

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.

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Jul 10 2020 12:07 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 79718

District Court Case No.

CV19-00641

APPEAL

**From the Second Judicial District Court
The Honorable Kathleen Drakulich, District Judge**

JOINT APPENDIX

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Summons to NV Department of Administrative Hearings	03/27/2019	JA008-JA009

DATED: July 10, 2020

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove

Kelly H. Dove

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Gil Kahn

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Attorneys for Appellant Michael Whitfield

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On July 10, 2020, I caused to be served a true and correct copy of the foregoing **JOINT APPENDIX** by the method indicated:



BY ELECTRONIC SUBMISSION: submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

BY U.S. MAIL: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

/s/ Lyndsey Luxford

An Employee of Snell & Wilmer L.L.P.

1 Code: \$3550
2 Michael Whitfield
3 P.O. Box 18421
4 Reno, NV 89511
5 Email: mwhitfi2000@gmail.com
6 Self-Represented Litigant

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

9 * * *

10 IN THE MATTER OF: Case No.
11 MICHAEL WHITFIELD Dept. No.
12 (Appeal No. 1803430-LLW)
13 Petitioner,

14 _____/
15 **PETITION FOR JUDICIAL REVIEW**
16

17 **NOTICE IS HEREBY GIVEN** that Petitioner, in the above-entitled action, does
18 hereby Petition to the Second Judicial District Court for Judicial Review from the final
19 judgment of the Nevada State Personnel Commission in this action. Said judgement
20 was rendered on March 1, 2019, finding Petitioner ineligible for reinstatement/rehire
21 to his position as Nevada Department of Corrections. Petitioner alleges as follows:

- 22 1. That the decision was not supported by substantial evidence;
23 2. That the decision was arbitrary and capricious;
24 3. That the decision was marked by an abuse of discretion; and
25 4. That the decision was improper as a matter of law.

26 WHEREFORE, the Petition, Michael Whitfield, asks for the following relief:

- 27 1. That the decision of the Nevada State Personnel Commission be
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reversed, and the Petitioner be determined to be eligible for
reinstatement/rehire to his former position;

2. That this court grant such other and further relief as may be just, equitable,
and proper.

**This document does not contain the personal information of any person
as defined by NRS 603A.040.**

Dated this 20 day of March, 2019


Michael Whitfield
In Proper Person

Respondent in Proper Person

MAR 25 2019

Code: 4085

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

Micheal Whitfield,
Plaintiff / Petitioner / Joint Petitioner,

vs.

Case. No. CV 19-00641

Dept. No. 1

NV Human Resource Mangement,
Defendant / Respondent / Joint Petitioner.

SUMMONS

TO THE DEFENDANT: YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND IN WRITING WITHIN 20 CALENDAR DAYS. READ THE INFORMATION BELOW VERY CAREFULLY.

A civil complaint or petition has been filed by the plaintiff(s) against you for the relief as set forth in that document (see complaint or petition). When service is by publication, add a brief statement of the object of the action. See Nevada Rules of Civil Procedure, Rule 4(b).

The object of this action is: Petition for Judicial Review

1. If you intend to defend this lawsuit, you must do the following within 20 calendar days after service of this summons, exclusive of the day of service:
 - a. File with the Clerk of the Court, whose address is shown below, **a formal written answer** to the complaint or petition, along with the appropriate filing fees, in accordance with the rules of the Court, and;
 - b. Serve a copy of your answer upon the attorney or plaintiff(s) whose name and address is shown below.
2. Unless you respond, a default will be entered upon application of the plaintiff(s) and this Court may enter a judgment against you for the relief demanded in the complaint or petition.

Dated this _____ day of MAR 22 2019, 20_____

Issued on behalf of Plaintiff(s):

Name: Michael Whitfield
Address: P.O. Box 18421
Reno, NV 89511
Phone Number: 775-737-3493

JACQUELINE BRYANT
CLERK OF THE COURT

By: [Signature]
Deputy Clerk
Second Judicial District Court
75 Court Street
Reno, Nevada 89501

AARON D. FORD
Attorney General

CAROLINE BATEMAN
First Assistant Attorney General

CHRISTINE JONES
BRADY
Second Assistant Attorney General



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
100 North Carson Street
Carson City, Nevada 89701

JESSICA L. ADAIR
Chief of Staff

RACHEL J. ANDERSON
General Counsel

HEIDI PARRY STERN
Solicitor General

DATE RECEIVED: 3/25/19

RECEIVED BY: Diana Herrera

CASE
NAME: Whitfield, v. NV Human Resources
management

CASE NUMBER: CV19-00641 COURT: 2nd JD

DOCUMENT(S) RECEIVED: Summons

NOTICE

NRS 41.031(2) provides in part that, in any action against the State of Nevada, the action must be brought in the name of the State of Nevada on relation of the particular department, commission, board or other agency of the state whose actions are the basis for the suit. In an action against the State of Nevada, the summons and a copy of the complaint must be served upon the Attorney General, at the Office of the Attorney General in Carson City and upon the person serving in the office of administrative head of the named agency. Service on the Attorney General or designee does not constitute service on any individual or administrative head.

This Receipt acknowledges that the documents described herein have been received by the Nevada Attorney General or the designee authorized by NRS 41.031(2)(a). This Receipt does not ensure that any party, person or agency has been properly served, nor does it waive any legal requirement for service.

Receipt of a subpoena by the Office of the Attorney General does not constitute valid service of the subpoena upon any individual or upon any state agency, except the Office of the Attorney General. Receipt of summons and complaint or any other process by the Attorney General or designee does not constitute service upon any individual, nor does it constitute service upon the administrative head of an agency pursuant to NRS 41.

DECLARATION OF PERSONAL SERVICE

(To be filled out and signed by the person who served the Defendant or Respondent)

STATE OF Nevada

COUNTY OF W Carson City

I, Kyron Riddess, declare:
(Name of person who completed service)

1. That I am not a party to this action and I am over 18 years of age.
2. That I personally served a copy of the Summons and the following documents:

I was redirected from 209 Masser to Attorney
General Office at the address below

Petition for Judicial Review, Summons

upon Human Resource Management Sofia Diana Herrera, at the following
(Name of Respondent/Defendant who was served) Herrera

address: 100 N. Carson Carson City, NV 89701

on the 25 day of March, 20 19.
(Month) (Year)

This document does not contain the Social Security Number of any Person.

I declare, under penalty of perjury under the law of then State of Nevada, that the foregoing is true and correct.

Kyron Riddess

(Signature of person who completed service)

Code: 4085

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

Micheal Whitfield,
Plaintiff / Petitioner / Joint Petitioner,

vs.

Case. No. CV19-00641

Dept. No. 1

James Dzurenda/NDOC Director,
Defendant / Respondent / Joint Petitioner.

SUMMONS

TO THE DEFENDANT: YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND IN WRITING WITHIN 20 CALENDAR DAYS. READ THE INFORMATION BELOW VERY CAREFULLY.

A civil complaint or petition has been filed by the plaintiff(s) against you for the relief as set forth in that document (see complaint or petition). When service is by publication, add a brief statement of the object of the action. See Nevada Rules of Civil Procedure, Rule 4(b).

The object of this action is: Judicial Review

1. If you intend to defend this lawsuit, you must do the following within 20 calendar days after service of this summons, exclusive of the day of service:
 - a. File with the Clerk of the Court, whose address is shown below, a **formal written answer** to the complaint or petition, along with the appropriate filing fees, in accordance with the rules of the Court, and;
 - b. Serve a copy of your answer upon the attorney or plaintiff(s) whose name and address is shown below.
2. Unless you respond, a default will be entered upon application of the plaintiff(s) and this Court may enter a judgment against you for the relief demanded in the complaint or petition.

Dated this MAR 22 day of 2019, 20

Issued on behalf of Plaintiff(s):

JACQUELINE BRYANT
CLERK OF THE COURT

By: J. Shields
Deputy Clerk

Name: Michael Whitfield
Address: P.O. Box 18421
Reno, NV 89511
Phone Number: 775-737-3493

Second Judicial District Court
75 Court Street
Reno, Nevada 89501

CODE 1067

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

MICHEAL WHITFIELD,

Plaintiff(s),

VS.

CASE NO: CV19-00641

JAMES DZURENDA/NDOC DIRECTOR,

Defendant(s),

DECLARATION OF SERVICE

STATE OF NEVADA

COUNTY OF CARSON CITY ss.:

SERWIND NETZLER, being duly sworn says: That at all times herein Affiant was and is a citizen of the United States, over 18 years of age, and not a party to nor interested in the proceedings in which this Affidavit is made.

That Affiant received copy(ies) of the **PETITION FOR JUDICIAL REVIEW; SUMMONS** On 3/26/2019 and served the same on 3/26/2019 at 2:26 PM by delivery and leaving a copy with:

By then and there personally delivering a true and correct copy of the documents into the hands of and leaving with **Nancy Sanders** whose title is **Administrative Assistant**.

Served on behalf of **JAMES DZURENDA NEVADA DEPARTMENT OF CORRECTION DIRECTOR**

Service Address: **NDOC - 5500 Snyder Ave Bldg 17 , Carson City, NV 89701-6752**

A description of Nancy Sanders is as follows

Gender	Color of Skin/Race	Hair	Age	Height	Weight
Female	White	Red	36 - 40	5'1 - 5'6	161-180 Lbs

Pursuant to NRS 239B.030 this document does not contain the social security number of any person.

Affiant does hereby affirm under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on: 3/27/2019

by SERWIND NETZLER

Registration: R-2018-05938

No notary is required per NRS 53.045

X

SERWIND NETZLER

Registration: R-2018-05938

Reno Carson Messenger Service, Inc #322

185 Martin St.

Reno, NV 89509

(775) 322-2424

www.renocarson.com



Order#: R67257 NVPRF411

JA007

Code: 4085

STATE OF NEVADA
DEPT OF ADMINISTRATION
HEARINGS DIVISION
APPEALS UNIT

2019 MAR 25 09:11 PM

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

Micheal Whitfield,
Plaintiff / Petitioner / Joint Petitioner,

Case. No. CV19-00641

vs.

Dept. No. 1

State of NV Dept of Admin/Hearings Div,
Defendant / Respondent / Joint Petitioner.

SUMMONS

TO THE DEFENDANT: YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND IN WRITING WITHIN 20 CALENDAR DAYS. READ THE INFORMATION BELOW VERY CAREFULLY.

A civil complaint or petition has been filed by the plaintiff(s) against you for the relief as set forth in that document (see complaint or petition). When service is by publication, add a brief statement of the object of the action. See Nevada Rules of Civil Procedure, Rule 4(b).

The object of this action is: Petition for Judicial Review

1. If you intend to defend this lawsuit, you must do the following within 20 calendar days after service of this summons, exclusive of the day of service:
 - a. File with the Clerk of the Court, whose address is shown below, a **formal written answer** to the complaint or petition, along with the appropriate filing fees, in accordance with the rules of the Court, and;
 - b. Serve a copy of your answer upon the attorney or plaintiff(s) whose name and address is shown below.
2. Unless you respond, a default will be entered upon application of the plaintiff(s) and this Court may enter a judgment against you for the relief demanded in the complaint or petition.

Dated this _____ day of MAR 22 2019, 20_____.

Issued on behalf of Plaintiff(s):

JACQUELINE BRYANT
CLERK OF THE COURT

By: J. Shields

Name: Michael Whitfield

Address: P.O. Box 18421

Reno, NV 89511

Phone Number: 775-737-3493

Deputy Clerk

Second Judicial District Court

75 Court Street

Reno, Nevada 89501

DECLARATION OF PERSONAL SERVICE

(To be filled out and signed by the person who served the Defendant or Respondent)

STATE OF Nevada)
COUNTY OF Carson City)

I, Kylon Ridders, declare:
(Name of person who completed service)

1. That I am not a party to this action and I am over 18 years of age.
2. That I personally served a copy of the Summons and the following documents:

Summons, Petition for Judicial Review

upon Human Resource Management, at the following
(Name of Respondent/Defendant who was served) Tasha Eaton

address: 1050 Williams #450 Carson City, NV

on the 25 day of March, 20 19.
(Month) (Year)

This document does not contain the Social Security Number of any Person.

I declare, under penalty of perjury under the law of then State of Nevada, that the foregoing is true and correct.

K. Ridders
(Signature of person who completed service)

3795
AARON D. FORD
Attorney General
KEVIN A. PICK
Deputy Attorney General
Nevada Bar No. 11683
5420 Kietzke Lane, Suite 202
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(775) 687-2100
Email: kpick@ag.nv.gov
*Attorneys for Respondent State of Nevada
ex rel. Department of Corrections*

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

IN THE MATTER OF:

MICHAEL WHITFIELD
(Appeal No. 1803430-LLW)

Petitioner,

Case No. CV19-00641
Dept. No. 1

**REPLY IN SUPPORT OF
MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW**

Respondent, State of Nevada, Department of Corrections (hereinafter “NDOC”), by and through its attorneys, Nevada Attorney General, Aaron D. Ford, and Deputy Attorney General, Kevin A. Pick, hereby submits its Reply in support of its Motion to Dismiss Petition for Judicial Review. This Reply is made and based on the Memorandum of Points and Authorities set forth below, any exhibits attached hereto, and all papers and pleadings on file herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

On April 4, 2019, NDOC moved this Court to dismiss with prejudice Michael Whitfield’s Petition for Judicial Review, because Mr. Whitfield had failed to comply with the mandatory and jurisdictional requirements of NRS 233B.130(2). Specifically, Mr. Whitfield failed to name any respondents whatsoever in his Petition and, as such, Mr. Whitfield failed to invoke the subject matter

1 jurisdiction of this Court. *See Washoe Cty. v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 725 (2012)
2 (explaining that a district court lacks subject matter jurisdiction to consider a petition for judicial review
3 where the petitioner fails to comply with the statutory requirements for filing the petition); *see also*
4 *Vaile v. Eighth Judicial Dist. Court*, 118 Nev. 262, 276, 44 P.3d 506, 515–16 (2002) (providing that
5 subject matter jurisdiction cannot be waived). Similarly, NDOC contended that Mr. Whitfield failed to
6 invoke an exception to the State’s sovereign immunity when he neglected to name the State of Nevada,
7 or any agency thereof, in his defective Petition for Judicial Review. *See* NRS 41.031(2).

8 After receiving the underlying Motion, Mr. Whitfield ostensibly recognized his error and filed
9 an Amended Petition for Judicial Review on April 8, 2019. The Amended Petition added the following
10 parties as respondents, none of which were identified as respondent in the original Petition: (1) Nevada
11 State Personnel Commission; (2) State of Nevada, Department of Administration; (3) Lorna Ward,
12 Appeals Officer; and (4) James Dzurenda, Nevada Department Of Corrections. *See* Amended Petition
13 for Judicial Review, at 1. However, as discussed below, that Amended Petition was untimely and filed
14 more than 30 days after Mr. Whitfield was served with the administrative decision at issue on March 1,
15 2019. *See* NRS 233B.130(2)(d). Accordingly, the Amended Petition does not relate back to the filing of
16 the original Petition and this Court lacks jurisdiction to even permit such an amendment, since the 30-
17 day filing deadline had already expired.

18 On April 9, 2019, Mr. Whitfield filed an Opposition to Motion to Dismiss. However, instead of
19 contesting the legal arguments made in NDOC’s Motion, Mr. Whitfield downplays his failure to strictly
20 comply with NRS 233B.130(2) and argues that dismissal is not required. *See* Opposition, at 2 (citing
21 *Prevost v. State Dep’t of Admin.*, 134 Nev. Adv. Op. 42, 418 P.3d 675, 677 (2018)). However, binding
22 Nevada Supreme Court precedent does not allow Mr. Whitfield to downplay his defective petition or
23 ignore the mandatory and jurisdictional requirements of NRS 233B.130(2). Nor can Mr. Whitfield
24 avoid dismissal by misconstruing an already-inapplicable Nevada case (*Prevost*). As such, Mr.
25 Whitfield failed to strictly comply with NRS 233B.130(2) and, therefore, this Court lacks subject matter
26 jurisdiction over this Petition, which must be dismissed as a matter of law.

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II.
LEGAL ARGUMENT

A. THE PETITION FOR JUDICIAL REVIEW FAILED TO COMPLY WITH NRS 233B.130(2)(a) AND MUST BE DISMISSED AS A MATTER OF LAW.

District courts have jurisdiction to review administrative decisions under the APA, but only when they “fall within the APA's terms and [are] challenged according to the APA's procedures.” *Otto*, 128 Nev. at 431. To invoke a district court's jurisdiction, parties seeking judicial review of an administrative decision must strictly comply with all statutory requirements for such review, and thus, noncompliance is grounds for dismissal. *Id.*; *see also Kame v. Employment Security Dep't*, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989).

As such, in order to invoke this Court’s jurisdiction to consider his Petition for Judicial Review, Mr. Whitfield must have “strictly complied” with the APA’s procedural requirements. These procedural requirements are set forth in NRS 233B.130, which provide in pertinent part that all petitions for judicial review “must . . . [n]ame as respondents the agency and all parties of record to the administrative proceeding.” (Emphasis added). *See* NRS 233B.130(2)(a). The Supreme Court in *Otto* specifically held that “it is **mandatory** to name all parties of record in a petition for judicial review” and that a district court “**lacks jurisdiction** to consider a petition that fails to comply with this requirement.” *See Otto*, 128 Nev. at 432–33 (emphasis added).

Here, pursuant to NRS 233B.130(2)(a), Mr. Whitfield was required to name numerous respondents in his Petition for Judicial Review, including: (1) the Department of Corrections; (2) the State of Nevada; (3) the Department of Administration; (4) the Personnel Commission; (5) the Division of Hearings and Appeals; and (6) Hearing Officer Lorna Ward. *See Otto*, 128 Nev. at 430; *see also* NRS 233B.035 (defining “[p]arty” as “each person . . . named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any contested case.”) In fact, the Hearing Officer’s Decision and Order clearly identified the “STATE OF NEVADA, DEPARTMENT OF CORRECTIONS” as the “Respondent-Employer.” *See* Motion, Exhibit No. 1 (Decision and Order Affirming Termination). Furthermore, the Certificate of Service attached to the Hearing Officer’s

* * *

1 Decision and Order identified the following parties: (1) James Dzerunda, Director Department of
2 Corrections; (2) Department of Corrections; and (3) Human Resource Management. *Id.*

3 Nevertheless, Mr. Whitfield's Petition for Judicial Review failed to identify even a single
4 respondent in either the caption or the body of the Petition. *See generally*, Petition for Judicial Review.
5 Nowhere is NDOC, Director Dzerunda, the Department of Administration, Hearing Officer Ward, the
6 Hearings Division, Human Resource Management, or the State of Nevada identified as a respondent.
7 *Id.* Indeed, the word "respondent" appears nowhere in the entire Petition for Judicial Review, except on
8 the second page where Mr. Whitfield erroneously refers to himself as the "Respondent in Proper
9 Person." *Id.* Nor did Mr. Whitfield incorporate by reference the Hearing Officer's Decision and Order.
10 *Id.* Nor did Mr. Whitfield attach a copy of the Decision and Order to the Petition for Judicial Review.
11 *Id.*

12 NDOC must strongly emphasize that a party must "strictly comply" with the naming
13 requirements of NRS 233B.130(2)(a). *See Otto*, 128 Nev. at 431 (emphasis added). However, Mr.
14 Whitfield failed to name a multitude of necessary respondents in either the caption of his Petition for
15 Judicial Review, in the body of the Petition, or in any attachment to the Petition (there were no
16 attachments). *Id.* at 430 (Holding that Washoe County failed to comply with NRS 233B.130(2)(a)
17 because Washoe County did not "name any [respondent] taxpayer individually in the caption, in the
18 body of the amended petition, or in an attachment.") In fact, the Amended Petition is an outright
19 admission that the original Petition failed to comply with NRS 233B.130(2)(a); otherwise, Mr.
20 Whitfield would not have needed to amend his Petition and identify five different respondents that were
21 not identified in the original Petition. *See Amended Petition for Judicial Review*. As such, Mr.
22 Whitfield irrefutably failed to comply (either strictly or even substantially) with the mandatory and
23 jurisdictional naming requirements of NRS 233B.130(2)(a). Accordingly, this Court lacks subject
24 matter jurisdiction over Mr. Whitfield's Petition for Judicial Review. *See Otto*, 128 Nev. at 432–33.

25 In his Opposition, Mr. Whitfield cites the case of *Prevost v. State Dep't of Admin.*, 134 Nev.
26 Adv. Op. 42, 418 P.3d 675, 677 (2018), and argues that the "failure to name a party of record in the
27 caption of a petition for judicial review is not jurisdictionally fatal under NRS 233B.130(2)(a)" and that

28 * * *

1 dismissal is not required. *See* Opposition, at 2. However, Mr. Whitfield distorts the content of his own
2 Petition and Mr. Whitfield relies on a gross mischaracterization of *Prevost*.

3 First, Mr. Whitfield did not merely omit respondents from the *caption* of his Petition, but failed
4 to name *any* respondents *anywhere* in his entire Petition. *See generally*, Petition for Judicial Review.
5 Nor did Mr. Whitfield attach any documents naming the required respondents. *Id.* Nor did Mr.
6 Whitfield incorporate by reference and attach a copy of the Hearing Officer's Decision and Order. *Id.*
7 Therefore, it is simply untrue for Mr. Whitfield to argue that his errors were limited to the *caption* of his
8 Petition, when Mr. Whitfield's *entire* Petition failed to comply with NRS 233B.130(2)(a).

9 Second, Mr. Whitfield's reliance on *Prevost* is completely misplaced. In *Prevost*, the petitioner
10 (Prevost) failed to name a required respondent (CCMSI) in the caption of the petition for judicial
11 review; however, the appeals officer's order and decision, *which did identify CCMSI*, was attached and
12 was specifically incorporated by reference into the body of the petition. *Prevost*, 418 P.3d at 676.
13 Therefore, the Nevada Supreme Court excused Prevost's failure to name CCMSI in the caption of the
14 Petition because "Prevost named CCMSI in the body of the petition through incorporation by reference
15 of the administrative decision, which Prevost also attached as an exhibit to the petition." *Id.* Here,
16 however, Mr. Whitfield **did not** name any respondent in the body of his Petition; the Petition **did not**
17 incorporate by reference the Hearing Officer's Decision and Order; and the Petition **did not** include an
18 attached copy of the Decision and Order. *See generally*, Petition for Judicial Review. As such, *Prevost*
19 is completely inapplicable to this matter and provides no legal basis to excuse Mr. Whitfield's failure to
20 comply with NRS 233B.130(2)(a). Consequently, this Court lacks jurisdiction to even consider Mr.
21 Whitfield's Petition for Judicial Review. *See Otto*, 128 Nev. at 434.

22 **B. THE (UNTIMELY) AMENDED PETITION DOES NOT RELATE BACK AND CANNOT CURE THE**
23 **JURISDICTIONAL DEFECTS IN MR. WHITFIELD'S ORIGINAL PETITION.**

24 On April 8, 2019, Mr. Whitfield attempted to cure his defective Petition by filing an untimely
25 "Amended Petition for Judicial Review" after the APA's 30-day time limit had expired on April 3,
26 2019.¹ As seen in the Amended Petition, Mr. Whitfield readily concedes that he violated NRS

27 ¹ Under NRS 233B.130(2)(d), petitions for judicial review must be filed within 30 days after
28 service of the final decision of the agency. Since Hearing Officer Ward's Decision and Order was

1 233B.130(2)(a) by not listing the following required respondents in his caption: Nevada State Personnel
2 Commission; State of Nevada, Department of Administration; Lorna Ward, Appeals Officer; and James
3 Dzurenda, Nevada Department of Corrections. *See* Amended Petition.

4 However, as noted above, Mr. Whitfield did not merely omit respondents from the *caption* of
5 his Petition for Judicial Review, but failed to identify any respondents in his *entire* Petition for Judicial
6 Review or in *any* attached documents. *See generally*, Petition for Judicial Review. Furthermore,
7 because Mr. Whitfield's original Petition failed to comply with the mandatory naming requirements of
8 NRS 233B.130(2)(a), the original Petition failed to invoke this Court's jurisdiction and the original
9 Petition cannot be amended outside of the 30-day deadline for filing a petition. *See Otto*, 128 Nev. at
10 435 ("Because Washoe County's original petition failed to invoke the district court's jurisdiction, it
11 could not properly be amended outside of the filing deadline."). As such, Mr. Whitfield's Amended
12 Petition does not relate back to the filing of the original Petition and this Court must disregard Mr.
13 Whitfield's Amended Petition.

14 **C. MR. WHITFIELD FAILED TO COMPLY WITH NRS 41.031(2) AND ARGUABLY FAILED TO**
15 **INVOKE AN EXCEPTION TO NEVADA'S SOVEREIGN IMMUNITY.**

16 As discussed in NDOC's underlying Motion, NRS 41.031 establishes that the State of Nevada is
17 ordinarily exempt from lawsuits under sovereign immunity but has allowed itself to be sued as long as
18 certain requirements are met. NRS 41.031(2) provides that "[i]n any action against the State of Nevada,
19 the action must be brought in the name of the State of Nevada on relation of the particular department,
20 commission, board or other agency of the State whose actions are the basis for the suit." *See* NRS
21 41.031(2). However, Mr. Whitefield failed to name either the Department of Corrections or the State of
22 Nevada (or indeed any respondents) in his Petition for Judicial Review. *See generally*, Petition for
23 Judicial Review. Consequently, NDOC submits that Mr. Whitfield failed to invoke an exception to the
24 State's sovereign immunity and that this matter must be dismissed.

25 Mr. Whitfield's April 9, 2019, Opposition to Motion to Dismiss does not even address the
26 foregoing legal issues or explain why sovereign immunity does not apply due to Mr. Whitfield's

27 _____
28 served by regular mail on March 1, 2019, Mr. Whitfield had until April 3, 2019, (30 days, plus 3 days
for mailing) in which to file his Petition. *See* Motion, Exhibit No. 1.

1 noncompliance with NRS 41.031(2). Since Mr. Whitfield chose not to contest the foregoing issue, it is
2 undisputed that Mr. Whitfield failed to comply with NRS 41.031(2), that Mr. Whitfield has not invoked
3 an exception to the State's sovereign immunity, and that this Petition must therefore be dismissed.

4 **III.**

5 **CONCLUSION**

6 Based on the foregoing, NDOC respectfully moves this Court to dismiss Michael Whitfield's
7 Petition for Judicial Review with prejudice.

8 **AFFIRMATION**

9 The undersigned hereby affirms that the preceding document does not contain the social security
10 number of any person.

11 DATED this 12th day of April 2019.

12 AARON D. FORD
13 Attorney General

14 By: /s/ Kevin A. Pick
15 Kevin A. Pick (Bar. No. 11683)
16 Deputy Attorney General
17 *Attorneys for Respondent, State of Nevada*
18 *ex rel. Department of Corrections*
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General,
3 and that on the 12th day of April 2019, I served a copy of the foregoing **REPLY IN SUPPORT OF**
4 **MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW** by causing a true copy thereof to
5 be filed with the Clerk of the Court using the eFlex system and by depositing a true copy of the same
6 for mailing addressed as follows:

7 Michael Whitfield
8 PO Box 18421
9 Reno, NV 89511
10 *Petitioner-Employee*

11 Lorna L. Ward, Esq.
12 Hearing Officer
13 C/O Hearings Division
14 1050 West William Street, Suite 450
15 Carson City, Nevada 89701

16 Department of Administration
17 Hearings Division
18 1050 West William Street, Suite 450
19 Carson City, Nevada 89701

20 /s/ Ginny Brownell
21 An employee of the State of Nevada,
22 Office of the Attorney General
23
24
25
26
27
28

2315
AARON D. FORD
Attorney General
KEVIN A. PICK
Deputy Attorney General
Nevada Bar No. 11683
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
(775) 687-2100
Email: kpick@ag.nv.gov
Attorneys for Respondent State of Nevada
ex rel. Department of Corrections

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

IN THE MATTER OF:

MICHAEL WHITFIELD
(Appeal No. 1803430-LLW)

Petitioner,

Case No. CV19-00641
Dept. No. 1

MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW

Respondent, State of Nevada, Department of Corrections (hereinafter “NDOC”), by and through its attorneys, Nevada Attorney General, Aaron D. Ford, and Deputy Attorney General, Kevin A. Pick, hereby moves this Court to dismiss Petitioner Michael Whitfield’s Petition for Judicial Review with prejudice, on the grounds that this Court lacks jurisdiction and that the Petition for Judicial Review fails to comply with mandatory and jurisdictional requirements of NRS 233B.130. This Motion is made and based on the Memorandum of Points and Authorities set forth below, any exhibits attached hereto and all papers and pleadings on file herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Respectfully, this Court must dismiss with prejudice Michael Whitfield’s Petition for Judicial Review because the Court lacks jurisdiction to hear Mr. Whitfield’s appeal, due to his failure to comply

1 with the mandatory and jurisdictional requirements of NRS 233B.130(2). Namely, the Petition for
2 Judicial Review fails to name any respondents, much less the agency and all parties of record to the
3 administrative proceeding as required by NRS 233B.130(2)(a). As such, Mr. Whitfield has failed to
4 invoke the subject matter jurisdiction of this Court and, accordingly, the Petition must be dismissed
5 with prejudice since the deadline in which to file for judicial review has expired.

6 II.

7 PROCEDURAL AND FACTUAL HISTORY

8 Petitioner, Michael Whitfield was previously employed by NDOC as a correctional officer at
9 Warm Springs Correctional Center. On August 2, 2017, a Domestic Violence Restraining Order was
10 entered against Mr. Whitfield by the Superior Court of California, County of Santa Clara, which
11 (among other provisions) specifically made it *illegal* for Mr. Whitfield to use or handle firearms until
12 August 2, 2020. The no-firearms clause made no exceptions at all, including no exception for Mr.
13 Whitfield's employment as a correctional officer. However, Mr. Whitfield was required by Nevada law
14 to qualify with a firearm *biannually* in order to maintain a basic POST certificate, which allows
15 individuals to act as peace officers. *See* NAC 289.230(5). Likewise, NDOC Administrative Regulations
16 (AR) 362.01 and 362.03 expressly instruct that: (1) all NDOC peace officers are required to handle
17 firearms as part their assigned duties; (2) all NDOC peace officers must meet the requirements of NAC
18 Chapter 289 to ensure POST certification; and (3) all NDOC peace officers must maintain firearm
19 certification under NAC Chapter 289 "as a condition of employment."

20 As a result of the August 2, 2017, Restraining Order, NDOC assigned Mr. Whitfield to a
21 temporary administrative position where he would not be exposed to firearms. Over the next six
22 months, NDOC *repeatedly* urged Mr. Whitfield to resolve the Restraining Order and complete his
23 biannual firearm qualification requirements. Unfortunately, Mr. Whitfield ignored all of NDOC's
24 repeated urgings; he neglected to resolve the Restraining Order; he neglected to satisfy his biannual
25 firearm qualification requirements; and he lost his POST certification.

26 As a result, NDOC was forced to terminate Mr. Whitfield effective April 20, 2018, for
27 violations of NAC 284.650(1), NAC 289.230, NDOC AR 362, and NDOC AR 339.07.15(UU) (Failure

28 * * *

1 to maintain POST requirements). At the time of his termination, nearly 10 months had passed since Mr.
2 Whitfield last satisfied his firearm qualification requirement on June 22, 2017.

3 On April 30, 2018, Mr. Whitfield appealed his dismissal and on December 14, 2018, an appeal
4 hearing was conducted in this matter before Hearing Officer Lorna Ward. At the hearing, substantial
5 evidence was introduced that Mr. Whitfield violated AR 339.07.15(UU) and NAC 284.650(1). Indeed,
6 Mr. Whitfield conceded that he failed to maintain his POST requirements in accordance with NAC
7 289.230 and that it was *still illegal* for Mr. Whitfield to use firearms—which was contrary to the
8 conditions of his employment at NDOC. These facts were undisputed and there was no debate that Mr.
9 Whitfield committed the charged misconduct. Pursuant to NDOC AR 339, a violation of AR
10 339.07.15(UU) (Failure to maintain POST requirements) was a Class 5 offense and termination was the
11 only level of discipline available to NDOC, which made this violation “serious” as a matter of law. *See*
12 *O’Keefe v. Nevada Department of Motor Vehicles*, 134 Nev. Adv. Op. 92, at *12–13 (December 6,
13 2018). NDOC also produced substantial evidence that Mr. Whitfield’s termination was for the good of
14 the public service, a decision which was entitled to deference as a matter of law. *O’Keefe*, 134 Nev.
15 Adv. Op. 92, at *13. Namely, undisputed testimony was presented that the safety and security of the
16 institution would be negatively affected by an officer who cannot legally use firearms; moreover,
17 undisputed testimony was presented that Mr. Whitfield’s failure to maintain his POST requirements and
18 his inability to legally use firearms were incompatible with his employment as a correctional officer.

19 On March 1, 2019, Hearing Officer Ward filed her Findings of Fact, Conclusions of Law,
20 Decision and Order. *See* Exhibit A. As seen therein, Hearing Officer Ward found as follows:

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

26 *See* Exhibit A, at 8.

27 * * *

28 * * *

1 Next, the Hearing Officer found as follows:

2 “The violation of AR 339.07.15(UU) failure to maintain POST requirements is a
3 Class 5 offense with dismissal recommended for a first offense . . . [A] violation
4 of AR 339.07.15(UU) is a ‘serious’ offense as evidence by the fact that NDOC
5 determined that a violation warrants dismissal on a first offense. This
6 determination is given 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.”

7 *Id.* at 8.

8 Lastly, Hearing Officer Ward found that:

9 “The dismissal of Officer Whitfield was for the good of the public service as
10 determined by NDOC. The dismissal was reasonable in light of all the facts and
the applicable law.”

11 *Id.*

12 Based on the foregoing factual determinations, the Hearing Officer affirmed Mr. Whitfield’s
13 termination. *Id.* at 9. The Hearing Officer’s Decision and Order was served on the parties by regular
14 mail on March 1, 2019. Therefore, pursuant to NRS 233B.130(2)(d) the deadline for Mr. Whitfield to
15 file his Petition for Judicial Review was April 3, 2019.

16 Mr. Whitfield filed the instant Petition for Judicial Review on March 20, 2019, and (while
17 Whitfield did not provide a Declaration of Service with regard to service on NDOC), Mr. Whitfield
18 personally served NDOC on March 26, 2019. However, as discussed below, Mr. Whitfield did not
19 name any respondents in his Petition for Judicial Review, which merely named Mr. Whitfield as the
20 Petitioner and named no other parties or respondents.

21 **II.**

22 **LEGAL ARGUMENT**

23 **A. APPLICABLE LEGAL STANDARD.**

24 Pursuant to Nevada Rule of Civil Procedure 12(b), lack of subject matter jurisdiction and
25 insufficient service of process are defenses properly made by motion. A district court may grant a
26 motion to dismiss for lack of subject matter jurisdiction when the absence of jurisdiction is apparent on
27 the face of the pleading. *See Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 573 n. 22, 170 P.3d 989, 995 n.
28 22 (2007); *Giola v. Roussille*, 81 Nev. 661, 663, 408 P.2d 918, 919 (1965). A court’s lack of subject

1 matter jurisdiction can be raised at any time. *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166
2 (2011). If a district court does not have subject matter jurisdiction over an action, the judgment is
3 rendered void. *Id.* at 179, 251 P.3d at 166. Thus, this Court must first determine whether it has statutory
4 authority to even review the action of an administrative agency before considering the merits of the
5 Petition for Judicial Review.

6 Nevada’s Administrative Procedures Act, codified at NRS Chapter 233B, governs judicial
7 review of administrative decisions. *See generally* NRS Chapter 233B; *Liberty Mut. v. Thomasson*, 130
8 Nev. 27, 30, 317 P.3d 831, 833 (2014).

9 NRS 233B.130 provides in pertinent part as follows:

10 2. Petitions for judicial review **must**:

- 11 (a) **Name as respondents the agency and all parties of record to**
12 **the administrative proceeding;**
- 13 (b) Be instituted by filing a petition in the district court in and for
14 Carson City, in and for the county in which the aggrieved party
15 resides or in and for the county where the agency proceeding
16 occurred;
- 17 (c) Be served upon:
 - 18 (1) The Attorney General, or a person designated by the
19 Attorney General, at the Office of the Attorney General in
20 Carson City; and
 - 21 (2) The person serving in the office of administrative head of
22 the named agency; and
- 23 (d) Be filed within 30 days after service of the final decision of the
24 agency.

25 * * *

26 6. The provisions of this chapter **are the exclusive means of judicial**
27 **review** of, or judicial action concerning, a final decision in a
28 contested case involving an agency to which this chapter applies.

(Emphasis added).

22 “When a party seeks judicial review of an administrative decision, strict compliance with the
23 statutory requirements for such review is a precondition to jurisdiction by the court of judicial review,”
24 and “[n]oncompliance with the requirements is grounds for dismissal.” *Kame v. Employment Security*
25 *Dep’t*, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989). “To invoke a district court’s jurisdiction to consider a
26 petition for judicial review, the petitioner **must strictly comply with the APA’s procedural**
27 **requirements.**” *Washoe Cty. v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 725 (2012) (emphasis added).
28 Indeed, the Nevada Supreme Court has specifically instructed that “pursuant to NRS 233B.130(2)(a), it

1 is mandatory to name all parties of record in a petition for judicial review of an administrative decision,
2 **and a district court lacks jurisdiction to consider a petition that fails to comply with this**
3 **requirement.”** *See Otto*, 128 Nev. at 432–33. Accordingly, the failure to comply with the naming
4 requirements of NRS 233B.130(2)(a) leaves a district court without subject matter jurisdiction to even
5 consider the subject decision of the administrative agency. *Id.* at 432–34. Furthermore, a petitioner who
6 fails to comply with this mandatory requirement cannot properly correct any deficiency outside of the
7 30-day filing deadline set forth in NRS 233B.130(2)(c). *Id.*

8 **B. WHITFIELD’S PETITION FOR JUDICIAL REVIEW FAILED TO NAME AS RESPONDENTS ALL**
9 **PARTIES OF RECORD AND MUST BE DISMISSED AS A MATTER OF LAW.**

10 Again, NRS 233B.130(2)(a) requires that the petition for judicial review name as respondents
11 the agency and all parties of record to the administrative proceeding. In *Washoe County v. Otto*, the
12 Nevada Supreme Court specifically concluded that “pursuant to NRS 233B.130(2)(a), it is **mandatory**
13 to name all parties of record in a petition for judicial review of an administrative decision, and a district
14 court **lacks jurisdiction** to consider a petition that fails to comply with this requirement.” *Id.* (Emphasis
15 added). Indeed, in *Otto* the Nevada Supreme Court specifically found that petitioner Washoe County
16 had failed to comply with NRS 233B.130(2)(a) because Washoe County did not “name any
17 [respondent] taxpayer individually in the caption, in the body of the amended petition, or in an
18 attachment.” *Id.* at 430; *See also Sierra Club v. State Div. of Environmental Protection*, No. 59906,
19 2013 WL 7158582 at 2 (Nev. Dec. 19, 2013) (unpublished) (concluding that the organization “failed to
20 comply with the NRS 233B.130(2)(a) mandatory requirements when it failed to name the SEC as a
21 respondent in its petition for judicial review”); *Cooper Roofing and Solar, LLC v. Chief Administrative*
22 *Officer of Occupational Safety & Health Admin.* No. 67914, 2016 WL 2957129, at 2 (Nev. May 19,
23 2016) (unpublished) (holding that Occupational Safety and Health Review Board was an independent
24 agency that must be named separately from Nevada OSHA in petition for judicial review).

25 Here, Mr. Whitfield does not name any party as a respondent in either the caption or the body of
26 the Petition for Judicial Review. *See generally*, Petition for Judicial Review. Nor did Mr. Whitfield
27 incorporate by reference Hearing Officer Ward’s Decision and Order or attach the Decision and Order
28 to the Petition for Judicial Review. *Id.* In fact, Mr. Whitfield only names himself as “petitioner” and no

1 other party is named as a respondent. *Id.* As such, Mr. Whitfield irrefutably failed to comply with the
2 mandatory and jurisdictional naming requirements of NRS 233B.130(2)(a) when he neglected to
3 properly name: (1) the Department of Corrections; (2) the State of Nevada; (3) the Department of
4 Administration; (4) the Personnel Commission; and (5) the Hearing Officer—all of whom were either
5 the subject agency or parties of record to the administrative proceeding. *See Otto*, 128 Nev. at 430; *see*
6 *also* NRS 233B.035 (defining “[p]arty” as “each person . . . named or admitted as a party, or properly
7 seeking and entitled as of right to be admitted as a party, in any contested case.”) Again, *Otto* instructs
8 that a party must “strictly comply” with the naming requirements of NRS 233B.130(2)(a); however,
9 Mr. Whitfield did not even substantially comply (much less strictly comply) with these statutory
10 requirements. *Id.* at 431.

11 Furthermore, *Otto* instructed that a district court lacks jurisdiction to permit a petitioner to
12 amend his/her petition for judicial review outside of the APA's 30-day time limit. *Id.* at 435. As such,
13 Mr. Whitfield can no longer correct his defective Petition, since the APA's 30-day filing deadline
14 expired on April 3, 2019. *See* NRS 233B.130(2)(c). Accordingly, this Court lacks subject matter
15 jurisdiction over Mr. Whitfield's Petition for Judicial Review, which cannot be cured and must
16 therefore be dismissed with prejudice.

17 Lastly, as an equally-important side matter, NRS 41.031 establishes that the State of Nevada is
18 ordinarily exempt from lawsuits under sovereign immunity but has allowed itself to be sued as a party
19 under certain circumstances, so long as certain requirements are met. NRS 41.031(2) provides that “[i]n
20 any action against the State of Nevada, the action **must** be brought in the name of the State of Nevada
21 on relation of the particular department, commission, board or other agency of the State whose actions
22 are the basis for the suit.” *See* NRS 41.031(2) (emphasis added); *see also Otto*, 128 Nev. at 432
23 (holding that the word “must” generally imposes a mandatory requirement). Here, Mr. Whitefield failed
24 to name either the Department of Corrections or the State of Nevada in his Petition for Judicial Review.
25 *See generally*, Petition for Judicial Review. Consequently, NDOC respectfully submits that Mr.
26 Whitfield's Petition for Judicial Review has arguably failed to invoke an exception to the State's
27 sovereign immunity, which therefore requires this matter to be dismissed as a matter of law.

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III.

CONCLUSION

Based on the foregoing, NDOC respectfully moves this Court to dismiss Michael Whitfield's Petition for Judicial Review with prejudice.

AFFIRMATION

The undersigned hereby affirms that the preceding document does not contain the social security number of any person.

DATED this 4th day of April 2019.

AARON D. FORD
Attorney General

By: /s/ Kevin A. Pick
Kevin A. Pick (Bar. No. 11683)
Deputy Attorney General
Attorneys for Respondent, State of Nevada
ex rel. Department of Corrections

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General,
3 and that on the 4th day of April 2019, I served a copy of the foregoing **MOTION TO DISMISS**
4 **PETITION FOR JUDICIAL REVIEW** by causing a true copy thereof to be filed with the Clerk of
5 the Court using the eFlex system and by depositing a true copy of the same for mailing addressed as
6 follows:

7 Michael Whitfield
8 PO Box 18421
9 Reno, NV 89511
10 *Petitioner-Employee*

11 Lorna L. Ward, Esq.
12 Hearing Officer
13 C/O Hearings Division
14 1050 West William Street, Suite 450
15 Carson City, Nevada 89701

16 Department of Administration
17 Hearings Division
18 1050 West William Street, Suite 450
19 Carson City, Nevada 89701

20 /s/ Ginny Brownell
21 An employee of the State of Nevada,
22 Office of the Attorney General
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INDEX OF EXHIBITS

Exhibit A Findings of Fact, Conclusions of Law and Decision

10 pages

EXHIBIT A

Findings of Fact, Conclusions of Law
and Decision

EXHIBIT A

BEFORE THE NEVADA STATE PERSONNEL COMMISSION
HEARING OFFICER

1050 E. WILLIAM, SUITE 450
CARSON CITY, NV 89701

FILED

MAR - 1 2019

DEPT. OF ADMINISTRATION
APPEALS OFFICER

MICHAEL WHITFIELD,
Petitioner-Employee,

APPEAL NO: 1803430-LLW

vs

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

STATE OF NEVADA DEPARTMENT OF
CORRECTIONS,
Respondent-Employer.

This matter was set for administrative hearing before the undersigned administrative hearing officer for the Nevada State Personnel Commission on December 14, 2018 pursuant to the Petitioner-Employee's appeal of his dismissal from state service, effective April 20, 2018. The Petitioner-Employee was represented by Doug Nicholson, Esq.¹ The Respondent-Employer, Nevada Department of Corrections (NDOC) was represented by and through its counsel, Adam Paul Laxalt, Attorney General of the State of Nevada², and Kevin A. Pick, Deputy Attorney General.

At the conclusion of the December 14, 2018 hearing this matter was submitted for decision and the record closed as of that date. However, Mr. Whitfield submitted his closing argument with several documents attached. NDOC objected. After review of the additional documents, only one

¹ On January 2, 2019, prior to the submission of closing arguments, Mr. Nicholson filed a Withdrawal of Counsel. In addition, on January 2, 2019 Mr. Whitfield requested discovery. An order was issued granting Mr. Nicholson's request to withdraw as counsel and denying Mr. Whitfield's requests for discovery and a new hearing. Mr. Whitfield elected to proceed with closing argument on his own.

² Aaron D. Ford became Attorney General as of January 2019.

1 is relevant. The August 29, 2018 Superior Court of California, County of Santa Clara Order is
2 admitted as Exhibit 2 over the objection of NDOC as it had been previously provided and it was
3 discussed at the hearing.

4 Therefore, the evidence of record consists of the testimony of six witnesses, including Mr.
5 Whitfield, and Employer Exhibits A-K, and Employee Exhibits 1-2.

6 Having heard the testimony and considered the exhibits and the arguments of the parties,
7 the hearing officer finds as follows:

8 FINDINGS OF FACT

9 Mr. Whitfield was employed as a correctional officer at NDOC for approximately 13
10 years prior to his dismissal. He last qualified with a firearm on June 22, 2017. Exhibit B, page
11 17. In August 2017 he was a correctional officer III assigned to Warm Springs Correctional
12 Center. Exhibit B, page 3. On August 2, 2017 an Order of Protection was entered against him by
13 the Superior Court of California, County of Santa Clara effective August 2, 2017 through August
14 2, 2020. Exhibit C, pages 18-24. Among other provisions, the Order instructed that Whitfield
15 "cannot own, possess, have, buy, or try to buy, receive or try to receive, or in any other way get
16 guns, other firearms, or ammunitions" while the order is in effect. See Exhibit C, page 23. There
17 were no exceptions to these prohibitions.

18 Whitfield was required by Nevada law to qualify with a firearm biannually in order to
19 maintain a basic POST (Police Officer Standards & Training) certificate. In addition, an
20 essential job function of a correctional officer includes the requirement to carry a firearm and
21 qualify biannually with a firearm. Whitfield did not dispute that carrying a firearm was a
22 condition of his employment.

23 Elizabeth Walsh, Associate Warden at Warm Springs Correctional Center, was notified
24 of the Order of Protection on August 8, 2017. On September 8, 2017 Whitfield was temporarily
25 assigned to administrative duties that did not require the use of a firearm. Exhibit E, page 31.
26 Associate Warden Walsh testified that she was under the impression that he was going to court to
27 resolve the TRO issue. Walsh testified that she talked to him several times and treated him fairly.
28 She gave him extra time off and extended the time frame for him to resolve his issue with the
California court. She further testified that she could not simply allow an officer to not qualify
with a firearm. She testified that she had never had this situation happen before.

1 On November 17, 2017 Walsh issued a Letter of Instruction to Whitfield regarding his
2 failure to address the Order of Protection and the firearm prohibition. Exhibit F, pages 32-33. He
3 was given until December 17, 2017 to resolve this issue.

4 On December 27, 2017 Associate Warden Walsh issued a second letter outlining the
5 situation and giving Whitfield until January 5, 2018 to resolve the firearm prohibition so that he
6 could qualify with a firearm and maintain his POST requirements. She noted that compliance
7 with mandatory firearm proficiency standards and the ability to use a firearm and ammunition
8 are essential functions of his current position at NDOC. See Exhibit G, pages 34-35.

9 In addition, the letter stated that Whitfield had inquired several times about vocational
10 rehabilitation and/or job re-training and Walsh gave him instructions to contact the Department
11 of Training and Rehabilitation (DETR) with contact information. She also informed him of the
12 procedure for applying for other positions at NDOC. Id.

13 Whitfield testified that he tried three times in the fall of 2017 to get the Protective Order
14 modified and was unsuccessful. He testified that he requested leave without pay on several
15 occasions in December 2017 and that it was denied. See Exhibit 1.

16 The first request was denied by Perry Russell, Warden of Warm Springs Correctional
17 Center. Warden Russell testified that he told Whitfield that he would not grant leave for an
18 indefinite period of time. Exhibit 1, page 1. The second request was for 3 weeks of leave,
19 however no reason was given and was denied by Associate Warden Walsh. Exhibit 1, page 2.
20 Whitfield noted on the third request that he had no work and "if I cannot be productive, I prefer
21 time off". Exhibit 1, page 3. This request shows no supervisor response, and therefore, no
22 evidence that it was submitted to NDOC.

23 Whitfield was unable to obtain modification or exception to the firearms prohibition. In
24 fact, there was no evidence that he attempted to return to court in early 2018. NDOC kept him in
25 the administrative position for over seven months in an effort to allow him to get his firearm
26 privileges reinstated. On March 1, 2018 Whitfield was served with a Notice of Allegations
27 Administrative Investigation. Exhibit B, page 14.

28 //

//

//

1 On April 9, 2018 Whitfield was served with a Specificity of Charges. Exhibit B, pages 2-
2 17. The charges are as follows:

3
4 A. NAC 284.650 Causes for disciplinary action (NRS 284.065, 284.155, 284.383).
5 Appropriate disciplinary or corrective action may be taken for the following causes:

6 NAC 284.650(1) Activity which is incompatible with an employee's conditions of
7 employment established by law or which violates a provision of
8 NAC 284.653 or NAC 284.738 to 284.771, inclusive.

9 NAC 289.230 Basic or reserved certificate: Requirements for maintaining
10 certificate and resuming duties. (NRS 289.510, 289.590)

11 B. AR 339.07 CLASS OF OFFENSE GUIDELINES

12 AR 339.07.15 NEGLECT OF DUTY

13 UU. Failure to meet Peace Officer Standards & Training (POST) requirements.
14 Class 5

15 C. AR 362 WEAPONS TRAINING AND QUALIFICATION

16 As a Category III Peace Officer for the State of Nevada, one of Michael Whitfield's
17 essential job includes the ability to carry a firearm and to qualify biannually with a firearm.
18 However, the Order of Protection entered against Michael Whitfield makes it illegal for him to
19 use, receive, possess, or any other way get a firearm and ammunition while the Order is in effect.
20 As such, since the issuance of the August 2, 2017, Order of Protection, Michael Whitfield has
21 been unable to satisfy his Peace Officer Standards & Training (POST) requirements or the
22 Weapons Training and Qualifications requirements set forth in NDOC Administrative
23 Regulation 362. Based on the foregoing, it has been determined to be for the good of the public
24 service to recommend that Correctional Officer Michael Whitfield be dismissed from state
25 service.

26 The Specificity of Charges noted that Whitfield had one prior disciplinary action and all
27 of his evaluations met standards. A pre-disciplinary hearing was held by Associate Warden
28 Brian Ward on April 18, 2018. Exhibit I. Whitfield argued, among other things, that NAC

1 284.611 applied in his case.³ After the hearing Associate Warden Ward recommended that the
2 disciplinary sanction of termination from state service be upheld.

3 Officer Whitfield was dismissed from state service effective April 20, 2018. Exhibit A.
4 He timely appealed asking "be retrained for another position". Exhibit J, page 68.

5 Over four months later, on August 29, 2018, the Superior Court of California, County of
6 Santa Clara entered another order regarding the Protective Order. Exhibit 2. The only change
7 was as follows:

8 Upon proof from Respondent that he has employment as a peace officer, the Court
9 hereby grants an exemption to the firearms relinquishment requirement related to the
10 domestic violence restraining order. This exemption is not in place until respondent
11 has provided that proof and the Court issues a further order.

Exhibit 2.

12 Perry Russell, Warden of Warm Springs Correctional Center, testified that the safety and
13 security of the institution would be affected by the inability of an officer to carry a firearm, and
14 that it is a condition of employment. He testified that Officer Whitfield was treated fairly. He
15 was given a list of jobs by human resources. In addition, he testified that NDOC was not
16 obligated to place him in an administrative position in September 2017 and could have
17 disciplined him at that time.

18 Warden Isidro Baca testified that the failure to qualify and maintain POST recertification
19 was incompatible with employment and that is a minimum Category 5 offense with dismissal
20 mandatory on the first offense.

21 Deputy Director of NDOC, Harold Wickham, also testified that a failure to maintain
22 POST requirements was incompatible with employment as a correctional officer. He further
23 testified that it was a Class 5 offense and the minimum level of discipline is dismissal. He noted
24 that Whitfield was still not qualified and could not resume duties as a correctional officer. He
25 stated that the dismissal was for the good of the public service because a correctional officer
26 must maintain POST certification and it is essential for an officer to be able to use firearms for
27 the safety and security of the institution.

28 ³ However, NAC 284.611 only applies to separation from state service for physical, mental or
emotional disorders. None of which applies in this case.

1 Associate Warden Walsh, Associate Warden Ward, Warden Russell and Warden Baca
2 and Deputy Director Wickham all testified that NDOC has never allowed officers to neglect their
3 biannual firearms qualification requirements. POST is a separate agency and monitors firearms
4 qualification of correctional officers.

5 At the time of the December 14, 2018 hearing the firearms prohibition was still in effect
6 and it is still unlawful for him to use firearms. Therefore, he was and is unable to complete his
7 biannual firearm qualification for either the second half of 2017 and all of 2018.

8 ARGUMENT OF THE PARTIES

9 Officer Whitfield argues that he was a victim of domestic battery in November 2016.⁴
10 He states in his closing argument that he requested advice and assistance from NDOC in
11 handling his problem but that no one would help him. He also states that he believed other
12 officers in similar circumstances were given time off.⁵ He also argues that NAC 284.578(8)
13 applies to him as a victim of domestic violence. This regulation does not apply to Officer
14 Whitfield as there is no evidence that he is a victim. In fact, the opposite is true as he was issued
15 an Order of Protection ordering no contact with several individuals in California.

16 Officer Whitfield cites two other regulations, NAC 284.618, and NAC 289.200, neither
17 of which applies to his situation. He further argues that NRS 33.031 would allow the court to
18 give him a limited exception to the firearms prohibition. However, NRS 33.031 is a Nevada
19 statute, not valid in California, and it allows a Nevada court to include the exception, but
20 certainly does not mandate it. In addition, the California court refused to issue an exemption
without proof of current peace officer employment.

21 NDOC argues that Officer Whitfield admitted that the August 2017 restraining order
22 prohibited him from maintaining his POST requirement and that the ability to use a firearm was
23

24
25
26 ⁴ There is no evidence of this assertion.

27 ⁵ There is no evidence of similar circumstances. The situation of the individual mentioned by
28 Whitfield is not similar. That individual was apparently involved in a marriage breakup, and there is no evidence of
a restraining order with a firearm prohibition.

1 a condition of his employment. Further NDOC notes that Officer Whitfield is required to
2 complete biannual firearm qualification and that the last time he did so was June 2017.

3 In addition, NDOC argues that Whitfield's violations were serious because a violation of
4 AR 339.07.15 (UU) mandates termination for a first offense. NDOC asserts that Whitfield's
5 termination served the good of the public service and that NDOC's decision is entitled to
6 deference.

7 Last, NDOC argues that Whitfield can not be reinstated and resume his duties as a
8 correctional officer because he must first qualify with firearms, and he is unable to do so with the
9 current Order of Protection.

10 DISCUSSION AND CONCLUSIONS OF LAW

11
12 Officer Whitfield's appeal was timely filed and the determination of the merits of the
13 appeal is properly within the jurisdiction of the commission.

14 The authority granted the hearing officer is to determine the reasonableness of the
15 disciplinary action taken against an employee and to determine whether the agency had just
16 cause for the discipline as provided in NRS 284.385. See NRS 284.390 (1) and (6).

17 The employer has the burden of proof to present evidence and argument to prove the
18 allegations presented in the specificity of charges. The "standard of proof is the 'degree or level
19 of proof demanded' to prove a specific allegation." Nassiri and Johnson v. Chiropractic
20 Physicians' Board of Nevada, 130 Nev.Ad.Op. 27 (2014) at 5. The Supreme Court of Nevada
21 further opined "that the preponderance-of-the-evidence standard is the minimum civil standard
22 of proof", and "that the preponderance of the evidence amounts to whether the existence of the
23 contested fact is found to be more probable than not." Id. at 8 and 9.

24 In O'Keefe v. Nevada Dept of Motor Vehicles, 134 Nev.Ad.Op. 92 (2018) at 12-13, the
25 Nevada Supreme Court held that when an employee requests a hearing to challenge an agency
26 decision to terminate him as a first-time disciplinary measure, the hearing officer must determine
27 the reasonableness of the agency decision by conducting a three-step process. First, the hearing
28 officer conducts a de novo review of the evidence to determine whether a violation actually
occurred. Id. at 12. Second, the hearing officer reviews whether the violation is "serious" so as

1 to warrant termination. A violation is deemed to be serious as a matter of law if termination is
2 available as a first-time disciplinary action. Id. at 12-13. Last, the hearing officer reviews
3 whether the termination is for the “good of the public service” giving deference to the agency’s
4 determination. Id. at 13.

5 Officer Whitfield clearly and by a preponderance of the evidence violated
6 AR 339.07.15 (UU) and NAC 284.650 (1). He failed to maintain his POST requirements as
7 required by AR 339.07.15 (UU) and his failure to qualify biannually and his inability to use a
8 firearm violated NAC 284.650 (1) because such is incompatible with an employee’s condition of
employment established by statute and regulation.

9 Officer Whitfield failed to maintain his POST requirements in accordance with NAC
10 Chapter 289 and AR 339.07.15 (UU) and the ability to use a firearm is a condition of
11 employment for correctional officers. He was given more than 8 months to rectify the situation
12 and was unable to do so. There is no question that Officer Whitfield was unable to legally use a
13 firearm from August 2, 2017 to the present. The violation of AR 339.07.15 (UU) failure to
14 maintain POST requirements is a Class 5 offense with dismissal recommended for a first offense.

15 There is no evidence that other officers, in the same situation as Officer Whitfield, were
16 treated differently by NDOC. NDOC has proven by a preponderance of the evidence and
17 Whitfield’s own admissions that he violated AR 339.07.15 (UU) and NAC 284.650 (1).
18 Violation of AR 339.07.15 (UU) is a “serious” offense as evidenced by the fact that NDOC has
19 determined that a violation warrants dismissal on a first offense. This determination is given
20 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.

21 The dismissal of Officer Whitfield was for the good of the public service as determined
22 by NDOC. The dismissal was reasonable in light of all of the facts and the applicable law.

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1 DECISION

2 Based on the foregoing Findings of Fact, Conclusions of Law and Discussion and Good
3 Cause Appearing therefore,

4 IT IS HEREBY ORDERED:

5 That the preponderance of the evidence establishes that the dismissal of Officer Michael
6 Whitfield has been shown to be for the good of the public service, and that the decision of the
7 Nevada Department of Corrections to dismiss Officer Whitfield from state service is
8 AFFIRMED.

9 IT IS SO ORDERED.

10
11 

12 Lorna L. Ward
13 HEARING OFFICER
14

15 NOTICE: Pursuant to NRS 233B.130 should any party desire to appeal this final decision of the
16 Hearing Officer, a Petition for Judicial Review must be filed with the district court within thirty
17 (30) days after service by mail of this decision.
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CERTIFICATE OF MAILING

The undersigned, an employee of the State of Nevada, Department of Administration, Hearings Division, does hereby certify that on the date shown below, a true and correct copy of the foregoing **Decision** was deposited into the State of Nevada Interdepartmental mail system, **OR** with the State of Nevada mail system for mailing via United States Postal Service, **OR** placed in the appropriate addressee runner file at the Department of Administration, Hearings Division, 1050 E. Williams Street, Suite 450, Carson City, Nevada, 89701 to the following:

MICHAEL WHITFIELD
PO BOX 18421
RENO, NV 89511

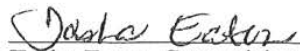
JAMES DZURENDA DIRECTOR
DEPARTMENT OF CORRECTIONS
3955 W RUSSELL RD
LAS VEGAS, NV 89118

DEPARTMENT OF CORRECTIONS
NEVADA DEPARTMENT OF CORRECTIONS
5500 SNYDER AVE BLDG 17
CARSON CITY NV 89702

KEVIN PICK ESQ
OFFICE OF THE ATTORNEY GENERAL
5420 KIETZKE LN STE 202
RENO NV 89511

HUMAN RESOURCE MANAGEMENT
100 N STEWART ST STE 200
CARSON CITY NV 89701

Dated this 1 day of March, 2019.



Tasha Eaton, Supervising Legal Secretary
Employee of the State of Nevada

Office of the Attorney General
Reno, Nevada

MAR - 4 2019

Bureau of the Attorney General
Personnel Section

JA038

1 3960
AARON D. FORD
2 Attorney General
KEVIN A. PICK
3 Deputy Attorney General
Nevada Bar No. 11683
4 5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
5 (775) 687-2100
Email: kpick@ag.nv.gov
6 *Attorneys for Respondent State of Nevada*
ex rel. Department of Corrections
7

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

10
11 IN THE MATTER OF:
12 MICHAEL WHITFIELD
(Appeal No. 1803430-LLW)
13
14 Petitioner,
15

Case No. CV19-00641
Dept. No. 1

16 **STATEMENT OF INTENT TO PARTICIPATE**
17 **IN PETITION FOR JUDICIAL REVIEW**

18 Respondent, State of Nevada, Department of Corrections (hereinafter "NDOC"), by and
19 through its attorneys, Nevada Attorney General, Aaron D. Ford, and Deputy Attorney General, Kevin
20 A. Pick, hereby notifies the District Court and all interested parties pursuant to NRS 233B.130(3),
21 that it intends to participate in the Petition for Judicial Review filed in the Second Judicial District
22 Court by Michael Whitfield on March 20, 2019.

23 NDOC denies the allegations of errors set forth in the Petition for Judicial Review.

24 By filing this Notice of Intent to Participate, NDOC does not waive any defenses, including
25 the ability to contest subject matter jurisdiction and the Petitioner's compliance with NRS 233B.130.

26 **NOTICE IS HEREBY GIVEN** that all documents to Respondent, NDOC, should be
27 addressed as follows: Office of the Attorney General, Attention: Kevin A. Pick, 5420 Kietzke Lane,
28 Suite 202, Reno, Nevada, 89511.

1 **WHEREFORE**, Respondent State of Nevada, Department of Corrections, prays that the
2 Court dismiss the Petition as a matter of law, affirm the decision of the Hearing Officer, and for such
3 other and further relief as the Court may deem just and proper.

4 **AFFIRMATION**

5 The undersigned hereby affirms that the preceding document does not contain the social
6 security number of any person.

7 DATED this 4th day of April 2019.

8 AARON D. FORD
9 Attorney General

10 By: /s/ Kevin A. Pick
11 Kevin A. Pick (Bar. No. 11683)
12 Deputy Attorney General
13 *Attorneys for Respondent, State of Nevada*
14 *ex rel. Department of Corrections*
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General,
3 and that on the 4th day of April 2019, I served a copy of the foregoing STATEMENT OF INTENT
4 TO PARTICIPATE IN PETITION FOR JUDICIAL REVIEW by causing a true copy thereof to be
5 filed with the Clerk of the Court using the eFlex system and by depositing a true copy of the same for
6 mailing addressed as follows:

7 MICHAEL WHITFIELD
8 PO Box 18421
9 Reno, NV 89511
10 *Petitioner-Employee*

11 Lorna L. Ward, Esq.
12 Hearing Officer
13 C/O Hearings Division
14 1050 West William Street, Suite 450
15 Carson City, Nevada 89701

16 Department of Administration
17 Hearings Division
18 1050 West William Street, Suite 450
19 Carson City, Nevada 89701

20 /s/ Ginny Brownell
21 An employee of the State of Nevada,
22 Office of the Attorney General
23
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28

1 Code: 1110
Michael Whitfield
2 P.O. Box 18421
3 Reno, NV 89511
(775) 737-3493
4 Email: mwhitfi2000@gmail.com
5 Self-Represented Litigant

6
7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF WASHOE

9 * * *

10 IN THE MATTER OF: Case No. CV19-00641
11
12 MICHAEL WHITFIELD Dept. No. 1
(Appeal No. 1803430-LLW)

13 Petitioner,

14
15 vs.

16 NEVADA STATE PERSONNEL
17 COMMISSION, STATE OF NEVADA
18 DEPARTMENT OF ADMINISTRATION,
LORNA WARD, APPEALS OFFICER, and
19 JAMES DZURENDA, NEVADA
DEPARTMENT OF CORRECTIONS,
20 As Employer,

21 Respondents.
22 _____/

23 **AMENDED PETITION FOR JUDICIAL REVIEW**

24 **COMES NOW**, Petitioner, and hereby amends his Petition for Judicial Review
25 pursuant to NRCP Rule 15(a). Petitioner served James Dzurenda, Nevada
26 Department of Corrections, on March 26, 2019, State of Nevada Department of
27 Administration on March 25, 2019 and the State of Nevada Human Resource
28 Management on March 26, 2019. Petitioner is well within the time frame of 21 days
to amend pursuant to Rule 15(a)(1)(A).

1 This amendment is necessitated to correct the Caption of said Petition.
2 Petitioner inadvertently erred in not listing the Respondents within the caption of his
3 petition and hereby files this amended petition in order to correct said error.

4 **NOTICE IS HEREBY GIVEN** that Petitioner, in the above-entitled action, does
5 hereby Petition to the Second Judicial District Court for Judicial Review from the final
6 judgment of the Nevada State Personnel Commission in this action. Said judgment
7 was rendered on March 1, 2019, finding Petitioner ineligible for reinstatement/rehire
8 to his position as Nevada Department of Corrections. Petitioner alleges as follows:

- 9
- 10 1. That the decision was not supported by substantial evidence;
 - 11 2. That the decision was arbitrary and capricious;
 - 12 3. That the decision was marked by an abuse of discretion; and
 - 13 4. That the decision was improper as a matter of law.

14 WHEREFORE, the Petition, Michael Whitfield, asks for the following relief:

- 15
- 16 1. That the decision of the Nevada State Personnel Commission be
17 reversed, and the Petitioner be determined to be eligible for
18 reinstatement/rehire to his former position;
 - 19 2. That this court grant such other and further relief as may be just, equitable,
20 and proper.

21 **This document does not contain the personal information of any person
22 as defined by NRS 603A.040.**

23 Dated this 8th day of April, 2019

24 /s/ Michael Whitfield
25 Michael Whitfield
26 Petitioner in Proper Person
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 9th day of April 2019, I served a copy of the foregoing **AMENDED PETITION FOR JUDICIAL REVIEW** by causing a true copy thereof to be filed with the Clerk of the Court using the eFlex system and by depositing a true copy of the same for mailing addressed as follows:

- Kevin Pick, Esq.
Deputy Attorney General
5420 Kietzke Lane, Suite 202
Reno, NV 89511
- Lorna L. Ward, Esq.
Hearing Officer
c/o Hearings Division
1050 West William Street, Suite 450
Carson City, NV 89701
- Department of Administration
Hearing Division
1050 West William Street, Suite 450
Carson City, NV 89701
- Human Resource Management
209 East Musser Street, Suite 101
Carson City, Nevada 89701-4204

/s/ Michael Whitfield
Michael Whitfield
Petitioner in Proper Person

1 Code: 2645
Michael Whitfield
2 P.O. Box 18421
3 Reno, NV 89511
(775) 737-3493
4 Email: mwhitfi2000@gmail.com
5 Self-Represented Litigant
6

7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF WASHOE
9

10 * * *

11 IN THE MATTER OF: Case No. CV19-00641
12 MICHAEL WHITFIELD Dept. No. 1
(Appeal No. 1803430-LLW)

13 Petitioner,
14

15 vs.

16 NEVADA STATE PERSONNEL
17 COMMISSION, STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION,
18 LORNA WARD, APPEALS OFFICER, and
JAMES DZURENDA, NEVADA
19 DEPARTMENT OF CORRECTIONS,
20 As Employer,

21 Respondents.
22 _____/

23 **OPPOSITION TO MOTION TO DISMISS**

24 **PETITION FOR JUDICIAL REVIEW**

25 Petitioner, hereby submits his Opposition to Respondent's Motion to Dismiss

26 Petition for Judicial Review.

27 //

28 //

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. INTRODUCTION**

3 Dismissal of Petition for Judicial Review is not appropriate.

4 **2. FACTUAL BACKGROUND**

5 Petitioner was employed as a correctional officer at NDOC for approximately
6 13 years. On August 2, 2017 and Order of Protection was entered against Petitioner
7 which temporarily prohibited Petitioner from carrying a firearm. Petitioner was
8 required to qualify with a firearm biannually in order to maintain a basic POST
9 certificate which was a mandatory requirement for his position as a correctional
10 officer. Petitioner was "temporarily" assigned to an administrative position. Petitioner
11 was required to resolve the Order of Protection and obtain his firearm privileges.
12 Petitioner was dismissed from his position on April 20, 2018. Petitioner's firearm
13 privileges were reinstated on August 29, 2018, contingent upon his rehire with
14 NDOC. This matter was heard on appeal, by the Nevada State Personnel
15 Commission on December 14, 2018 with a final decision being issued on March 1,
16 2019. Petitioner filed his request for Judicial Review on March 20, 2019. Petitioner
17 served James Dzurenda, Nevada Department of Corrections, on March 26, 2019,
18 State of Nevada Department of Administration on March 25, 2019 and the State of
19 Nevada Human Resource Management on March 26, 2019. An Amended Petition
20 for Judicial Review was filed on April 8, 2019, pursuant to NRCP Rule 15(a)(1)(A)
which correctly identifies the Respondents in this matter.

21 **3. ARGUMENT**

22 As Petitioner has corrected his inadvertent error of not identifying
23 Respondents within the Caption of his pleading, Respondent NDOC's motion for
24 dismissal is moot.

25 Additionally, pursuant to *Prevost v. State of Nevada et. al.*, 134 Nev.,
26 Advance Opinion 42, the failure to name a party of record in the caption of a petition
27 for judicial review is not jurisdictionally fatal under NRS 233B.130(2)(a). As such
dismissal is not required.

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4. CONCLUSION

Based on the foregoing, Petitioner respectfully moves this Court to deny NDOC’s Motion for Dismissal of his Petition for Judicial Review.

This document does not contain the personal information of any person as defined by NRS 603A.040.

Dated this 9th day of April, 2019

/s/ Michael Whitfield
Michael Whitfield
Petitioner in Proper Person

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 9th day of April 2019, I served a copy of the foregoing **OPPOSITION TO MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW** by causing a true copy thereof to be filed with the Clerk of the Court using the eFlex system and by depositing a true copy of the same for mailing addressed as follows:

- Kevin Pick, Esq.
Deputy Attorney General
5420 Kietzke Lane, Suite 202
Reno, NV 89511
- Lorna L. Ward, Esq.
Hearing Officer
c/o Hearings Division
1050 West William Street, Suite 450
Carson City, NV 89701
- Department of Administration
Hearing Division
1050 West William Street, Suite 450
Carson City, NV 89701
- Human Resource Management
209 East Musser Street, Suite 101
Carson City, Nevada 89701-4204

/s/ Michael Whitfield
Michael Whitfield
Petitioner in Proper Person

2540
AARON D. FORD
Attorney General
KEVIN A. PICK
Deputy Attorney General
State of Nevada
Office of the Attorney General
Nevada Bar No. 11683
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
(775) 687-2100
Email: kpick@ag.nv.gov
Attorneys for Respondent State of Nevada
ex rel. Department of Corrections

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF:

Case No. CV19-00641

MICHAEL WHITFIELD
(Appeal No. 1803430-LLW)

Dept. No. 1

Petitioner,

NOTICE OF ENTRY OF ORDER

TO: Petitioner Michael Whitfield:

PLEASE TAKE NOTICE that on June 24, 2019, the Court entered an Order Granting Motion to Dismiss Petition for Judicial Review, a true and correct copy of which is attached to this Notice as Exhibit 1.

AFFIRMATION

The undersigned hereby affirms that the preceding document does not contain the social security number of any person.

DATED this 24th day of June 2019.

AARON D. FORD
Attorney General

By: /s/ Kevin A. Pick
Kevin A. Pick (Bar. No. 11683)
Deputy Attorney General
Attorneys for Respondent, State of Nevada
ex rel. Department of Corrections

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MICHAEL WHITFIELD
PO Box 18421
Reno, NV 89511
Petitioner-Employee

Department of Administration
Hearings Division
1050 West William Street, Suite 450
Carson City, Nevada 89701

/s/ Ginny Brownell
An employee of the State of Nevada,
Office of the Attorney General

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INDEX OF EXHIBITS

Exhibit 1 Order Granting Motion to Dismiss Petition for Judicial Review 7 pages

EXHIBIT 1

Order Granting Motion to Dismiss Petition for
Judicial Review

EXHIBIT 1

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

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

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

However, in the *Reply*, NDOC asserts that the filing of the Amended Petition does not cure Petitioner’s failure, as the Amended Petition is untimely, pursuant to NRS 233B.130(2)(d), as the Amended Petition was not filed within 30 days from when Petitioner was served with the 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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CERTIFICATE OF SERVICE

CASE NO. CV19-00641

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


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

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

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

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

NONE


DANIELLE KENT
Department 1 Judicial Assistant

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

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

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

However, in the *Reply*, NDOC asserts that the filing of the Amended Petition does not cure Petitioner’s failure, as the Amended Petition is untimely, pursuant to NRS 233B.130(2)(d), as the Amended Petition was not filed within 30 days from when Petitioner was served with the 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
16
17
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19 
20 DANIELLE KENT
21 Department 1 Judicial Assistant
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Code: 2175
Michael Whitfield
P.O. Box 18421
Reno, NV 89511
(775) 737-3493
Email: mwhitfi2000@gmail.com
Self-Represented Litigant

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

* * *

IN THE MATTER OF: Case No. CV19-00641
MICHAEL WHITFIELD Dept. No. 1
(Appeal No. 1803430-LLW)

Petitioner,

vs.

NEVADA STATE PERSONNEL
COMMISSION, STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION,
LORNA WARD, APPEALS OFFICER, and
JAMES DZURENDA, NEVADA
DEPARTMENT OF CORRECTIONS,
As Employer,

Respondents.

MOTION FOR RECONSIDERATION

COMES NOW, Petitioner, MICHAEL WHITEFIELD, in proper person, and
respectfully requests reconsideration of the Court's Order, dated June 24, 2019.

This Motion is based on the Memorandum of Points and Authorities as referenced
and attached hereto, as well as all other pleadings and papers on file with this Court.

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MEMORANDUM OF POINTS AND AUTHORITIES

1. ARGUMENTS

Respectfully, and with all deference to the Court, the Court's Order, granting the Defendants' Motion to Dismiss, is erroneous and unsupported by the evidence.

In reviewing a motion to dismiss, the court should determine whether the pleading states allegations sufficient to make out the elements of a right to relief. *Edgar v. Wagner*, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985). In determining whether the pleadings are sufficient, the court is bound to accept all the factual allegations in the complaint as true. *Marcoz v. Summa Corporation*, 106 Nev. 737, 739, 801 P.2d 1346, 1347 (1990). Most importantly, a claim should not be dismissed unless it appears to a certainty that the plaintiff/petitioner is not entitled to relief under any set of facts which could be proved in support of the claim. *Hale v. Burkhardt*, 104 Nev. 632, 636, 764 P.2d 866, 868 (1988).

In *Prevost v. State of Nevada et. al.*, 134 Nev., Advance Opinion 42, Prevost named CCMSI in the body of the petition through incorporation by reference of the administrative decision, which Prevost also attached as an exhibit to the petition. See NRCP 10(c) ("Statements in a pleading may be adopted by reference in a different part of the same pleading. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."). The court concludes that this is sufficient to satisfy NRS 233B.130(2)(a), which requires that "the agency and all parties of record to the administrative proceeding" be named as respondents, but does not explicitly require that the parties be named in the caption of the petition. Petitioner's failure to name a party of record in the caption of a petition for judicial review **is not jurisdictionally fatal under NRS 233B.130(2)(a)**. As such dismissal is not required, unwarranted and in this case, does not serve justice.

1 Plaintiff's claims have significant merit and Defendants' Motion to Dismiss was
2 based on a mere technicality.

3 **Defendants' Motion to Dismiss Lacked Merit**

4 As previously asserted, Petitioner argues that he has in fact complied with NRS 233B
5 by properly naming the Respondents within the body of his Petition for Judicial Review and
6 therefore Defendants' Motion to Dismiss should be denied.
7

8 **Deficiencies were corrected via the Amended Petition**

9 Additionally, even if the court continues to find merit in Defendants' arguments, the
10 Court's order was erroneous for failing to accept Petitioner's Amended Petition which fully
11 corrected the caption's deficiencies and was filed well within the time frame of 21 days to
12 amend pursuant to Rule 15(a)(1)(A). "Leave to amend should be freely given when justice
13 requires, and a request to amend should not be denied simply because it was made in open
14 court rather than by formal motion." *Weiler v. Ross*, 80 Nev. 380, 382, 395 P.2d 323, 324
15 (1964). Additionally, if a complaint can be amended to state a claim for relief, leave to
16 amend, rather than dismissal, is the preferred remedy. *Cohen v. Mirage Resorts, Inc.*, 62
17 P.3d 720, 734 (Nev.,2003).
18
19

20 In the instant case, the Petition for Judicial Review has merit and Petitioner timely
21 filed his Amended Petition pursuant to Rule 15(a)(1)(A).
22

23 **2. CONCLUSION**

24 Based on the foregoing, Petitioner respectfully moves this Court to reconsider its
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Order for Dismissal and Reinstate the Briefing Schedule for this matter.

**This document does not contain the personal information of any person
as defined by NRS 603A.040.**

Dated this 2nd day of July, 2019

/s/ Michael Whitfield
Michael Whitfield
Petitioner in Proper Person

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 2ND day of July, 2019, I served a copy of the foregoing **MOTION FOR RECONSIDERATION** by causing a true copy thereof to be filed with the Clerk of the Court using the eFlex system and by depositing a true copy of the same for mailing addressed as follows:

Kevin Pick, Esq.
Deputy Attorney General
5420 Kietzke Lane, Suite 202
Reno, NV 89511

Lorna L. Ward, Esq.
Hearing Officer
c/o Hearings Division
1050 West William Street, Suite 450
Carson City, NV 89701

Department of Administration
Hearing Division
1050 West William Street, Suite 450
Carson City, NV 89701

Human Resource Management
209 East Musser Street, Suite 101
Carson City, Nevada 89701-4204

/s/ Michael Whitfield
Michael Whitfield
Petitioner in Proper Person

1 2645
2 AARON D. FORD
3 Attorney General
4 KEVIN A. PICK
5 Deputy Attorney General
6 Nevada Bar No. 11683
7 5420 Kietzke Lane, Suite 202
8 Reno, Nevada 89511
9 (775) 687-2100
10 Email: kpick@ag.nv.gov
11 *Attorneys for Respondent State of Nevada*
12 *ex rel. Department of Corrections*
13
14

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

11 IN THE MATTER OF:
12 MICHAEL WHITFIELD
13 (Appeal No. 1803430-LLW)
14 Petitioner.

Case No. CV19-00641
Dept. No. 1

15 **OPPOSITION TO PETITIONER'S**
16 **MOTION FOR RECONSIDERATION**

17 Respondent, State of Nevada, Department of Corrections (hereinafter "NDOC"), by and
18 through its attorneys, Nevada Attorney General, Aaron D. Ford, and Deputy Attorney General, Kevin
19 A. Pick, hereby submits its Opposition to Petitioner's Motion for Reconsideration. This Opposition is
20 made and based on the Memorandum of Points and Authorities set forth below, any exhibits attached
21 hereto, and all papers and pleadings on file herein.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I.**

24 **INTRODUCTION**

25 On April 4, 2019, NDOC moved this Court to dismiss with prejudice Michael Whitfield's
26 Petition for Judicial Review, because Mr. Whitfield had failed to comply with the mandatory and
27 jurisdictional requirements of NRS 233B.130(2). Specifically, Mr. Whitfield failed to name any
28 respondents in his Petition and thereby failed to invoke the subject matter jurisdiction of this Court.

1 *See Washoe Cty. v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 725 (2012) (explaining that a district court
2 lacks subject matter jurisdiction to consider a petition for judicial review where the petitioner fails to
3 comply with the statutory requirements for filing the petition); *see also Vaile v. Eighth Judicial Dist.*
4 *Court*, 118 Nev. 262, 276, 44 P.3d 506, 515–16 (2002) (providing that subject matter jurisdiction
5 cannot be waived). Similarly, NDOC contended that Mr. Whitfield failed to invoke an exception to the
6 State’s sovereign immunity when he neglected to name the State of Nevada, or any agency thereof, in
7 his defective Petition for Judicial Review. *See* NRS 41.031(2).

8 In response to NDOC’s Motion to Dismiss, Mr. Whitfield recognized his error and filed an
9 Amended Petition for Judicial Review on April 8, 2019, in which he named four new respondents that
10 were omitted from the original Petition for Judicial Review. However, the Amended Petition was
11 untimely and filed more than 30 days after Mr. Whitfield was served with the administrative decision
12 at issue. *See* NRS 233B.130(2)(d).

13 On April 9, 2019, Mr. Whitfield filed an Opposition to NDOC’s Motion to Dismiss, in which
14 Mr. Whitfield attempted to downplay his failure to comply with NRS 233B.130(2). Mr. Whitfield
15 argued that his failure to name any respondents in his Petition was not jurisdictionally fatal and that he
16 did not need to strictly comply with NRS 233B.130(2), citing the recent case of *Prevost v. State Dep’t*
17 *of Admin.*, 134 Nev. Adv. Op. 42, 418 P.3d 675, 677 (2018). *See* Opposition, at 2. Nowhere did the
18 Opposition dispute that Mr. Whitfield failed to invoke an exception to the State’s sovereign immunity
19 under NRS Chapter 41. *Id.* at 2–3.

20 In its Reply, NDOC re-emphasize that Whitfield must “strictly comply” with the naming
21 requirements of NRS 233B.130(2)(a). *See Otto*, 128 Nev. at 431. Moreover, the Petition did not
22 merely fail to name any respondents *in the caption*, as Whitfield argues in his Opposition, but Mr.
23 Whitfield failed to name any respondents anywhere *in either the caption or body* of the Petition. Nor
24 did the Petition attach or incorporate by reference any documents whatsoever. As such, this case was
25 readily distinguishable from *Prevost*, where the petitioner incorporated by reference and attached a
26 copy of the underlying administrative decision for purposes of satisfying the naming requirements of
27 NRS 233B.130(2)(a). *See Prevost*, 418 P.3d at 676. Accordingly, Mr. Whitfield did not “strictly
28 comply” with NRS 233B.130(2)(a) and Mr. Whitfield’s reliance on *Prevost* was misplaced.

1 Furthermore, NDOC also emphasized that the Supreme Court in *Otto* had expressly held that if an
2 “original petition fail[s] to invoke the district court's jurisdiction, [then] it could not properly be
3 amended outside of the filing deadline.” *See Otto*, 128 Nev. at 435. Therefore, since the filing deadline
4 for Mr. Whitfield’s Petition was April 3, 2019¹, the Petition could not, as a matter of law, be amended.

5 NDOC’s Motion to Dismiss was then submitted for decision and on June 24, 2019, this Court
6 issued its Order Granting Motion to Dismiss Petition for Judicial Review. As seen therien, the Court
7 found as follows: (1) that the original Petition failed to comply with the naming requirements of NRS
8 233B.130(2)(a); and (2) that the Amended Petition failed to cure Petitioner’s jurisdictionally defective
9 Petition, because the Amended Petition was not filed within 30 days after service of the final decision
10 of the agency. *See Order Granting Motion to Dismiss*, at 5–6. As a result of these findings, the Court
11 granted NDOC’s Motion to Dismiss. *Id.*

12 Mr. Whitfield now asks the Court to reconsider its June 24, 2019, Order based on the exact
13 same arguments which Mr. Whitfield offered in his April 9, 2019, Opposition. However, as discussed
14 below, this sort of motion is barred by Nevada case law governing reconsideration, the law-of-the-case
15 doctrine, and DCR 13(7). Even if the Court were to reconsider Mr. Whitfield’s previously-rejected
16 arguments, these arguments still lack merit and Mr. Whitfield still failed to strictly comply with the
17 naming requirements of NRS 233B.130(2)(a). As such, the Petition failed to vest jurisdiction with this
18 Court and the untimely Amended Petition was incapable, as a matter of law, of curing the defective
19 Petition. Accordingly, NDOC respectfully urges the Court to deny this Motion to Reconsider and to
20 once again affirm the legal conclusions reached in this Court’s June 24, 2019, Order Granting Motion
21 to Dismiss Petition for Judicial Review.

22 * * *

23 * * *

24 * * *

25 * * *

26 ¹ Under NRS 233B.130(2)(d), petitions for judicial review must be filed within 30 days after
27 service of the final decision of the agency. Hearing Officer Ward’s Decision and Order was served by
28 regular mail on March 1, 2019; therefore, Mr. Whitfield had until April 3, 2019, (30 days, plus 3 days
for mailing) in which to file his Petition. *See Motion*, Exhibit No. 1.

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A. Reconsideration is not appropriate, as a matter of law.

However, this effort by Mr. Whitfield to rehash previously rejected legal arguments runs contrary to established case law governing reconsideration, as well as DCR 13(7), and the law-of-the-case doctrine.

Additionally, DCR 13(7) also clearly instructs that “[n]o motion once heard and disposed of shall be renewed in the same cause, nor shall the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties.” Here, however, Mr. Whitfield not only reasserts the exact same legal issues which this Court

1 previously rejected, but Mr. Whitfield fails to seek leave of the Court prior to renewing these
2 arguments in his Motion for Reconsideration. As such, NDOC respectfully submits that Whitfield's
3 Motion for Reconsideration violates the plain language and spirit of DCR 13(7).

4 Lastly, under the law-of-the-case doctrine, "a court is generally precluded from reconsidering
5 an issue previously decided by the same court, or a higher court in the identical case." *United States v.*
6 *Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000). This law-of-the-case doctrine has developed
7 to "maintain consistency and avoid reconsideration of matters once decided during the course of a
8 single continuing lawsuit." 18B Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction
9 2d § 4478, at 637–38 (2002). When applied to the matter at bar, the law-of-the-case doctrine bars
10 Whitfield from re-asserting the same arguments made in his Opposition to Motion to Dismiss;
11 furthermore, the law-of-the-case doctrine also arguably precludes this Court from reconsidering these
12 same issues which were previously analyzed and explicitly rejected in the June 24, 2019, Order
13 Granting Motion to Dismiss Petition for Judicial Review. Frankly, Mr. Whitfield has a remedy under
14 NRS 233B.150 and that remedy is not to repeatedly ask the Court to reconsider the same previously
15 decided legal issues.

16 **B. Reconsideration is not appropriate because the Court correctly dismissed this**
17 **Petition for lack of subject matter jurisdiction.**

18 In his Motion for Reconsideration, Mr. Whitfield initially argues that the dismissal of his
19 Petition was erroneous because (in the general context of a civil action) courts are "bound to accept all
20 the factual allegations in the complaint as true" and that a civil complaint cannot be dismissed unless
21 the "petitioner/plaintiff is not entitled to relief under any set of facts . . ." *See* Motion, at 2. In making
22 this argument, Whitfield cites the following civil cases: *Edgar v. Wagner*, 101 Nev. 226, 227, 699
23 P.2d 110, 111 (1985) (Litigating a claim under 42 U.S.C. § 1983, seeking damages for deprivation of
24 due process); *Marcoz v. Summa Corp.*, 106 Nev. 737, 801 P.2d 1346 (1990) (Litigating claims for
25 breach of employment contract, bad faith discharge, and tortious discharge); and *Hale v. Burkhardt*,
26 104 Nev. 632, 764 P.2d 866 (1988) (Real estate broker sued developer to recover commissions and
27 fees).

28 * * *

1 Simply put, general rules applicable to civil actions do not apply to petitions brought under
2 NRS 233B.130. As explained by the Supreme Court in *Washoe County. v. Otto*, the Nevada
3 Legislature “enacted the APA to govern judicial review of many administrative decisions, permitting
4 an aggrieved party to petition the district court for judicial review of a final agency decision in a
5 contested case.” *Otto*, 128 Nev. at 431. However, “[p]ursuant to the [APA] . . . , not every
6 administrative decision is reviewable.” *Id.* (citing *Private Inv. Licensing Bd. v. Atherley*, 98 Nev. 514,
7 515, 654 P.2d 1019, 1019 (1982)). Instead, “only those decisions falling within the APA's terms and
8 challenged according to the APA's procedures invoke the district court's jurisdiction.” *Id.* Accordingly,
9 “pursuant to NRS 233B.130(2)(a), it is mandatory to name all parties of record in a petition for
10 judicial review of an administrative decision, and a district court lacks jurisdiction to consider a
11 petition that fails to comply with this requirement.” *Id.*

12 Therefore, since Whitfield’s Petition was brought pursuant to NRS 233B.130 and not as a civil
13 action under NRCP 3 *et seq.*, strict compliance with NRS 233B.130(2)(a) applies and not the liberal
14 notice-pleading standard applicable under NRCP 8(a). What is more, *Edgar*, *Marcoz*, and *Hale* (which
15 are all civil actions) are not remotely applicable to this Petition for Judicial Review. As such, Mr.
16 Whitfield cannot use inapplicable case law and an inapplicable notice-pleading standard to circumvent
17 strict compliance with NRS 233B.130(2)(a). It is undisputed that Whitfield’s original Petition failed to
18 comply with the naming requirements of NRS 233B.130(2)(a) and, accordingly, this Court correctly
19 held that the Petition failed to vest subject matter jurisdiction in this Court.

20 Next, Mr. Whitfield makes a second attempt to apply *Prevost* as an exception to his non-
21 compliance with NRS 233B.130(2)(a). Specifically, Whitfield argues that his failure to name any
22 respondents “in the caption of the petition” is not fatal under NRS 233B.130(2)(a). *See* Motion, at 2.
23 However, Mr. Whitfield again mischaracterizes the true extent of his failure to comply with NRS
24 233B.130(2)(a). The original Petition not only failed to name any respondents in the caption, but
25 failed to name any respondents in either the caption or the body of the Petition. *See* Petition for
26 Judicial Review. Furthermore, the Petition also failed to attached or incorporate by reference any
27 documents, including the underlying administrative decision. *Id.* Again, the Supreme Court in *Prevost*
28 overlooked the petitioner’s failure to name a respondent in the caption because the underlying

1 administrative decision (which did name the missing respondent) was specifically incorporated by
2 reference in the body of the petition *and* attached to the petition. *Prevost*, 418 P.3d at 676. As such,
3 *Prevost* is completely inapplicable to this case and actually underscores Mr. Whitfield's non-
4 compliance with NRS 233B.130(2)(a).

5 Lastly, Mr. Whitfield again argues that his Amended Petition successfully corrected the
6 deficiencies in his original Petition and that, pursuant to NRCP 15(a), the filing date of the Amended
7 Petition relates back to the filing date of the original Petition. *See* Motion, at 3. However, this same
8 argument was rejected by the Supreme Court in *Otto*, which held that “[b]ecause Washoe County's
9 original petition failed to invoke the district court's jurisdiction, it could not properly be amended
10 outside of the filing deadline.” *See Otto*, 128 Nev. at 435. Here, the filing deadline for Mr. Whitfield's
11 Petition was April 3, 2019; therefore, the April 8, 2019, Amended Petition could not (as a matter of
12 law) cure the jurisdictional defects in the original Petition. *See id.* Accordingly, this Court was correct
13 in previously finding that the Amended Petition “does not relate back to the original Petition” and
14 “does not cure Petitioner's jurisdictional defect.” *See* Order, at 5, 6. What is more, NRCP 15(a)
15 arguably applies to civil actions and not judicial review of administrative decisions under NRS
16 233B.130. Furthermore, to the extent NRCP 15(a) could be read as allowing a petitioner to amend a
17 defective petition outside the APA's 30-day filing period, then these rules are inconsistent and NRS
18 233B.130 takes precedent over NRCP 15(a). *See* Nev. R. Civ. P. 81(a) (“[t]hese rules do not govern
19 procedure and practice in any special statutory proceeding insofar as they are inconsistent or in
20 conflict with the procedure and practice provided by the applicable statute.”)

21 III.

22 CONCLUSION

23 It is undisputed that Whitfield was required by NRS 233B.130(2)(a) to name certain
24 respondents in his Petition. It is also undisputed that Whitfield failed to name any of these required
25 respondents anywhere in his Petition or in any attached document (there were none). Under these
26 circumstances, *Otto* commands that such a petition is fatally defective and must be dismissed for lack
27 of subject matter jurisdiction. *Otto*, 128 Nev. at 434. Moreover, *Otto* also commands that a defective
28 petition can only be amended within the APA's 30-day time limit; however, Whitfield's Amended

1 Petition was filed *after* the expiration of the APA's 30-day time limit. As a result, this Court lacks
2 jurisdiction to even consider Mr. Whitefield's Petition and this Court correctly dismissed this case in
3 its June 24, 2019, Order Granting Motion to Dismiss Petition for Judicial Review. Mr. Whitfield has
4 not provided this Court with any new facts, new arguments, or new legal authority that would allow
5 this Court's June 24, 2019, Order to be second-guessed. Therefore, NDOC respectfully moves this
6 Court to DENY Mr. Whitfield's Motion for Reconsideration and thereby reaffirm the dismissal of this
7 matter with prejudice.

8 **AFFIRMATION**

9 The undersigned hereby affirms that the preceding document does not contain the social
10 security number of any person.

11 DATED this 11th day of July 2019.

12 AARON D. FORD
13 Attorney General

14 By: /s/ Kevin A. Pick
15 Kevin A. Pick (Bar. No. 11683)
16 Deputy Attorney General
17 *Attorneys for Respondent, State of Nevada*
18 *ex rel. Department of Corrections*
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General,
3 and that on the 11th day of July 2019, I served a copy of the foregoing **OPPOSITION TO**
4 **PETITIONER'S MOTION FOR RECONSIDERATION** by causing a true copy thereof to be filed
5 with the Clerk of the Court using the eFlex system and by depositing a true copy of the same for
6 mailing addressed as follows:

7 Michael Whitfield
8 PO Box 18421
9 Reno, NV 89511
10 *Petitioner-Employee*

11 Lorna L. Ward, Esq.
12 Hearing Officer
13 C/O Hearings Division
14 1050 West William Street, Suite 450
15 Carson City, Nevada 89701

16 Department of Administration
17 Hearings Division
18 1050 West William Street, Suite 450
19 Carson City, Nevada 89701

20 /s/ Ginny Brownell
21 An employee of the State of Nevada,
22 Office of the Attorney General
23
24
25
26
27
28

1 Code:
2 Michael Whitfield
3 P.O. Box 18421
4 Reno, NV 89511
5 (775) 737-3493
6 Email: mwhitfi2000@gmail.com
7 Self-Represented Litigant

8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

10
11 IN AND FOR THE COUNTY OF WASHOE

12 * * *

13 IN THE MATTER OF: Case No. CV19-00641
14 MICHAEL WHITFIELD Dept. No. 1
15 (Appeal No. 1803430-LLW)

16 Petitioner,

17 vs.

18 NEVADA STATE PERSONNEL
19 COMMISSION, STATE OF NEVADA
20 DEPARTMENT OF ADMINISTRATION,
21 LORNA WARD, APPEALS OFFICER, and
22 JAMES DZURENDA, NEVADA
23 DEPARTMENT OF CORRECTIONS,
24 As Employer,

25 Respondents.
26 _____/

27 INDEX OF EXHIBITS

28 Exhibit Number 1 Number of Pages: 1
Exhibit Description: Summons: James Dzurenda/NDOC Director

Exhibit Number 2 Number of Pages: 1

1	Exhibit Description:	Summons: State of Nevada Department of Administrative Hearings
2		
3	Exhibit Number 3	Number of Pages 2
4	Exhibit Description:	Sommons: Nevada Human Resource Management
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1 **EXHIBIT 1**
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EXHIBIT 1

EXHIBIT 1

Code: 4085

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

Micheal Whitfield,
Plaintiff / Petitioner / Joint Petitioner,

Case. No. CV19-00641

vs.

Dept. No. 1

James Dzurenda/NDOC Director,
Defendant / Respondent / Joint Petitioner.

SUMMONS

TO THE DEFENDANT: YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND IN WRITING WITHIN 20 CALENDAR DAYS. READ THE INFORMATION BELOW VERY CAREFULLY.

A civil complaint or petition has been filed by the plaintiff(s) against you for the relief as set forth in that document (see complaint or petition). When service is by publication, add a brief statement of the object of the action. See Nevada Rules of Civil Procedure, Rule 4(b).

The object of this action is: Judicial Review

1. If you intend to defend this lawsuit, you must do the following within 20 calendar days after service of this summons, exclusive of the day of service:
 - a. File with the Clerk of the Court, whose address is shown below, a **formal written answer** to the complaint or petition, along with the appropriate filing fees, in accordance with the rules of the Court, and;
 - b. Serve a copy of your answer upon the attorney or plaintiff(s) whose name and address is shown below.
2. Unless you respond, a default will be entered upon application of the plaintiff(s) and this Court may enter a judgment against you for the relief demanded in the complaint or petition.

MAR 22 2019

Dated this _____ day of _____, 20____.

Issued on behalf of Plaintiff(s):

JACQUELINE BRYANT
CLERK OF THE COURT

Name: Michael Whitfield

By: J. Shields

Address: P.O. Box 18421

Deputy Clerk

Reno, NV 89511

Second Judicial District Court

Phone Number: 775-737-3493

75 Court Street

Reno, Nevada 89501

CODE 1067

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

MICHEAL WHITFIELD,

Plaintiff(s),

VS.

CASE NO: CV19-00641

JAMES DZURENDA/NDOC DIRECTOR,

Defendant(s),

DECLARATION OF SERVICE

STATE OF NEVADA

COUNTY OF CARSON CITY ss.:

SERWIND NETZLER, being duly sworn says: That at all times herein Affiant was and is a citizen of the United States, over 18 years of age, and not a party to nor interested in the proceedings in which this Affidavit is made.

That Affiant received copy(ies) of the PETITION FOR JUDICIAL REVIEW; SUMMONS On 3/26/2019 and served the same on 3/26/2019 at 2:26 PM by delivery and leaving a copy with:

By then and there personally delivering a true and correct copy of the documents into the hands of and leaving with Nancy Sanders whose title is Administrative Assistant.

Served on behalf of JAMES DZURENDA NEVADA DEPARTMENT OF CORRECTION DIRECTOR

Service Address: NDOC - 5500 Snyder Ave Bldg 17 , Carson City, NV 89701-6752

A description of Nancy Sanders is as follows

Gender	Color of Skin/Race	Hair	Age	Height	Weight
Female	White	Red	36 - 40	5'1 - 5'6	161-180 Lbs

Pursuant to NRS 239B.030 this document does not contain the social security number of any person.

Affiant does hereby affirm under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on: 3/27/2019

by SERWIND NETZLER

Registration: R-2018-05938

No notary is required per NRS 53.045

X

SERWIND NETZLER

Registration: R-2018-05938

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Reno, NV 89509

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Order#: R67257 NVPRF411

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EXHIBIT 2

EXHIBIT 2

EXHIBIT 2

Code: 4085

STATE OF NEVADA
DEPT OF ADMINISTRATION
HEARINGS AND APPEALS

2019 MAR 25 11:17

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

Micheal Whitfield
Plaintiff / Petitioner / Joint Petitioner,

Case No. CV19-00641

vs.

Dept. No. 1

State of NV Dept of Admin/Hearings Div,
Defendant / Respondent / Joint Petitioner.

SUMMONS

TO THE DEFENDANT: YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND IN WRITING WITHIN 20 CALENDAR DAYS. READ THE INFORMATION BELOW VERY CAREFULLY.

A civil complaint or petition has been filed by the plaintiff(s) against you for the relief as set forth in that document (see complaint or petition). When service is by publication, add a brief statement of the object of the action. See Nevada Rules of Civil Procedure, Rule 4(b).

The object of this action is: Petition for Judicial Review

1. If you intend to defend this lawsuit, you must do the following within 20 calendar days after service of this summons, exclusive of the day of service:
 - a. File with the Clerk of the Court, whose address is shown below, a **formal written answer** to the complaint or petition, along with the appropriate filing fees, in accordance with the rules of the Court, and;
 - b. Serve a copy of your answer upon the attorney or plaintiff(s) whose name and address is shown below.
2. Unless you respond, a default will be entered upon application of the plaintiff(s) and this Court may enter a judgment against you for the relief demanded in the complaint or petition.

Dated this MAR 22 day of 2019, 20 .

Issued on behalf of Plaintiff(s):

Name: Michael Whitfield
Address: P.O. Box 18421
Reno, NV 89511
Phone Number: 775-737-3493

JACQUELINE BRYANT
CLERK OF THE COURT

By: J. Shields
Deputy Clerk
Second Judicial District Court
75 Court Street
Reno, Nevada 89501

DECLARATION OF PERSONAL SERVICE

(To be filled out and signed by the person who served the Defendant or Respondent)

STATE OF Nevada)

COUNTY OF Carson City)

I, Kyle Ridders, declare:
(Name of person who completed service)

1. That I am not a party to this action and I am over 18 years of age.
2. That I personally served a copy of the Summons and the following documents:

Summons, Petition for Judicial Review

upon Human Resource Management, at the following
(Name of Respondent/Defendant who was served)

address: 1050 Williams #450 Carson City, NV
Tasha Eaton

on the 25 day of March, 20 19.
(Month) (Year)

This document does not contain the Social Security Number of any Person.

I declare, under penalty of perjury under the law of then State of Nevada, that the foregoing is true and correct.

K. Ridders
(Signature of person who completed service)

1 **EXHIBIT 3**
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EXHIBIT 3

EXHIBIT 3

FILED
Electronically
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2019-03-27 11:16:28 AM

OFFICE OF THE ATTORNEY GENERAL, Jacqueline Bryant
CLERK OF THE COURT
RENO, NEVADA Transaction # 7187548 : sacordag

MAR 25 2019

Code: 4085

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

Micheal Whitfield
Plaintiff / Petitioner / Joint Petitioner,

vs.

Case. No. CV 19-00641

Dept. No. 1

NV Human Resource Mangagement
Defendant / Respondent / Joint Petitioner.

SUMMONS

TO THE DEFENDANT: YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND IN WRITING WITHIN 20 CALENDAR DAYS. READ THE INFORMATION BELOW VERY CAREFULLY.

A civil complaint or petition has been filed by the plaintiff(s) against you for the relief as set forth in that document (see complaint or petition). When service is by publication, add a brief statement of the object of the action. See Nevada Rules of Civil Procedure, Rule 4(b).

The object of this action is: Petition for Judicial Review

1. If you intend to defend this lawsuit, you must do the following within 20 calendar days after service of this summons, exclusive of the day of service:
 - a. File with the Clerk of the Court, whose address is shown below, a **formal written answer** to the complaint or petition, along with the appropriate filing fees, in accordance with the rules of the Court, and;
 - b. Serve a copy of your answer upon the attorney or plaintiff(s) whose name and address is shown below.
2. Unless you respond, a default will be entered upon application of the plaintiff(s) and this Court may enter a judgment against you for the relief demanded in the complaint or petition.

Dated this MAR 22 day of 2019, 20

Issued on behalf of Plaintiff(s):

Name: Michael Whitfield

Address: P.O. Box 18421

Reno, NV 89511

Phone Number: 775-737-3493

JACQUELINE BRYANT

CLERK OF THE COURT

By: [Signature]

Deputy Clerk

Second Judicial District Court

75 Court Street

Reno, Nevada 89501

AARON D. FORD
Attorney General

CAROLINE BATEMAN
First Assistant Attorney General

CHRISTINE JONES
BRADY
Second Assistant Attorney General



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
100 North Carson Street
Carson City, Nevada 89701

JESSICA L. ADAIR
Chief of Staff

RACHEL J. ANDERSON
General Counsel

HEIDI PARRY STERN
Solicitor General

DATE RECEIVED: 3/25/19
RECEIVED BY: Diana Herrera
CASE NAME: Whitfield, v. NV Human Resources
management
CASE NUMBER: CV19-00641 COURT: 2nd JD
DOCUMENT(S) RECEIVED: Summons

NOTICE

NRS 41.031(2) provides in part that, in any action against the State of Nevada, the action must be brought in the name of the State of Nevada on relation of the particular department, commission, board or other agency of the state whose actions are the basis for the suit. In an action against the State of Nevada, the summons and a copy of the complaint must be served upon the Attorney General, at the Office of the Attorney General in Carson City and upon the person serving in the office of administrative head of the named agency. **Service on the Attorney General or designee does not constitute service on any individual or administrative head.**

This Receipt acknowledges that the documents described herein have been received by the Nevada Attorney General or the designee authorized by NRS 41.031(2)(a). This Receipt does not ensure that any party, person or agency has been properly served, nor does it waive any legal requirement for service.

Receipt of a subpoena by the Office of the Attorney General does not constitute valid service of the subpoena upon any individual or upon any state agency, except the Office of the Attorney General. **Receipt of summons and complaint or any other process by the Attorney General or designee does not constitute service upon any individual, nor does it constitute service upon the administrative head of an agency pursuant to NRS 41.**

DECLARATION OF PERSONAL SERVICE

(To be filled out and signed by the person who served the Defendant or Respondent)

STATE OF Nevada)

COUNTY OF W Carson City)

I, Kyron Ridders, declare:
(Name of person who completed service)

1. That I am not a party to this action and I am over 18 years of age.
2. That I personally served a copy of the Summons and the following documents:

I was redirected from 209 Mason to Attorney
General Office at the address below
Petition for Judicial Review, Summons

upon Human Resource Management ~~Sofia~~ Diana Herrera, at the following
(Name of Respondent/Defendant who was served) Herrera

address: 100 N. Carson Carson City, NV 89701

on the 25 day of March, 20 19.
(Month) (Year)

This document does not contain the Social Security Number of any Person.

I declare, under penalty of perjury under the law of then State of Nevada, that the foregoing is true and correct.

Kyron Ridders
(Signature of person who completed service)

1 Code: 3790
2 Michael Whitfield
3 P.O. Box 18421
4 Reno, NV 89511
5 (775) 737-3493
6 Email: mwhitfi2000@gmail.com
7 Self-Represented Litigant

8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

10 IN AND FOR THE COUNTY OF WASHOE

11 * * *

12 IN THE MATTER OF:

Case No. CV19-00641

13 MICHAEL WHITFIELD
14 (Appeal No. 1803430-LLW)

Dept. No. 1

15 Petitioner,

16 vs.

17 NEVADA STATE PERSONNEL
18 COMMISSION, STATE OF NEVADA
19 DEPARTMENT OF ADMINISTRATION,
20 LORNA WARD, APPEALS OFFICER, and
21 JAMES DZURENDA, NEVADA
22 DEPARTMENT OF CORRECTIONS,
23 As Employer,

24 Respondents.
25 _____/

26 **REPLY TO OPPOSITION TO PETITIONER'S MOTION FOR**
27 **RECONSIDERTATION**

28 Petitioner hereby submits his Reply to Respondent's Opposition to Petitioner's
Motion for Reconsideration.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **LEGAL ARGUMENT**

3 Respondent states that NRCP 15(a) does not apply as it is “a liberal notice-pleading
4 standard”. Petitioner believes that the rules of NRCP have been set in place to provide
5 guidance for individuals in order to access to their legal system. As such, all parties are
6 required to comply with said rules.

7 Petitioner, in his reliance upon these rules, additionally looked to NRCP 15(c)1,

8 **Relation Back to Amendments.** which states:

9 An amendment to a pleading relates back to the date of the
10 original pleading when:

- 11 (1) the amendment asserts a claim or defense that arose out of the
12 conduct, transaction, or occurrence set out — or attempted
13 to be set out — in the original pleading;

14 In *Techansky v. Wilson*, 83 Nev. 263, 428 P.2d 375 (1967), the court found that a
15 motion to amend under NRCP 15(a), made after the statute of limitations had run, should be
16 granted and given retroactive effect under NRCP 15(c) to the date of the original proceeding
17 to cure the defective pleading.

18 In this matter, Petitioner corrected the caption of his Petition via his Amended
19 Petition. A correction that clearly addressed a technical defect and does not vitiate this action.

20 Respondent places great emphasis on the timing of Petitioner’s Amended Petition and
21 incorrectly advises this Court that “The original Petition not only failed to name any
22 respondents in either the caption or the body of Petition”. That is simply not true. Within the
23 body of the Petition, Nevada Department of Corrections and Nevada State Personnel
24 Commission were both referenced and identified in the body of his petition. Additionally, it
25 must be noted that all Parties were served **before** April 3, 2019.

26 This is apparent by the filing of the Motion to Dismiss which began “Respondent,
27 State of Nevada, Department of Corrections (hereinafter “NDOC”)...”. That is clear
28 acknowledgment of NDOC that it was a properly named/identified “Respondent”.

 This is further supported by the summons issued on March 22, 2019, which named
James Dzurenda/NDOC Director as “Defendant/Respondent/Joint Petitioner” and was served
on 3/26/19. (Exhibit 1). The Summons for Defendant/Respondent/Joint Petitioner State of

1 Nevada Depart of Admin/Hearing Divisions was issued and March 22, 2019 and served on
2 March 25, 2019. (Exhibit 2). The Summons for Defendant/Respondent/Joint Petitioner
3 Nevada Human Resource Management was issued on March 22, 2019 and also
4 served on March 25, 2019. Therefore, the intent of notifying a party that an action is being
5 appealed was met. Service of the Respondents must be considered when determining whether
6 they have been “named” in the Petition. In this case, it is undeniable all interested parties,
7 Nevada State Personnel Commission, State of Nevada Administration, and NDOC were well
8 aware of the filing of Petition for Judicial Review.

9 In *Prevost* the Supreme Court reversed, holding that Appellant’s failure to name
10 CCMSI in the caption of the petition did not render the petition jurisdictionally defective
11 **because the body of the petition named CCMSI through incorporation by reference of**
12 **the attached administrative decision and CCMSI was timely served with the petition.**

13 Petitioner complied with these elements.

14 CONCLUSION

15 Based on the foregoing, Petitioner respectfully moves this Court to for
16 Reconsideration of its Order for Dismissal and Reinstate the Briefing Schedule for this
17 matter.

18 **This document does not contain the personal information of any person as**
19 **defined by NRS 603A.040.**

20 Dated this 16th day of July, 2019

21 /s/ Michael Whitfield
22 Michael Whitfield
23 Petitioner in Proper Person
24
25
26
27
28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of the State of Nevada, Office of the Attorney
3 General, and that on the 16th day of July, 2019, I served a copy of the foregoing **REPLY TO**
4 **OPPOSITION TO PETITIONER'S MOTION FOR RECONSIDERATION** by causing
5 a true copy thereof to be filed with the Clerk of the Court using the eFlex system and by
6 depositing a true copy of the same for mailing addressed as follows:

7
8 Aaron D. Ford
9 Attorney General
10 100 N. Carson Street
11 Carson City, NV 89701

12 Kevin Pick, Esq.
13 Deputy Attorney General
14 5420 Kietzke Lane, Suite 202
15 Reno, NV 89511

16 Lorna L. Ward, Esq.
17 Hearing Officer
18 c/o Hearings Division
19 1050 West William Street, Suite 450
20 Carson City, NV 89701

21 Department of Administration
22 Hearing Division
23 1050 West William Street, Suite 450
24 Carson City, NV 89701

25 Human Resource Management
26 209 East Musser Street, Suite 101
27 Carson City, Nevada 89701-4204

28
/s/ Michael Whitfield
Michael Whitfield
Petitioner in Proper Person

2540
AARON D. FORD
Attorney General
KEVIN A. PICK
Sr. Deputy Attorney General
State of Nevada
Office of the Attorney General
Nevada Bar No. 11683
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
(775) 687-2100
Email: kpick@ag.nv.gov
Attorneys for Respondent State of Nevada
ex rel. Department of Corrections

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF:

Case No. CV19-00641

MICHAEL WHITFIELD
(Appeal No. 1803430-LLW)

Dept. No. 1

Petitioner,

NOTICE OF ENTRY OF ORDER

TO: Petitioner Michael Whitfield:

PLEASE TAKE NOTICE that on September 17, 2019, the Court entered an Order Denying Motion for Reconsideration, a true and correct copy of which is attached to this Notice as Exhibit 1.

AFFIRMATION

The undersigned hereby affirms that the preceding document does not contain the social security number of any person.

DATED this 17th day of September 2019.

AARON D. FORD
Attorney General

By: /s/ Kevin A. Pick
Kevin A. Pick (Bar. No. 11683)
Sr. Deputy Attorney General
Attorneys for Respondent, State of Nevada
ex rel. Department of Corrections

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3 and that on the 17th day of September 2019, I served a copy of the foregoing NOTICE OF ENTRY
4 OF ORDER by causing a true copy thereof to be filed with the Clerk of the Court using the eFlex
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6 MICHAEL WHITFIELD
7 PO Box 18421
8 Reno, NV 89511
Petitioner-Employee

9 Lorna L. Ward, Esq.
10 Hearing Officer
11 C/O Hearings Division
12 1050 West William Street, Suite 450
13 Carson City, Nevada 89701

14 Department of Administration
15 Hearings Division
16 1050 West William Street, Suite 450
17 Carson City, Nevada 89701

18 /s/ Ginny Brownell
19 An employee of the State of Nevada,
20 Office of the Attorney General
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INDEX OF EXHIBITS

Exhibit 1 Order Denying Motion for Reconsideration 6 pages

EXHIBIT 1

EXHIBIT 1

2840

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 DENYING MOTION FOR RECONSIDERATION

Currently before the Court is Petitioner Michael Whitfield's *Motion for Reconsideration* filed July 2, 2019. The State of Nevada, Department of Corrections ("NDOC") filed an *Opposition to Petitioner's Motion for Reconsideration* on July 11, 2019. On July 16, 2019, Petitioner filed a *Reply to Opposition to Petitioner's Motion for Reconsideration* and submitted the Motion to the Court for consideration.

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 ("Restraining Order") was entered against Petitioner by the Superior Court of California, County of

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

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

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

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

25 The violation of AR 339.07.15(UU) failure to maintain POST requirements is a Class
26 5 offense with dismissal recommended for a first offense . . . [A] violation of AR
27 339.07.15(UU) is a ‘serious’ offense as evidenced by the fact that NDOC determined
28 that a violation warrants dismissal on a first offense. This determination is given
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.

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

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

8 Thereafter, on March 20, 2019, Petitioner Whitfield filed his *Petition for Judicial Review*. On
9 April 4, 2019, Respondent NDOC filed a *Motion to Dismiss Petition for Judicial Review*. On April
10 8, 2019, Petitioner Whitfield filed an *Amended Petition for Judicial Review*, and thereafter, on April
11 9, 2019, an *Opposition to Motion to Dismiss Petition for Judicial Review*. On April 12, 2019, NDOC
12 filed a *Reply* and submitted the matter to the Court for decision. This Court issued an *Order Granting*
13 *Motion to Dismiss Petition for Judicial Review* on June 24, 2019. Petitioner now brings the instant
14 Motion seeking reconsideration of this Court’s June 24, 2019 *Order Granting Motion to Dismiss*
15 *Petition for Judicial Review*.

16 **II. Relevant Legal Authority**

17 Pursuant to DCR 13(7), no motion once heard and disposed of shall be renewed in the same
18 cause, nor shall the same matters therein embraced be reheard, unless by leave of the court upon
19 motion therefor, after notice of such motion to the adverse parties. Although this Court has inherent
20 authority to reconsider its prior orders, it will only do so if a party subsequently introduces
21 substantially different evidence or establishes that the decision is clearly erroneous. *Masonry and*
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23 589 (1997). Furthermore, arguments not raised in the original motion practice cannot be maintained
24 or considered in a motion for reconsideration. *See, Achrem v. Expressway Plaza, Ltd.*, 112 Nev. 737,
25 742, 917 P.2d 447, 450 (1996); *Chowdhry v. NLVH, Inc.*, 111 Nev. 560, 562-63, 893 P.2d 385, 387
26 (1995). “Only in very rare instances in which new issues of fact or law are raised supporting a ruling
27 contrary to the ruling already reached should a motion for rehearing be granted.” *Moore v. City of*
28

1 *Las Vegas*, 92 Nev. 402,405, 551 P.2d 244, 246 (1976). Additionally, WDCR 12(8) provides in
2 relevant part:

3 The rehearing of motions must be done in conformity with D.C.R. 13, Section 7. A
4 party seeking reconsideration of a ruling of the court, other than an order which may
5 be addressed by motion pursuant to NRCP 50(b), 52(b), 59 or 60, must file a motion
6 for such relief within 10 days after service of written notice of entry of the order or
judgment, unless the time is shortened or enlarged by order.

7 **III. Analysis**

8 A motion for reconsideration is not an opportunity to reargue a previously decided motion.
9 *See Moore*, 92 Nev. at 405, 551 P.2d at 246 (upholding a district court’s denial of a second motion
10 for rehearing on the basis that the second motion “raised no new issues of law and made reference to
11 no new or additional facts”). Petitioner’s Motion for Reconsideration reiterates an attempt to
12 analogize the facts of this case to *Prevost* and a reference to NRCP 15 to argue his Amended Petition
13 was permitted. Mot. at 2–3; *Prevost v. State Dep’t of Admin.*, 134 Nev. Adv. Op. 42, 418 P.3d 675,
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15 the Order.

16 Here, the Court found that the Petition was noncompliant with the requirements of NRS
17 223B.130 because: (1) it failed to name all of the subject agencies and parties of record in either the
18 caption or the body of the original Petition, and (2) it failed to name the subject agencies and parties
19 of record through attachment. Order Granting Mot. Dismiss Pet. Jud. Rev. (“Order”) at 5.
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26 comply with the statutory requirements by not naming the required parties and failing to file his
27 Amended Petition until after the 30-day deadline had passed.

28 ///

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4 upon motion therefor, after notice of such motion to the adverse parties." Thus, Petitioner's motion
5 is similarly denied on a procedural basis.

6 Accordingly, and good cause appearing,

7 IT IS HEREBY ORDERED that Petitioner's *Motion for Reconsideration* is DENIED.

8 DATED this 17th day of September, 2019.

9 
10 KATHLEEN DRAKULICH
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CERTIFICATE OF SERVICE

CASE NO. CV19-00641

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 17th day of September, 2019, I electronically filed the **ORDER DENYING MOTION FOR RECONSIDERATION** with the Clerk of the Court by using the ECF system.

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


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

KEVIN PICK, ESQ. for JAMES DZURENDA, NDOC

MICHAEL WHITFIELD

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

NONE


DANIELLE KENT
Department 1 Judicial Assistant

2840

IN THE SECOND JUDICIAL DISTRICT COURT OF
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COUNTY OF WASHOE

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Petitioner,

Case No.: CV19-00641

vs.

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5 is similarly denied on a procedural basis.

6 Accordingly, and good cause appearing,

7 IT IS HEREBY ORDERED that Petitioner's *Motion for Reconsideration* is DENIED.

8 DATED this 17th day of September, 2019.

9 
10 KATHLEEN DRAKULICH
11 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 17th day of September, 2019, I
5 electronically filed the **ORDER DENYING MOTION FOR RECONSIDERATION** with the
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7 I further certify that I transmitted a true and correct copy of the foregoing document by the
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9 **Electronically filed with the Clerk of the Court by using the ECF system which will send a**
10 **notice 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
16
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20 
21 DANIELLE KENT
22 Department 1 Judicial Assistant
23
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1 Code: 1350
2 Michael Whitfield
3 P.O. Box 18421
4 Reno, NV 89511
5 (775) 737-3493
6 Email: mwhitfi2000@gmail.com
7 Self-Represented Litigant

Electronically Filed
Oct 01 2019 11:29 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

8 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

9 IN AND FOR THE COUNTY OF WASHOE

10 * * *

11 IN THE MATTER OF:

Case No. CV19-00641

12 MICHAEL WHITFIELD
13 (Appeal No. 1803430-LLW)

Dept. No. 1

14 Petitioner,

15 vs.

16 NEVADA STATE PERSONNEL
17 COMMISSION, STATE OF NEVADA
18 DEPARTMENT OF ADMINISTRATION,
19 LORNA WARD, APPEALS OFFICER, and
20 JAMES DZURENDA, NEVADA
21 DEPARTMENT OF CORRECTIONS,
22 As Employer,

23 Respondents.
24 _____/

25 **NOTICE OF APPEAL**

26 Notice is hereby given that Michael Whitfield, Petitioner above named, hereby
27 appeals to the Supreme Court of Nevada from the Order Denying Motion for
28

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CERTIFICATE OF SERVICE

I hereby certify that I am the Petitioner in the above entitled matter and that on the 23rd day of September, 2019, I served a copy of the foregoing **Notice of Filing Appeal Bond** by causing a true copy thereof to be filed with the Clerk of the Court using the eFlex system and by depositing a true copy of the same for mailing addressed as follows:

Kevin Pick, Esq.
Deputy Attorney General
5420 Kietzke Lane, Suite 202
Reno, NV 89511

Lorna L. Ward, Esq.
Hearing Officer
c/o Hearings Division
1050 West William Street, Suite 450
Carson City, NV 89701

/s/ Michael Whitfield
Michael Whitfield
Petitioner in Proper Person

1 Code: 2490
Michael Whitfield
2 P.O. Box 18421
3 Reno, NV 89511
(775) 737-3493
4 Email: mwhitfi2000@gmail.com
Self-Represented Litigant
5

Electronically Filed
Nov 13 2019 02:56 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

8 IN AND FOR THE COUNTY OF WASHOE

9 * * *

10 IN THE MATTER OF:

Case No. CV19-00641

11 MICHAEL WHITFIELD
12 (Appeal No. 1803430-LLW)

Dept. No. 1

13 Petitioner,

14 vs.
15

16 NEVADA STATE PERSONNEL
17 COMMISSION, STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION,
18 LORNA WARD, APPEALS OFFICER, and
JAMES DZURENDA, NEVADA
19 DEPARTMENT OF CORRECTIONS,
20 As Employer,

21 Respondents.
22 _____/

23 **MOTION TO FILE AMENDED NOTICE OF APPEAL**

24 Comes now, Petitioner, Michael Whitfield, Petitioner in proper person, and hereby
25 requests this Court to permit him to amend his NOTICE OF APPEAL filed on September
26 23, 2019.

27 In Petitioner's Notice of Appeal he mistakenly listed the incorrect Order in which
28

1 he was appealing from. Petitioner should have listed the Order Dismissing Petition for
2 Judicial Review, entered on June 24, 2019.

3 Pursuant to NRAP 3(a)(3) upon the initial filing of the Notice of Appeal the district
4 court clerk should have apprised Petitioner/Appellant of the apparent deficiency regarding
5 the incorrectly identified Order, in writing.
6

7 In *Whitman v. Whitman*, 107 Nev. 328, 810 P.2nd 1209 (1991), the Court held that
8 the clerk of the district court should have ... informed appellant by letter of any perceived
9 deficiencies in the document. In this case, as in the *Whitman* matter, Appellant could then
10 have taken corrective action to pursue his appeal.
11

12 1. Petitioner offers his Amended Notice of Appeal as Exhibit 1 as attached to
13 this Motion.

14 2. Petitioner believes that his claims are valid and that his rights and interests
15 of justice will be served by the offered amendment; and
16

17 3. This Motion is not brought for any dilatory or other impermissible purpose.

18 **This document does not contain the personal information of any person as**
19 **defined by NRS 603A.040.**

20 Dated this 7th day of November, 2019

21
22 /s/ Michael Whitfield
23 Michael Whitfield
24 Petitioner in Proper Person
25
26
27
28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am the Petitioner in the above entitled matter and that on the 7th
3 day of November, 2019, I served a copy of the foregoing **Motion to File Amended Notice of**
4 **Appeal** by causing a true copy thereof to be filed with the Clerk of the Court using the eFlex
5 system and by depositing a true copy of the same for mailing addressed as follows:

6
7 Kevin Pick, Esq.
8 Deputy Attorney General
9 5420 Kietzke Lane, Suite 202
10 Reno, NV 89511

11 Lorna L. Ward, Esq.
12 Hearing Officer
13 c/o Hearings Division
14 1050 West William Street, Suite 450
15 Carson City, NV 89701

16 /s/ Michael Whitfield
17 Michael Whitfield
18 Petitioner in Proper Person
19
20
21
22
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24
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28

1 Code:
Michael Whitfield
2 P.O. Box 18421
3 Reno, NV 89511
(775) 737-3493
4 Email: mwhitfi2000@gmail.com
5 Self-Represented Litigant

6
7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

8 IN AND FOR THE COUNTY OF WASHOE

9 * * *

10 IN THE MATTER OF:

Case No. CV19-00641

11
12 MICHAEL WHITFIELD
(Appeal No. 1803430-LLW)

Dept. No. 1

13 Petitioner,

14
15 vs.

16 NEVADA STATE PERSONNEL
17 COMMISSION, STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION,
18 LORNA WARD, APPEALS OFFICER, and
JAMES DZURENDA, NEVADA
19 DEPARTMENT OF CORRECTIONS,
20 As Employer,

21 Respondents.
22 _____/

23 INDEX OF EXHIBITS

24 Exhibit Number 1 Number of Pages: 3
25 Exhibit Description: Amended Notice of Appeal
26
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EXHIBIT 1

EXHIBIT 1

EXHIBIT 1

1 Code: 1097
Michael Whitfield
2 P.O. Box 18421
Reno, NV 89511
3 (775) 737-3493
4 Email: mwhitfi2000@gmail.com
Self-Represented Litigant
5

6
7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF WASHOE

9 * * *

10 IN THE MATTER OF: Case No. CV19-00641
11
12 MICHAEL WHITFIELD Dept. No. 1
(Appeal No. 1803430-LLW)

13 Petitioner,
14

15 vs.

16 NEVADA STATE PERSONNEL
17 COMMISSION, STATE OF NEVADA
18 DEPARTMENT OF ADMINISTRATION,
LORNA WARD, APPEALS OFFICER, and
19 JAMES DZURENDA, NEVADA
DEPARTMENT OF CORRECTIONS,
20 As Employer,

21 Respondents.
22 _____/

23 **AMENDED NOTICE OF APPEAL**

24 Notice is hereby given that Michael Whitfield, Petitioner above named, herby
25 appeals to the Supreme Court of Nevada from the Order Dismissing Petition for Judicial

26 //

27 //
28

1 Review entered in this action on June 24, 2019.

2 **This document does not contain the personal information of any person as**
3 **defined by NRS 603A.040.**

4 Dated this 7th day of November, 2019

6 /s/ Michael Whitfield
7 Michael Whitfield
8 Petitioner in Proper Person

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am the Petitioner in the above entitled matter and that on the 7th
3 day of November, 2019, I served a copy of the foregoing **Amended Notice of Appeal** by
4 causing a true copy thereof to be filed with the Clerk of the Court using the eFlex system and
5 by depositing a true copy of the same for mailing addressed as follows:

6
7 Kevin Pick, Esq.
8 Deputy Attorney General
9 5420 Kietzke Lane, Suite 202
10 Reno, NV 89511

11 Lorna L. Ward, Esq.
12 Hearing Officer
13 c/o Hearings Division
14 1050 West William Street, Suite 450
15 Carson City, NV 89701

16 /s/ Michael Whitfield
17 Michael Whitfield
18 Petitioner in Proper Person
19
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**SECOND JUDICIAL DISTRICT COURT
STATE OF NEVADA
COUNTY OF WASHOE
Case History - CV19-00641**

Case Description: IN RE: MICHAEL WHITFIELD (D1)

Case Number: CV19-00641 Case Type: OTHER JUDICIAL REVIEW/APPEAL - Initially Filed On: 3/20/2019

Parties

<u>Party Type & Name</u>	<u>Party Status</u>
JUDG - KATHLEEN DRAKULICH - D1	Active
AG - Kevin A. Pick, Esq. - 11683	Active
PETR - MICHAEL WHITFIELD - @189487	Active
RESP - JAMES DZURENDA, NDOC - @1325667	Active
RESP - NEVADA STATE PERSONNEL COMMISSION - @64452	Active

Disposed Hearings

- 1 Department: D1 -- Event: Request for Submission -- Scheduled Date & Time: 4/12/2019 at 11:25:00
Extra Event Text: RESPONDENT'S MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW FILED 4-4-19
Event Disposition: S200 - 6/24/2019
- 2 Department: D1 -- Event: Request for Submission -- Scheduled Date & Time: 5/29/2019 at 13:32:00
Extra Event Text: RESPONDENT'S UNOPPOSED MOTION FOR EXTENSION OF TIME FILED 5--9-19
Event Disposition: S200 - 6/6/2019
- 3 Department: D1 -- Event: Request for Submission -- Scheduled Date & Time: 7/19/2019 at 10:36:00
Extra Event Text: MOTION FOR RECONSIDERATION (NO ORDER)
Event Disposition: S200 - 9/17/2019

Actions

- | <u>Filing Date</u> | <u>-</u> | <u>Docket Code & Description</u> |
|--------------------|-----------|---|
| 1 | 3/20/2019 | - \$3550 - \$Pet for Judicial Review
Additional Text: PETITION FOR JUDICIAL REVIEW - Transaction 7177318 - Approved By: YVILORIA : 03-21-2019:08:10:44 |
| 2 | 3/21/2019 | - PAYRC - **Payment Receipted
Additional Text: A Payment of \$260.00 was made on receipt DCDC633708. |
| 3 | 3/21/2019 | - 4090 - ** Summons Issued
<i>No additional text exists for this entry.</i> |
| 4 | 3/22/2019 | - 4090 - ** Summons Issued
Additional Text: X 3 |
| 5 | 3/27/2019 | - 2880 - Ord for Briefing Schedule
Additional Text: Transaction 7187149 - Approved By: NOREVIEW : 03-27-2019:09:39:44 |
| 6 | 3/27/2019 | - NEF - Proof of Electronic Service
Additional Text: Transaction 7187155 - Approved By: NOREVIEW : 03-27-2019:09:40:45 |
| 7 | 3/27/2019 | - 4085 - Summons Filed
Additional Text: JAMES DZURENDA/NDOC DIRECTOR 03/26/2019 - Transaction 7187548 - Approved By: SACORDAG : 03-27-2019:11:19:45 |

Report Does Not Contain Sealed Cases or Confidential Information

- 8 3/27/2019 - 4085 - Summons Filed
Additional Text: STATE OF NV DEPT OF ADMIN/HEARINGS DIV - TASHA EATON 03/25/2019 - Transaction 7187548 - Approved By: SACORDAG : 03-27-2019:11:19:45
- 9 3/27/2019 - 4085 - Summons Filed
Additional Text: NV HUMAN RESOURCE MGMT - DIANA HERRERA 03/25/2019 - Transaction 7187548 - Approved By: SACORDAG : 03-27-2019:11:19:45
- 10 3/27/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7187564 - Approved By: NOREVIEW : 03-27-2019:11:20:40
- 11 4/4/2019 - 3960 - Statement Intent Participate
Additional Text: STATEMENT OF INTENT TO PARTICIPATE IN PETITION FOR JUDICIAL REVIEW - Transaction 7201586 - Approved By: YVILORIA : 04-04-2019:11:21:19
- 12 4/4/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7201609 - Approved By: NOREVIEW : 04-04-2019:11:22:18
- 13 4/4/2019 - 2315 - Mtn to Dismiss ...
Additional Text: MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW - Transaction 7202421 - Approved By: YVILORIA : 04-04-2019:16:14:45
- 14 4/4/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7202841 - Approved By: NOREVIEW : 04-04-2019:16:15:59
- 15 4/8/2019 - 1110 - Amended Pet ...
Additional Text: AMENDED PETITION FOR JUDICIAL REVIEW - Transaction 7207153 - Approved By: YVILORIA : 04-08-2019:15:46:14
- 16 4/8/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7207309 - Approved By: NOREVIEW : 04-08-2019:15:47:16
- 17 4/9/2019 - 2645 - Opposition to Mtn ...
Additional Text: OPPOSITION TO MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW - Transaction 7208163 - Approved By: SACORDAG : 04-09-2019:10:11:34
- 18 4/9/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7208252 - Approved By: NOREVIEW : 04-09-2019:10:12:37
- 19 4/12/2019 - 3795 - Reply...
Additional Text: REPLY IN SUPPORT OF MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW - Transaction 7216036 - Approved By: YVILORIA : 04-12-2019:11:22:38
- 20 4/12/2019 - 3860 - Request for Submission
Additional Text: REQUEST FOR SUBMISSION - Transaction 7216043 - Approved By: YVILORIA : 04-12-2019:11:23:28
DOCUMENT TITLE: RESPONDENT'S MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW FILED 4-4-19
PARTY SUBMITTING: KEVIN PICK ESQ
DATE SUBMITTED: 4-12-19
SUBMITTED BY: YV
DATE RECEIVED JUDGE OFFICE:
- 21 4/12/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7216073 - Approved By: NOREVIEW : 04-12-2019:11:23:56
- 22 4/12/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7216082 - Approved By: NOREVIEW : 04-12-2019:11:24:54
- 23 4/24/2019 - 1365 - Certificate of Transmittal
Additional Text: CERTIFICATION OF TRANSMITTAL - Transaction 7235572 - Approved By: YVILORIA : 04-24-2019:11:34:59

- 24 4/24/2019 - 3746 - Record on Appeal
Additional Text: * SEALED * ORIGINAL RECORD ON APPEAL IN ACCORDANCE WITH THE NEVADA ADMINISTRATIVE PROCEDURE ACT (CHAPTER 233B OF NRS) - Transaction 7235572 - Approved By: YVILORIA : 04-24-2019:11:34:59
- 25 4/24/2019 - 4195 - Transmittal of Rec. on Appeal
Additional Text: TRANSMITTAL OF RECORD ON APPEAL - Transaction 7235572 - Approved By: YVILORIA : 04-24-2019:11:34:59
- 26 4/24/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7235596 - Approved By: NOREVIEW : 04-24-2019:11:35:58
- 27 5/8/2019 - 1520 - Declaration
Additional Text: * SEALED EXHIBIT * PETITIONER'S OPENING BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW - Transaction 7258732 - Approved By: CVERA : 05-08-2019:08:20:36
- 28 5/8/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7258743 - Approved By: NOREVIEW : 05-08-2019:08:21:44
- 29 5/9/2019 - 2075 - Mtn for Extension of Time
Additional Text: MOTION FOR EXTENSION OF TIME - Transaction 7261369 - Approved By: YVILORIA : 05-09-2019:09:36:44
- 30 5/9/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7261418 - Approved By: NOREVIEW : 05-09-2019:09:37:35
- 31 5/29/2019 - 3860 - Request for Submission
Additional Text: REQUEST FOR SUBMISSION - Transaction 7292843 - Approved By: YVILORIA : 05-29-2019:13:28:10
DOCUMENT TITLE: RESPONDENT'S UNOPPOSED MOTION FOR EXTENSION OF TIME FILED 5--9-19
PARTY SUBMITTING: KEVIN PICK ESQ
DATE SUBMITTED: 5-29-19
SUBMITTED BY: YV
DATE RECEIVED JUDGE OFFICE:
- 32 5/29/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7292866 - Approved By: NOREVIEW : 05-29-2019:13:29:27
- 33 6/6/2019 - 3030 - Ord Granting Extension Time
Additional Text: Transaction 7308240 - Approved By: NOREVIEW : 06-06-2019:15:11:42
- 34 6/6/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7308248 - Approved By: NOREVIEW : 06-06-2019:15:12:30
- 35 6/6/2019 - S200 - Request for Submission Complet
Additional Text: RESPONDENT'S UNOPPOSED MOTION FOR EXTENSION OF TIME FILED 5--9-19 (SEE ORDER FILED 6/6/19)
- 36 6/24/2019 - 3060 - Ord Granting Mtn ...
Additional Text: TO DISMISS PETITION FOR JUDICIAL REVIEW - Transaction 7336330 - Approved By: NOREVIEW : 06-24-2019:09:52:41
- 37 6/24/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7336337 - Approved By: NOREVIEW : 06-24-2019:09:53:52
- 38 6/24/2019 - S200 - Request for Submission Complet
Additional Text: RESPONDENT'S MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW FILED 4-4-19 (SEE ORDER FILED 6/24/19)
- 39 6/24/2019 - F135 - Adj Motion to Dismiss by DEFT
No additional text exists for this entry.
- 40 6/24/2019 - 2540 - Notice of Entry of Ord
Additional Text: Transaction 7336695 - Approved By: NOREVIEW : 06-24-2019:11:28:58

- 41 6/24/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7336698 - Approved By: NOREVIEW : 06-24-2019:11:29:58
- 42 7/2/2019 - 2175 - Mtn for Reconsideration
Additional Text: MOTION FOR RECONSIDERATION - Transaction 7350959 - Approved By: YVILORIA : 07-02-2019:09:15:44
- 43 7/2/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7351203 - Approved By: NOREVIEW : 07-02-2019:09:16:46
- 44 7/11/2019 - 2645 - Opposition to Mtn ...
Additional Text: Opposition to Petitioner's Motion for Reconsideration - Transaction 7367268 - Approved By: CSULEZIC : 07-11-2019:10:55:37
- 45 7/11/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7367498 - Approved By: NOREVIEW : 07-11-2019:10:56:42
- 46 7/16/2019 - 3790 - Reply to/in Opposition
Additional Text: REPLY TO OPPOSITION TO PETITIONER'S MOTION FOR RECONSIDERTATION - Transaction 7376076 - Approved By: CSULEZIC : 07-16-2019:14:44:35
- 47 7/16/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7376193 - Approved By: NOREVIEW : 07-16-2019:14:45:49
- 48 7/19/2019 - 3860 - Request for Submission
Additional Text: Transaction 7382577 - Approved By: NOREVIEW : 07-19-2019:10:30:54
DOCUMENT TITLE: MOTION FOR RECONSIDERATION (NO ORDER)
PARTY SUBMITTING: MICHAEL WHITFIELD
DATE SUBMITTED: 7/19/19
SUBMITTED BY: AZAMORA
DATE RECEIVED JUDGE OFFICE:
- 49 7/19/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7382597 - Approved By: NOREVIEW : 07-19-2019:10:33:18
- 50 9/17/2019 - 2842 - Ord Denying Motion
Additional Text: FOR RECONSIDERATION - Transaction 7488771 - Approved By: NOREVIEW : 09-17-2019:14:33:44
- 51 9/17/2019 - S200 - Request for Submission Complet
Additional Text: MOTION FOR RECONSIDERATION (SEE ORDER FILED 9/17/19)
- 52 9/17/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7488781 - Approved By: NOREVIEW : 09-17-2019:14:35:05
- 53 9/17/2019 - 2540 - Notice of Entry of Ord
Additional Text: Transaction 7489040 - Approved By: NOREVIEW : 09-17-2019:15:24:11
- 54 9/17/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7489046 - Approved By: NOREVIEW : 09-17-2019:15:25:13
- 55 9/23/2019 - 1310 - Case Appeal Statement
Additional Text: CASE APPEAL STATEMENT - (NOT COMPLETE) Transaction 7497400 - Approved By: YVILORIA : 09-23-2019:10:12:50
- 56 9/23/2019 - 1310 - Case Appeal Statement
Additional Text: CASE APPEAL STATEMENT - Transaction 7497412 - Approved By: NOREVIEW : 09-23-2019:10:12:46
- 57 9/23/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7497414 - Approved By: NOREVIEW : 09-23-2019:10:13:43

- 58 9/23/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7497416 - Approved By: NOREVIEW : 09-23-2019:10:13:51
- 59 9/23/2019 - \$2515 - \$Notice/Appeal Supreme Court
Additional Text: Transaction 7498636 - Approved By: YVILORIA : 09-23-2019:14:36:48
- 60 9/23/2019 - PAYRC - **Payment Received
Additional Text: A Payment of \$34.00 was made on receipt DCDC646311.
- 61 9/23/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7498683 - Approved By: NOREVIEW : 09-23-2019:14:40:46
- 62 9/25/2019 - SAB - **Supreme Court Appeal Bond
Additional Text: Transaction 7502443 - Approved By: YVILORIA : 09-25-2019:09:07:18
- 63 9/25/2019 - PAYRC - **Payment Received
Additional Text: A Payment of \$500.00 was made on receipt DCDC646471.
- 64 9/25/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7502511 - Approved By: NOREVIEW : 09-25-2019:09:08:36
- 65 9/25/2019 - 1350 - Certificate of Clerk
Additional Text: CERTIFICATE OF CLERK AND TRANSMITTAL - NOTICE OF APPEAL - Transaction 7503400 - Approved By: NOREVIEW : 09-25-2019:12:12:17
- 66 9/25/2019 - 1310E - Case Appeal Statement
Additional Text: CASE APPEAL STATEMENT - Transaction 7503400 - Approved By: NOREVIEW : 09-25-2019:12:12:17
- 67 9/25/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7503402 - Approved By: NOREVIEW : 09-25-2019:12:13:08
- 68 10/1/2019 - 1187 - **Supreme Court Case No. ...
Additional Text: SUPREME COURT NO. 79718 - WHITFIELD
- 69 10/3/2019 - 1188 - Supreme Court Receipt for Doc
Additional Text: SUPREME COURT NO. 79718 / RECEIPT FOR DOCUMENTS - Transaction 7519147 - Approved By: NOREVIEW : 10-03-2019:13:58:18
- 70 10/3/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7519157 - Approved By: NOREVIEW : 10-03-2019:13:59:20
- 71 10/16/2019 - 4126 - Supreme Ct Order Directing...
Additional Text: SUPREME COURT NO. 79718 / ORDER DIRECTING TRANSMISSION OF RECORD - Transaction 7541149 - Approved By: NOREVIEW : 10-16-2019:13:21:09
- 72 10/16/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7541171 - Approved By: NOREVIEW : 10-16-2019:13:22:54
- 73 10/23/2019 - 1350 - Certificate of Clerk
Additional Text: CERTIFICATE OF CLERK AND TRANSMITTAL - RECORD ON APPEAL - Transaction 7552793 - Approved By: NOREVIEW : 10-23-2019:09:07:50
- 74 10/23/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7552799 - Approved By: NOREVIEW : 10-23-2019:09:08:51
- 75 11/7/2019 - 2490 - Motion ...
Additional Text: MOTION TO FILE AMENDED NOTICE OF APPEAL - Transaction 7578362 - Approved By: YVILORIA : 11-07-2019:15:29:01

- 76 11/7/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7578406 - Approved By: NOREVIEW : 11-07-2019:15:30:07
- 77 11/7/2019 - 1350 - Certificate of Clerk
Additional Text: CERTIFICATE OF CLERK AND TRANSMITTAL - AMENDED NOTICE OF APPEAL - Transaction 7578715 - Approved By:
NOREVIEW : 11-07-2019:16:26:53
- 78 11/7/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7578720 - Approved By: NOREVIEW : 11-07-2019:16:27:58

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
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incompatible with such employment.

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

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

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

However, in the *Reply*, NDOC asserts that the filing of the Amended Petition does not cure Petitioner’s failure, as the Amended Petition is untimely, pursuant to NRS 233B.130(2)(d), as the Amended Petition was not filed within 30 days from when Petitioner was served with the 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.

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9 KATHLEEN DRAKULICH
10 DISTRICT JUDGE
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CERTIFICATE OF SERVICE

CASE NO. CV19-00641

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


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

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

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

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

NONE


DANIELLE KENT
Department 1 Judicial Assistant

2540
AARON D. FORD
Attorney General
KEVIN A. PICK
Deputy Attorney General
State of Nevada
Office of the Attorney General
Nevada Bar No. 11683
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
(775) 687-2100
Email: kpick@ag.nv.gov
Attorneys for Respondent State of Nevada
ex rel. Department of Corrections

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF:

Case No. CV19-00641

MICHAEL WHITFIELD
(Appeal No. 1803430-LLW)

Dept. No. 1

Petitioner,

NOTICE OF ENTRY OF ORDER

TO: Petitioner Michael Whitfield:

PLEASE TAKE NOTICE that on June 24, 2019, the Court entered an Order Granting Motion to Dismiss Petition for Judicial Review, a true and correct copy of which is attached to this Notice as Exhibit 1.

AFFIRMATION

The undersigned hereby affirms that the preceding document does not contain the social security number of any person.

DATED this 24th day of June 2019.

AARON D. FORD
Attorney General

By: /s/ Kevin A. Pick
Kevin A. Pick (Bar. No. 11683)
Deputy Attorney General
Attorneys for Respondent, State of Nevada
ex rel. Department of Corrections

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General,
3 and that on the 24th day of June 2019, I served a copy of the foregoing NOTICE OF ENTRY OF
4 ORDER by causing a true copy thereof to be filed with the Clerk of the Court using the eFlex system
5 and by depositing a true copy of the same for mailing addressed as follows:

6 MICHAEL WHITFIELD
7 PO Box 18421
8 Reno, NV 89511
Petitioner-Employee

9 Lorna L. Ward, Esq.
10 Hearing Officer
11 C/O Hearings Division
12 1050 West William Street, Suite 450
13 Carson City, Nevada 89701

14 Department of Administration
15 Hearings Division
16 1050 West William Street, Suite 450
17 Carson City, Nevada 89701

18 /s/ Ginny Brownell
19 An employee of the State of Nevada,
20 Office of the Attorney General
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INDEX OF EXHIBITS

Exhibit 1 Order Granting Motion to Dismiss Petition for Judicial Review 7 pages

EXHIBIT 1

Order Granting Motion to Dismiss Petition for
Judicial Review

EXHIBIT 1

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
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The violation of AR 339.07.15(UU) failure to maintain POST
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8 Nevada State Personnel Commission (“Commission”). Pet. at 1:17-21. Petitioner contends that the
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25 through an attachment. As such, the Court finds that the original Petition was not compliant with
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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.

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9 KATHLEEN DRAKULICH
10 DISTRICT JUDGE
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CERTIFICATE OF SERVICE

CASE NO. CV19-00641

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


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

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

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

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

NONE


DANIELLE KENT
Department 1 Judicial Assistant

Code 1350

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.

CERTIFICATE OF CLERK AND TRANSMITTAL – AMENDED NOTICE OF APPEAL

I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on the 7th day of November, 2019 I electronically filed the Amended Notice of Appeal in the above entitled matter to the Nevada Supreme Court.

I further certify that the transmitted record is a true and correct copy of the original pleadings on file with the Second Judicial District Court.

Dated this 7th day of November, 2019.

Jacqueline Bryant
Clerk of the Court

By /s/YViloria
YViloria
Deputy Clerk