

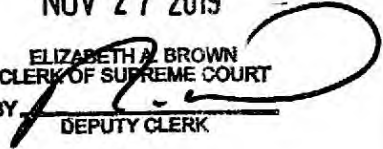
IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL WHITFIELD,
Appellant,
vs.
NEVADA STATE PERSONNEL
COMMISSION; STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION;
LORNA WARD, APPEALS OFFICER;
AND THE STATE OF NEVADA
DEPARTMENT OF CORRECTIONS, AS
EMPLOYER,
Respondents.

No. 79718

FILED

NOV 27 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER REGARDING PRO BONO COUNSEL

This is a pro se appeal from an order granting a motion to dismiss a petition for judicial review. Having considered the documents transmitted by the district court and the record on appeal, this court has determined that the appointment of pro bono counsel to represent appellant would assist this court in reviewing this appeal.¹ By this order, the court expresses no opinion as to the merits of this appeal.

Pro bono counsel is an attorney who provides legal services without charge for the benefit of the public good. The appointment of pro bono counsel provides attorneys with an opportunity to volunteer legal services in furtherance of their professional responsibility and, at the same time, allows financially eligible litigants access to quality legal representation without cost. Counsel will be appointed for purposes of this appeal only and will participate in oral argument. Currently, the Pro Bono

¹A copy of the district court order challenged on appeal is attached.

19-48549

Committee of the Appellate Litigation Section of the State Bar of Nevada (Pro Bono Committee), in conjunction with the Legal Aid Center of Southern Nevada, has developed a pro bono appellate program to assist the public and this court. This case is hereby referred to the program established by the Pro Bono Committee to evaluate whether appellant can benefit from the program.

Accordingly, the clerk of this court shall transmit a copy of this order and the attached case summary and district court order to the Legal Aid Center of Southern Nevada for financial eligibility screening. If appellant qualifies and does not object to pro bono counsel, the Legal Aid Center in cooperation with the Pro Bono Committee shall locate a volunteer attorney from the program to represent appellant. Once an attorney is located, the attorney shall file a notice of appearance in this court within 60 days from the date of this order. Briefing and oral argument will be scheduled thereafter.

Alternatively, if appellant is not financially eligible or objects to pro bono representation, or if a volunteer attorney cannot be located, the Legal Aid Center of Southern Nevada shall notify this court in writing within 60 days from the date of this order. In such case, oral argument will not be held. The briefing schedule in this appeal shall be suspended pending further order of this court.

It is so ORDERED.²

 C.J.

²This court defers ruling on the motion to dismiss.

cc: Michael Whitfield
Attorney General/Carson City
Attorney General/Reno
Legal Aid Center of Southern Nevada, Barbara E. Buckley,
Executive Director
Anne R. Traum, Coordinator, Appellate Litigation Section,
Pro Bono Committee, State Bar of Nevada
Kelly Dove

Docket No. 79718

Whitfield v. Nevada State Pers. Comm'n

Appellant filed a petition for judicial review of a hearing officer's decision upholding his dismissal from employment as a corrections officer. Respondent Department of Corrections moved to dismiss the petition because petitioner did not name all parties of record as respondents pursuant to NRS 233B.130(2)(a). Appellant filed an amended petition in an attempt to remedy any deficiency. However, the district court granted the motion to dismiss, concluding that the original petition was deficient and the amended petition did not cure the defect.

3060

IN THE SECOND JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WASHOE

MICHAEL WHITFIELD,

Petitioner,

Case No.: CV19-00641

vs.

Dept. No.: 1

NEVADA STATE PERSONNEL
COMMISSION, STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION,
LORNA WARD, APPEALS OFFICER, and
DEPARTMENT OF CORRECTIONS, as
Employer,

Respondents.

ORDER GRANTING MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW

Currently before the Court is the *Motion to Dismiss Petition for Judicial Review* filed by Respondent State of Nevada, Department of Corrections ("NDOC") on April 4, 2019. On April 8, 2019, Petitioner Michael Whitfield ("Petitioner") filed an *Amended Petition for Judicial Review*, and thereafter, on April 9, 2019, an *Opposition to Motion to Dismiss Petition for Judicial Review*. On April 12, 2019, NDOC filed a *Reply* and submitted the matter to the Court for decision.

Upon careful review of the record, this Court finds good cause to grant NDOC's Motion.

I. Background

Petitioner was previously employed by NDOC as a correctional officer at Warm Springs Correctional Center. Mot. at 2:8-9. On August 2, 2017, a Domestic Violence Restraining Order

1 (“Restraining Order”) was entered against Petitioner by the Superior Court of California, County of
2 Santa Clara, which specifically made it illegal for Petitioner to use or handle firearms until August 2,
3 2020. *Id.* at 2:9-12. However, the NDOC Administrative Regulations (AR) 362.01 and 362.03
4 expressly instruct that (1) all NDOC peace officers are required to handle firearms as part of their
5 assigned duties; (2) all NDOC peace officers must meet the requirements of NAC Chapter 289 to
6 ensure POST certification; and (3) all NDOC peace officers must maintain firearm certification under
7 NAC Chapter 289 “as a condition of employment.” *Id.* at 2:15-19. Following the issuance of the
8 Restraining Order entered against Petitioner, NDOC assigned him to a temporary administrative
9 position, where he would not be exposed to firearms. *Id.* at 2:20-21. Over the following six months,
10 NDOC allegedly urged Petitioner to resolve the Restraining Order and complete his biannual firearm
11 qualification requirements. *Id.* at 2:21-23. Petitioner allegedly failed to satisfy his biannual firearm
12 qualification requirements and he lost his POST certification. *Id.* at 2:24-25. As a result, NDOC
13 terminated Petitioner effective April 20, 2018, for violations of NAC 284.650(1), NAC 289.230,
14 NDOC AR 362, and NDOC AR 339.07.15(UU) (Failure to maintain POST requirements). *Id.* at 1:26-
15 3:1.

16 On April 30, 2018, Petitioner appealed his dismissal and on December 14, 2018, an appeal
17 hearing was conducted in this matter before Hearing Officer Lorna Ward. *Id.* at 3:3-4. On March 1,
18 2019, Hearing Officer Ward filed her Findings of Fact, Conclusions of Law, Decision and Order.
19 Mot. Ex. A. Hearing Officer Ward found:

20 Officer Whitfield clearly and by a preponderance of the evidence
21 violated AR 339.07.15(UU) and NAC 284.650(1). He failed to
22 maintain his POST requirements as required by AR 339.07.15(UU) and
23 his failure to qualify biannually and his inability to use a firearm
24 violated NAC 284.650(1) because such is incompatible with an
25 employee’s condition of employment established by statute and
26 regulation . . . There is no question that Officer Whitfield was unable
27 to legally use a firearm from August 2, 2017 to the present.

28 Mot. at Ex. A, 8. The Hearing Officer further held:

The violation of AR 339.07.15(UU) failure to maintain POST
requirements is a Class 5 offense with dismissal recommended for a
first offense . . . [A] violation of AR 339.07.15(UU) is a ‘serious’

1 offense as evidence by the fact that NDOC determined that a violation
2 warrants dismissal on a first offense. This determination is given
3 deference. In addition, the ability of a correctional officer to use a
firearm is a condition of employment and the inability to do so is
incompatible with such employment.

4 *Id.* at 8. Lastly, Hearing Officer Ward found that “the dismissal was reasonable in light of all the facts
5 and the applicable law.” *Id.*

6 After Hearing Officer Ward issued her findings on March 1, 2019, Petitioner in pro per filed
7 the present Petition for Judicial Review (“Petition”), seeking to challenge the final judgment of the
8 Nevada State Personnel Commission (“Commission”). Pet. at 1:17-21. Petitioner contends that the
9 Commission’s decision was: (1) not supported by substantial evidence; (2) arbitrary and capricious;
10 (3) marked by an abuse of discretion; and (4) improper as a matter of law. *Id.* at 1:22-25. Thereafter,
11 Respondent filed its Motion to Dismiss Petition for Judicial Review (“Motion”).

12 **II. Relevant Legal Authority**

13 In reviewing a motion to dismiss pursuant to Nevada Rules of Civil Procedure Rule 12(b)(5)
14 for failure to state a claim upon which relief can be granted, the “court must construe the pleadings
15 liberally and accept all factual allegations in the complaint as true . . . [and] draw every fair inference
16 in favor of the non-moving party. ‘A complaint will not be dismissed for failure to state a claim unless
17 it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier
18 of fact, would entitle him or her to relief.’” *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116
19 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000) (citing *Simpson v. Mars. Inc.*, 113 Nev. 188, 190, 929
20 P.2d 966, 967 (1997)). As Nevada is a “notice-pleading” jurisdiction, a complaint need only set forth
21 sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party
22 has “adequate notice of the nature of the claim and relief sought.” *Hay v. Hay*, 100 Nev. 196, 198,
23 678 P.2d 672, 674 (1984); see also *Stockmeier v. Nevada Dep’t of Corrections*, 124 Nev. 313, 316,
24 183 P.3d 133, 135 (2008) (dismissal, pursuant to NRCP 12(b)(5), is proper where the allegations are
25 insufficient to establish the elements of a claim for relief).

26 **III. Analysis**

27 Respondent comes now requesting this Court to dismiss the Petition on the basis that
28 Petitioner failed to name as respondents all parties of record pursuant to NRS 233B.130(2)(a). NRS

1 233B.130 provides, in relevant part, that “[p]etitions for judicial review must: (a) Name as
2 respondents the agency and all parties of record to the administrative proceeding.” NDOC cites to
3 *Washoe County v. Otto*, wherein the Nevada Supreme Court held that “pursuant to NRS
4 233B.130(2)(a), it is mandatory to name all parties of record in a petition for judicial review of an
5 administrative decision, and a district court lacks jurisdiction to consider a petition that fails to comply
6 with this requirement. 128 Nev. 424, 431, 282 P.3d 719, 725 (2012). NDOC asserts that Petitioner
7 did not name any party as a respondent in either the caption or the body of the Petition, nor did
8 Petitioner reference Hearing Officer Ward’s Decision and Order so as to put NDOC on notice of what
9 was being challenged. Mot. at 6:25-28. As such, NDOC contends that Petitioner failed to comply
10 with the mandatory and jurisdictional naming requirements of NRS 233B.130(2)(a) by neglecting to
11 properly name: (1) the Department of Corrections; (2) the State of Nevada; (3) the Department of
12 Administration; (4) the Personnel Commission; and (5) the Hearing Officer—all of whom were either
13 the subject agency or parties of record to the administrative proceeding. *Id.* at 7:1-5.

14 In response to the Motion, Petitioner filed an *Amended Petition for Judicial Review* on April
15 8, 2019, wherein Petitioner listed in the caption, as well as the body of the Amended Petition, the
16 following parties as Respondents: (1) Nevada State Personnel Commission, (2) State of Nevada
17 Department of Administration, (3) Lorna Ward, Appeals Officer, and (4) James Dzurenda,
18 Department of Corrections. *See* Amended Pet. Petitioner alleges, through the Amended Petition, that
19 he is well within the time frame of 21 days to amend pursuant to NRCP 15(a)(1)(A). Further,
20 Petitioner filed an *Opposition* on April 9, 2019, wherein he argues that NDOC’s Motion is rendered
21 moot by the filing of the Amended Petition. Petitioner cites to *Prevost v. State Dep’t of Admin.*, 134
22 Nev. Adv. Op. 42, 418 P.3d 675, 677 (2018), to support the assertions that the failure to name a party
23 of record in the caption of a petition for judicial review is not jurisdictionally fatal under NRS
24 233B.130(2)(a). Opp. at 2:24-28.

25 However, in the *Reply*, NDOC asserts that the filing of the Amended Petition does not cure
26 Petitioner’s failure, as the Amended Petition is untimely, pursuant to NRS 233B.130(2)(d), as the
27 Amended Petition was not filed within 30 days from when Petitioner was served with the
28 administrative decision at issue. Reply at 2:13-15. Contending that the Amended Petition was

1 untimely, NDOC further asserts that it cannot relate back to the original Petition, as the APA 30-day
2 time limit expired on April 3, 2019, prior to the filing of the Amended Petition. *Id.* at 5:24-26.
3 Further, NDOC contends that the case cited by Petitioner, *Prevost*, is not binding in this case as
4 Petitioner failed to simply name the respondents in the caption of the Petition. *Id.* at 5:2-8. Rather,
5 NDOC asserts, Petitioner failed to name any respondents anywhere in the entire Petition. *Id.* Lastly,
6 NDOC alleges that Petitioner failed to comply with NRS 41.031(2) governing governmental
7 exceptions for sovereign immunity. *Id.* at 6:14-16. Specifically, NDOC cites to NRS 41.031(2),
8 which provides that “[i]n any action against the State of Nevada, the action must be brought in the
9 name of the State of Nevada on relation of the particular department, commission, board or other
10 agency of the State whose actions are the basis for the suit.” Here, NDOC alleges that Petitioner
11 failed to name the Department of Corrections or the State of Nevada in the Petition, and thus, failed
12 to invoke the exception to the State’s sovereign immunity rule. *Id.* at 6:21-24.

13 Upon review of the arguments presented, the Court finds (1) that Petitioner’s original Petition
14 is noncompliant with NRS 233B.130, and (2) that the APA controls regarding the filing of an
15 Amended Petition, and thus the Amended Petition does not relate back to the original Petition and
16 does not cure the defect. Under Nevada law, district courts have jurisdiction to review administrative
17 decisions under the APA, but only when they “fall within the APA’s terms and [are] challenged
18 according to the APA’s procedures.” *Otto*, 128 Nev. at 431. To invoke a district court’s jurisdiction,
19 parties seeking judicial review of an administrative decision must strictly comply with all statutory
20 requirements for such review, and thus, noncompliance is grounds for dismissal. *Id.* In *Otto*, the
21 Nevada Supreme Court specifically found that petitioner Washoe County had failed to comply with
22 NRS 233B.130(2)(a) because Washoe County did not “name any [respondent] taxpayer individually
23 in the caption, in the body of the amended petition, or in an attachment.” *Id.* at 430. Here, the facts
24 are analogous. Petitioner failed to name any respondent in the caption or the body of the Petition, nor
25 through an attachment. As such, the Court finds that the original Petition was not compliant with
26 NRS 233B.130, warranting dismissal.

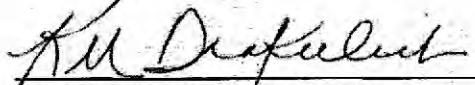
27 Further, as to the Amended Petition, NRS 233B.130(2)(d) provides that “[p]etitions for
28 judicial review must: (d) Be filed within 30 days after service of the final decision of the agency.”

1 Despite Petitioner's assertion that the Amended Petition was filed in compliance with NRCP 15, the
2 Amended Petition was not filed in compliance with NRS 233B.130(2)(d). As a result, this Court
3 finds that the Amended Petition does not cure Petitioner's jurisdictional defect.

4 Accordingly, and good cause appearing,

5 IT IS HEREBY ORDERED that the *Motion to Dismiss Petition for Judicial Review* filed by
6 Respondent State of Nevada, Department of Corrections is GRANTED.

7 DATED this 24th day of June, 2019.

8 
9 KATHLEEN DRAKULICH
10 DISTRICT JUDGE
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1 **CERTIFICATE OF SERVICE**

2 CASE NO. CV19-00641

3 I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the
4 STATE OF NEVADA, COUNTY OF WASHOE; that on the 24th day of June, 2019, I electronically
5 filed the **ORDER GRANTING MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW**
6 with the Clerk of the Court by using the ECF system.


7 I further certify that I transmitted a true and correct copy of the foregoing document by the
8 method(s) noted below:

9 **Electronically filed with the Clerk of the Court by using the ECF system which will send a notice**
10 **of electronic filing to the following:**

11 KEVIN PICK, ESQ. for JAMES DZURENDA, NDOC
12 MICHAEL WHITFIELD

13 **Deposited to the Second Judicial District Court mailing system in a sealed envelope for postage**
14 **and mailing by Washoe County using the United States Postal Service in Reno, Nevada:**

15 NONE
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17
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19

20 
21 DANIELLE KENT
22 Department 1 Judicial Assistant
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