

IN THE COURT OF APPEALS FOR THE STATE OF NEVADA

REGINALD BINGHAM,

Appellant,

VS.

STATE OF NEVADA; PUBLIC
EMPLOYEES RETIREMENT
SYSTEM,

Respondents.

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Elizabeth A. Brown
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APPELLANT’S OPENING BRIEF

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the Appellant hereby certifies that there are no persons or entities that must be disclosed, other than the Appellant and his undersigned counsel, as set forth herein. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Dated this 9th day of November, 2021.

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1. JURISDICTIONAL STATEMENT:

Pursuant to Nevada Constitution, Article 6, section 4, the Supreme Court has appellate jurisdiction over the within appeal in that it arises from a civil action before the District Court.

This appeal is from an order denying the Appellant's petition for writ of mandamus, which is a final decision subject to direct appellate review under NRAP 3 and 4.

NRAP 28- Routing Statement: Under NRCP 17(b)(4), this matter is related to an appeal from an administrative agency decision. Therefore, this case should be routed to the Nevada Court of Appeals as a presumptive appeal assignment.

2. STATEMENT OF ISSUES PRESENTED FOR REVIEW:

a. Whether the district court abused its discretion in denying the writ of mandamus based on the record below.

3. STATEMENT OF THE CASE

Bingham filed a petition for writ of mandamus in the district court on April 1, 2021, to challenge the Respondent PERS Board's refusal to allow him a discretionary hearing related to claims regarding his disability retirement status.

App., 6, Petition for Writ of Mandamus

The Respondent filed a motion to dismiss the Petition on May 27, 2021. App., 10, Respondent's Motion to Dismiss. Bingham filed his opposition to the motion to dismiss on June 8, 2021. App., 31, Opposition to Motion to Dismiss. The Respondent filed a reply brief on June 14, 2021. App., 71, Reply in Support of Motion to Dismiss.

A hearing was held before the district court on the motion on June 22, 2021, wherein the district court granted the Respondent's motion to dismiss. App., 80, Transcript of Hearing, 6/22/21. The district court's order was filed on June 25, 2021, and served by notice of entry of order on July 7, 2021. App., 92, Notice of Entry of Order and Order.

Bingham timely filed his notice of appeal to this Court on August 6, 2021. App., 100, Notice of Appeal.

4. STATEMENT OF THE FACTS:

Bingham's Petition for Writ of Mandamus set forth the following background facts, which are relevant to this appeal and state his factual contentions in this matter, to wit:

“ This Petition for mandamus relief is filed pursuant to N.R.S. 34.150 et seq., as there is no plain, speedy or adequate remedy in the ordinary course of law to address the Petitioner's claim regarding his statutory rights under N.R.S. 286 et seq. to a hearing before the Respondent PERS Board related to his claims for disability retirement benefits. Specifically, Petitioner alleges as follows:

1. Petitioner Bingham had a previous hearing before the Respondent PERS Board on January 21, 2015, wherein his claim to receive PERS disability benefits was argued, heard and decided against by the PERS Board. Of note, Bingham was a previous employee of the City of Las Vegas and had a claim for benefits under PERS disability retirement provisions as set forth in NRS 286.620 et seq.
2. Bingham challenged the PERS Board denial of benefits by filing a petition for judicial review in the district court, which was denied in 2015. That denial was reviewed on appeal by the Nevada Supreme Court, which upheld the district court order by decision filed February 10, 2017, in case number 69927.

3. Subsequently, on or about 2020, Bingham discovered information regarding one of the PERS Board members who participated, argued and voted against Bingham at his PERS Board hearing in 2015. Petitioner determined that PERS Board member at the time, Mr. Mark Vincent, the PERS Chairman in 2015, was also employed as the Chief Financial Officer with the City of Las Vegas at the same time as the underlying hearing.

4. The participation by the Chairman in Petitioner Bingham's hearing was a potential and/or arguable conflict of interest, which, at a minimum, exhibited implied bias against Bingham's pending disability claim for benefits, as Bingham's former employer was the City of Las Vegas. The record of the proceedings does not indicate that the Chairman disclosed his employment capacity at the time of the previous hearing and, instead, participated in the hearing which was adverse to Petitioner.

5. On or about 2020, upon discovery of this information, Bingham requested a hearing before the PERS Board on his disability claim status, given the alleged and potential improprieties discovered from the earlier Board hearing on his claims. Respondent has repeatedly and arbitrarily ignored, denied and refused to allow Bingham any hearing to address these concerns before the PERS Board.

6. Petitioner Bingham is entitled to mandamus relief under NRS 34 et seq. as he

has no other plain, speedy or adequate remedy against the Respondent State agency which is refusing to allow a hearing on Bingham's claims, in light of the potential conflict of interest concerns noted herein.

7. Petitioner moves pursuant to NRS 34.190 for a Court order to compel the Respondent to allow Bingham a new hearing on his disability claims before the current PERS Board, or to appear before the Court to show cause why the relief should not be granted. Alternatively, the Respondent should be ordered to appear before the Court to address the concerns raised by Petitioner's action herein."

App., 6, Petition for Writ of Mandamus.

As argued in Bingham's Opposition to the Respondent's Motion to Dismiss, In 2020-2021, Bingham's Counsel sent written communications to PERS' General Counsel and to a PERS Board Member, which requested a hearing before the Board in light of the circumstances of the alleged conflict of interest noted in the instant Petition. **App., 47- 53, Opposition; Exh. 2, Letters to Counsel/PERS Member.** The letters garnered no attention by the Board which ignored the communications and provided no formal response.

Under NRS 286 et seq., as well as existing PERS Official Policies and regulations, Nevada law contemplates a procedure for a PERS member, such as Bingham, to request consideration by the Board of a claim for benefits, as well as

a process for reconsideration of any denial. **App., 63, Opposition; Exh. 3, Excerpts PERS Official Policies Regulation 12.4, 7/1/19.** PERS regulations allow a matter to be heard by the Board, in certain circumstances, at the request of a PERS member; at the request of PERS Staff and at the request of a PERS Board member. *Id.* The existing regulations also provide a catch-all type provision which states as follows:

“ d. All other petitions will be denied unless extenuating circumstances exist and the general counsel believes the Board has jurisdiction to hear the matter pursuant to NRS 286.190. The Board will be provided with a copy of the denial but if a Board member disagrees with the denial the Board member may request that the matter be presented for Board consideration at a future meeting.” *Id.*

Bingham’s written communications requested a new hearing before the Board in 2020/2021 were directly premised on his newly discovered information related to the alleged conflict of interest and implied bias of former Chairman Vincent overseeing Bingham’s hearing, while at the same time holding an executive employment position with the City of Las Vegas. Bingham’s request was properly based on an interpretation of existing PERS regulations.

Bingham sent multiple requests to PERS General Counsel in August, 2020,

and, again in February, 2021, which were summarily denied by that Counsel.

App., 47-53, Opposition, Exh. 2, Letters to PERS/Counsel. Bingham also sent a letter directly to a PERS Board member requesting a hearing, but this was also ignored. *Id.* All of Bingham's good faith attempts to bring the newly discovered issue of a conflict of interest from his prior 2015 PERS hearing to the attention of PERS were ignored and given no action by PERS.

A. The 2015 PERS Hearing:

The hearing transcript from Bingham's 2015 PERS hearing reveals that the PERS Board Chairman at issue, Mr. Mark Vincent, led the hearing and the proceedings related to Bingham's PERS request in 2015. **App., 54-62,**

Opposition, Exh. 2, Transcript of Hearing, 1/21/15. Clearly absent from the transcript is any formal disclosure of then Chairman Vincent's concurrent employment with the City of Las Vegas at the time in 2015. There was no pre-hearing disclosure of his City of Las Vegas employment at the time and no effort by Mr. Vincent to recuse himself from participating in Bingham's matter. Without question, Mr. Vincent was on notice that Bingham's PERS request for disability based benefits arose from his City of Las Vegas employment, which was repeatedly addressed at the hearing in 2015. *Id.*

Bingham concedes that Mr. Vincent's City employment status, though unknown at the time by both Bingham and his Counsel, was not hidden from the public and his City employment was disclosed at the time on the PERS based website for public viewing. However, this status was not addressed or disclosed in any manner at the January, 2015 hearing.

This particular claim has never been litigated by Bingham in his prior 2015 challenge to his PERS denial of benefits or in his prior Nevada Supreme Court appeal.

B. Prior Litigation:

As acknowledged in Bingham's Petition for Writ of Mandamus, Bingham previously litigated PERS' denial of his disability benefits claim in 2015 by filing a timely petition for judicial review with the district court, which was denied by the district court. Bingham subsequently filed an appeal to the Nevada Supreme Court, which upheld the district court's denial of his Petition. **App., 1, Nevada Court of Appeals Decision, Bingham v. PERS, No. 69927.**

The issue of Chairman Vincent's alleged conflict of interest/implied bias was never raised or addressed in the prior litigation or on the prior Supreme Court appeal. This issue was never addressed, as it was completely unknown to Bingham at the time and was never part of the record in the prior proceedings.

The failure of the former Chairman to apprise Bingham of his City of Las Vegas employment status at the hearing in January, 2015, foreclosed any realistic opportunity to make that non-disclosure an issue of concern in Bingham's 2015 litigation.

In 2020, when Bingham realized the issue of a conflict of interest, Bingham's efforts to bring this failure of disclosure to PERS attention were rebuffed and ignored by PERS, which denied any new hearing on the matter.

C. The District Court's Order:

The district court did not agree with Bingham's arguments regarding his requests for a hearing with PERS that he made in 2020 and 2021. The district court found that Bingham's requests were ineffective and outside the applicable statute of limitations. **App., 96-97, Order.** The court found the case time barred under application of NRS 286.630(4), which provides that a re-hearing on a PERS decision must be requested within 45 days of the decision at issue. *Id.* The district court found Bingham's requests for a hearing were too far removed from the original PERS decision against his disability benefit claim from January, 2015. *Id.*

The district court also found that Bingham's new claims regarding an alleged conflict of interest of the PERS Board Chairman in January, 2015, were

insufficient to be raised now and should have been addressed within 45 days of the 2015 PERS decision. Id.

As argued in the court below, Bingham never previously raised the conflict of issue concerns in 2015 given (1) his lack of knowledge of Vincent's City of Las Vegas employment status and (2) the failure of disclosure at the January, 2015 hearing by Vincent of that status. Bingham is being unfairly faulted for his failure to pursue an issue in 2015, which was unknown and undisclosed to him in the first instance by PERS and/or by former Chairman Vincent at the original PERS hearing in January, 2015.

The non-disclosure of the City of Las Vegas employment status by Chairman Vincent at the time of the January, 2015, PERS hearing effectively denied any formal notice to Bingham that one of the PERS Board members deciding the fate of his disability benefit claim was an executive level employee with the City.

5. ARGUMENT:

A. The district court erred in denying Bingham's writ, as his conflict of interest claims justified a discretionary hearing by PERS:

Standard of Review: A review of a PERS Board decision is based on whether substantial evidence supports the Board's decision. *City of Reno v. Traveler's Hotel Ltd.*, 100 Nev. 436, 439 (1984). The denial of a writ of mandamus is reviewed for a manifest abuse of discretion or whether the decision is arbitrary or capricious. *Building and Construction Trades Council of Northern Nevada v. State of Nevada ex rel Public Works Board*, 836 P.2d 633, 636 (Nev. 1992).

In the district court below, the Respondent relied upon NRCP 12(b) as the basis for its motion to dismiss. This Court has held that a district court may dismiss a complaint under NRCP 12(b)(5) "only if it appears to a certainty that a plaintiff can prove no set of facts which would entitle him to relief." *Bergman v. Boyce*, 109 Nev. 670, 856 P.2d 560, 563 (1993), citing to *Edgar v. Wagner*, 101 Nev. 226, 228 (1985). In *Buzz Stew, LLC v. City of North Las Vegas*, 181 P.3d 670, 672-73 (2008), the Court held that it "will recognize all factual allegations in . complaint as true and draw all inferences in" favor of the non-moving party. *Buzz Stew* also ruled that a complaint should be dismissed only if it appears

beyond a doubt that the nonmoving party can prove no set of facts which, if true, would entitle it to relief. *Id.*, See also, *Capital Mortgage Holding v. Hahn*, 101 Nev. 314, 315 (1985). At the stage of the proceedings below, all of Bingham’s factual allegations were to be accepted as true for purposes of Rule 12(b) analysis.

Bingham’s petition for writ of mandamus sought the extraordinary relief afforded by NRS 34.170, as he had no other plain, speedy or adequate remedy at law. The PERS Board exercised discretionary conduct by ignoring Bingham’s requests for a new hearing in 2020/2021. The PERS decision to ignore Bingham’s hearing requests was an arbitrary and capricious abuse of Nevada laws and regulations by PERS, which manifestly abused its discretionary authority against Bingham. See *PERS v. Gitter*, 383 P.3d 673 (2017).

Under Nevada law, upon the discretionary denial of Bingham’s request for a hearing in 2021, there was no other remedy available at law to compel PERS to grant him a hearing on his claims, short of Bingham’s mandamus action.

A. Application of Ethics Rules to the Nevada PERS Board:

PERS Board members serve in appointed positions, whereby the Governor appoints each of the seven Board members who serve four year terms. See NRS 286.120; NRS 286.130. As appointed positions by the Governor, PERS Board members are statutorily defined as “public officers” under NRS 281.005 and NRS

281A.160. Nevada law sets forth codified ethics rule requirements which apply to all public officers, including the PERS Board, as described in NRS 281A.400 et seq.

PERS Board members must disclose certain conflicts of interest and even abstain from voting in certain conflict situations, as described in NRS 281A.420. The statutory ethics rules contemplate that a public officer, at a minimum, should disclose, prior to a hearing upon which he is deciding a matter, any potential or existing conflict of interest in the matter at issue. NRS 281A.420(1)(b) and (c).

Whether such disclosure is necessary is dependent upon an interpretation of the ethics situations set forth in NRS 281A.400, however, disclosure events include situations whereby a public officer has a separate commitment in a private capacity, such as separate employment, or situations where the public officer has a separate, significant pecuniary interest, such as employment, which may affect or impair the public officer's judgment. See NRS 281A.420(1)(b) and (c).

PERS Chairman Vincent in 2015 was concurrently employed in an executive capacity with the City of Las Vegas as the Chief Financial Officer for the City. Bingham, a former City employee, challenged whether the City of Las Vegas gave him effective notification of his PERS disability retirement rights upon his separation from employment with the City. **App., 54-62, PERS Hearing**

Transcript, January, 2015. Bingham argued to PERS that the City gave improper, insufficient and erroneous notification to him regarding his ability to obtain PERS disability retirement benefits.

Given Bingham's arguments, he alleged that the City engaged in intentional misconduct related to his rights for PERS disability benefits. Chairman Vincent, and the City's Chief Financial Officer, actively participated in the discussions, arguments and voting that occurred at the January, 2015, PERS hearing, despite the nature of Bingham's arguments that Vincent's employer, the City of Las Vegas, engaged in alleged notification improprieties. *Id.*

Chairman Vincent's participation in a hearing wherein misconduct was alleged against his own, separate employer, the City of Las Vegas, evidences, at a minimum, the potential for implied bias against Bingham's case and arguments before the PERS Board in 2015. The existence of this implied bias constitutes the core of Bingham's ethics claims regarding Chairman Vincent's active participation at Bingham's January, 2015, PERS Board hearing.

B. PERS Regulations Allow for Bingham's Hearing Request.

PERS Regulations contemplate that petitions for relief may be submitted to the Board by PERS Board Staff, by action of PERS general counsel or by a PERS Board member. **App., 66-67, Opposition; Exh. 3, Official Policies, Section 12.4,**

12.5.

PERS regulations also provide a catch all provision which states as follows:
“ 12.4(d): All other petitions will be denied unless extenuating circumstances exist and the general counsel believes the Board has jurisdiction to hear the matter pursuant to NRS 286.190. The Board will be provided with a copy of the denial but if a Board member disagrees with the denial the Board member may request that the matter be presented for Board consideration at a future meeting.” Id., at 82.

Pursuant to PERS’ own regulations, the Board may allow for the discretionary placement of a hearing matter request from a System member for consideration by the Board at any time. In reliance on these provisions, Bingham requested to both PERS counsel and to a PERS Board member that he be allowed a new hearing on his disability benefit claims, given the extenuating and unique circumstances posed by the implied conflict of interest claims related to Chairman Vincent’s participation at Bingham’s original hearing.

Noticeably absent from the PERS Regulations is any specific time limitation for a System member, such as Bingham, to petition the Board to hear a *new* petition or claim for benefits. Nevada law does not specifically limit or prohibit a PERS System member, such as Bingham, from submitting a discretionary hearing

request for consideration of relief by the Board, either to its counsel or to a Board member directly. There is no statute of limitations or time bar for such request for discretionary relief.

Bingham concedes that Nevada law does provide for a time limit of 45 days for a member to request reconsideration of the denial of a disability application, however, Bingham's requests for a new hearing are not predicated directly upon his prior, 2015 benefits application.

Bingham, for the first time in 2020/2021, sought a discretionary Board hearing based on the new evidence related to Chairman Vincent's alleged conflict of interest in derogation to Nevada ethics laws. For relief, Bingham sought a new hearing on a disability benefits claim which did not include a Board member affiliated with the City of Las Vegas, as occurred at the 2015 prior hearing.

Both the Respondent and the district court below misinterpreted the 45 day rehearing regulation. Bingham's claims were premised upon newly discovered evidence, not solely a request for rehearing of the January, 2015, denial of benefits.

6. CONCLUSION:

Bingham's request for a new hearing with the PERS Board in 2020/2021 is predicated upon the extenuating circumstance regarding the ethics allegations against former Chairman Vincent's adverse participation in Bingham's prior disability benefit claim hearing. This is a new claim which was (1) never litigated in the previous case and (2) could not have been litigated in the prior district court petition for review or the prior Nevada Supreme Court proceedings given its absence from the record.

Bingham's prior 2015 hearing was infected with both procedural and substantive due process errors given the active participation of the then City of Las Vegas' Chief Financial Officer while serving in the capacity as PERS Board Chairman over a benefits claim by Bingham which alleged intentional misconduct by the City. The appearance of implicit bias was present at the prior hearing overseen by Chairman Vincent, who was also the City's CFO, given Bingham's allegations of misconduct by the City which adversely impacted his original PERS disability benefits application. This implicit bias constitutes a violation of Nevada's statutory ethics rules, as applied to public officers, and warrants a new, conflict-free PERS hearing for Bingham.

For all the foregoing reasons, the district court order should be reversed and the matter remanded for a new benefits hearing before the PERS Board on Bingham's claim.

Dated this 9th day of November, 2021.

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7. CERTIFICATE OF COMPLIANCE WITH NRAP 28.2 AND NRAP 32:

As undersigned counsel for the Appellant, I hereby certify as follows:

1. I have prepared and read the foregoing opening brief;
2. To the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
3. I certify that the brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found; and
4. I certify that the brief complies with the formatting requirements of Rule 32(a)(4)-(6) and the page and/or type volume limitations stated in Rule 32 (a)(7).
5. I hereby further certify that this brief complies with the typeface and type style requirements of Rule 32(a)(4)-(6) as it utilizes times new roman type face with a 14 point type style. Further, this brief is in compliance with the type-volume limitations as it contains less than 14,000 words and has a word count of

approximately 4,147 words in the countable sections of the brief.

Dated this 9th day of November, 2021.

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8. CERTIFICATE OF SERVICE:

I hereby affirm that on this 9th day of November, 2021, I mailed via first class U.S. Mail a copy of the foregoing brief to the Respondent at the address below:

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/s/Kirk T. Kennedy
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