IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL WHITFIELD,

Petitioner,

vs.

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

Respondents.

Supreme Court No. 79718

Dist. Court Case No. CV 19-00641

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

RESPONDENT'S ANSWERING BRIEF

AARON D. FORD
Attorney General
KEVIN A. PICK
Senior Deputy Attorney General
Nevada Bar No. 11683
State of Nevada
Office of the Attorney General
5420 Kietzke Lane, Suite 202
Reno, NV 89511
Tel: 775-687-2129
Fax: 775-688-1822
kpick@ag.nv.gov
Attorneys for State of Nevada, Department of Corrections

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

RULES OF APPELLATE PROCEDURE

CODES

Respondent, NEVADA DEPARTMENT OF CORRECTIONS (hereinafter, "NDOC"), by and through its counsel, Aaron D. Ford, Attorney General, by Kevin A. Pick, Senior Deputy Attorney General, hereby files its Answering Brief.

I. ROUTING STATEMENT.

This case is presumptively assigned to the Court of Appeals under NRAP 17(b)(9). Contrary to Petitioner's Routing Statement, the issues raised in this appeal have been uniformly and repeatedly resolved in cases before the Court of Appeals and the Nevada Supreme Court, including in *Washoe County v. Otto* and its progeny. 128 Nev. 424, 431, 282 P.3d 719, 725 (2012). As such, this appeal does not involve conflicting legal precedent, nor does it present unique legal issues of statewide importance. Accordingly, this matter should be assigned to the Court of Appeals.

II. STATEMENT OF THE CASE.

Petitioner, Michael Whitfield, was previously employed by NDOC as a correctional officer at Warm Springs Correctional Center, in Carson City, Nevada. JA: 030. On August 2, 2017, a Domestic Violence Restraining Order (hereinafter, "restraining order") was entered against Whitfield by the Superior Court of California, County of Santa Clara, which (among other provisions) specifically made it *illegal* for Whitfield to use or handle firearms for a three-year period ending on August 2, 2020. *Id*. The no-firearms clause included no exceptions and made no allowance for Whitfield's employment as a correctional officer. *Id*.

The provisions of the restraining order were problematic because Whitfield was required by Nevada law to qualify with a firearm *biannually* in order to maintain a basic POST certificate, which allows one to act as a peace officer. *See* NAC 289.230(5). Likewise, NDOC Administrative Regulations (AR) 362.01 and 362.03 expressly instruct that: (1) all NDOC peace officers are required to handle firearms as part their assigned duties; (2) all NDOC peace officers must meet the requirements of NAC Chapter 289 to ensure POST certification; and (3) all NDOC peace officers must maintain a firearms certification under NAC Chapter 289 "as a condition of employment." JA: 030.

To assist Whitfield in complying with the restraining order, NDOC assigned Whitfield to a temporary administrative position away from firearms. *Id*. Over the next six months, NDOC *repeatedly* urged Whitfield to resolve the restraining order and complete his biannual firearm qualification requirements. JA: 030–031. However, Whitfield ignored all of NDOC's repeated urgings; he neglected to resolve the restraining order; he neglected to satisfy his biannual firearm qualification requirements; and he lost his POST certification. *Id*.

As a result, NDOC was forced to terminate Whitfield effective April 20, 2018, for violations of NAC 284.650(1), NAC 289.230, NDOC AR 362, and NDOC AR 339.07.15(UU) (Failure to maintain POST requirements). JA: 032. By the time of

his termination, nearly 10 months had passed since Whitfield last satisfied his biannual firearm qualification requirements on June 22, 2017. JA: 032–033.

On April 30, 2018, Whitfield appealed his dismissal, and, on December 14, 2018, an appeal hearing was conducted before Hearing Officer Lorna Ward. JA: 029. The parties of record to that proceeding were Whitfield and NDOC. *Id*.

At the hearing, substantial evidence was introduced that Whitfield violated AR 339.07.15(UU) and NAC 284.650(1). JA: 034–036. Whitfield admitted that he failed to maintain his POST requirements in accordance with NAC 289.230 and Whitfield admitted that it was *still* illegal for him to use firearms — which was contrary to the conditions of his employment at NDOC. *Id*. These facts were undisputed and there was no debate that Whitfield committed the charged misconduct. Pursuant to NDOC AR 339, a violation of AR 339.07.15(UU) (Failure to maintain POST requirements) was a Class 5 offense and termination was the only level of discipline available to NDOC, which made this violation "serious" as a matter of law. *See O'Keefe v. Nevada Department of Motor Vehicles*, 134 Nev. Adv. Op. 92, at *12–13 (December 6, 2018). NDOC also produced substantial evidence that Whitfield's termination was for the good of the public service, a decision which was entitled to deference. *Id. and* JA: 036. Undisputed testimony was presented that the safety and security of the institution would be negatively affected if an officer on duty could not legally use firearms; moreover, undisputed testimony was

presented that Whitfield's failure to maintain his POST requirements and his inability to legally use firearms were incompatible with his employment as a correctional officer. JA: 033–034, 036.

On March 1, 2019, Hearing Officer Ward issued her Findings of Fact, Conclusions of Law, Decision and Order (hereinafter, "Decision and Order.") JA: 29–38. As seen therein, Hearing Officer Ward found as follows:

> "Officer Whitfield clearly and by a preponderance of the evidence violated AR 339.07.15(UU) and NAC 284.650(1). He failed to maintain his POST requirements as required by AR 339.07.15(UU) and his failure to qualify biannually and his inability to use a firearm violated NAC 284.650(1) because 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."

JA: 036.

Next, the Hearing Officer found as follows:

> "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' offense as evidence by the fact that NDOC determined 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."

Id.

Lastly, Hearing Officer Ward found that:

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

Id.

Accordingly, Hearing Officer Ward affirmed Whitfield's termination. JA: 037. The Decision and Order was served on the parties by regular mail on March 1, 2019. JA: 038. Therefore, pursuant to NRS 233B.130(2)(d), the statutory deadline for Mr. Whitfield to file a petition for judicial review was April 3, 2019.

Whitfield filed the underlying Petition for Judicial Review on March 20, 2019. JA: 001–002. However, Whitfield did not name any respondents in his petition. *Id*. As a result, NDOC moved to dismiss the petition on the basis that Whitfield failed to strictly comply with the naming requirements of NRS 233B.130(2)(a). JA: 018–026. NDOC cited *Washoe County v. Otto*, which 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." *Otto*, 128 Nev. at 431. Based on *Otto*, NDOC contended that Whitfield failed to strictly comply with NRS 233B.130(2)(a) by neglecting to properly name all necessary respondents, including: the Department of Corrections; the Department of Administration; the Personnel Commission; and Hearing Officer Ward — all of whom were either the subject agency or a party of record to the administrative proceeding.

In response, Whitfield filed an untimely Amended Petition for Judicial Review on April 8, 2019, *without* ever seeking leave of the district court. Whitfield attempted to amend his defective petition to include the following (previously-

omitted) 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. JA: 042–044. Whitfield's attempt to amend his petition was an outright admission that the original petition was defective and failed to comply with NRS 233B.130(2)(a). Nevertheless, in his Opposition to NDOC's Motion to Dismiss, Whitfield cited his amended petition and argued that his non-compliance with NRS 233B.130(2)(a) was now cured or (in the alternative) that his non-compliance was not fatal under *Prevost v. State Department of Administration*, 134 Nev. 326, 328, 418 P.3d 675, 676 (2018). JA: 046.

In response, NDOC emphasized that Whitfield's amended petition was untimely and cannot relate back to the original petition, since the APA's 30-day filing deadline had expired prior to Whitfield filing his amended petition. JA: 014-15. Further, *Prevost* was not applicable herein, because Whitfield failed to name any parties as respondents in the caption of the petition, in the body, or via attachment incorporation by reference. JA: 013–14.

On June 24, 2019, the district court found that: (1) Whitfield's original petition was non-compliant with the naming requirements of NRS 233B.130(2)(a); and (2) that Whitfield's untimely amended petition did not relate back to the filing of the original petition, since it was filed outside of the APA's 30-day filing deadline and the district court's jurisdiction was therefore never invoked. JA: 053–58.

Thereafter, instead of filing an appeal in accordance with NRS 233B.150, Whitfield filed a Motion for Reconsideration. JA: 067–71. While reconsideration was pending, the appeal period under NRAP 4(a)(1) expired because a motion for reconsideration under NRCP 60(b) is not a tolling motion under NRAP 4(a)(4). The district court ultimately denied reconsideration on the basis that Whitfield was merely reasserting his previous arguments and the district court upheld its Order Granting Motion to Dismiss. JA: 107–112.

On September 23, 2019, Whitfield filed his Notice of Appeal, which expressly advised that Whitfield was appealing "from the Order Denying Motion for Reconsideration entered in this action on September 17, 2019." Subsequently, NDOC filed a Motion to Dismiss with the Nevada Supreme Court, arguing that (1) Whitfield's appeal was untimely under NRAP 4(a)(1), because a motion to reconsider under NRCP 60(b) is not a tolling motion under NRAP 4(a)(4); and (2) that Whitfield's Notice of Appeal was limited to the order denying reconsideration, which is not independently appealable. JA: 113–115.

Ultimately, the Supreme Court construed Whitfield's Motion for Reconsideration as being brought under NRCP 59(e), while also construing the Notice of Appeal as intending to appeal the Order Granting Motion to Dismiss. This appeal then proceeded to briefing.

III. SUMMARY OF THE ARGUMENT

The mandatory and jurisdictional requirements of NRS 233B.130(2) are plain and unambiguous. All petitions for judicial review *must* "name as respondents the agency and all parties of record to the administrative proceeding" and "be filed within 30 days after service of the final decision of the agency." *See* NRS 233B.130(2)(a)-(d). All petitions must strictly comply with these mandatory and jurisdictional requirements and a statutorily defective petition cannot be amended outside of the APA's 30-day filing deadline. *Otto*, 128 Nev. at 432, 435.

Here, Whitfield failed to name *any* respondents *anywhere* in his petition for judicial review. No respondents were named in the caption; none were named in the body; and none were named by attachment incorporated by reference (there were none). Whitfield also failed to amend his statutorily defective petition within the APA's 30-day filing period.

As such, the district court correctly dismissed Whitfield's petition for lack of jurisdiction based on his failure to strictly comply with the APA's mandatory and jurisdictional naming requirements. The district court also correctly refused leave to amend this statutorily defective petition outside of the APA's 30-day filing period. Frankly, no other result could have been reached without the district court abandoning the mandatory language of NRS 233B.130(2) and ignoring the seminal case of *Washoe County v. Otto*.

Whitfield raises two hasty arguments that his petition somehow *substantially* complied with the APA's naming requirements; however, apart from the fact that strict compliance is the applicable standard[1], both of Petitioner's arguments are irreversibly flawed.

Whitfield first argues that he sufficiently named the Personnel Commission and NDOC in the body of the petition; however, the text of the petition speaks for itself. Nowhere are NDOC or the Personnel Commission named as respondents and certainly not in a manner that would satisfy strict compliance. Furthermore, the Department of Administration and Hearing Officer Ward were *also* necessary respondents but were wholly omitted from the petition and this omission is ignored in Whitfield's opening brief.

Second, the opening brief cites *Prevost* and argues that the mere failure to name respondents in the caption of a petition is not fatal. However, the petition herein did not *merely* fail to name respondents in the caption, as no respondents were named in the body of the petition and there were no attachments that purported to incorporate respondents by reference. As such, Whitfield's reliance on *Prevost* is misplaced, as *Prevost* actually reaffirms Whitfield's failure to strictly comply with NRS 233B.130(2)(a).

[1] *See Otto*, 128 Nev. at 432 ("petitioner must strictly comply with the APA's procedural requirements.")

Whitfield no doubt realizes that he is on the wrong side of binding precedent in *Washoe County v. Otto*, which is why the remainder of the opening brief urges this Court to disregard the mandatory language of NRS 233B.130 and "modify" *Otto* to allow a substantial compliance standard that permits the untimely amendment of statutorily defective petitions. Indeed, the vast majority of the opening brief ignores the actual district court order challenged on appeal and, instead, hurls a series of fragmented arguments at *Otto* and NRS 233B.130(2).

While ignoring the sound reasoning of the Supreme Court's jurisdictional analysis in *Otto*, the opening brief first argues that nothing in NRS 233B.130(2) specifically prohibits the untimely amendment of a statutorily defective petition. However, the naming and filing requirements of NRS 233B.130(2) are mandatory[2] and nowhere does NRS 233B.130(2) permit the untimely amendment of defective petitions, which would be contrary to the 30-day filing deadline. Furthermore, even if NRS 233B.130 was silent in this regard, the judiciary cannot step into the shoes of the Nevada Legislature and fill in alleged legislative omissions. *See McKay v. Bd. of Cty. Comm'r*, 103 Nev. 490, 492, 746 P.2d 124, 125 (1987).

Next, the opening brief argues that the Court should relax the strict compliance standard under NRS 233B.130(2) for *pro se* litigants and thereby permit the untimely amendment of defective petitions. However, jurisdictional

[2] *Otto*, 128 Nev. at 432 (As used in NRS 233B.130(2), the word "must" imposes a mandatory requirement).

requirements (such as those in NRS 233B.130(2)) go to a court's authority to act and even *pro se* litigants must meet basic jurisdictional requirements. Furthermore, the naming and filing requirements of NRS 233B.130(2) are mandatory and jurisdictional[3]; therefore, the Court cannot simply ignore the Nevada Legislature and judicially legislate an exception to NRS 233B.130(2) for *pro se* litigants.

The opening brief also relies on NRCP 15 and argues that an untimely amended petition for judicial review should relate back and cure a statutorily defective petition. However, amendment is not permitted by NRS 233B.130, which is therefore inconsistent with NRCP 15 and renders NRCP 15 inapplicable. *See* Nev. R. Civ. P. 81(a). Furthermore, as explained in *Otto*, a district court lacks authority to grant leave to amend if the original petition was statutorily defective and failed to timely invoke the court's jurisdiction in the first place. *Otto*, 128 Nev. at 435.

The final argument offered in the opening brief is that *Otto* should be modified because it was "badly reasoned" and created an unworkable standard that victimizes novice litigants. However, apart from generally declaring that all jurisdictional requirements are unfair, the opening brief never explains how the Supreme Court's sound reasoning in *Otto* was legally erroneous. Furthermore, the petition herein was not defective because *Otto* is unclear or because NRS 233B.130(2)(a) is vague as to which respondents must be named. The petition herein failed to name *any* respondents *anywhere* in the petition or in *any* attachment incorporated by reference.

[3] *Otto*, 128 Nev. at 432.

In sum, the district court correctly applied binding precedent and dismissed Whitfield's defective petition, which irrefutably failed to strictly comply with the jurisdictional naming requirements of NRS 233B.130(2)(a) and therefore could not be amended outside of the APA's 30-day filing deadline. The district court fully complied with *Otto* and its progeny, which are soundly reasoned and which have been correctly utilized by countless litigants (both represented and unrepresented) for nearly a decade. Accordingly, NDOC respectfully urges this Court to affirm the district court's Order Granting Motion to Dismiss.

IV. LEGAL ARGUMENT

A. WHITFIELD'S PETITION FOR JUDICIAL REVIEW FAILED TO STRICTLY COMPLY WITH THE MANDATORY AND JURISDICTIONAL NAMING REQUIREMENTS OF NRS 233B.130(2)(a) AND THE DISTRICT COURT CORRECTLY DISMISSED THIS CASE FOR LACK OF JURISDICTION.

Nevada's Administrative Procedures Act (APA), codified as NRS Chapter 233B, governs judicial review of administrative decisions, such as those issued in contested cases under NRS Chapter 284. *See generally* NRS Chapter 233B; *see also* NRS 284.390(9). NRS 233B.130 provides in pertinent part as follows:

> 2. Petitions for judicial review **must**:
>
> (a) **Name as respondents the agency and all parties of record to the administrative proceeding**;
> * * *
> (d) Be filed within 30 days after service of the final decision of the agency.
> * * *
>
> 6. The provisions of this chapter **are the exclusive means of judicial review** of, or judicial action concerning, a final

> decision in a contested case involving an agency to which this chapter applies.

(Emphasis added).

"When a party seeks judicial review of an administrative decision, **strict compliance** with the statutory requirements for such review **is a precondition to jurisdiction** by the court of judicial review," and "[n]oncompliance with the requirements is grounds for dismissal." *Kame v. Employment Security Dep't*, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989) (emphasis added). "To invoke a district court's jurisdiction to consider a petition for judicial review, the petitioner must **strictly comply** with the APA's procedural requirements." *Washoe Cty. v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 725 (2012) (emphasis added). Indeed, the Nevada Supreme Court has specifically instructed 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." *See Otto*, 128 Nev. at 432–33; *see also Sierra Club v. State Div. of Environmental Protection*, No. 59906, 2013 WL 7158582 at 2 (Nev. Dec. 19, 2013) (unpublished); *Cooper Roofing and Solar, LLC v. Chief Administrative Officer of Occupational Safety & Health Admin.* No. 67914, 2016 WL 2957129, at 2 (Nev. May 19, 2016) (unpublished). Accordingly, the failure to comply with the naming requirements of NRS 233B.130(2)(a) leaves a district court without jurisdiction to even consider the underlying decision of the

administrative agency. *Id.* at 432–34. Furthermore, a petitioner who fails to strictly comply with this mandatory requirement cannot properly correct the deficiency outside of the 30-day filing deadline set forth in NRS 233B.130(2)(d). *Id*.

Here, Whitfield failed to identify *any* respondent in either the caption or the body of his petition. JA: 001–002. Whitfield did not incorporate by reference any portion of Hearing Officer Ward's Decision and Order. *Id*. Whitfield did not attach any document to his petition. *Id*. Whitfield merely identified himself as the "petitioner" in the caption and no respondents are identified at all. Nor does the word "respondent" appear anywhere in the body of the petition and no parties are identified as "respondents" to judicial review. In fact, the only place the word "respondent" appears in the petition is below the signature block, where Whitfield identified himself as the "respondent." *Id*.

As such, Whitfield irrefutably failed to "strictly comply" (or even substantially comply) with the mandatory and jurisdictional naming requirements of NRS 233B.130(2)(a). *See Otto*, 128 Nev. at 431. Any argument to the contrary is belied by the actual text of the petition and by Whitfield's untimely attempt to amend his defective petition and add four new respondents. JA: 042–044. Frankly, if the necessary respondents had already been identified in the petition, then there would be no need to amend the petition. Furthermore, in his amended petition, Whitfield readily concedes that "Petitioner inadvertently erred in not listing the Respondents

in the caption of his Petition and hereby files this amended petition in order to correct said error." JA: 043. Accordingly, not only has Whitfield (through his words and actions) knowingly admitted that his petition failed to strictly comply with the naming requirements of NRS 233B.130(2)(a), but he is judicially estopped from taking an inconsistent position on appeal. *See NOLM, LLC v. County of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004) (Judicial estoppel requires, inter alia, that a party took contrary positions "in judicial or quasi-judicial administrative proceedings.")

Therefore, because Whitfield failed to strictly comply with NRS 233B.130(2)(a) and because the district court lacked jurisdiction to permit amendment outside of the APA's 30-day time limit, the district court was correct in dismissing Whitfield's petition for lack of jurisdiction. *See Otto*, 128 Nev. at 431.

The opening brief levies two main arguments with respect to the petition's failure to strictly comply with NRS 233B.130(2)(a). *See* Opening Brief, at 11–15. First, the opening brief argues that the petition somehow *did* name the Nevada State Personnel Commission and NDOC as respondents in the body of the petition and that no other respondents were required to be named. Second, the opening brief cites *Prevost* and argues that Whitfield's mere failure to name respondents in the caption of the petition was not fatal. *Id*. However, both of these arguments are incorrect, legally unworkable, and belied by the record.

1. The Petition did not "strictly comply" with NRS 233B.130(2)(a).

Initially, Whitfield argues that he strictly complied with NRS 233B.130(2)(a) by mentioning the underlying administrative judgment and that said judgment found Whitfield "ineligible" to return to his former position. *See* Opening Brief, at 11–12. Then, Whitfield argues that the Personnel Commission and NDOC were the only two respondents required to be named under NRS 233B.130(2)(a). *Id*.

However, respectfully, Whitfield can only make these arguments by torturing that language of his own petition. When looking to the actual text of the petition, it merely indicates that Whitfield was appealing "the final judgment of" the State Personnel Commission, but the petition does not name the Personnel Commission "as a respondent" in order to strictly comply with NRS 233B.130(2)(a). JA: 001 (emphasis added). Even more apparent, the petition merely indicates that Whitfield was found "ineligible for reinstatement/rehire to his position as [sic] Nevada Department of Corrections." *Id*. (emphasis added). But again, nowhere does the Petition name NDOC "as a respondent" or even reference NDOC as a party to the underlying administrative proceeding. *Id.* It was not "strict compliance" with NRS 233B.130(2)(a) for Mr. Whitfield to merely allude to an unattached judgment or to say that he was found ineligible for rehire at his former position. Such casual remarks simply do not name the Personnel Commission as an agency-respondent or NDOC as a party-respondent. As such, the content of the petition did not strictly comply (or

even substantially comply) with the mandatory and jurisdictional naming requirements of NRS 233B.130(2)(a). Therefore, the district court correctly dismissed the petition for lack of jurisdiction. To hold otherwise would allow substantial compliance or (more accurately) non-compliance to suffice where "strict compliance" is required. *See Otto*, 128 Nev. at 432.

Furthermore, Whitfield incorrectly argues that NRS 233B.130(2)(a) *only* required him to name the Personnel Commission and NDOC (and no others) as respondents. NRS 233B.130(2)(a) expressly requires the petitioner to name as respondents "the agency" and "all parties of record to the administrative proceeding." Apart from failing to name NDOC as a respondent, the petition also did not name "the agency" as a respondent. The term "agency" is defined in NRS 233B.031 as "an agency, bureau, board, commission, department, division, officer or employee of the Executive Department of the State Government authorized by law to make regulations or to determine contested cases." As with all statutes, this definition must be read in harmony with other statutes and read in the broader context of the statute as a whole. *See Bowyer v. Taack,* 107 Nev. 625, 627, 817 P.2d 1176, 1177 (1991); *see also Nev. Dep't of Corrs. v. York Claims Servs.*, 131 Nev. 199, 204, 348 P.3d 1010, 1013 (2015). NRS Chapter 233B not only provides the procedure for review of contested administrative decisions (like those under NRS Chapter 284), but also provides the general procedure for adopting and reviewing administrative regulations. *See* NRS 233B.0395, *et seq*. Therefore, since the matter

at bar was an appeal of a contested case, the "agency" under NRS 233B.031 (i.e. the employee of the Executive Department authorized to determine contested cases) was Hearing Officer Ward. *See* NRS 233B.031 (defining "agency"); *see also* NRS 284.091 (ordering the appointment of hearing officers to conduct hearings and render decisions as provided in NRS 284.376 and 284.390). However, it is undisputed that Hearing Officer Ward was not identified as a respondent anywhere in the petition. JA: 001–002. Nor was Hearing Officer Ward's Decision and Order attached and incorporated by reference into the petition. *Id*. Accordingly, since the petition failed to name Hearing Officer Ward as a respondent, the petition failed to strictly comply with NRS 233B.130(2)(a) and dismissal was necessary. *See Otto*, 128 Nev. at 431.[4]

Furthermore, the petitioner in *Prevost* named the Department of Administration in the caption of his petition, which was upheld by this Court and thereby suggests that the Department of Administration (which statutes place above the Personnel Commission and Hearing Officer Ward[5]) should also have been named as a respondent herein. *See Prevost*, 418 P.3d at 676. Indeed, the Supreme Court has seemingly twice confirmed that the governing agency must be named

[4] Also, Whitfield has never served a copy of the petition for judicial review on Hearing Officer Ward. *See* NRS 233B.130(5) (requiring service within 45 days).

[5] *See* NRS 284.030 (creating a Personnel Commission "in the Division"); *see also* NRS 284.015(4) defining "Division" as the Division of Human Resource Management of the Department of Administration).

separately from the administrative body which actually renders the contested decision. *See Sierra Club*, No. 59906, 2013 WL 7158582 at 2 (Nev. Dec. 19, 2013) (unpublished) (Dismissing a petition that failed to separately name both NDEP and the State Environmental Commission); *see also Cooper Roofing and Solar, LLC*, No. 67914, 2016 WL 2957129, at 2 (Nev. May 19, 2016) (unpublished) (Dismissing a petition that failed to separately name both Nevada OSHA and the OSH Review Board). Again, it is undisputed that the Department of Administration was not named as a respondent anywhere in the petition and, as such, the petition fails to comply with NRS 233B.130(2)(a) on this additional basis.

2. Whitfield's reliance on *Prevost* is misplaced.

Next, Whitfield relies on the Supreme Court's decision in *Prevost* and argues that the mere failure to name respondents "in the caption" of a petition is not fatal. *See* Opening Brief, at 13 (citing *Prevost*, 134 Nev. at 328). However, there are two immediate problems with Whitfield's argument.

First, the petition did not *merely* fail to name respondents in the caption, but also failed to name any respondents anywhere in the body of the petition or via attachments incorporated by reference. JA: 001–002. As noted above, NRS 233B.130(2)(a) mandates that the agency and all parties of record must be "named as respondents" and the standard for naming parties is "strict compliance." *See Otto*, 128 Nev. at 432. The petition vaguely mentions the "judgment of" the Personnel

Commission and provides only a single reference to Whitfield's former "position as" Nevada Department of Corrections, but nowhere does the petition name either the Personnel Commission or NDOC "as a respondent" on judicial review – and certainly not in a manner that would strictly comply with NRS 233B.130(2)(a). JA: 001–002. Also, Hearing Officer Ward and the Department of Administration were necessary respondents but were wholly omitted from the petition. *Id*. As such, Whitfield's argument (i.e. that he merely neglected to name respondents *in the caption*) mischaracterizes both the record and the district court's challenged order, which found that "Petitioner failed to name any respondent in the caption or the body of the Petition, nor through an attachment." JA: 057.

Second, Whitfield argues that the petition herein is analogous to the petition in *Prevost*, which was upheld as compliant with NRS 233B.130(2)(a). *See* Opening Brief, at 13–15. However, Whitfield's reliance on *Prevost* is misplaced, as *Prevost* actually confirms Whitfield's non-compliance with NRS 233B.130(2)(a).

In *Prevost*, an NDOC officer (Prevost) made a workers' compensation claim alleging that various medical conditions were caused by the stress of his job. *See Prevost*, 134 Nev. at 327. Upon review, NDOC's third-party administrator (CCMSI) denied Prevost's workers' compensation claim and Prevost administratively appealed CCMSI's denial. *Id*. An appeals officer for the Department of Administration ultimately issued a decision and order affirming CCMSI's denial. *Id*. Prevost then

filed a petition for judicial review of the appeals officer's decision with the district court. *Id*. The caption of the petition did not identify CCMSI as a respondent; however, the appeals officer's order (which *did* identify CCMSI as a party) was attached and expressly incorporated by reference in the body of the petition. *Id*. CCMSI moved to dismiss the petition, alleging that the failure to name CCMSI in the caption rendered the petition jurisdictionally defective under NRS 233B.130(2)(a). *Id*. However, the Supreme Court ultimately excused Prevost's failure to name CCMSI in the caption and found as follows: "We conclude that the failure to name CCMSI in the caption of the petition for judicial review did not render the petition jurisdictionally defective where (1) the body of the petition named CCMSI through incorporation by reference of the attached administrative decision, NRCP 10(c); and (2) CCMSI and its attorney were timely served with the petition." *Id*. at 328.

By contrast, Whitfield's petition failed to name NDOC, the Department of Administration, the Personnel Commission, or Hearing Officer Ward as respondents anywhere in the petition – either in the body, in the caption, or by attachment incorporated by reference. JA: 001–002. Indeed, the *attachment* of the administrative decision in *Prevost* was the cornerstone of the Supreme Court's application of NRCP 10(c). *Prevost*, 134 Nev. at 328 (citing NRCP 10(c) and noting that "a copy of any written instrument which is an exhibit to a pleading is a part

thereof for all purposes.") However, it is undisputed that Hearing Officer Ward's Decision and Order was not attached as an exhibit to Whitfield's petition and nowhere did the petition incorporate by reference any statement within the Decision and Order, and certainly not for the purposes of naming respondents. JA: 001–002.[6] Any argument to the contrary is a legal fiction, which is the antithesis of the strict compliance standard applicable to NRS 233B.130(2)(a).

Moreover, unlike CCMSI in *Prevost*, the Department of Administration, the Personnel Commission, and Hearing Officer Ward were not named parties in the underlying administrative proceeding. JA: 029. In fact, the Department of Administration is not mentioned anywhere in the Decision and Order. Therefore, even if the Decision and Order had been attached to the Petition and incorporated by reference, the Decision and Order was not competent to name these missing respondents for purposes of judicial review.

Based on the foregoing, *Prevost* does not assist Whitfield and *Prevost* actually confirms Whitfield's non-compliance with NRS 233B.130(2)(a), while validating the district court's challenged order.

[6] Under NRCP 10(c), only "statements" can be adopted by reference and not entire pleadings; moreover, any statement being adopted by reference must be identified with specificity. *See* Nev. R. Civ. P. 10(c); *see also Federal National Mortgage Association v. Cobb*, 738 F. Supp. 1220, 1227 (N.D. Ind. 1990) (Interpreting FRCP 10(c) and holding that a pleading must "specifically identify which portions of the prior pleading are adopted therein.")

B. THE DISTRICT COURT LACKED JURISDICTION TO PERMIT THE UNTIMELY AMENDMENT OF WHITFIELD'S DEFECTIVE PETITION OUTSIDE OF THE APA'S 30-DAY FILING DEADLINE.

The next argument offered in the opening brief is that (under principles of justice and fairness) Whitfield should have been permitted to untimely amend his defective petition outside of the APA's 30-day filing deadline. *See* Opening Brief, at 15–19.

However, the opening brief never claims that the district court *erred* in finding that it lacked jurisdiction to permit an untimely amendment of Whitfield's defective petition. *Id*. Indeed, such an argument could not be made in good faith, as it would be directly adverse to binding precedent in *Washoe v. Otto*. *See Otto*, 128 Nev. at 435 ("[b]ecause Washoe County's original petition failed to invoke the district court's jurisdiction, it could not properly be amended outside of the filing deadline.") The opening brief even concedes that Nevada courts have uniformly dismissed petitions that fail to comply with the APA's mandatory and jurisdictional requirements. *See* Opening Brief, at 16. Therefore, it is undisputed that the district court *complied* with binding precedent and *conformed* with how Nevada courts have historically treated this issue statewide.

Instead of citing any legal error committed by the district court, the opening brief resorts to principles of equity and fairness in an apparent attempt to convince this Court to abandon *Otto* and permit the untimely amendment of defective petitions

outside the APA's 30-day filing deadline. But before turning to these arguments, NDOC must highlight the logic behind the Supreme Court's holding in *Otto* and why a defective petition cannot be amended outside of the APA's 30-day time limit.

As the Supreme Court explained in *Otto*, the Nevada Legislature "enacted the APA to govern judicial review of many administrative decisions, permitting an aggrieved party to petition the district court for judicial review of a final agency decision in a contested case." *Otto*, 128 Nev. at 431. However, "[p]ursuant to the [APA] . . ., not every administrative decision is reviewable." *Id*. (citing *Private Inv. Licensing Bd. v. Atherley*, 98 Nev. 514, 515, 654 P.2d 1019, 1019 (1982)). Instead, "only those decisions falling within the APA's terms and challenged according to the APA's procedures invoke the district court's jurisdiction." *Id.* As explained in *Otto*, a defective petition fails to invoke the jurisdiction of the court and, therefore, that court lacks jurisdiction to allow an amendment to relate back to the original day of filing. *Id*. Courts across the country have reached the same conclusion. *Id*. (citing decisions from Indiana, Kansas, Oklahoma, and Texas). Accordingly, the Supreme Court's jurisdictional analysis in *Otto* is well reasoned, as a court cannot grant leave to amend if that court's jurisdiction was never properly invoked in the first place.

Instead of confronting the Supreme Court's sound reasoning in *Otto*, the opening brief first argues that nothing within the text of NRS 233B.130(2)(d) actually prohibits the amendment of a petition that "properly invoked" jurisdiction.

See Opening Brief, at 16. However, Whitfield's legal argument is irrelevant because his petition failed to strictly comply with NRS 233B.130(2)(a) and did not "properly invoke" the district court's jurisdiction. Furthermore, the APA is not silent on the ability to amend outside the 30-day filing period because the 30-day filing period is mandatory. *Otto*, 128 Nev. at 432 (The word "must" generally imposes a mandatory requirement). Still, even if the APA was silent on whether amendment is possible outside of the 30-day filing period, this Court has refused to "fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done." *See McKay*, 103 Nev. at 492.

Next, the opening brief argues that the district court should have granted Whitfield leave to amend his petition because the jurisdictional requirements of NRS 233B.130(2)(a) are unfair and act as a "trap for the unwary." *Id*. at 17. However, NRS 233B.130(2)(a) unambiguously states that a petitioner "must . . . name as respondents the agency and all parties of record to the administrative proceeding." The term "agency" is even defined in NRS 233B.031 and this Court's decision in *Otto* made absolutely clear that the naming requirements of NRS 233B.130(2) were mandatory and jurisdictional. *Otto*, 128 Nev. at 432–33. As such, the APA's naming requirements are neither mysterious nor confusing, and certainly do not amount to a "trap for the unwary." Moreover, the petition herein was not defective because of

some insurmountable confusion over who to name as respondents, as no respondents were named anywhere in the entire petition.

Third, the opening brief makes the passing argument that not permitting the untimely amendment of a defective petition violates due process. *See* Opening Brief, at 19. Due process is satisfied by giving parties "a meaningful opportunity to present their case." *Mathews v. Eldridge*, 424 U.S. 319, 349, 96 S. Ct. 893 (1976). Here, Whitfield had a meaningful opportunity to seek judicial review by invoking the district court's jurisdiction in compliance with NRS 233B.130(2), but simply failed to do so. He was in no way denied that opportunity. Nor was it a violation of due process for the district court to enforce mandatory jurisdictional requirements and decline to exercise jurisdiction it did not have.

Lastly, the opening brief argues that *pro se* petitioners should receive liberal leave to amend defective petitions even outside the APA's 30-day filing deadline. *Id*. at 17–18. However, as explained in *Otto*, the Nevada Legislature has instructed that (like the naming requirement) the filing requirement of NRS 233B.130(2) is mandatory and jurisdictional. *Otto*, 128 Nev. at 432. Therefore, this Court cannot simply ignore the Nevada Legislature and judicially legislate an exception to NRS 233B.130 for *pro se* litigants.

Furthermore, jurisdictional requirements go to the very power of a court to act and cannot be artificially relaxed to the benefit of certain parties. Even *pro se*

litigants (although sometimes held to less stringent standards than lawyers) must nonetheless meet basic jurisdictional requirements. *See Kelley v. Sec'y, U.S. Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987) (finding that a court may not take a liberal view of jurisdictional requirements and "set a different rule for *pro se* litigants only" and also noting the lack of authority to support that type of differentiation between litigants); *see also Henke v. United States*, 60 F.3d 795, 799 (Fed. Cir. 1995) ("The fact that [the plaintiff] acted *pro se* in the drafting of his complaint may explain its ambiguities, but it does not excuse its failures . . . "). In other words, courts may not "take a liberal view of [a] jurisdictional requirement" even with respect to *pro se* litigants. *Michelotti v. United States*, 112 Fed. Cl. 187, 191 (2013), aff'd, 557 F. App'x 956 (Fed. Cir. 2014). As such, Whitfield's reliance on his *pro se* status is misplaced, as jurisdictional requirements establish the limits of a *court's* authority and apply irrespective of whether a litigant is represented.

Based on the foregoing, the district court correctly held that it lacked jurisdiction to permit Whitfield to untimely amend his defective petition outside of the 30-day filing deadline under NRS 233B.130(2)(d). The district court's decision in this regard complied with *Otto* and the clear legislative intent of NRS 233B.130(2). The opening brief has not cited any compelling legal basis for this Court to abandon *Otto* and disregard the clear intent of the Nevada Legislature.

C. NO LEGAL BASIS EXISTS TO MODIFY *WASHOE COUNTY V. OTTO*.

The final pages of the opening brief advocate in the alternative for this Court to "modify *Otto*" and apply a substantial compliance standard that would permit the untimely amendment of defective petitions outside the APA's 30-day filing deadline. *See* Opening Brief, at 18–25.

First, Whitfield's alternative argument for "modifying *Otto*" is an outright admission that his petition failed to strictly comply with the mandatory and jurisdictional requirements of NRS 233B.130(2)(a). If the petition had actually named all the required respondents, then modifying *Otto* would not be necessary. As such, Whitfield's entire final argument actually affirms the district court's Order Granting Motion to Dismiss.

Second, in his final argument Whitfield compares a petition for judicial review to a civil complaint for damages and then advocates for the Court to adopt a liberal amendment standard such as that seen under NRCP 15(a). *See* Opening Brief, at 22–23. The opening brief then invokes NRCP 15(c) and argues that Whitfield should "be permitted to file an amended petition after the 30-day window to correct any technical defects to the party-naming requirements." *Id*. at 23.

Whitfield's reliance on NRCP 15 is misplaced because judicial review is a special statutory proceeding that does not allow for the untimely amendment of defective petitions outside the 30-day filing deadline. *See* NRS 233B.130(2)(d); *see*

also Otto, 128 Nev. at 432–33. Likewise, NRCP 15(a)(2) specifically instructs that courts should freely give leave to amend when justice so requires, but no such provision is found in NRS 233B.130. As such, NRCP 15 is clearly inconsistent with the provisions of the APA and is inapplicable pursuant to NRCP 81(a).

Also, as explained in *Otto*, a court cannot grant leave to amend if a statutorily defective petition fails to invoke the court's jurisdiction in the first place. *Otto*, 128 Nev. at 435. Put another way, when an original petition is statutorily defective, "a district court does not obtain jurisdiction over it; thus, the district court has no jurisdiction to allow an amendment relating back to the original day of filing." *Id*. (citing *Commissioner v. Bethlehem Steel Corp.*, 703 N.E.2d 680, 683 (Ind. Ct. App. 1998)). Indeed, not even NRCP 15 permits the untimely amendment of a complaint that never properly invoked the court's jurisdiction. As such, it would have been clear legal error for the district court to permit Whitfield to amend his statutorily defective petition outside the APA's 30-day filing deadline; furthermore, no articulable basis exists to modify *Otto* and permit courts (without jurisdiction) to allow the untimely amendment of a statutorily defective petition.

Also, Whitfield admits that nothing in the text of the APA permits the untimely amendment of defective petitions, yet he asks the Court to recognize the right to amend defective petitions even outside the APA's 30-day filing deadline. *See* Opening Brief, at 23. In making this argument, Whitfield is really asking this

Court to take the place of the Nevada Legislature and to judicially legislate new terms into the clear and unambiguous language of NRS 233B.130 for the specific benefit of Whitfield. This is something the Nevada Supreme Court has always eschewed. *See McKay*, 103 Nev. at 492; *see also Cashman Equip. Co. v. W. Edna Assocs., Ltd.*, 132 Nev. 689, 698, 380 P.3d 844, 851 (2016) (recognizing that the authority to legislate "resides solely with the Legislature.")

Whitfield's final argument maintains that the mandatory and jurisdictional requirements of NRS 233B.130(2) are "unworkable" and that *Otto* is "badly reasoned"; therefore, Whitfield asks this Court to reverse *Otto* and disregard the mandatory and jurisdictional requirements of NRS 233B.130(2). *See* Opening Brief, at 24–25 (citing *State v. Lloyd*, 129 Nev. 739, 750, 312 P.3d 467, 474 (2013)).

Simply put, Whitfield's entire argument is detached from the record in this case. Whitfield's petition was not defective because *Otto* or the naming requirements of NRS 233B.130(2)(a) are "unworkable." Nor was the petition defective because of some impossible confusion over which respondents must be named. Whitfield did not name *any* respondents *anywhere* in the petition or in *any* attachment incorporated by reference. JA: 001–002. Indeed, Whitfield failed to name any respondents in his petition, despite the clear and unambiguous language of NRS 233B.130(2)(a) which instructs that "Petitions for judicial review **must** . . . name as respondents the agency and all parties of record to the administrative proceeding." (Emphasis added.)

Therefore, no legitimate argument can be made that Whitfield was somehow an unfair victim of a mysterious and unworkable legal standard. Indeed, Whitfield merely had to read the regulation set forth at the end of the Decision and Order. JA: 037. Consequently, the district court correctly dismissed Whitfield's petition for failure to strictly comply with the well-defined mandates of NRS 233B.130(2) and failure to invoke the district court's jurisdiction.

V. CONCLUSION

For the reasons set forth above, Respondent NDOC respectfully urges this Court to AFFIRM the District Court's Order Granting Motion to Dismiss.

DATED this 23rd day of September 2020.

AARON D. FORD
Attorney General

By: 

KEVIN A. PICK
Deputy Attorney General
Nevada Bar No. 11683
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

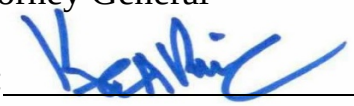
1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type face requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in font size 14 and font style Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 7,287 words and complies with NRAP 32(a)(7)(A)(ii).

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28e(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 23rd day of September 2020.

AARON D. FORD
Attorney General

By: 

KEVIN A. PICK
Deputy Attorney General
Nevada Bar No. 11683
Attorneys for Respondent

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I certify that on this 23rd day of September 2020, I caused a true and correct copy of the foregoing **RESPONDENT'S ANSWERING BRIEF**, Supreme Court Case No. 79718, to be electronically filed and served upon the following individuals through the Supreme Court's Electronic Case Filing System:

Kelly H. Dove
Gil Kahn
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
kdove@swlaw.com
gkahn@swlaw.com

An Employee of the
Office of the Attorney General