pursuant to NRCP 4 and 12 based on insufficiency of service of process. JA 53-67. On October 19, 2018, one hundred and twenty-one (121) days after the Petition was filed in District Court, NDOC, for the first time, sent the Petition and its opening brief to Employee's home address by certified mail. JA 85-88. Employee signed for them on October 30, 2019. *Id.* NDOC did not, at this point, personally serve either document on

Employee. JA 97. As of the District Court's consideration of the motion to dismiss, neither Employee nor any person residing at her home had ever received personal service of the Petition, the opening Memorandum of Points and Authorities, or any other document filed by NDOC in the District Court. JA 61 & 96-98. Similarly, NDOC never asked Employee's counsel to accept service of process on behalf of Employee. JA 56 & 90. On November 21, 2018, the District Court granted Employee's Motion to Dismiss, and the order was entered on November 27, 2018. JA 96-107. This appeal followed. JA 108-11. One hundred and fifty-four (154) days passed between the filing of NDOC's Petition and the District Court's order granting the motion to dismiss. Thus, if the District Court were to have granted an extension for NDOC to personally serve Employee, it would have more than tripled the forty-five (45) day limitation set forth in NRS 233B.130(5).

SUMMARY OF THE ARGUMENT

The District Court applied the plain meaning of NRS 233B.130, the other sections of NRS chapter 233B and the Nevada Rules of Civil Procedure to find that a petition for judicial review must be personally served on the respondent and to dismiss NDOC's Petition for NDOC's failure to do so. The District Court's order was consistent with the plain meaning, the standard rules of statutory construction and the public policy that service of process is jurisdictional and not a mere

technicality. The District Court also appropriately exercised its discretion to determine that NDOC had not demonstrated good cause for its failure to personally serve the Employee within the forty-five (45) days required by NRS 233B.130(5). Therefore, the District Court correctly refused NDOC's request to be allowed to personally serve Employee more than one hundred and fifty-four (154) days after the filing of the petition for judicial review, an extension that would have more than tripled the time allotment set by statute.

ARGUMENT

I. Standard on Review

The District Court construed NRS 233B.130 and NRCP 4(d)(6) and 12(b)(4) to dismiss NDOC's Petition for insufficiency of service of process because it had not been served personally on Employee in a timely manner. JA 97. This court reviews a district court's statutory construction under a *de novo* standard of review. *Washoe County v. Otto*, 128 Nev. 424, 430-31, 282 P.3d 719, 724 (2012) (applying a *de novo* standard of review of a district court's dismissal of a petition for judicial review pursuant to NRCP 12); *see also Leven v. Frey*, 123 Nev. 399, 402, 168 P.3d 712, 714 (2007); *So. Nev. Homebuilders Ass'n v. Clark County*,121 Nev. 446, 449, 117 P.3d 171, 173 (2005).

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II. As an Initial Pleading In a Civil Action, a Petition for Judicial Review Requires Personal Service

The question of law in this case is whether service of a petition for judicial review pursuant to NRS 233B.130 requires personal service on the respondent. Determination of this question requires a reading of NRS 233B.130, the other provisions of NRS chapter 233B and all applicable provisions of law.

A. The Plain Meaning of NRS 233B.130(5) Read Harmoniously with the Statutory Scheme Dictates Personal Service

Unambiguous statutory language is given its plain meaning. *Simmons Self-Storage v. Rib Roof,* Inc., 130 Nev. 540, 546, 331 P.3d 850, 854 (2014). Additionally, the Court interprets "provisions within a common statutory scheme 'harmoniously with one another in accordance with the general purpose of those statutes.'" *Id.* (*quoting So. Nev. Homebuilder's Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005)). NRS 233B.130(5) unambiguously and plainly provides that a petition for judicial review must be served on all parties. NRS 233B.130 plainly does not provide for the method of service. Thus, examination of the full statutory scheme is necessary.

Chapter 233B of NRS provides "minimum procedural requirements for the . . . adjudication procedure of all [state] agencies . . . and for judicial review . . . " thereof. NRS 233B.020. It "does not abrogate or limit additional requirements

imposed on such agencies by statute or otherwise recognized by law." *Id.* The first procedural step to obtain judicial review pursuant to chapter 233B is that petitions for judicial review "must be instituted by filing a petition in the district court." NRS 233B.130(2). Proceedings in the district courts are governed by the NRCP. Thus, the full statutory scheme includes these general provisions of NRS chapter 233B and the requirements of the NRCP for district court proceedings.

NRCP 1 states that "these rules govern the procedure in all civil actions and proceedings in the district courts, except as stated in Rule 81." Rule 81 only limits the applicability of the NRCP to special statutory proceedings *where the applicable statute contains an inconsistent or conflicting procedure.* (Emphasis added). Therefore, wherever NRS chapter 233B does <u>not</u> specify an inconsistent or conflicting procedure for judicial review in the district courts, the relevant NRCP governs. NRS chapter 233B does not specify the procedure or means of service of a petition for judicial review. Thus, the NRCP govern the appropriate method of service of a petition for judicial review.[3]

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[3] Additionally, when NRS chapter 233B was enacted, the NRCP had been in effect for some twelve (12) years. Order Adopting Rules of Civil Procedure, August 29, 1952. In providing for the judicial review petition to be filed as a civil action in the district courts, the Legislature must be presumed to have anticipated and intended that the procedural rules applicable in the district courts would apply, including those for the means of service. *City of Boulder v. General Sales Drivers,* 101 Nev. 117, 118- 199, 694 P.2d 498, 500

Moreover, "petitions" are considered "complaints" for purposes of application of the NRCP. *See* NRCP 3, Advisory Committee Note ("[a]s used in these rules, 'complaint' includes a *petition* or other document that initiates a civil action.") (Emphasis added).[4] NRCP 4(d)(6) specifies that for service of a complaint (petition) upon an individual defendant (respondent) in a civil matter, the method is delivery "to the [respondent] personally, or by leaving copies thereof at the [respondent]'s dwelling ... with some person of suitable age and discretion then residing therein." This is plain language that requires no interpretation, and because NRS chapter 233B does not specify the method of service, there is no "inconsistent or conflicting procedure" (*see* NRCP 81) and, thus, NRCP 4(d)(6)'s personal service requirement clearly governs.

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(1985) ("Legislature is presumed to act with full knowledge of existing statutes *related to the same subject.*") (Emphasis added).

[4] This Advisory Note was added with the 2019 amendments to the NRCP, which, by order of the Nevada Supreme Court, are effective "prospectively on March 1, 2019, *as to all pending cases* . . ." (Emphasis added). *See* ADKT 522, Order Amending the Rules of Civil Procedure, https://nvcourts.gov/Supreme/Rules/Amendments/Nevada_Rules_of_Appellate_Procedure/.

1. There is No "Legislative Omission" that the Court Would be "Filling-in" by a Finding that Personal Service on the Respondent is Required

NDOC acknowledges that NRS 233B.130 does not specify the method of service. However, NDOC's argument that this means the Court cannot conclude that personal service is required misses the mark. *See* NDOC's Opening brief ("NDOC brief") at 8-9. Without citation to any supporting authority, NDOC concludes that the absence of a directive for personal service "demonstrates that the APA does not require personal service of the petition." *Id.* at 9. NDOC argues that the lack of specification for personal service is an intentional legislative omission that the Court may not "fill-in." *Id.* However, NRS 233B.130 does not address the method of service at all. Therefore, there is also a lack of a specification for service by mail.

By NDOC's logic, the Court is also prohibited from agreeing with NDOC and determining that service by mail is appropriate because that it is also a "legislative omission" in NRS 233B.130. Indeed, if the Court were to apply NDOC's logic, it would be prohibited from determining the method of service at all because the Legislature did not explicitly state it in NRS 233B.130 or elsewhere in NRS chapter 233B. Clearly, the Court's hands are not so tied. To resolve this appeal, the Court is authorized and, indeed, charged with the responsibility to interpret NRS 233B.130

in harmony with other provisions of NRS chapter 233B and applicable court rules to determine the required method of service to initiate district court review of an administrative decision.

2. Rules of Statutory Construction Applicable when a Statute is Ambiguous Do Not Apply and Do Not Support Appellant's Position

Directly after arguing that there is a legislative omission in NRS 233B.130 as to the method of service, NDOC proceeds to cite the rule of statutory construction known as *expressio unius est exclusio alterius*. NDOC brief at 9. Briefly stated, this rule provides that "the expression of one thing is the exclusion of another." *Ramsey v. City of N. Las Vegas*, 133 Nev. ___, ___, 392 P.3d 614, 619, (133 Nev. Adv. Op. 16, *7 (April 13,2017)). This rule would not apply to a case of legislative omission; this rule applies where a course of conduct or operation is provided. Therefore, this rule is not applicable to an interpretation of NRS 233B.130 because, in it, the Legislature has not expressed "one [method of service to] the exclusion of another." *See id.* Once again, NRS 233B.130 does not specify the method of service at all.

NDOC further argues that because in other statutes in other chapters of NRS, the Legislature has used the phrase "served in the same manner as a summons in a civil action," the omission of such a phrase in NRS 233B.130 necessarily means that

the Legislature intended to allow service by mail. NDOC brief at 10. To support this argument, NDOC points to NRS 34.080 and 34.280 which require writs of certiorari and writs of mandamus "to be served in the same manner as a summons in a civil action." *Id.* However, writs and judicial review of administrative decisions are not the same subject, and, even more to the point, NRS 34.080 and 34.280 do not address service of the *petition* or *application* for a writ (the vehicle which initiates the court proceedings on the subject). Rather, they address service of the writ that is issued by the court or judge to compel or prohibit a certain action. The writ issued by a court or judge compelling or prohibiting an action is completely distinguishable from a petition **to initiate proceedings in district court**. The Legislature's specification of service requirements for a writ does **not** shed any light on the Legislature's intent regarding service of a petition to initiate proceedings in district court, including a petition for judicial review under NRS chapter 233B.

Finally, the fact that, in NRS 233B.133(5), the Legislature specifically referenced NRAP 28 and directed that a memorandum of points and authorities in support of a petition for judicial review must comply with NRAP 28 is also of no relevance to the issue in this case. *See* NDOC brief at 11. Of course the Legislature had to direct, in statute, that NRAP 28 applied because the Rules of Appellate Procedure do not normally apply to proceedings in district court. By contrast, and as

discussed above, the NRCP are fully applicable to district court proceedings, including proceedings for judicial review pursuant to chapter 233B of NRS when there is no conflicting or inconsistent procedure specified therein. *See* NRCP 1 & 81. Therefore, there was no need for the Legislature to specifically reference NRCP 4 to make it applicable to service of petitions for judicial review filed pursuant to NRS chapter 233B. On all of its attempts to apply rules of statutory construction to support its case, NDOC's logic is patently flawed.

B. There is no Relevant Legislative History Much Less Legislative History that Supports Appellant's Position

Similar to its flawed application of rules of statutory construction, NDOC's fabrication of relevant legislative history is, at best, ineffective, and, at worst, false and misleading. NDOC directs the Court's attention to what it describes as legislative history relevant to the method of service required for petitions for judicial review. NDOC brief at 11-13. NDOC quotes the original language of NRS 233B.130 from 1965 regarding service[5] and, then, points out that a 1989 bill added a forty-five (45) day time limitation and moved this language from subsection 2 to subsection 5 of

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[5] "Copies of the petition shall be served upon the agency and all other parties of record." NRS 233B.130(2) (1965).

NRS 233B.130.[6] *Id.* Then, NDOC plucks another bill (AB 758) from the other eight hundred and ninety (890) bills enacted in 1989 and points out that it contained language requiring that a certain "notice" had to be served "in the manner prescribed for service of summons in a civil action." *Id.* at 12.[7] NDOC does not follow this observation with any conclusion or citation to authority, *id.*, but seems to be arguing that because the Legislature included such language in a bill in the same legislative session in which it made minor tweaks to NRS 233B.130, it necessarily follows that the Legislature intended to allow service pursuant to NRS 233B.130 to be by mail. Once again, the failure of this argument is that there is nothing remotely similar about these two 1989 bills except that they both address service of some type of document. However, the other 1989 bill, AB 758, addressed service of a "notice" to be issued by an executive branch employee to a delinquent parent to notify him or her of financial responsibility for a child who has become a recipient of public assistance.

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[6] "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." NRS 233B.130(5), as amended by AB 884 (1989 Nev. Stat., ch. 716 at p. 1652).

[7] The citation provided for the bill referenced by NDOC was 1989 Nev. Stat., ch. 425, § 7 at 1634. NDOC brief at 12. However, chapter 425 from Statutes of Nevada 1989 does not contain a § 7, nor is it located near page 1634. The chapter that begins at page 1634 contains a § 7 with the language NDOC quoted and Respondent believes this is the chapter NDOC intended to reference. Its full citation is: 1989 Nev. Stat., ch. 711, § 7 at 1634.

See 1989 Nev. Stat., ch. 711 at 1634, codified at NRS 425.3822. Clearly, such a notice, which does not initiate proceedings in district court or have anything to do with district court, has no relation whatsoever to a petition invoking the jurisdiction of the district courts to review an administrative decision pursuant to NRS chapter 233B. Specification, in statute, for how such a "notice" was to be served was necessary because the NRCP requirements on service would not otherwise be applicable. It, thus, provides no relevant comparison to the Legislature's drafting choices or insight into the Legislature's intent for service of a petition for judicial review pursuant to NRS 233B.130.

In a final desperate attempt to provide legislative history, NDOC refers to a 2015 amendment to subsection 2 of NRS 233B.130 by A.B. 53 (2015). This amendment addressed service, but only to require that, for service on an agency to be effective, it must also be on the Attorney General's office. However, once again, the amendment did **not** address the method of service, only the party or entity to be served. Thus, this bill does **not** support the conclusion NDOC urges. Indeed, as NDOC acknowledges, when testifying in support of A.B. 53, the Attorney General's "concern was ensuring that the State receives adequate notice of a petition by requiring service on both the Attorney General and the relevant agency head." *See* NDOC brief at 13. Furthermore, NDOC acknowledges that the Attorney General's

testimony "requested that the language of the statute mirror NRS 41.031(2) which addresses service of a summons and complaint." *Id.* at 12. It would be ludicrous to interpret this change as an indication of the Legislature's desire for less stringent requirements, such as service only on the respondent's attorney or service merely by mail. If this bill supports any conclusion related to this case, it is that the Legislature intends the service requirement for petitions for judicial review to be stringent in order to ensure adequate notice to all parties.

III. Reason and Public Policy Support a Requirement for Personal Service on the Respondent

After acknowledging the importance of personal notice for the initiation of proceedings in district court, NDOC, summarily and without citation to legal authority, concludes that the filing of a petition for judicial review is merely the "continuation of existing legal proceedings of which the parties already have notice" and thus does not require the same personal service. NDOC brief at 14. Of course, this is not the case. A petition for judicial review initiates the proceeding in district court which will review an administrative agency's decision. There are no pleadings filed in district court which precede the petition for judicial review. It is the petition for judicial review that receives the district court's case number which will be affixed to all subsequent pleadings. Of course, all of the foregoing is the same for a

complaint filed in district court. A district court proceeding which is conducted in the Judicial branch of government and an administrative matter which is conducted in the Executive branch are **not the same legal proceedings**. Thus, contrary to NDOC's assertion, *see id.* at 13, service of a summons and complaint is "logically analogous to service of a petition for judicial review." And, public policy supports the same type of service requirements.

The policy behind the personal service requirement is to ensure that "individuals are provided actual notice of suit and a reasonable opportunity to defend." *Orme v. Eighth Judicial Dist. Court,* 105 Nev. 712, 715, 782 P.2d 1325, 1327 (1989). Personal service of process is not merely a technical triviality, but a threshold requirement for exercising jurisdiction over a respondent. *Cf. Travelers Cas. & Sur. Co. of Am. v. Brenneke*, 551 F.3d 1132, 1135 (9th Cir. 2009) (quoting *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986) ("neither actual notice nor simply naming the defendant in the complaint will provide personal jurisdiction without substantial compliance with Rule 4"). Reviewing an administrative action pursuant to chapter 233B of NRS is an exercise of jurisdiction over a respondent by the district court. Therefore, respondents in such cases deserve the same service as defendants in other types of district court proceedings, which is service in accordance with NRCP 4.

By its express terms, NRCP 5 is inapplicable. NRCP 5(a) authorizes service by mail pursuant to NRCP 5(b) only of:

> every order required by its terms to be served, every pleading **subsequent to** the original complaint . . ., every paper relating to discovery required to be served upon a party. . ., every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper. . . ." (Emphasis added.)[8]

As previously stated, there are no pleadings filed in district court which precede the petition for judicial review, and the NRCP references to "complaint" include "petition,"[9] thus, it is clear that, as it pertains to petitions for judicial review, NRCP 5(b) would apply only to service of the pleadings filed **subsequent to the original petition**.

NDOC's outrageous assertion that because a respondent's failure to participate in such a judicial review will not result in a default, this Court should be satisfied with allowing the more "liberal standard" of service by mail should be rejected outright. *See* NDOC brief at 13-14. If a respondent does not participate, the

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[8] As with NRCP 4, NRCP 5 was amended in 2019, to break the above quoted language out into paragraphs, but is substantively identical. For consistency with the briefing below, Respondent quotes the wording from the original NRCP 5(a).

[9] *See* NRCP 3, Advisory Committee Note.

respondent's position goes completely undefended, and the likelihood of success is nill. Service on a respondent of a petition for judicial review is just as critical as service of a summons and complaint. Indeed, in this case, given that Respondent State of Nevada, *ex rel.* its Department of Administration, Personnel Commission, Division of Hearings and Appeals followed its usual practice and did not file a notice of intent to participate in the judicial review, Employee is the only party who could have opposed the petition and sought an order affirming the Hearing Officer's Decision in accordance with NRS 233B.135(3). NDOC's contention is laughable.[10]

Finally, NDOC's pathetic attempt to excuse its failure to serve Employee by arguing that a personal service requirement would disadvantage "unwary *pro se* litigants" should be rejected. *Id.* at 14-15. NDOC's legal counsel does "understand the difference between personal service of a summons and complaint under NRCP 4 and service of other pleadings and papers under NRCP 5." *See Id.* at 15. As Employee pointed out in her motion to dismiss filed in the District Court, the Attorney General's office was on notice of a dismissal, for failure to effect personal

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[10] Similarly, NDOC's attempted reliance upon NRAP 3(d)(1) is unquestionably misplaced in this case. NDOC brief at 16, fn.4.

service, of an earlier petition for judicial review filed by it on behalf of another state agency.[11] JA 58-66 (discussing *State Dept. Of Trans. v. Boice*, Case No. 14 OC 00158 1B (1st Jud. Dist. Ct. of Nev., 2015)). The Attorney General's office would also be aware that failure to substantially comply with NRCP 4's service requirements ordinarily renders any subsequent judgment void. *See Dobson v. Dobson*, 108 Nev. 346, 348, 830 P.2d 1336, 1337 (1992) (nullifying a divorce decree after quashing improper service) (citing with approval *Combs v. Nick Garin Trucking*, 825 F.2d 437, 442 (D.C. Cir. 1987) (holding that an attempt to utilize mail service was insufficient, voiding a default judgment)).

Reviewing an administrative action pursuant to chapter 233B of NRS is an exercise of jurisdiction over a respondent. Therefore, respondents in such cases deserve the same service as defendants in other types of district court proceedings. Here, NDOC completely failed to serve Employee for nearly four (4) months before Employee filed her motion to dismiss. JA 97. Rather, NDOC moved forward unilaterally by filing its Opening Brief under the apparent assumption that it had properly complied with its requirements to give Employee legally-sufficient notice of the Petition. Indeed, even after Employee filed her motion to dismiss below and

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[11] As with NDOC in the instant matter, the other State agency, NDOT was represented by the Nevada Attorney General's Office in *Boice*.

NDOC made its first attempt to serve Employee, rather than her attorney, it still only sent the petition by mail. *Id.* Consequently, NDOC has failed to substantially comply with the letter and spirit of NRCP 4. NDOC's fabrication of "public policies" – that the participation of a respondent to a petition for judicial review is merely optional and that the public needs to protect "unwary *pro se* litigants" – should be rejected for what it is, a transparent and incompetent attempt to excuse its manifest failure to follow the law.

IV. Non-precedential and Distinguishable Case Law from Foreign Jurisdictions and Unpublished Decisions Must be Rejected

The Nevada Supreme Court requires strict compliance with NRS chapter 233B in order for a district court to exercise jurisdiction on a petition for judicial review. "Noncompliance with the requirements is grounds for dismissal." *Washoe County v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 725 (2012) (*quoting Kame v. Employment Security Dep't*, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989)).

In the cases from other states that NDOC cites, the same strict standard was not followed. Additionally, neither of the decisions have been followed outside of their states and neither are precedential or persuasive in this matter. In *Hilands Golf Club v. Ashmore*, 277 Mont. 324, 330-31, 922 P. 2d 469, 473-74 (Mont. 1996) the Montana Supreme Court "encourage[d] a liberal interpretation of procedural rules

governing judicial review of an administrative decision" to find that service by mail on the agency's attorney was sufficient where an employer (Hilands) petitioned for review of the agency's determination that Hilands discriminated against the employee (Ashmore). The court did not address the limits imposed by language such as is contained in NRCP 5 ("every pleading **subsequent** to the original complaint"). In *Douglas Ashphalt Co. v. Ga. Public Service Commission*, 263 Ga. App. 711, 589 S.E.2d 292, 293 (Ga. Ct. App. 2003), the Court of Appeals of Georgia, First Division considered that there were two relevant statutes, one for a notice of appeal of an agency decision to a superior court, allowing for service either "in person or by mail," and one in the Georgia Administrative Procedure Act, which did not address method of service. *Id.* After considering the two statutes, the court concluded that it was not error for the district court to allow for service by mail. 263 Ga. App at 712, 589 S.E. 2d at 293-24. Nevada does not have a statute analogous to the Georgia statute providing for a "notice of appeal" from an agency to a district court that allows service to be either in person or by mail. Thus, in addition to having no precedential value, these cases are factually and legally distinguishable and do not provide even persuasive authority in Nevada.

Although it is not precedent on this Court, the Attorney General's Office should have been aware of the nearly indistinguishable order from the First Judicial

District Court in *State Dept. of Trans. v. Boice*, Case No. 14 OC 00158 1B (1st Jud. Dist. Ct. of Nev., 2015). In that case, NDOT failed to serve its petition for judicial review on Mr. Boice for nearly eight (8) months. Therefore, the First Judicial district court issued an Order Granting a Motion to Dismiss NDOT's petition, holding:

> The Court has determined that [NDOT] has failed to substantially comply with the technical requirements of NRS 233B.130(5), namely that [NDOT] failed to properly serve Respondent. Failure to effectuate service is more than a technicality. Furthermore, there was no good cause shown by [NDOT] in its Opposition as to why service was not complied with.

JA 58-9. On the other hand, relying on and citing to unpublished orders of this Court, *see* NDOC brief at 18, that were decided prior to 2016, and do not involve nearly identical circumstances is inappropriate. *See* NRAP 36(c)(3) (unpublished decisions issued prior to 2016 inappropriate to cite).

V. The District Court Appropriately Exercised its Discretion to Determine that NDOC Did Not Demonstrate Good Cause for Failing to Serve the Petition on Employee Personally and in a Timely Manner

NDOC argues that "[o]nce the district court found that [Employee] was required to be personally served, NDOC's request for an extension of time to serve [Employee] should have been granted." NDOC brief at 17. However, as NDOC acknowledges, the District Court had discretion on whether to extend the time required for service of a petition for judicial review. *Id.* (*citing* NRS 233B.130(5) and

Heat & Frost Insulators and Allied Workers Local 16 v. Labor Commissioner, __ Nev. __, 408 P.3d 156 (134 Nev. Adv. Op.1, January 4, 2018)). In *Heat & Frost*, the petition for judicial review was timely served on all parties but was not timely served on the Attorney General's office as required by NRS 233B.130(2). *Heat & Frost Insulators* moved the court for an extension for "good cause" but the district court declined to consider the motion. 134 Nev. Adv. Op.1, *4, 408 P.3d at 158-59. The Nevada Supreme Court found that the district court had jurisdiction to consider exercising its discretion to extend the time limitation for service on the Attorney General, and remanded the case to the district court for that consideration. 134 Nev. Adv. Op. 1, *7, 408 P.3d at 160.

Here, the District Court also cited to *Heat & Frost*, as well as *Civil Serv. Comm'n v. Dist. Ct.*, 118 Nev. 186, 190, 42 P.2d 268 (2002) and recognized that dismissal was not mandatory for failure to effect timely service. JA 97. The District Court made a finding that NDOC "failed to substantially comply with the technical requirements of NRS 233B.130(5)." *Id.* Then, the District Court proceeded to conduct the analysis which the district court in *Heat & Frost* failed to do. *Id.* It considered whether NDOC had "good cause" for its failure to effect proper and timely service, and found that NDOC had not shown "good cause" for its failure, specifically noting that NDOC's first attempted service by mail on the Employee

occurred one hundred and twenty-one (121) days after filing its Petition and that NDOC had **never** served Employee personally or left copies with anyone at her home. *Id.* Thus, there can be no doubt that the District Court appropriately exercised its discretion in refusing to extend NDOC's time for serving Employee.[12]

The District Court's analysis was also consistent with the case cited by NDOC, *Scrimer v. Eighth Judicial Dist. Ct. ex rel., County of Clark*, 116 Nev 507, 516, 998 P.2d 1190, 1195-96 (2000), which endorsed a flexible approach to determining "good cause" and specified that "no single consideration is controlling." *See* NDOC brief at 17. The District Court, here, rightly considered NDOC's total lack of diligence in locating and attempting proper personal service on Employee. Prejudice to Employee would, of course, occur if the District Court were to have considered the Petition and uphold her termination well after the period for filing the Petition had expired. *See* NRS 233B.130(2)(d) (such a petition must "[b]e filed within 30 days after service of the final decision of the agency). Employee has additionally been prejudiced by the unnecessary incurrence of attorney's fees in defending NDOC's defective Petition, while NDOC utilized the Attorney General's Office, at taxpayers' expense. The fact

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[12] Additionally, in this case, NDOC had the benefit of and, yet, failed to comply with the District Court's Order for Briefing Schedule dated June 21, 2018, which specifically directed that "Petitioner must serve the Petition for Judicial Review upon the agency and every party ***within 45 days after the filing*** of the Petition for Judicial Review." (Emphasis added.) JA 56 & 91.

that Employee has been diligent in preserving her rights (by filing her statement of intent to participate) and preventing an even greater degree of prejudice from occurring to her does not excuse nor outweigh NDOC's total lack of competence and diligence to personally serve her in accordance with NRS chapter 233B and the NRCP.

The only "excuse" that NDOC proffers is that it was relying on its interpretation of NRS 233B.130(5) and NRCP 5(b)(1), and unpublished Nevada Supreme Court decisions. NDOC brief at 16. Once again, the NDOC's legal counsel, the Office of the Attorney General, should have been fully aware of the earlier First Judicial District Court's dismissal of a petition for judicial review for failure to effect personal service in *Boice*, which is nearly indistinguishable from this case. The suggestion that serving Employee personally may have implicated Nevada Rule of Professional Conduct 4.2, *id.*, is ridiculous, as communication of a lawyer of the Attorney General's office with Employee was not required to effect personal service. Finally, if NDOC and its attorneys were so devoted to professional conduct it would not have referenced unpublished orders of this Court issued prior to 2016.[13] In short, NDOC simply made an incorrect and unsupported reading of the relevant statutes and

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[13] *See* NRAP 36 (unpublished decisions issued prior to 2016 are inappropriate to cite).

court rules. This is not the kind of extenuating circumstances of the petitioner or his or her attorney that this Court considers as "good cause" for noncompliance. *See Scrimer,* 116 Nev at 516, 998 P.2d at1195-96 ("difficulties in locating the defendant," "defendant's efforts in evading service," "difficulties encountered by counsel" such as illness or new counsel being retained at last minute). NDOC really does not proffer an excuse and certainly does not demonstrate "good cause" for its failure to personally serve Employee.

Outside of its own behavior, NDOC meekly points out that Employee "had knowledge of the petition for judicial review" and that NDOC did not intend to cause delay or prejudice. NDOC brief at 18-19. As has already been stated and supported with authority in this brief, personal service of process is not merely a technical triviality, but a threshold requirement for exercising jurisdiction over a respondent. *Cf. Travelers Cas. & Sur. Co. of Am. v. Brenneke*, 551 F.3d 1132, 1135 (9th Cir. 2009) (quoting *Benny v. Pipes*, 799 F.2d 489,492 (9th Cir. 1986) ("neither actual notice nor simply naming the defendant in the complaint will provide personal jurisdiction without substantial compliance with Rule 4."). Indeed, NDOC explicitly "acknowledges that notice is not a substitute for proper service." NDOC brief at 18. Additionally, the fact that NDOC did not intend to cause delay or prejudice is not relevant. *See* NDOC brief at 18-19. The standard is whether proper and timely

service has occurred and, if not, whether there was "good cause" for the failure. NRS 233B.130(5).

This case is closely analogous to *Dallman v. Merrell*, 106 Nev. 929, 803 P.2d 232 (1990), in which the Nevada Supreme Court affirmed a district court's dismissal of an action in which service was not accomplished until one-hundred and eight (108) days after the expiration of the deadline.[14] In *Dallman*, even though Dallman had retained new counsel, and had used a private investigator, as well as a process server, the Court determined that, because the defendant's address was available in public records, the plaintiff did not have "good cause" for the failure to effect timely service of process. 106 Nev. at 930-31, 803 P.2d at 232-33. Here, NDOC made less effort than Dallman and took even longer to attempt proper service.

Employee was employed by NDOC throughout the time in between the filing of the petition for judicial review and the District Court's dismissal. It would not have been difficult to personally serve Employee at work. Still, absolutely no efforts were made. Furthermore, it bears repeating that even after Employee's motion to dismiss was filed, and NDOC attempted, for the first time, to effect service directly on her,

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[14] The Court distinguished its earlier decision in *Domino v. Gaughan*, 103 Nev. 582, 748 P.2d 236 (1987), in which it found good cause for an extension after a nine (9) day delay in which there were extenuating circumstances that do not exist here.

it still only did so by mailing the petition to her. It has not demonstrated any difficulties of its counsel and certainly could not demonstrate any actions by Employee that made service on her difficult. There is a total lack of cause for NDOC's failure to personally serve Employee, much less "good cause." Thus, the District Court's refusal to exercise discretion to give NDOC an extension, that would have more than tripled the statutory allotment of time, was entirely appropriate.

CONCLUSION

The District Court construed NRS 233B.130, the other provisions of NRS chapter 233B and the NRCP on their face to determine correctly that petitions for judicial review must be served personally on a defendant within forth-five (45) days after the filing of the petition. In addition to reflecting the plain meaning of those provisions, this construction is consistent with rules of statutory construction and the public policy that service of process is jurisdictional and not a mere technicality. The District Court appropriately applied this construction to determine that NDOC had not substantially complied with the requirements of NRS 233B.130(5), as it had not served its Petition on Employee by any means before Employee filed her motion to dismiss and has not ever served it on her personally. Finally, the District Court appropriately exercised its discretion to determine that NDOC had not demonstrated good cause for its failure to effect personal service on Employee or for its request for

a generous extension of time to do so. The District Court's Order Granting Motion to Dismiss should be upheld.

Respectfully submitted this 2nd day of August, 2019.

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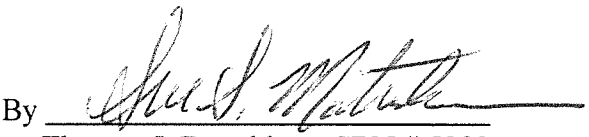
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect in Times New Roman in 14 point font. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionetely spaced, has a typeface of 14 points or more, and contains 7733 Words. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd day of August, 2019.

By 

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Dyer Lawrence, LLP and that on the 2nd day of August, 2019, I caused a true and correct copy of the within RESPONDENT'S ANSWERING BRIEF, to be delivered via electronic mail to the following persons:

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