

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

v.

PATRICIA DEROSA,

Respondent.

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Case No. 77704

District Court No. 18 OC 00150 1B

Appeal from Order Dismissing Petition for Judicial Review

First Judicial District Court

APPELLANT'S REPLY BRIEF

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ARGUMENT

A. Introduction

This is a simple appeal based on two interrelated issues. First, was Appellant Nevada Department of Corrections (“NDOC”) required to personally serve Respondent Ms. DeRosa (“Ms. DeRosa”) with NDOC’s Petition for Judicial Review? Second, did the district court abuse its discretion by failing to find good cause for NDOC’s requested extension when the district court determined NDOC was required to personally serve Ms. DeRosa?

A petition for judicial review under Nevada Revised Statute Chapter 233B is a continuation of administrative proceedings under Nevada’s Administrative Procedure Act (“APA”). Therefore, there is no requirement for personal service resulting in the applicability of the default provisions for service under Rule 5 of the Nevada Rules of Civil Procedure. In serving Ms. DeRosa’s attorney by mail, NDOC timely complied with all relevant and applicable provisions of NRS Chapter 233B and the Nevada Rules of Civil Procedure. The district court erred when it dismissed NDOC’s petition for a lack of personal service. NDOC respectfully requests this Court reverse the district court’s dismissal and remand this matter to the district court for a determination on the merits.

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Alternatively, if NRS 233B.130 requires personal service of Ms. DeRosa, the district court abused its discretion in concluding that NDOC failed to show good cause for an extension of time to personally serve Ms. DeRosa. NDOC respectfully requests that this Court remand this matter with instruction to the district court to grant NDOC's request for an extension so that NDOC's petition can be heard on the merits.

B. A Petition for Judicial Review is a Continuation of Administrative Proceedings. Therefore, There Is No Requirement for Personal Service.

Nevada Rule of Civil Procedure 3 provides that “[a] civil action is commenced by filing a complaint with the court.” NRCP 3. The Advisory Committee Note to this rule, added with the 2019 rule amendments, states that a “complaint” as used in the Rules of Civil Procedure, “includes a petition or other document that initiates a civil action.”¹ Ms. DeRosa relies on this Advisory Committee Note to argue that a petition for judicial review is the equivalent of a complaint. Therefore, Ms. DeRosa argues, a party seeking judicial review must personally serve all related parties,

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¹ The persuasive value of the Advisory Committee Note added to NRCP 3 in 2019 is limited, if it is even relevant at all, in analyzing what the legislature meant when it used the term “service” while adopting, and amending, the APA over the years. If the legislature had intended for personal service to be required for a petition for judicial review, it would have said so, as it has done in other statutes. Opening Brief at 8-11.

including any adverse party, with the petition for judicial review. Ms. DeRosa's argument fails on two interrelated points.

First, Ms. DeRosa misconstrues the nature of a petition for judicial review under Nevada Revised Statute Chapter 233B. A petition for judicial review under Chapter 233B is not the petition-based initiation of a new civil action contemplated by the 2019 Advisory Committee Note to NRCP 3. A petition for judicial review is the continuation of an underlying administrative proceeding.² This Court has repeatedly acknowledged this point, indicating that the legislature granted the district courts *appellate* jurisdiction to review administrative decisions by adopting the APA.³

As a result, Ms. DeRosa's argument that "[r]eviewing an administrative decision pursuant to chapter 233B of NRS is an exercise of jurisdiction over a respondent," lacks persuasive force in establishing the need for personal service. Answering Brief at 23. Judicial review is not a "civil action." It is appellate review

² See NRS 233B.130(1) (discussing Nevada's Administrative Procedure Act and noting that any party who is identified as a party of record by an agency in an administrative proceeding or any party who is aggrieved by an agency decision may seek judicial review of the administrative decision thereby continuing the administrative proceeding).

³ *Dept. of Health and Human Services v. Samantha Inc.*, 103 Nev. 809, 811, 407 P.3d 327, 329 (2017) (citing *Crane v. Continental Telephone*, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989)); see also *Fitzpatrick v. State ex rel., Dep't of Commerce, Ins. Div.*, 107 Nev. 486, 488, 813 P.2d 1004, 1005 (1991) (characterizing judicial review as "taking an administrative appeal").

of an administrative decision. And Ms. DeRosa submitted herself to the full administrative process—including the authority of the courts to engage in judicial review of the underlying administrative proceeding—when she challenged her termination under Chapter 284 and Chapter 233B.

Second, Ms. DeRosa seems to misread the Advisory Committee Note’s reference to a “petition” as including any petition whether or not that petition initiates a civil action. The Advisory Committee Note qualifies the word “petition” as a petition that “initiates a civil action” along with any other document that “initiates a civil action.” A petition for judicial review, as argued above, does not initiate a civil action. Therefore, the Advisory Committee Note to NRCP 3 does not support Ms. DeRosa’s argument that the statutory framework and applicable rules require personal service.

A party who seeks judicial review of an administrative decision is simply continuing the administrative process. Therefore, there is no need for personal service of a petition for judicial review under NRS 233B.130.

C. Nevada Rule of Civil Procedure 5 is a Default Rule That Applies to Initial Service of Petitions for Judicial Review Because a Petition for Judicial Review is Not a “Complaint.”

The Nevada Rules of Civil Procedure govern procedure in Nevada’s district courts. NRCP 1. Rules 4 and 5 pertain to service of certain pleadings, documents

and other items. Nevada Rule of Civil Procedure 4, including Rules 4.1 through 4.5, specifically refers to service of a “complaint.”

Compared to NRCP 4, which specifically applies to a summons and complaint, NRCP 5 is a catch-all service provision for anything other than a summons and complaint. NRCP 5’s list of items that must be served on every party includes a number of general categories such as “any pleading filed after the original complaint” or a “written notice or any similar paper.” NRCP 5(b)(1) requires service on a party’s attorney if a party is represented by counsel. NRCP 5(b)(2) does not require personal service. It allows, among other methods, for service by mail to a last known address. NRCP 5(b)(2)(C).

A petition for judicial review is the equivalent of a notice by the petitioning party that the petitioning party intends to continue the administrative decision-making process by seeking judicial review of an administrative decision. Therefore, NRCP 5 applies to service of a petition for judicial review. Here, NDOC complied with NRCP 5 by serving Ms. DeRosa’s counsel of record with a copy of NDOC’s petition for judicial review of the hearing officer’s May 23, 2018 decision. Indeed, under NRCP 5(b)(1) and Rule 4.2 of the Rules of Professional Conduct, NDOC was required to serve Ms. DeRosa’s counsel of record. Further, NDOC timely served the petition under NRS 233B.130(5) by mailing the petition to opposing counsel within 45 days of filing the petition.

NDOC complied with Chapter 233B and the Nevada Rules of Civil Procedure in timely serving Ms. DeRosa by mail with NDOC's petition for judicial review. Accordingly, the district court erred in dismissing NDOC's petition for judicial review. NDOC respectfully requests this Court reverse the district court's dismissal and remand this matter to the district court so that NDOC's petition can proceed on the merits.

D. This Court Should Adopt a Rule Allowing Service of a Petition for Judicial Review Under Nevada Rule of Civil Procedure 5 As Doing So Would Afford All Litigants, Particularly Indigent and Pro Se Litigants, the Greatest Access to Justice.

NDOC argues in its opening brief that service of a petition for judicial review should be allowed by mail for a number of reasons. In addition to relying on the plain language of the relevant statute and rules, and legislative history, NDOC argues that public policy countenances a more liberal service requirement absent a specific legislative directive for personal service. Specifically, NDOC argues that the Court should interpret Chapter 233B and the Rules of Civil Procedure to allow for service by mail of a petition for judicial review. NDOC argues that requiring personal service could create a trap for the unwary *pro se* litigant who does not understand the complexities of personal service or that the applicable authorities require personal service. NDOC's suggested interpretation would deconstruct barriers to the process of judicial review and favor dispositions of matters on the merits, thereby expanding litigants' access to justice.

Ms. DeRosa characterizes NDOC's argument that this Court should consider how the outcome of this case will impact *pro se* litigants as "pathetic" and "fabricated." But Ms. DeRosa does not explain why concerns on how this Court's decisions will impact *pro se* litigants in an area of law where parties are frequently self-represented is pathetic or fabricated. Meanwhile, this Court's long history of favoring dispositions on the merits⁴ demonstrates a public policy favoring access to the courts for all parties, represented or not. This important public policy validates NDOC's position.

NRCP 1 requires the public policy NDOC suggests. NRCP 1 states that the Rules "shall be construed and administered to secure the just, speedy and inexpensive determination of every action." Ms. DeRosa's suggested interpretation for a requirement of personal service would result in a manifest injustice to the unsophisticated litigant who does not understand the complexities of personal service. It would further limit the already narrow pathway to judicial review of agency determinations. Additionally, the added costs of personal service and the likelihood of motion practice around the effectiveness of such service, create unnecessary barriers to accessing the legal system. It would further narrow access to justice. Such a result is inconsistent with public policy and the core purpose of

⁴ See *Stubli v. Big D Int'l Trucks, Inc.*, 107 Nev. 309, 316, 810 P.2d 785, 789 (1991); *Moore v. Cherry*, 90 Nev. 390, 393, 528 P.2d 1018, 1021 (1974).

Nevada's Rules of Civil Procedure. Thus, NDOC's interpretation of the statute is also supported by public policy.

E. Assuming Personal Service is Required, the District Court Abused Its Discretion When It Refused to Grant NDOC an Extension of Time to Personally Serve Ms. DeRosa.

NDOC argued in its opening brief that the district court abused its discretion in not granting NDOC an extension of time in which to personally serve Ms. DeRosa. "NRS 233B.130(5) does not preclude a petitioner from moving for an extension of time after the 45-day period has passed. Thus, the district court may exercise its authority to extend the service period either before or after the 45-day period has run" upon a showing of good cause. *Heat & Frost Insulators and Allied Workers Local 16 v. Labor Commissioner*, ___ Nev. ___, 408 P.3d 156, 158 (Nev. 2018).

In support of its argument that the district court abused its discretion, NDOC explained that good cause existed for an extension because NDOC relied in good faith on its own legal analysis that service by mail would be effective service. Further, NDOC relied on unpublished Nevada authorities supporting service by mail. NDOC pointed out the extreme prejudice to NDOC in having its petition dismissed. NDOC compared these "case-concluding" consequences to the lack of any prejudice to Ms. DeRosa.

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In response, Ms. DeRosa argues she has suffered prejudice for two reasons. First, Ms. DeRosa claims she would suffer prejudice if the extension were granted thereby allowing the district court to overturn the hearing officer. This would result in an affirmance of Ms. DeRosa's termination. Should this occur, it would in fact be to Ms. DeRosa's detriment. However, this argument is illogical and entirely speculative. Ms. DeRosa cannot argue that she would suffer *undue* prejudice by extending the time for service of the petition for judicial review. If this were in fact a basis to undercut a party's ability to show good cause for an extension under NRS 233B.130(5), no court would ever be able to grant an extension as doing so would potentially expose an opposing party to an adverse decision. Ms. DeRosa has offered no authority for the proposition that the risk of facing an adverse decision is a factor the district court is to consider in determining good cause.

Second, Ms. DeRosa claims she has suffered prejudice in the form of incurring attorney's fees to defend against NDOC's "defective petition." Similar to her first claim of prejudice, this claim is also illogical and entirely speculative. The fact that Ms. DeRosa has had to pay an attorney to defend against NDOC's "defective petition" or this appeal is not a prejudice she would have suffered if the district court had granted the extension. Nor are her attorney's fees a factor that the district court could have considered in deciding whether to extend the 45-day service period.

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Ms. DeRosa, who remains employed by NDOC, would not have been unduly prejudiced by the district court granting the requested extension.⁵ Ms. DeRosa, who was a party to the administrative proceedings resulting in the petition, was well aware of the existence of the judicial review proceedings and indicated her intent to participate.⁶ She likewise consented to NDOC's request for additional time to file its opening brief in those proceedings. NDOC's request for an extension was its first request for an extension⁷ and was premised on a good faith interpretation of Nevada authority. The fact that some of that authority came from unpublished decisions does not undermine NDOC's good faith analysis on the issue of service.

The district court abused its discretion and erred when it determined that NDOC did not have good cause to extend the 45-day time period. Accordingly, NDOC requests this Court reverse the district court's dismissal of its petition and remand the proceedings to the district court for a consideration of the petition on the merits.

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⁵ See *Scrimmer v. Eighth Judicial District Court ex rel., County of Clark*, 116 Nev. 507, 516, 998 P.2d 1190, 1195-96 (2000) (noting that prejudice to the defendant is a consideration in determining good cause).

⁶ *Id.* (noting knowledge of the existence of the action as a factor in determining good cause).

⁷ *Id.* (noting consideration of any previous requests for extensions as a factor in determining good cause).

CONCLUSION

The district court erred in dismissing NDOC's Petition for Judicial Review with prejudice for failure to personally serve the petition in accordance with NRCP 4(d)(6). Otherwise, the district court abused its discretion in refusing to grant an extension of time to serve Ms. DeRosa. Therefore, this Court should reverse the district court's Order Granting Motion to Dismiss and remand for further proceedings.

DATED this 17th day of October, 2019.

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CERTIFICATE OF COMPLIANCE

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

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 pt. Times New Roman; or

☐ This brief has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

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

☒ Proportionately spaced, has a typeface of 14 points or more, and contains [2,452] words and [_____] lines of text; or

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☒ Does not exceed 15 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable

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

DATED this 17th day of October, 2019.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on October 17, 2019, I electronically filed the foregoing document via this Court's electronic filing system. I certify that the following participants in this case are registered electronic filing systems users and will be served electronically and by U.S. Mail first class postage prepaid:

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