

**IN THE COURT OF APPEALS FOR THE STATE OF NEVADA**

REGINALD BINGHAM,

Appellant,

**vs.**

STATE OF NEVADA; PUBLIC  
EMPLOYEES RETIREMENT  
SYSTEM,

### Respondents.

**No. 83353** Electronically Filed  
Nov 09 2021 09:32 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**APPELLANT'S APPENDIX, VOL. 1**

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## **TABLE OF CONTENTS**

	<b>PAGE:</b>
1. Nevada Supreme Court, Order, No. 69927, 2/10/17	1
2. Petition for Writ of Mandamus, 4/1/21	6
3. Respondent's Motion to Dismiss, 5/27/21	10
4. Petitioner's Opposition to Motion to Dismiss, 6/8/21	31
5. Respondent's Reply In Support of Motion to Dismiss, 6/14/21	71
6. Transcript of Hearing on Motion to Dismiss, 6/22/21	80
7. Notice of Entry of Order and Order, 7/7/21	92
8. Notice of Appeal, 8/6/21	100

## **CERTIFICATE OF SERVICE**

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

Ian Carr  
Deputy Attorney General  
100 N. Carson St.  
Carson City, NV 89701

/s/Kirk T. Kennedy  
Law Office of Kirk T. Kennedy

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

REGINALD BINGHAM,  
Appellant,  
vs.  
PUBLIC EMPLOYEES' RETIREMENT  
SYSTEM OF NEVADA,  
Respondent.

No. 69927

FILED

FEB 10 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for a writ of mandamus in a public benefits matter. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Appellant Reginald Bingham, a former Las Vegas city employee, was terminated from his job in 2010 and started to receive retirement benefits from respondent, the Public Employees' Retirement System of Nevada (PERS). In 2012, Bingham sent a letter to PERS inquiring if he could obtain PERS-based disability benefits. PERS concluded that, because Bingham did not apply for disability benefits in the time set by statute, he was not eligible for disability retirement. See NRS 286.620(1)(b) (providing that a party seeking disability retirement must apply for such while still "in the employ of a participating public employer" in order to be eligible). Bingham administratively appealed that decision, but it was upheld by the PERS Board, which also declined Bingham's invitation to allow him to apply for disability retirement based on equity considerations. See NRS 286.190(3)(a) (giving the PERS Board the discretion to adjust benefits "after an error or inequity has been



determined"). Bingham then filed a petition for writ of mandamus<sup>1</sup> with the district court, alleging that the PERS decision was an arbitrary and capricious abuse of discretion. The district court denied the petition, finding that he failed to timely seek disability retirement and that PERS properly denied his request to file an untimely application, and this appeal followed.

On appeal, Bingham raises the same arguments as he did before the PERS board and the district court. Specifically, he asserts that, even if his request for disability retirement was untimely, the City of Las Vegas sent a letter notifying Bingham that he would need to apply for disability retirement before his termination date in order to be eligible for those benefits, but that this letter was sent to the incorrect address. Thus, Bingham argues that he was not properly notified of this requirement, which constitutes an inequity that the PERS board should have used its discretionary powers under NRS 286.190(3)(a) to correct. In this vein, Bingham claims it does not matter whether his application was just two weeks late, or two years late; the equity principles in NRS 286.190(3)(a) apply regardless.

Having reviewed the briefs and record on appeal, we conclude that the district court did not abuse its discretion in denying Bingham's petition for a writ of mandamus. *See Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006) (explaining that a district court's decision regarding a petition for a writ of mandamus is reviewed under an abuse of discretion standard). A writ of mandamus is "available to compel the

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<sup>1</sup>Initially, Bingham filed a petition for judicial review of the PERS decision, but the parties stipulated to convert that petition to one for mandamus relief. Because neither party asserts that writ relief was an inappropriate avenue for the relief Bingham sought, we do not address that issue further.

performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion.” *Int’l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); see also NRS 34.160. In particular, we conclude that Bingham failed to show that PERS abused its discretion in refusing to allow him to seek disability retirement, despite the untimeliness of his request, based on equity considerations and NRS 286.190(3)(a). See NRS 34.160; cf. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) (recognizing that the petitioner carries the burden of demonstrating that the extraordinary remedy of writ relief is warranted).

NRS 286.190(4) defines “error or inequity” as used in subsection (3)(a) to mean “the existence of extenuating circumstances, including, but not limited to, a member’s reasonable and detrimental reliance on representations made by [PERS] or by the public employer . . . which prove to be erroneous, or the mental incapacity of the member.” And, while the list of extenuating circumstances identified in the statute is not exhaustive, “it is significant that none of the examples involves employee fault or neglect.” See *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 618, 627, 310 P.3d 560, 566 (2013).

In this case, Bingham alleges neither detrimental reliance on an erroneous statement by PERS or his employer nor mental incapacity; rather, he only alleges that the letter notifying him of the application deadline was sent to the wrong address. But Bingham points to no law that even requires a public employer to send such a letter or other notice before an employee is terminated or otherwise separates from public service. And, further, he waited approximately two years after leaving public employment to request disability benefits. Thus, the failure to timely apply for disability retirement rests squarely on Bingham’s shoulders rather than that of PERS or Bingham’s prior employer, the City

of Las Vegas. As a result, PERS did not abuse its discretion in declining to use its equitable powers to rectify Bingham's self-inflicted failure to timely request disability retirement. *See id.* at 626-29, 310 P.3d at 566-67 (concluding that PERS did not abuse its discretion in refusing to use NRS 286.190(3)(a) to allow a party to receive retirement benefits that the party did not timely request, when neither PERS nor the employer was at fault for the late application).

Accordingly, because PERS' refusal to allow Bingham to file a late application for disability retirement under equity principles did not constitute an arbitrary or capricious exercise of its discretion, *see id.* at 623, 310 P.3d at 564 (providing that PERS decisions are reviewed like administrative agency decisions such that a court may not substitute its judgment regarding the evidence for that of PERS), we necessarily conclude that the district court did not abuse its discretion in refusing to grant mandamus relief on this ground. *See Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558; *see also Kay*, 122 Nev. at 1105, 146 P.3d at 805.

Based on the foregoing, we affirm the district court's denial of Bingham's petition for mandamus relief.

It is so ORDERED.

Silver C.J.  
Silver

Tao J.  
Tao

Gibbons J.  
Gibbons

cc: Hon. Stefany Miley, District Judge  
Israel Kunin, Settlement Judge  
Kirk T. Kennedy  
Christopher G. Nielsen  
Woodburn & Wedge  
Eighth District Court Clerk

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*Steven D. Grierson*

PET  
KIRK T. KENNEDY, ESQ.  
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CASE NO: A-21-832163-W  
Department 29

DISTRICT COURT

CLARK COUNTY, NEVADA

REGINALD BINGHAM,

Petitioner/Claimant,

Case No:  
Dept. No:

vs.

STATE OF NEVADA,

Respondent,

PUBLIC EMPLOYEES RETIREMENT  
SYSTEM,

Administrative Agency.

PETITION FOR WRIT OF MANDAMUS

COMES NOW, the Petitioner, REGINALD BINGHAM, by and through his undersigned counsel, KIRK T. KENNEDY, ESQ., who files this petition for writ of mandamus against the Respondent, State of Nevada Public Employees Retirement System.

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.

WHEREFORE, Petitioner prays that this Court grant the requested relief set forth herein.

Dated this 12<sup>th</sup> day of March, 2021.

/s/Kirk T. Kennedy  
KIRK T. KENNEDY, ESQ.  
Nevada Bar No: 5032  
815 S. Casino Center Blvd.  
Las Vegas, NV 89101  
(702) 385-5534  
Attorney for Petitioner

DECLARATION OF COUNSEL

STATE OF NEVADA }  
COUNTY OF CLARK } SS:

Under penalties of perjury, I, KIRK T. KENNEDY, ESQ., declare and affirm as follows:

I am an attorney duly licensed to practice law in Nevada and I am counsel for the Petitioner in this matter. I have read the foregoing petition and I know the contents thereof; and that the same is true of my own knowledge, except for those matters stated on information and belief and as to those matters I believe them to be true.

I am authorized by the Petitioner herein to file this writ of mandamus action.

Executed under penalties of perjury in accordance with the laws of the State of Nevada on this 12<sup>th</sup> day of March, 2021.

/s/Kirk T. Kennedy  
KIRK T. KENNEDY, ESQ.

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**AFFIRMATION REGARDING SOCIAL SECURITY NUMBERS**

I hereby affirm that this document contains no social security numbers.  
Dated this 12<sup>th</sup> day of March, 2021.

/s/Kirk T. Kennedy  
KIRK T. KENNEDY, ESQ.  
Nevada Bar No: 5032  
815 S. Casino Center Blvd.  
Las Vegas, NV 89101  
(702) 385-5534  
Attorney for Petitioner



08P due  
6/10/21

Electronically Filed  
5/27/2021 2:14 PM  
Steven D. Griferson  
CLERK OF THE COURT

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13 *Employees' Retirement System*  
14 *of Nevada*

9 DISTRICT COURT  
10 CLARK COUNTY, NEVADA

11 REGINALD BINGHAM,

12 Petitioner,

13 vs.

14 STATE OF NEVADA, PUBLIC  
15 EMPLOYEES' RETIREMENT SYSTEM  
16 OF THE STATE OF NEVADA,

17 Respondents.

Case No.: A-21-832163-W

Dept. No.: XXIX

HEARING REQUESTED

RESPONDENTS' MOTION TO  
DISMISS

17 Respondents, the State of Nevada and the Public Employees' Retirement System of  
18 Nevada (PERS), by and through counsel, Aaron D. Ford, Attorney General of the State of  
19 Nevada, and Deputy Attorney General Ian Carr, hereby move to dismiss this case  
20 pursuant to Nevada Rule of Civil Procedure (NRCP) 12.

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1 This Motion is based on the following Memorandum of Points and Authorities and  
2 the papers and pleadings on file herein.

3 DATED this 27th day of May, 2021.

4 AARON D. FORD  
Attorney General

5 By: /s/ Ian Carr  
6 IAN CARR  
7 Deputy Attorney General  
8 State of Nevada  
9 (775) 684-1250  
10 ICarr@ag.nv.gov  
Attorneys for Respondents

11 NOTICE OF THE MOTION

12 TO: PETITIONER REGINALD BINGHAM AND COUNSEL.

13 PLEASE TAKE NOTICE THAT Respondents, the State of Nevada and PERS.  
14 through counsel, Aaron D. Ford, Attorney General of the State of Nevada, and Ian Carr,  
15 Deputy Attorney General, will bring this MOTION TO DISMISS, filed and served on May  
16 \_\_, 2021, for hearing in Department XXIX of the above-entitled Court, on the \_\_\_\_ day  
17 of \_\_, 2021, at \_\_, or as soon thereafter as counsel may be heard.

18 DATED this 27th day of May, 2021.

19 AARON D. FORD  
Attorney General

20 By: /s/ Ian Carr  
21 IAN CARR  
22 Deputy Attorney General  
23 Nevada Bar # 13840  
24 (775) 684-1250  
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Attorneys for Respondents

25 ///

26 ///

27 ///

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Petitioner Reginald Bingham's (Bingham) case should be dismissed as a matter of law.

Bingham alleges that as a PERS member, he applied for disability retirement benefits in 2015; his application was denied by the former Public Employees' Retirement Board<sup>1</sup> (PERS Board), the result of which was upheld after litigation in 2017. However, Bingham further alleges that he subsequently discovered in 2020 that one of the former PERS Board members that voted to deny his disability retirement application was employed by Bingham's former public employer at the time, therefore entitling Bingham to a new hearing before the current PERS Board.

Bingham's case is procedurally lacking for at least five separate and distinct reasons.

First, Bingham had available plain, speedy, and adequate remedies at law when he previously litigated this case and actually availed himself of them, foreclosing Bingham from justifying extraordinary writ relief. Bingham admits that he litigated this case's denial through district court and appellate proceedings, and the former PERS Board's decision was affirmed at all junctures. Furthermore, Bingham fails to identify any known, cognizable statutory duty of the current PERS Board to revive this case under these newly alleged circumstances.

Second, Bingham's denied disability retirement application is long barred by the applicable statute of limitations. Bingham's case was duly heard by the PERS Board in 2015 and litigated to a final decision by 2017. All known, prescribed legal periods for filing this case have run, and Bingham fails to allege a viable tolling mechanism that would extend them.

Third, Bingham fails to state a claim upon which relief can be granted. Bingham's insinuation that a solitary former PERS Board member voted to deny his disability retirement application (while employed by Bingham's former public employer) fails to

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<sup>1</sup> The former and current PERS Boards and their members are not named as respondents in this case.

1 generate a known conflict of interest or other disqualifying condition that would require the  
2 former PERS Board member to recuse himself or otherwise abstain from voting.  
3 Furthermore, Bingham fails to allege any impropriety on behalf of the sole former PERS  
4 Board member that would have influenced, changed, or otherwise altered the decision  
5 ultimately made by the full former PERS Board.

6 Fourth, Bingham's case is barred by the doctrine of res judicata and, specifically,  
7 issue preclusion. Bingham admits that he fully litigated this case to a final judgment on the  
8 merits among duplicate issues and participants. Even if Bingham were to demonstrate a  
9 supposed conflict of interest on behalf of the sole former PERS Board member, the Court of  
10 Appeals held that, for separate reasons, Bingham's disability retirement application was  
11 invalid under NRS Chapter 286 and its denial was legally sound. Bingham's attempts to  
12 resuscitate this case based on an alleged conflict of interest are futile as the merits of this  
13 case have been heard and defeated.

14 Fifth, Bingham's requested relief is objectionable based on the doctrine of laches.  
15 Bingham reasonably should have known about the supposed "conflict of interest" of the sole  
16 former PERS Board member in 2015 when he argued his disability retirement application.  
17 Bringing up this alleged conflict six years later unduly prejudices the current PERS Board's  
18 decision-making prerogative.

19 For these reasons and those argued more fully below, the Court should dismiss this  
20 case in its entirety, with prejudice.

## 21 II. PROCEDURAL HISTORY AND STATEMENT OF ALLEGED FACTS<sup>2</sup>

22 On or about April 1, 2021, Bingham filed this case, demanding extraordinary writ  
23 relief pursuant to NRS 34.150 *et seq.* See Pet. Writ Mandamus at 1-3.

24 Bingham's allegations are as follows: Bingham is a former employee of the City of  
25

26 <sup>2</sup> The Statement of Alleged Facts is based on the allegations in Bingham's  
27 pleading. None of the statements or arguments in this brief, which are based on  
28 Bingham's allegations, should be construed as admissions of fact. Instead, they are  
simply assumed as true for purposes of this Motion as required. See *Simpson v. Mars,*  
*Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997).

1 Las Vegas. See *id.* at 1, ¶ 1. On January 21, 2015, the former PERS Board heard and  
2 denied Bingham's disability retirement application. See *id.* Bingham appealed the denial to  
3 district court via a petition for judicial review, but the denial was upheld. See *id.* at 2, ¶ 2.  
4 Bingham appealed the district court's order, but in *Bingham v. PERS*, Case No. 69927, the  
5 Court of Appeals affirmed. See *id.*; see also Exh. 1<sup>3</sup> (copy of the Court of Appeals order).

6 At some point in 2020, Bingham found out that one of the former PERS Board  
7 members that voted on his case, then Chairman Mark Vincent, worked for the City of Las  
8 Vegas as Chief Financial Officer (CFO) at the same time. See *id.* at ¶ 3. Chairman Vincent  
9 did not disclose his role as City of Las Vegas CFO at the time during the hearing, and his  
10 participation and vote during the hearing could have been "a potential and/or arguable  
11 conflict of interest, which, at a minimum, exhibited implied bias against Bingham's pending  
12 disability claim for benefits, as Bingham's former employer was the City of Las Vegas." See  
13 *id.* at ¶ 4. Bingham brought his revelation to PERS, requesting a rehearing before the  
14 current PERS Board, but PERS ignored him. See *id.* at ¶ 5. Bingham now demands a  
15 rehearing before the current PERS Board as to his disability retirement application. See *id.*  
16 at ¶ 6.

17 Respondents now move to dismiss Bingham's case as a matter of law.

### 18 III. LEGAL STANDARD<sup>4</sup>

19 A pleading is subject to certain rules; primary among them is that a plaintiff's or  
20 petitioner's complaint or petition must adhere to NRCP 8(a). NRCP 8(a) provides:

21 A pleading that sets forth a claim for relief must contain: (1) a  
22 short and plain statement of the grounds for the [C]ourt's  
23 jurisdiction, unless the [C]ourt already has jurisdiction and the  
24 claim needs no new jurisdictional support; (2) a short and plain  
statement of the claim showing that the pleader is entitled to  
relief; [and] (3) a demand for the relief sought, which may include

25 <sup>3</sup> The Court can take judicial notice of facts not subject to reasonable dispute. See  
26 NRS 47.130. Furthermore, the Court can take judicial notice of proceedings in related or  
27 parallel cases, including those in other Nevada courts and administrative agencies, when  
appropriate. See *Mack v. Estate of Mack*, 125 Nev. 80, 91-92, 206 P.3d 98, 106 (2009)  
(internal citations omitted). As binding or persuasive authority, unpublished cases of the  
Nevada Court of Appeals can be cited for res judicata or law of the case purposes in  
related cases. See NRAP 36(c)(2); see also NRAP 36(c)(3).

28 <sup>4</sup> To the extent there is no statutory conflict, writ petitions seeking mandamus  
relief adhere to the standard Nevada Rules of Civil Procedure. See NRS 34.300.

14



relief in the alternative or different types of relief[.]

NRCP 8(a). Nevada follows a notice pleading standard as to Rule 8(a) and the sufficiency of the initial pleading. See *Crucil v. Carson City*, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979) (“[T]he pleading of [a] conclusion, either of law or fact, is sufficient so long as the pleading gives fair notice of the nature and basis of the claim.”).

“If the [C]ourt determines at any time that it lacks subject-matter jurisdiction, the [C]ourt *must* dismiss the action.” NRCP 12(h)(3) (emphasis added). Cf. NRCP 12(b)(1) (regarding motions to dismiss for lack of subject matter jurisdiction); *Mainor v. Nault*, 120 Nev. 750, 761 n.9, 101 P.3d 308, 315 n.9 (2004) (citing *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990)) (“Lack of subject matter jurisdiction can be raised at any time during the proceedings and is not waivable.”).

NRCP 12(b)(5) provides that a defendant or respondent may move to dismiss a claim in any pleading for “failure to state a claim upon which relief can be granted[.]” In reviewing such a motion, “[u]ll factual allegations of the complaint must be accepted as true.” *Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997). “A complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief.” *Id.*

#### IV. ARGUMENT

##### A. Bingham Had a Plain, Speedy, and Adequate Remedy at Law, Actually Availed Himself of It, and No Statutory Duty Exists to Rehear His Disability Retirement Application

A writ of mandamus provides a mechanism to compel the performance of an act required by law, or to control an arbitrary or capricious exercise of discretion. See *PERS v. Gitter*, 133 Nev. 126, 135, 393 P.3d 673, 681 (2017) (internal citation omitted). Extraordinary writ relief is only appropriate when and where a petitioner has no “plain, speedy, or adequate remedy . . . [at] law.” See *id.*; see also NRS 34.170. Mandamus can only lie when “the respondent has a *clear, present legal duty to act* . . . [m]andamus will not lie to control discretionary action . . . unless discretion is manifestly abused or is

1 exercised arbitrarily or capriciously." See *Round Hill Gen. Improvement Dist. v. Newman*,  
2 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981) (emphasis added).

3 Additionally, it is axiomatic that equitable relief will not lie when an adequate  
4 remedy otherwise exists at law. See *Las Vegas Valley Water Dist. v. Curtis Park Manor*  
5 *Water Users Ass'n*, 98 Nev. 275, 278, 646 P.2d 549, 551 (1982) (internal citation omitted)  
6 (denying Clark County District Court's authority to grant equitable relief when a statute  
7 otherwise provided a remedy). Like injunctions, extraordinary writs can either require or  
8 forbid actions (in the forms of mandamus or prohibition). See *Cole H. v. Eighth Judicial*  
9 *Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 907-08 (2008) (internal citations omitted). A  
10 party seeking injunctive relief (as a form of equitable relief) must demonstrate a  
11 reasonable probability of irreparable injury that compensatory damages cannot cure. See  
12 *Dangberg Holdings Nev., L.L.C. v. Douglas Cnty. and its Bd. of Cnty. Comm'rs*, 115 Nev.  
13 129, 142, 978 P.2d 311, 319 (1999) (internal citation omitted); see also NRS 33.010(2). In  
14 considering whether to entertain mandamus relief, Nevada courts should determine  
15 whether "urgency and strong necessity" support the petition, especially in light of other  
16 available legal remedies. See *Barngrover v. Fourth Judicial Dist. Court*, 115 Nev. 104,  
17 111, 979 P.2d 216, 220 (1999) (internal citation omitted).

18 Here, Bingham cannot justify his attempt to seek extraordinary writ relief to force  
19 the current PERS Board to rehear his disability retirement application because he admits  
20 he had at least one plain, speedy, and adequate remedy at law: a petition for judicial review  
21 of an administrative decision, which he actually utilized. Bingham appealed the former  
22 PERS Board's decision to both the district court and Court of Appeals and was rebuked at  
23 each instance. See *Pet. Writ. Mandamus* at 2; see also generally Exh. 1. Bingham's  
24 disability retirement application was denied at the administrative level, the district court,  
25 and the appellate court because it was flatly untimely, and the former PERS Board had no  
26 mandatory obligation to exercise equitable power in Bingham's favor. See *id.*; see also NRS  
27 286.190(3) (PERS Board's statutory "errors and inequities" clause authority is wholly  
28 discretionary). See *Gitter*, 133 Nev. at 135, 393 P.3d at 681; see also NRS 34.170

1 (extraordinary writ relief can only lie for lack of a plain, speed, or adequate remedy at  
2 law).

3 Furthermore, Bingham's petition for writ of mandamus lacks the requisite urgency of  
4 resolution necessary to justify extraordinary relief, because he admits that he "discovered"  
5 the supposed conflict of interest of former Chairman Vincent approximately five years after  
6 his disability retirement application hearing. See Pet. Writ Mandamus at 2. How Bingham  
7 failed to discover Chairman Vincent's employment status as the prominent CFO of the most  
8 populous city in Nevada prior to the hearing, during the subsequent litigation, or within five  
9 years after the hearing, remains unalleged. See *id.* In addition, Bingham's contention that  
10 he was wrongfully denied a disability retirement benefit is entirely monetary (and therefore  
11 not irreparable), which obviates the basis for granting his demanded equitable relief. Yet  
12 Bingham identifies no known statutory duty requiring the current PERS Board to allow him  
13 a rehearing under these circumstances, undermining the existence of a clear, present legal  
14 duty to act required to sustain a petition for writ of mandamus. See *Barngrover*, 115 Nev.  
15 at 111, 979 P.2d at 220; see also *Round Hill Gen. Improvement Dist.*, 97 Nev. at 603-04,  
16 637 P.2d at 536; see also *Dangberg Holdings Nev., L.L.C.*, 115 Nev. at 142, 978 P.2d at  
17 319.

18 Because Bingham had and exercised an applicable plain, speedy, and adequate  
19 remedy at law, and because he cannot otherwise satisfy the legal requirements necessary to  
20 justify extraordinary writ relief, the Court should dismiss this case in its entirety, with  
21 prejudice.

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1           B.     Bingham's Attempt to Resurrect His Disability Retirement  
2                   Application Is Barred by Applicable Statutes of Limitations<sup>5</sup>

3           Under NRS Chapter 286, a PERS member can only qualify for disability retirement if  
4 still employed by a PERS-eligible employer at the time of application. See NRS  
5 286.620(1)(b). Furthermore, a PERS member may only apply for reconsideration of a PERS  
6 Board's denial of a disability retirement application within 45 days, if the member discovers  
7 evidence which was not known during the original hearing. See NRS 286.630(4).

8           Here, Bingham's case is barred under both known NRS Chapter 286 theories.  
9 Bingham admits that he attempted to apply for disability retirement benefits after his  
10 employment with the City of Las Vegas ended, disqualifying him by operation of law. See  
11 Pet. Writ Mandamus at 1-2, ¶ 1 ("Of note, Bingham was a previous employee of the City of  
12 Las Vegas"); see also Exh. 1 at 1-3 (analyzing Bingham's post facto attempt to seek  
13 disability retirement benefits after his job termination and his service credit retirement); see  
14 also NRS 286.620(1)(b). Furthermore, this case, Bingham's new attempt to usurp the  
15 former PERS Board's decision denying his disability retirement application, is more than six  
16 years untimely, far eclipsing the 45-day statutory period to request reconsideration. See  
17 NRS 286.630(4).

18           Because Bingham's petition for writ of mandamus is barred by known and applicable  
19 statutes of limitations, the Court should dismiss this case in its entirety, with prejudice.

20           C.     Bingham Fails to State a Claim upon which Relief Can Be Granted

21           Nevada is a notice-pleading state, but to meet the bare requirements of notice  
22 pleading, a plaintiff (or petitioner) must "set forth sufficient facts to demonstrate the  
23 necessary elements of a claim for relief so that the defending party has adequate notice of

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25           <sup>5</sup> Bingham appears not to have raised any Nevada Open Meeting Law (OML)  
26 claims or issues in this case (see generally Pet. Writ Mandamus); nevertheless, he would  
27 be plainly barred from doing so under that statutory construct's strictures. See NRS  
28 241.037(3)(b) (a case brought to void an action taken by a public body in violation of OML  
must be filed within 60 days). Even assuming *arguendo* a three-year statute of  
limitations for generic statutory liability cases could be applied to this case (see NRS  
11.190(3)(a)), that period has long since lapsed, given that this case was filed more than  
six years after Bingham's disability retirement application hearing.

1 the nature of the claim and relief sought." *Western States Constr. v. Michoff*, 108 Nev.  
2 931, 936, 840 P.2d 1220, 1223 (1992).

3 Here, Bingham alleges that former Chairman Vincent's status as CFO of the City of  
4 Las Vegas created "a potential and/or arguable conflict of interest, which, at a minimum,  
5 exhibited implied bias against Bingham's pending disability claim for benefits, as Bingham's  
6 former employer was the City of Las Vegas." See Pet. Writ of Mandamus at 2, ¶ 4.  
7 However, Bingham identifies no germane legal rule that decrees such a situation as a  
8 conflict of interest and Bingham provides no citation to any provision of the law that would  
9 have required Chairman Vincent to disclose<sup>6</sup> his employment status or that would have  
10 required Chairman Vincent to recuse himself, abstain from voting, or otherwise refuse to  
11 participate in the hearing. *Cf. id.* (citing to no provision that would have disqualified former  
12 Chairman Vincent). Under Nevada law, PERS Board members must be active PERS  
13 members, and are routinely drawn from municipal governments; former Chairman's  
14 Vincent's employment status as City of Las Vegas CFO was explicitly contemplated by  
15 statute. See generally NRS 286.130. Furthermore, Bingham fails to allege that former  
16 Chairman Vincent's participation in the hearing and vote somehow skewed, distorted, or  
17 altered the PERS Board's decision to deny his disability retirement application. *Cf. Pet.*  
18 *Writ Mandamus* (devoid of any allegations of improper conduct). Bingham's oblique  
19 allegations of "implied bias" and "potential improprieties" fail to meet basic notice pleading  
20 standards.

21 Because Bingham fails to state a viable, cognizable claim upon which relief can be  
22 granted, the Court should dismiss this case in its entirety.

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27 <sup>6</sup> The professional biographies of current PERS Board members are published on  
28 the official PERS public website at: <https://www.nvpers.org/about/retirement-board>. The  
Court can take judicial notice of facts not subject to reasonable dispute. See NRS 47.130.  
Presumably, former Chairman Vincent's biography was also available during his tenure.

1           D.    The Doctrine of Res Judicata Prevents Bingham from Reasserting  
2               Issues Arising from His Denied Disability Retirement Application

3           Nevada courts apply the doctrine of res judicata when "(1) the parties or their  
4   privies are the same, (2) the final judgment is valid, and (3) the subsequent action is  
5   based on the same claims or any part of them that were or could have been brought in the  
6   first case." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713  
7   (2008) (citing *University of Nevada v. Tarkanian*, 110 Nev. 581, 600, 879 P.2d 1180, 1191  
8   (1994)). Specifically germane to issue preclusion, there must exist: (1) an identity of  
9   issues in controversy; (2) a final ruling on the merits; (3) the same party or a party in  
10   privity; and (4) actual and necessary litigation of the issues in controversy. *See Alcantara*  
11   *ex rel Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 258, 321 P.3d 912, 916 (2014)  
12   (internal citations omitted).

13           Here, Bingham alleges the former PERS Board wrongfully denied his disability  
14   retirement application. *See generally* Pet. Writ Mandamus. However, Bingham previously  
15   litigated the denial of his disability retirement application by filing a petition for judicial  
16   review, which was upheld by the district court and affirmed by the Court of Appeals. *See id.*  
17   at 2. ¶ 2; *see also* Exh. 1. Comparing the Court of Appeals order to this case reveals a  
18   common identity of issues and parties that resulted in a final judgment on the merits after  
19   actual and necessary litigation, resulting in this case being barred by issue preclusion. *See*  
20   *id.*; *see also Alcantara ex rel Alcantara*, 130 Nev. at 258, 321 P.3d at 916. The Court of  
21   Appeals recognized Bingham's disability retirement application was untimely under NRS  
22   286.620(1)(b) in any event, and that the former PERS Board properly exercised its discretion  
23   in declining Bingham equitable relief under NRS Chapter 286's "errors and inequities"  
24   clause. *See* Exh. 1. Bingham's attempt to relitigate his disability retirement application is  
25   futile, because even his demand for a rehearing were granted, the same result would occur  
26   by operation of law.

27           Because this case is barred by res judicata, and specifically issue preclusion, the  
28   Court should dismiss it in its entirety, with prejudice.

1           E.     Bingham's Sought Relief is Barred by the Doctrine of Laches

2           "Laches is an equitable doctrine which may be invoked when delay by one party  
3 works to the disadvantage of the other, causing a change of circumstances which would  
4 make the grant of relief to the delaying party inequitable." *See Carson City v. Price*, 113  
5 Nev. 409, 412, 934 P.2d 1042, 1043 (1997) (internal citation omitted). "Thus, laches is more  
6 than a mere delay in seeking to enforce one's rights; it is a delay that works to the  
7 disadvantage of another." *See id.* "The condition of the party asserting laches must become  
8 so changed that the party cannot be restored to its former state." *See id.*

9           Here, Bingham alleges a supposed conflict of interest on behalf of former Chairman  
10 Vincent, which somehow contaminated or tainted the decision (notwithstanding the  
11 fundamental statutory, timeliness, and res judicata issues argued above), resulting in  
12 Bingham's disability retirement application being denied. *See Pet. Writ Mandamus* at 2.  
13 However, the vote to deny Bingham's disability retirement application occurred more than  
14 six years ago; former Chairman Vincent no longer serves as a member of the PERS Board,  
15 nor do the rest of the members of the former PERS Board that heard and voted in the case.  
16 *See NRS 286.130(5)* (PERS Board members serve for four years). Bingham's allegations of a  
17 biased decision will continue to haunt and otherwise pollute further proceedings, and the  
18 former PERS Board cannot reconstitute. This would leave the current PERS Board with no  
19 practical ability to defend themselves from Bingham's allegations against former Chairman  
20 Vincent and the former PERS Board, or otherwise sanitize a rehearing. Bingham's  
21 monumental delay in bringing the instant petition for writ of mandamus, after having fully  
22 litigated this case years ago all the way through Nevada's Court of Appeals, hamstring and  
23 prejudices PERS and the current PERS Board beyond repair. Therefore, the doctrine of  
24 laches nullifies Bingham's petition for writ of mandamus because his delay in bringing it  
25 has generated an inequitable disadvantage hampering the current PERS Board's ability to  
26 salvage its position. *See Price*, 113 Nev. at 412, 934 P.2d at 1043.

27           Because the doctrine of laches renders the relief sought by Bingham's petition for writ  
28 of mandamus inequitable, the Court should dismiss this case in its entirety, with prejudice.

1 V. CONCLUSION

2 In this case, Bingham alleges that a former PERS Board chairman's conflict of  
3 interest caused the former PERS Board to improperly deny his disability retirement  
4 application six years ago. However, Bingham's own admissions portray his petition for writ  
5 of mandamus as a veiled attempt at circumventing and evading the final, binding,  
6 authoritative decisions of the former PERS Board, the district court, and the Court of  
7 Appeals after full judicial review. Bingham's case is facially deficient in justifying  
8 extraordinary writ relief, and is categorically barred by applicable statutes of limitations,  
9 his failure to state a cognizable claim upon which relief can be granted, issue preclusion, and  
10 laches. Bingham cannot wait six years to weaponize the salacious but indeterminate  
11 specter of an alleged conflict of interest to coerce the current PERS Board into acquiescing to  
12 his demand to hold a dubious "rehearing" *in terrorem*.

13 For these reasons and those set forth above, Respondents respectfully request that  
14 the Court grant their Motion to Dismiss and dismiss Bingham's case in its entirety, with  
15 prejudice.

16 DATED this 27th day of May, 2021.

17 AARON D. FORD  
18 Attorney General

19 By: /s/ Ian Carr  
20 IAN CARR  
21 Deputy Attorney General  
22 Nevada Bar # 13840  
23 (775) 684-1250  
24 ICarr@ag.nv.gov

25 *Attorneys for Respondents*  
26  
27  
28



AFFIRMATION  
(Pursuant to NRS 239B.030)

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

DATED: May 27, 2021

AARON D. FORD  
Attorney General

By: /s/ Ian Carr  
IAN CARR, Bar No. 13840  
Deputy Attorney General  
(775) 684-1250  
ICarr@ag.nv.gov

1 CERTIFICATE OF SERVICE

2 I certify that I am an employee of the Office of the Attorney General, State of  
3 Nevada, and that on May 27, 2021, I filed the foregoing, RESPONDENTS' MOTION TO  
4 DISMISS, via the Court's CM/ECF system. Parties will be notified by the Court's  
5 electronic notification system.

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8 Las Vegas, NV 89101  
9 [ktkennedylaw@gmail.com](mailto:ktkennedylaw@gmail.com)  
10 Attorney for Petitioner

11 /s/ Caitie Collins  
12 Caitie Collins, An Employee of the  
13 Office of the Attorney General  
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# EXHIBIT 1

# EXHIBIT 1



IN THE COURT OF APPEALS OF THE STATE OF NEVADA

REGINALD BINGHAM,  
Appellant,  
vs.  
PUBLIC EMPLOYEES' RETIREMENT  
SYSTEM OF NEVADA,  
Respondent.

No. 69927

FILED

FEB 10 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a district court order denying a petition for a writ of mandamus in a public benefits matter. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Appellant Reginald Bingham, a former Las Vegas city employee, was terminated from his job in 2010 and started to receive retirement benefits from respondent, the Public Employees' Retirement System of Nevada (PERS). In 2012, Bingham sent a letter to PERS inquiring if he could obtain PERS-based disability benefits. PERS concluded that, because Bingham did not apply for disability benefits in the time set by statute, he was not eligible for disability retirement. See NRS 286.620(1)(b) (providing that a party seeking disability retirement must apply for such while still "in the employ of a participating public employer" in order to be eligible). Bingham administratively appealed that decision, but it was upheld by the PERS Board, which also declined Bingham's invitation to allow him to apply for disability retirement based on equity considerations. See NRS 286.190(3)(a) (giving the PERS Board the discretion to adjust benefits "after an error or inequity has been

26

determined"). Bingham then filed a petition for writ of mandamus<sup>1</sup> with the district court, alleging that the PERS decision was an arbitrary and capricious abuse of discretion. The district court denied the petition, finding that he failed to timely seek disability retirement and that PERS properly denied his request to file an untimely application, and this appeal followed.

On appeal, Bingham raises the same arguments as he did before the PERS board and the district court. Specifically, he asserts that, even if his request for disability retirement was untimely, the City of Las Vegas sent a letter notifying Bingham that he would need to apply for disability retirement before his termination date in order to be eligible for those benefits, but that this letter was sent to the incorrect address. Thus, Bingham argues that he was not properly notified of this requirement, which constitutes an inequity that the PERS board should have used its discretionary powers under NRS 286.190(3)(a) to correct. In this vein, Bingham claims it does not matter whether his application was just two weeks late, or two years late; the equity principles in NRS 286.190(3)(a) apply regardless.

Having reviewed the briefs and record on appeal, we conclude that the district court did not abuse its discretion in denying Bingham's petition for a writ of mandamus. *See Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006) (explaining that a district court's decision regarding a petition for a writ of mandamus is reviewed under an abuse of discretion standard). A writ of mandamus is "available to compel the

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<sup>1</sup>Initially, Bingham filed a petition for judicial review of the PERS decision, but the parties stipulated to convert that petition to one for mandamus relief. Because neither party asserts that writ relief was an inappropriate avenue for the relief Bingham sought, we do not address that issue further.

performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); see also NRS 34.160. In particular, we conclude that Bingham failed to show that PERS abused its discretion in refusing to allow him to seek disability retirement, despite the untimeliness of his request, based on equity considerations and NRS 286.190(3)(a). See NRS 34.160; cf. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) (recognizing that the petitioner carries the burden of demonstrating that the extraordinary remedy of writ relief is warranted).

NRS 286.190(4) defines "error or inequity" as used in subsection (3)(a) to mean "the existence of extenuating circumstances, including, but not limited to, a member's reasonable and detrimental reliance on representations made by [PERS] or by the public employer . . . which prove to be erroneous, or the mental incapacity of the member." And, while the list of extenuating circumstances identified in the statute is not exhaustive, "it is significant that none of the examples involves employee fault or neglect." See *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 618, 627, 310 P.3d 560, 566 (2013).

In this case, Bingham alleges neither detrimental reliance on an erroneous statement by PERS or his employer nor mental incapacity; rather, he only alleges that the letter notifying him of the application deadline was sent to the wrong address. But Bingham points to no law that even requires a public employer to send such a letter or other notice before an employee is terminated or otherwise separates from public service. And, further, he waited approximately two years after leaving public employment to request disability benefits. Thus, the failure to timely apply for disability retirement rests squarely on Bingham's shoulders rather than that of PERS or Bingham's prior employer, the City

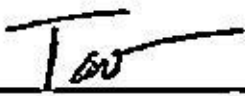
of Las Vegas. As a result, PERS did not abuse its discretion in declining to use its equitable powers to rectify Bingham's self-inflicted failure to timely request disability retirement. *See id.* at 626-29, 310 P.3d at 566-67 (concluding that PERS did not abuse its discretion in refusing to use NRS 286.190(3)(a) to allow a party to receive retirement benefits that the party did not timely request, when neither PERS nor the employer was at fault for the late application).

Accordingly, because PERS' refusal to allow Bingham to file a late application for disability retirement under equity principles did not constitute an arbitrary or capricious exercise of its discretion, *see id.* at 623, 310 P.3d at 564 (providing that PERS decisions are reviewed like administrative agency decisions such that a court may not substitute its judgment regarding the evidence for that of PERS), we necessarily conclude that the district court did not abuse its discretion in refusing to grant mandamus relief on this ground. *See Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558; *see also Kay*, 122 Nev. at 1105, 146 P.3d at 805.

Based on the foregoing, we affirm the district court's denial of Bingham's petition for mandamus relief.

It is so ORDERED.

  
Silver, C.J.

  
Tao, J.

  
Gibbons, J.

cc: Hon. Stefany Miley, District Judge  
Israel Kunin, Settlement Judge  
Kirk T. Kennedy  
Christopher G. Nielsen  
Woodburn & Wedge  
Eighth District Court Clerk

*Steven D. Grierson*

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Attorney for Petitioner

DISTRICT COURT  
CLARK COUNTY, NEVADA

REGINALD BINGHAM,  
Petitioner/Claimant,

Case No: A-21-832163-W  
Dept. No: 29

vs.

STATE OF NEVADA,  
Respondent,

PUBLIC EMPLOYEES RETIREMENT  
SYSTEM,  
Administrative Agency.

PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

COMES NOW, the Petitioner, REGINALD BINGHAM, by and through his undersigned counsel, KIRK T. KENNEDY, ESQ., who files this opposition to the Respondents' motion to dismiss his petition for writ of mandamus.

In support hereof, Petitioner relies on the following points and authorities and exhibits on file herein.

Dated this 8<sup>th</sup> day of June, 2021.

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Attorney for Petitioner



## POINTS AND AUTHORITIES

### **I. Factual Background for Petition:**

Petitioner Bingham filed his petition for writ of mandamus against the Respondent PERS, which generally alleged the following:

" 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.

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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." Exh. 1, Petition for Writ of Mandamus.

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. 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. Exh. 3, Excerpts PERS Official Policies, 7/1/19.

Bingham's written communications requesting 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.

**A. The 2015 PERS Hearing:**

The hearing transcript from Bingham's 2015 PERS hearing is attached as part of Exhibit 2 to this Opposition. Exh. 2, Letter Yolanda King, Exh. Transcript 1/21/15 Hearing. This transcript 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. Noticeably 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. The fact remains that there was no 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. Clearly, 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.

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.

Despite the open nature of Mr. Vincent's City employment, it was not addressed or disclosed in any manner at the January, 2015 hearing.

**B. Prior Litigation:**

As acknowledged in Bingham's Petition for Writ of Mandamus, Bingham has 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 that court. Bingham subsequently filed an appeal to the Nevada Supreme Court, which upheld the district court's denial of his Petition.

The issue of Chairman Vincent's alleged conflict of interest/implied bias was never raised or addressed in the prior litigation. 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.

## II. Argument:

Respondent moves pursuant to NRCP 12(b) for the dismissal of Bingham's Petition. As this Court is aware, the Nevada Supreme 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, 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 this stage of the proceedings, all of Petitioner Bingham's allegations are accepted as factually true for purposes of Rule 12(b) analysis.

Bingham's petition for writ of mandamus seeks the extraordinary relief afforded by NRS 34.170, as he has no other plain, speedy or adequate remedy at law. The PERS Board has exercised discretionary conduct by ignoring Bingham's requests for a new hearing. However, the PERS decision to ignore Bingham's hearing requests implicates the arbitrary and capricious abuse of Nevada laws and regulations by PERS, which has 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, he has no other remedy available at law to compel PERS to grant him a hearing on his claims. Short of mandamus relief, there exists no other remedy available for Bingham to compel the Respondent to grant his hearing request. For these reasons, Bingham's mandamus petition is appropriately filed against the Respondent at this time.

**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)(d).

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, which may affect or impair the public officer's judgment. See NRS 281A.420(1)(b)(c).

In this case, former 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, was challenging whether the City of Las Vegas gave him effective notification of his PERS disability retirement rights upon his separation from employment with the City. Bingham alleged, in part, at the hearing in January, 2015, that the City gave improper and/or erroneous notification to him regarding his ability to obtain PERS disability retirement benefits.

Given Bingham's arguments, he was essentially alleging 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

1 nature of Bingham's arguments that Vincent's employer, the City of Las Vegas, engaged  
2 in improprieties.

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

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

10 PERS Regulations contemplate that petitions for relief may be submitted to the  
11 Board by PERS Board Staff, by action of PERS general counsel or by a PERS Board  
12 member. Exh. 3, Official Policies, pgs. 81-83, Section 12.4, 12.5.

13 PERS regulations also provide a catch all provision which states as follows:  
14 " 12.4(d): All other petitions will be denied unless extenuating circumstances exist and  
15 the general counsel believes the Board has jurisdiction to hear the matter pursuant to NRS  
16 286.190. The Board will be provided with a copy of the denial but if a Board member  
17 disagrees with the denial the Board member may request that the matter be presented for  
18 Board consideration at a future meeting." Id., at 82.

19 Pursuant to PERS' own regulations, the Board may allow for the discretionary  
20 placement of a hearing matter request from a System member for consideration by the  
21 Board. Utilizing this provision, Bingham requested in writing to both PERS counsel and  
22 PERS Board member King that he be allowed a new hearing on his disability benefit  
23 claims, given the extenuating and unique circumstances posed by the implied conflict of  
24 interest claims related to Chairman Vincent's participation at Bingham's original hearing.

25 Noticeably absent from the PERS Official Policy manual is any specific time  
26 limitation for a System member, such as Bingham, to petition the Board to hear a new  
27 petition or claim for benefits. Nevada law does not specifically limit or prohibit a PERS  
28 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.

1 Bingham notes that Nevada law does speak to a time limit of 45 days for a  
2 member to request reconsideration of the denial of a disability application, however,  
3 Bingham's requests for a new hearing are not predicated directly upon his prior, 2015  
4 benefits application. Bingham, for the first time in 2020, sought a discretionary Board  
5 hearing based on the new evidence related to Chairman Vincent's alleged conflict of  
6 interest in derogation to Nevada ethics laws. Bingham sought a hearing on a disability  
7 benefits claim which did not include a Board member affiliated with the City of Las  
8 Vegas, as occurred at the 2015 prior hearing.

9 The Respondent's arguments about the statute of limitations as a bar to his  
10 petition are misplaced and ignore the essence of Bingham's efforts to obtain a new  
11 hearing from PERS.

### 12 C. Res Judicata is Inapplicable to Bingham's Petition.

13 Bingham's request for a new hearing with PERS was entirely premised upon the  
14 allegation that at his January, 2015, hearing, former Chairman Vincent failed to disclose  
15 his affiliation with the City of Las Vegas and failed to abstain from participating in the  
16 proceedings. This specific issue was never litigated in Bingham's prior petition for  
17 judicial review or the subsequent Nevada Supreme Court proceedings.

18 Bingham was completely unaware of Vincent's status with the City of Las Vegas  
19 at the time of his January, 2015, PERS hearing. Notably, at the prior hearing, Bingham  
20 did not address this unknown ethics claim, therefore, it was not part of the record on  
21 appeal in the subsequent judicial review proceedings in the district court and absent, as  
22 well, from the record of proceedings to the Nevada Supreme Court.

23 Given that Bingham's ethics claim allegations were never part of his 2015 PERS  
24 hearing and not part of the record of those proceedings, they could not have been brought  
25 in his subsequent litigation in the district court and on appeal. This was not a claim that  
26 was brought or could have been brought in the previous actions, given its absence from  
27 the records of those proceedings.  
28



Respondent relies on Nevada's law regarding the doctrines of res judicata and issue preclusion as set forth in *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008) and *Alcantara ex rel Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 258, 321 P.3d 912, 916 (2014). However, 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; (2) could not have been litigated in the prior district court petition for review or the Nevada Supreme Court proceedings given its absence from the record and (3) there was no prior "actual and necessary litigation" of the ethics claims and its relevance to Bingham's right to a fair, impartial and unbiased benefits hearing.

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. At a bare minimum, 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.

These issues do not constitute the "same claims" for purposes of res judicata analysis, as these were claims that were never brought before, nor could they have been brought at the time of the 2015 PERS hearing nor in the subsequent litigation. Again, Bingham was unaware of Chairman Vincent's status at the time of the 2015 PERS hearing.

#### **D. The Affirmative Defense of Laches Does Not Bar Bingham's New Claims.**

Respondent's argument that laches bars Bingham's petition for writ of mandamus ignores the foregoing history related to how Bingham's new claim arose and the lack of any prior challenge based on Bingham's ethics based allegations. Clearly, six years has now lapsed between the January, 2015, PERS hearing overseen by Chairman Vincent and

1 the present petition for mandamus relief. However, the relief requested by Bingham is  
2 not something which works to the disadvantage of the State of Nevada or PERS.

3 Bingham is a PERS System member, given his previous public employment. He  
4 has clear statutory and procedural rights to request a hearing related to a benefits claim, as  
5 outlined in the PERS Official Policy manual, Exhibit 3. Bingham also has a fundamental  
6 right to a fair hearing, which follows Nevada law and procedure. He was denied a fair  
7 hearing in 2015, as argued herein.

8 Bingham is not seeking money damages from PERS nor any extraordinary relief.  
9 He only requested a new hearing from PERS upon his discovery that at his prior hearing  
10 in 2015, the former Chairman's status with the City of Las Vegas evidenced the  
11 appearance of implicit bias and it was not disclosed in accordance with NRS 281A.400 et  
12 seq. Bingham's request for a discretionary hearing with PERS does not work to PERS  
13 disadvantage, as the Respondent argues regarding its laches claim. PERS regularly  
14 conducts hearings on benefit applications. Bingham's instant request is no different and  
15 imposes no unusual burden on the PERS Board.

16 Bingham's allegations are not designed to "haunt and otherwise pollute further  
17 proceedings," rather he only seeks a fair hearing premised upon full disclosure of separate  
18 employment status by the Board members. Bingham requests a new hearing to determine  
19 his right to PERS disability retirement benefits without the specter of implied bias  
20 infecting the thought processes of the Board members considering his claims.

21 Petitioner Bingham's request for mandamus relief merely seeks the district court's  
22 assistance to allow an actual, fair and impartial PERS hearing on his rightful, disability  
23 benefits claim. The passage of time between the original hearing in 2015 and today  
24 should not be an excuse to ignore an ethics violation which unfairly deprived Bingham of  
25 a full and impartial hearing on his benefits claim.

26 The Respondent excuses the potential ethical concerns by glossing over the  
27 allegations as unimportant and unworthy of consideration given the passage of time.  
28 Laches cannot be an excuse to justify the deprivation of statutory rights.



For all the foregoing reasons, the Respondents' motion to dismiss should be denied and Bingham's petition allowed to proceed.

Dated this 8<sup>th</sup> day of June, 2021.

/s/Kirk T. Kennedy  
KIRK T. KENNEDY, ESQ.  
Nevada Bar No: 5032  
815 S. Casino Center Blvd.  
Las Vegas, NV 89101  
(702) 385-5534  
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby affirm that on this 8<sup>th</sup> day of June, 2021, I mailed via first class U.S. Mail and served via electronic service a copy of the foregoing to Respondents at the address below:

Ian Carr  
Deputy Attorney General  
100 N. Carson St.  
Carson City, NV 89701-4717

/s/Kirk T. Kennedy  
Law Office of Kirk T. Kennedy

AFFIRMATION REGARDING SOCIAL SECURITY NUMBERS

I hereby affirm that this document contains no social security numbers.  
Dated this 8<sup>th</sup> day of June, 2021.

/s/Kirk T. Kennedy  
KIRK T. KENNEDY, ESQ.  
Nevada Bar No: 5032  
815 S. Casino Center Blvd.  
Las Vegas, NV 89101  
(702) 385-5534  
Attorney for Petitioner

**EXHIBIT 1:  
PETITION FOR WRIT  
OF MANDAMUS**

*Steven D. Grierson*

PET  
KIRK T. KENNEDY, ESQ.  
Nevada Bar No: 5032  
815 S. Casino Center Blvd.  
Las Vegas, NV 89101  
(702) 385-5534  
email: ktkennedylaw@gmail.com  
Attorney for Petitioner

CASE NO: A-21-832163-W  
Department 29

DISTRICT COURT  
CLARK COUNTY, NEVADA

REGINALD BINGHAM,  
Petitioner/Claimant,

Case No:  
Dept. No:

vs.

STATE OF NEVADA.

Respondent,

PUBLIC EMPLOYEES RETIREMENT  
SYSTEM,

Administrative Agency.

PETITION FOR WRIT OF MANDAMUS

COMES NOW, the Petitioner, REGINALD BINGHAM, by and through his undersigned counsel, KIRK T. KENNEDY, ESQ., who files this petition for writ of mandamus against the Respondent, State of Nevada Public Employees Retirement System.

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.

WHEREFORE, Petitioner prays that this Court grant the requested relief set forth herein.

Dated this 12<sup>th</sup> day of March, 2021.

/s/Kirk T. Kennedy  
KIRK T. KENNEDY, ESQ.  
Nevada Bar No: 5032  
815 S. Casino Center Blvd.  
Las Vegas, NV 89101  
(702) 385-5534  
Attorney for Petitioner

DECLARATION OF COUNSEL

STATE OF NEVADA }  
COUNTY OF CLARK } SS:

Under penalties of perjury, I, KIRK T. KENNEDY, ESQ., declare and affirm as follows:

I am an attorney duly licensed to practice law in Nevada and I am counsel for the Petitioner in this matter. I have read the foregoing petition and I know the contents thereof; and that the same is true of my own knowledge, except for those matters stated on information and belief and as to those matters I believe them to be true.

I am authorized by the Petitioner herein to file this writ of mandamus action.

Executed under penalties of perjury in accordance with the laws of the State of Nevada on this 12<sup>th</sup> day of March, 2021.

/s/Kirk T. Kennedy  
KIRK T. KENNEDY, ESQ.

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**AFFIRMATION REGARDING SOCIAL SECURITY NUMBERS**

I hereby affirm that this document contains no social security numbers.

Dated this 12<sup>th</sup> day of March, 2021.

/s/Kirk T. Kennedy  
KIRK T. KENNEDY, ESQ.  
Nevada Bar No: 5032  
815 S. Casino Center Blvd.  
Las Vegas, NV 89101  
(702) 385-5534  
Attorney for Petitioner

**EXHIBIT 2:  
LETTERS FROM  
BINGHAM TO PERS  
REQUESTING  
HEARING**





August 3, 2020

Chris Nielson  
General Counsel  
NV PERS  
5740 S. Eastern Ave., Ste. 120  
Las Vegas, NV 89119

RE: Reginald Bingham

Dear Mr. Nielson:

Earlier this year, we exchanged the attached letters regarding the claims of my client, Mr. Reginald Bingham related to his attempt to obtain disability PERS benefits by way of a new hearing. Given the litigation history of Mr. Bingham with PERS, your response indicated that any request for reconsideration was untimely.

There remains an issue which has never been litigated or fairly addressed by PERS in this matter. At the time of Mr. Bingham's PERS hearing on January 21, 2015, the PERS Chairman was the Honorable Mark R. Vincent. If my information is correct, Mr. Vincent was the Chairman, while he was also employed as the Chief Financial Officer with the City of Las Vegas. At the time of the January, 2015, hearing, Mr. Vincent was employed in both capacities. Mr. Bingham's public employer at issue with his claim was also the City of Las Vegas.

As you can see by reviewing the attached transcript from that hearing, Mr. Vincent did not disclose his dual capacities, nor did he recuse himself from the hearing. There exists a natural conflict of interest for the former Chairman to sit and preside over a hearing which involved his same public employer at the time. The transcript indicates Mr. Vincent participated by voting, as well, against Mr. Bingham's petition for benefits.

My review of the PERS general regulations indicates that a party has a right to one reconsideration upon the presentation of new evidence which was not known or available at the time. The existence of Mr. Vincent's dual capacities was not known to either Mr. Bingham or

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myself at the time. However, it was clearly known to Mr. Vincent who chose to participate and oversee the hearing which involved his same, public employer at the time, the City of Las Vegas.

Based on the foregoing and the conflict of interest concerns raised by this letter, I am again requesting that the Board allow a new hearing on Mr. Bingham's petition and request for disability retirement benefits for which he qualifies under Nevada law.

I would appreciate your response within the next ten days to my office. Thank you.

Yours truly,

A handwritten signature in black ink, appearing to read 'Kirk T. Kennedy', with a long horizontal flourish extending to the right.

Kirk T. Kennedy, Esq.  
KTK/pf  
Enc.

Retirement Board

Timothy M. Ross  
Chair  
Yolanda T. King  
Vice Chair

Dawn F. Hartley  
Todd H. Ingalsbee  
Mark Stevens  
Brian A. Wallace



Executive Staff

Tim Laine  
Executive Office

Steve Edwards  
Investment Office

March 24, 2020

Kirk T. Kennedy, Esq.  
Kennedy Law Offices  
815 S. Casino Center Blvd.  
Las Vegas, NV 89101

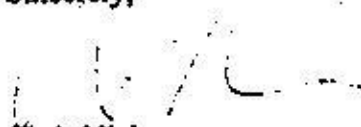
Re: Reginald Bingham

Dear Mr. Kennedy:

I am writing to you pursuant to a recent letter PERS received with respect to Mr. Reginald Bingham. In that letter, a request has been made for reconsideration of a PERS' Retirement Board decision that denied your client his request for disability retirement.

As you are aware, the Board's decision was rendered on or about January 21, 2015 and was upheld by the Nevada Court of Appeals in a decision issued on or about February 20, 2017. To that end, the request for reconsideration is untimely pursuant to NRS 286.630(4) (stating that under certain circumstances an application for reconsideration must be made within 45 days after denial by the Board). Moreover, I suspect the time to ask the Court of Appeals for reconsideration has lapsed as well. Consequently, we are unable to grant your client's request.

Sincerely,

  
Chris Nielsen  
General Counsel

~~CONFIDENTIAL~~

~~CONFIDENTIAL~~

February 10, 2020

NV PERS  
5740 S. Eastern Ave., Ste. 120  
Las Vegas, NV 89119

Re: Reginald Bingham Application for PERS Disability Benefits

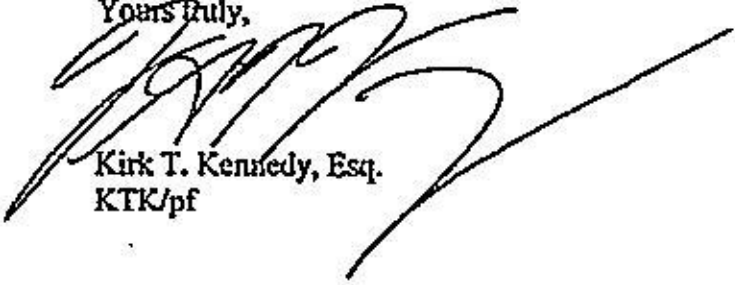
Dear Sirs:

I am Nevada counsel for Mr. Reginald Bingham. In 2012, my client applied for PERS disability benefits, following his previous employment with the City of Las Vegas. His request was heard and denied by the Board that same year. Mr. Bingham challenged that denial in the court system, however, ultimately the Board decision was upheld.

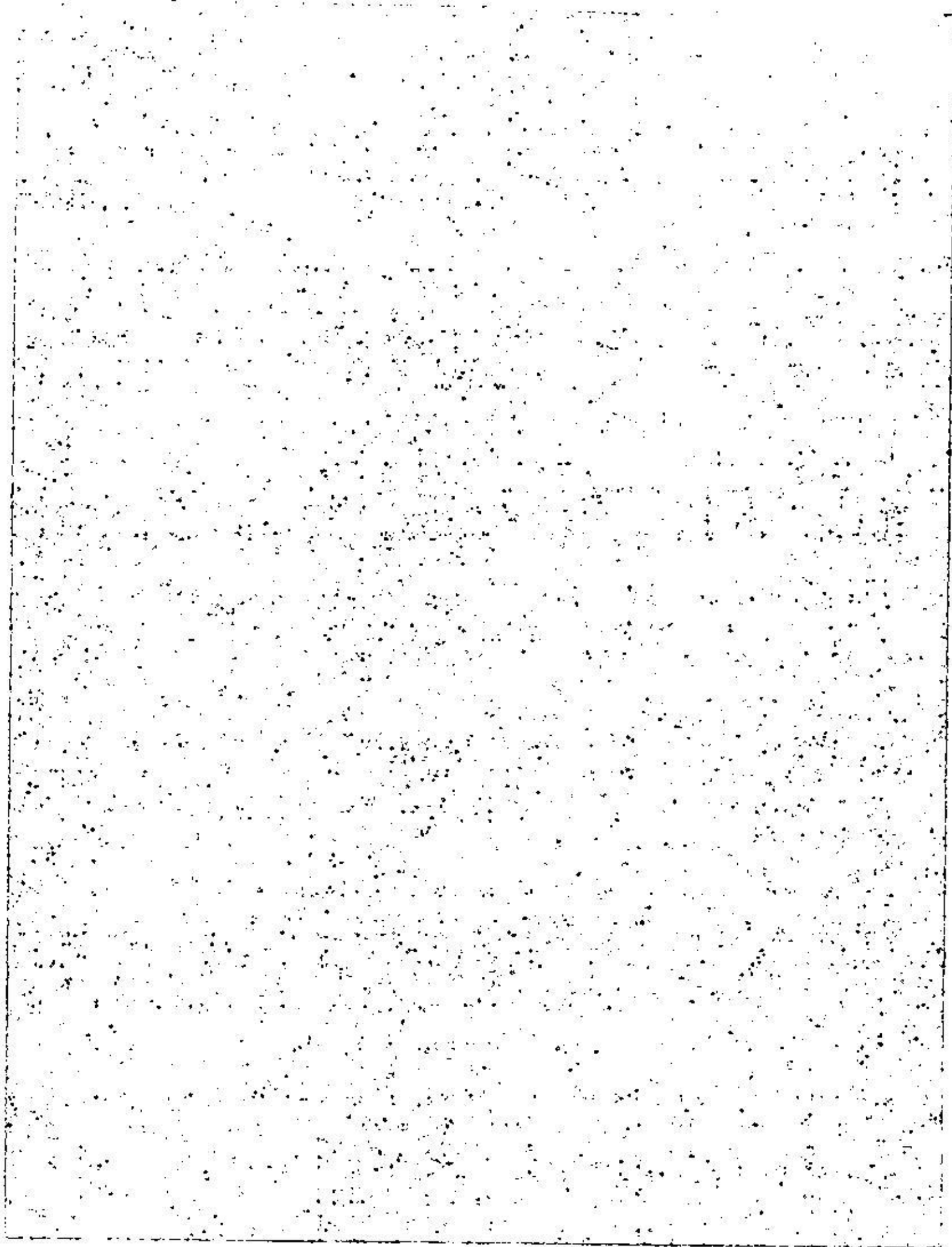
Under authority of NRS 286.190, Mr. Bingham is requesting the Board's consideration to allow him an opportunity to present arguments and mitigating factors at a hearing before the Board on this issue. While I realize the matter has been previously addressed by the Board and then litigated, my client contends that the Board still has the ultimate authority to determine whether an applicant may obtain PERS disability benefits. The Board also retains the authority to consider this matter, despite the previous procedural history.

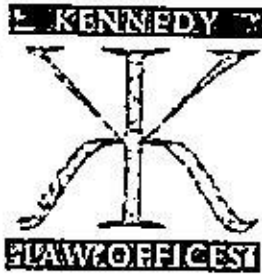
On behalf of Mr. Bingham, I would request consideration to allow a hearing on the next available agenda calendar for consideration related to Mr. Bingham's claims. Please advise my office if the Board will allow this accommodation. Thank you.

Yours Truly,

  
Kirk T. Kennedy, Esq.  
KTK/pf

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January 7, 2021

Yolanda T. King  
Vice Chair  
Board Member  
NV PERS  
5740 S. Eastern Ave., Ste. 120  
Las Vegas, NV 89119

RE: Reginald Bingham PERS Claim

Dear Vice Chair King:

I am counsel for Mr. Reginald Bingham, who had previous litigation with PERS regarding whether he was entitled to PERS based disability benefits related to his former employment with the City of Las Vegas. While this litigation resolved against Mr. Bingham's claims, there remains an issue which has never been litigated or fairly addressed by PERS in this matter.

At the time of Mr. Bingham's PERS hearing on January 21, 2015, the PERS Chairman was the Honorable Mark R. Vincent. Mr. Vincent was the Chairman, while he was also employed as the Chief Financial Officer with the City of Las Vegas. At the time of the January, 2015, Board hearing, Mr. Vincent was employed in both capacities. It appears to be an ethical conflict of interest for the CFO of the City of Las Vegas to also decide upon Mr. Bingham's entitlement to PERS based benefits. See Transcript Copy, 1/21/15 PERS Hearing.

As you can see by reviewing the attached transcript from that hearing, Mr. Vincent did not disclose his dual capacities, nor did he recuse himself from the hearing. There exists a natural conflict of interest for the former Chairman to sit and preside over a hearing which involved his same public employer at the time. The transcript indicates Mr. Vincent participated by voting, as well, against Mr. Bingham's petition for benefits.

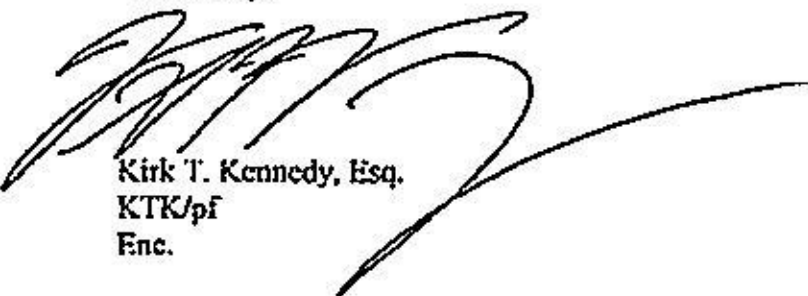
My review of the PERS general regulations indicates that a party has a right to one reconsideration upon the presentation of new evidence which was not known or available at the time. The existence of Mr. Vincent's dual capacities was not known to either Mr. Bingham or myself at the time. However, it was clearly known to Mr. Vincent who chose to participate and oversee the hearing which involved his same, public employer at the time, the City of Las Vegas.

Previously, I sent a letter addressing this matter to PERS Board Counsel Chris Nielson in August, 2020, however, Mr. Nielson viewed my concerns as untimely and not warranting reconsideration. I believe PERS regulations allow a Board member to place a matter on an agenda for consideration as well. By way of this letter, I am requesting your assistance and permission to have Mr. Bingham's matter heard, again, by the PERS Board.

Based on the foregoing and the conflict of interest concerns raised by this letter, I am again requesting that the Board allow a new hearing on Mr. Bingham's petition and request for disability retirement benefits for which he qualifies under Nevada law.

I would appreciate your response within the next ten days to my office. Thank you.

Yours truly,



Kirk T. Kennedy, Esq.  
KTK/pf  
Enc.



January 21, 2015  
Meeting of the Public Employees' Retirement Board  
Agenda Item 9.1  
Appeal of Reginald Bingham regarding his eligibility for Disability Retirement

Cheryl Price, PERS Operations Officer:

Okay, we'll start the first one, Reginald Bingham. On May 20th, 2014, Mr. Reginald Bingham through his attorney, Kirk Kennedy, Esq., sent a letter to PERS requesting that Mr. Bingham be considered eligible to apply for disability retirement benefits. Mr. Bingham had inquired about disability retirement benefits in November of 2012 and that prompted a staff denial. Um, a letter was sent to him November 26, 2012, saying that he was ineligible to apply for disability retirement. He was, uh, terminated from the City of Las Vegas July 16th of 2010, and Mr. Bingham started to collect his service retirement benefits on March 15th, 2011. He, um, just a little background, Mr. Bingham was hired by the City of Las Vegas on June 18th, 1993. He was evidently involved in some litigation with the City of Las Vegas which was resolved through a jury trial in February of 2011. He was terminated from his position July 16th of 2010. Um, a letter was sent to Mr. Bingham July 1st of 2010, informing him that he was going to be terminated and if he wanted to apply for disability retirement benefits he needed to contact PERS prior to his termination on July 16th, 2010. Um, per NRS 286.620 subsection 1, only members in the employ of a participating public employer may apply for disability retirement benefits. Um, the staff denial was presented to him via letter in November and also another letter, um, in, I believe, September or October of this year. I'm sorry, June 23rd, 2014, of this year. Staff does not feel that there was an error or inequity that occurred in this case. Uh, Mr. Bingham was not legally eligible to apply for the disability retirement because as a service retiree he is no longer a member and not in the public employ of a participating public employer and Mr. Bingham could have contacted the PERS office himself prior to termination of his employment to inquire about disability retirement benefits. Staff is recommending a motion denying Mr. Bingham's request for eligibility to apply for disability retirement benefits. And I believe Mr. Bingham and his attorney are here and would like to address the Board.

Kirk Kennedy, Esq., Attorney for Reginald Bingham:

Thank you. Good afternoon. My name is Kirk Kennedy, Nevada Bar No. 5032, and Mr. Bingham is present. I, \_\_\_\_\_ I appreciate the Board giving us this opportunity to, uh, address this matter to, uh, see if we can get the, essentially the equity discretionary power of this Board to allow Mr. Bingham a disability retirement benefit under PERS. Uh, just by way of quick background, uh, Mr. Bingham was a city employee as a painter from 1993 to approximately late 2007. In 2003 he suffered a work-related injury to his knee. This injury was so severe that the City of Las Vegas actually accommodated him under the Americans with Disabilities Act for several years until approximately the end of 2007. They did a, uh, a fresh fitness for duty evaluation on the job and position and they decided that they could no longer or they would no longer accommodate him and his disability so as of late 2007 he was no longer technically working physically with the City as the City felt it could no longer accommodate that disability,

uh, due to some changes on the job and position. In 2008 Mr. Bingham attempted some re-training, uh, but was unsuccessful, uh, as offered by the City and technically his job status sort of stayed as if he wasn't formally terminated and that sort of lingered on for a several, couple, two or three years thereafter. In the meantime Mr. Bingham had filed a complaint with the Nevada Equal Rights Commission alleging ADA, Americans with Disabilities Act, discrimination. He had hired my office and I was representing him throughout the 2008, 2009, 10, all the way to the jury trial we had in federal court in front of Judge Mahan in February 2011. And therein this is the issue, that, that, I know the statute says, the statute says if you want PERS disability retirement you got to apply for it before your separation date. The statute is very clear on that. But this, this is what happened, the letter, I actually have copies of, is actually attached to my letter that I originally sent to PERS, this is the letter, the notification, the July 1st letter 2010 from HR of the City of Las Vegas to Mr. Bingham. Now, what came about in this letter is what's missing, uh, first of all, this is right in the middle of the litigation, I see many of the Board you do have this, this is right in the middle of the litigation I had going on, on behalf of Mr. Bingham, with the City of Las Vegas. Proof of that as you see in the first full paragraph the HR Department says is referencing that the City Attorney Phil Byrnes advised that summary judgment was denied on our case and because of that the trial case will go forward. The City chose then to formally terminate and separate Mr. Bingham's employment. That's why this letter was generated. The problem had been that Mr. Bingham had been in litigation for, by that time, at least two years we were in litigation in federal court, they mailed this to an address the City had, uh, back in 2007. Mr. Bingham had moved to a new address in March 2010. He had been living at that new address for approximately four months when this letter came out. Mr. Bingham never received timely notice of this letter and you'll notice at the bottom of the letter what you don't see, cc to Kirk Kennedy, Attorney at Law. My office wasn't notified of this and they knew he was in litigation, they knew he had an attorney, they knew all communication when you are in litigation generally goes through the attorneys, either through the City Attorney's office or through my office. That's generally how it it's done when you have lawyers in the picture. And in this case the City took this action, prepared this letter, separated him from employment. Mr. Bingham actually didn't find out, I can remember finding out later, I think, in August or September and talking with the City Attorney that they had actually separated him and fired him formally terminated him. We ultimately did the jury trial in federal court in February 2011. The jury ruled against his claim and that's why in March 2011 he formally applied for his regular PERS. Uh, I think he, he has the years of service and the permanent injury and worked for a public employer for qualifications for disability retirement but he couldn't apply for that specific one because the statute that we are dealing with here in Nevada says he has to still be working there. And this letter does advise him that if you want to apply for disability retirement you need to do something before July 16th 2010. All of that would have happened if poor Mr. Bingham had received this letter, had I received this letter, had anybody of consequence received this letter, no one did. This, this whole argument that we are presenting in front of you is one on basically lack of notice. The statute is fine as long as you have notice of the requirements. Mr. Bingham was not given adequate notice by the City of Las Vegas. I don't know why. Clearly, the HR Department knew he was in litigation, they knew he had an attorney. Phil Byrnes, the City Attorney, who I know very well, knew that uh of my existence. We'd been fighting the case now in federal court for a couple years. I don't know why, it may be through negligence or oversight, the City didn't just notify my office with this very same letter on July 1st of 2010 and then Mr. Bingham could have timely applied for disability retirement. Instead he applied for, uh,

his normal PERS retirement. We believe there is a significant difference between the two benefit amounts. Uh, Mr. Bingham still suffers from the injury, he has not been able to find work, he has been under enormous hardship, so we are here essentially pleading to the Board under the equity power that you do have under 286.193 uh, that the, subsection 3, that allows this Board to consider in its discretion whether to grant this equitable relief and that's why we're here. Clearly, the statute itself is against us other than the equity power this Board has and so based on these unique and extenuating circumstances we are asking the Board to, uh, grant this relief and to grant Mr. Bingham, who does on paper qualify for disability PERS retirement, to formally go through the process and apply for it and if determined that he is acceptable to grant him retroactive benefits all the way back to July 2010 termination date with the City. If there are any questions, sir.

Thank you very much. I'm sorry. Thank you.

Mark Vincent:

I was just going to ask staff and I don't see where PERS has, uh, the Board has any ability to deal with this in terms of an error or inequity on the part of PERS.

Kimberly Okezie, Deputy Attorney General:

What I would say to that, Mr. Chairman, if I may, is that this Board is governed by the Retirement Act which is, uh, 286, Chapter 286 of NRS. You have a statute that's specifically on point, 286.620, that a member has to be in the employ of an employer at the time that they submit the retirement application. That was not done. Your equitable power, yes you have equitable power, however, you know it's, it's limited to adjust the service or correct the record allowing the benefits of any member, retiree, employer, beneficiary, after an error or inequity has been determined. Um, why you have \_\_\_\_\_. I'm not sure that this \_\_\_\_\_. Second, was there an error or inequity that occurred, I would submit to this Board that there is no statute on point that requires this Board to provide notice or no statute on point that provides even the employer to provide notice. So, with regards to being able to retire with disability, so with that I'm not sure that this Board has the power to \_\_\_\_\_.

Rusty McAllister:

Mr. Chairman, could I speak. Um, you know I've got the thing that sticks in my, my mind here that that makes me question is, one, so, uh, I mean I can understand Mr. Bingham if he left the, he moved and went \_\_\_\_\_. We are talking three years time, um, but Mr. Kennedy representing him and you already indicated that you, your office received no notification from the City of Las Vegas that he had been terminated or was going to be terminated.

Kirk Kennedy, Esq.:

It was actually a surprise when I actually found out that post July of 2010.

Rusty McAllister:

Does the City, on a termination notice like this, do they send, do they keep, I mean is it certified mail, is this receipt of, receipt of, I mean I get what you are saying Kimberly, that, that we don't have \_\_\_\_\_ but it's like you can't make decisions if you don't know what's coming your way. How can you make a logical, informed decision about your options and I'm assuming that there is a four percent per year penalty that he has basically had because he took a, started collecting a benefit early because he's disabled without the ability to apply for a disability retirement that we afford to people, as we know, we just discussed the disability policy, we have afforded to a lot of people for a lot of reasons who filed in timely fashion. I'm assuming that Mr., it's tough to assume, but, but Mr. Bingham would've had the option certainly to do that had he known.

Mark Vincent:

I can also argue that it would've been Mr. Bingham's responsibility to notify his employer that he had moved, otherwise how's the employer suppose to know how to reach him so...

Rusty McAllister:

I'm assuming all communications going through Mr. Kennedy and Mr. Kennedy's his legal representation.

Mark Vincent:

I don't know that there is any requirement to do that. (silence) Audrey.

Audrey Noriega:

Might I just add that given some some deals that we just recently addressed that came before the Board, it was very clearly determined that the employee has just as much of a responsibility to do their follow through as the employer does.

Rusty McAllister:

Along with those appeals we made adjustments to the penalties for the employees too.

Audrey Noriega:

We didn't adjust the penalty we just adjusted the payment.

Multiple voices/comments at one time

Audrey Noriega:

But we did not override the statute or the responsibility.



Rusty McAllister:

You are correct. But we made the payment so de minimis that it would not be a huge financial impact to those employees or former employees.

Audrey Noriega:

In this case if we, as a Board, I, this is just my opinion nothing more, if we as a Board chose to not recommend staff or not follow staff's recommendation and allow someone after the fact, because that's really what this is, to apply for disability retirement when at no time prior to that and from what I'm understanding for many years prior he did have an illness or an injury that was prohibiting him from being able to effectively do his job because he was covered under ADA and stuff, at some point for many years prior there were many opportunities to obtain disability information.

Mark Vincent:

I'd like to make another comment on the two cases that we were just talking about, we had an extensive discussion here in the Board, Boardroom about the employers responsibility and how really if there, if Mr. Bingham was harmed because the City didn't do something properly, then this course of action should be against the City not against, not against PERS. We talked about that in that particular case as well quite extensively.

Rusty McAllister:

And with those previous employees and the previous appeals, we did not recommend to those employees that they go file suit against the State of Nevada, their employer. We basically took it upon ourselves to help them.

Audrey Noriega:

Because...

Mark Vincent:

I'm not sure that's entirely accurate.

Audrey Noriega:

I don't know but...

Mark Vincent:

There's a lot of discussion but...

Andrey Noriega:

I did argue pretty strongly that I felt that the employer was just as responsible in the other situation ...

???

I agree.

Andrey Noriega:

Granted we didn't have anything we the Board could \_\_\_\_ to that.

???

I agree.

Andrey Noriega:

In this situation of a disability though, I really do think it's much more cut and dried. And that when you...

Rusty McAllister:

I would respectfully disagree.

Andrey Noriega:

Why?

Rusty McAllister:

Over the course of time, uh, my experience over the course of time with the workers' compensation system in the State of Nevada, and especially with employers, we passed law years ago requiring them to send, because what we were having was they were, they said we sent stuff out in a timely fashion when in fact the employee never received it, they would deny a claim and the employee would never know about it. We changed the law back then, back in 2001 2003, requiring employers to send a certificate of mailing just to prove that they sent it because they weren't doing it. They argued that, uh, certified mail was too expensive but they would pay for a certificate of mailing on stuff because third party administrators for workers' compensation and employers were taking it upon themselves to affect the lives of injured employees. So we changed the law.

Andrey Noriega:

I am really familiar with the workers' comp issue.

Mark Vincent:

David, you had your finger up.

David Olsen:

Yeah, \_\_\_\_\_ NRS 286.190 that's in our packet says our error and inequity section has to do with the reliance on something done by, by PERS and I don't see where we made any the System hasn't made any representations that were incorrect.

Mark Vincent:

That's sort of my point.

Kirk Kennedy, Esq.:

If I may, actually the statute says reliance or representations made by the System or by the public employer. So the statute is putting that either against PERS and or against the public employer. In this case the City of Las Vegas. We're not arguing that PERS did anything wrong; we're arguing that the City \_\_\_\_\_ notice and the statute clearly references the public employer may have that exposure for failing to in this case give that proper notice. I'm sorry. I didn't mean to speak out of turn.

Kimberly Okezie, Deputy Attorney General:

If I may Mr. Chairman, it does also reference NRS 286.288 which states, the last, the last it looks like the last sentence there, the System is responsible for any inaccurate or misleading information provided to any person or agency by an officer or employee of the System but is not responsible for inaccurate or misleading information provided by an officer or employee of a participating public employer or any other person.

Mark Vincent:

Any other comments? Questions?

Chris Collins:

I just have a comment Mr. Chairman. I have a tremendous amount of sympathy for Mr. Bingham but I do, is there a policy within the City of Las Vegas that you have to keep informing them of where you reside?

Mark Vincent:

I don't know.



Chris Collins:

Okay. I know we have one where I am employed and we have to have an address and a phone number in all files. So, I mean if the letter was sent to the wrong...

Mark Vincent:

I mean off the top of my head it would be silly for an employer not to have a policy where it says that you have to keep us informed of your address otherwise we can't correspond with you but ...

Multiple voices/comments at one time

Chris Collins:

When Mr. Bingham filed for his PERS benefits in 2011, he was already terminated but that's when he should have made his argument as to a disability retirement, not, not in 2015. I probably could've supported it in 2011; I mean I sit here today and I don't see how I can support that.

Mark Vincent:

Anything else?

Kirk Kennedy, Esq.:

Could I just add one, one last thing?

Mark Vincent:

Sure, go ahead.

Kirk Kennedy, Esq.:

To answer Board Member Collins' question about the timing of this, after the jury trial result in federal court, we appealed that to the Ninth Circuit, so we were still in limbo appealing the Ninth Circuit decision. That case at the Ninth Circuit, that's a two year ordeal. We didn't get a result back from the Ninth Circuit, which denied our appeal, until I want to say in early 2013 if I'm not mistaken. Around the same time, shortly after that is when we started looking at what other avenues were out there and so we were still thinking that perhaps the Ninth Circuit would overturn what happened in federal court and we'd still have action so to speak on his disability case, his ADA case. That's why he didn't, uh, at that time, even if he applied in March 2011, I hear the same argument that he didn't apply for it before he was separated, but the argument is still there, but if you're wondering how much the time that's gone by, in 2013 we got the appeal result, and there is the lingering question why didn't we sue the City. Actually I did sue the City,

the packet right here, and the City of Las Vegas argued in district court in front of Judge Nancy Allf in Department 27 and, uh, earlier this year, that oh no these claims are related to the disability claim so you're precluded on the concept of res judicata. In other words, this should have been the federal case which we already had the federal trial and, in other words, nobody, every door is closed for Mr. Bingham. So we can't go back to the City. The courts denied that effort, we've been to federal court and a jury has heard his ADA claim and for different reasons found against him. The Ninth Circuit upheld that and so that sort of brought us here. Uh, perhaps I could've, we could've gotten on this a little earlier than 2014, May 2014 is when I first brought this to PERS' attention. I think, what it was, was I was waiting for a result on the state case. In fact, that decision came down in, I think, late April or early May 2014 and after that, that's when I wrote the letter to the PERS Board staff. If you are wondering about the gap in time, that's it. For what it's worth, there it is, there is a few cents.

Mark Vincent:

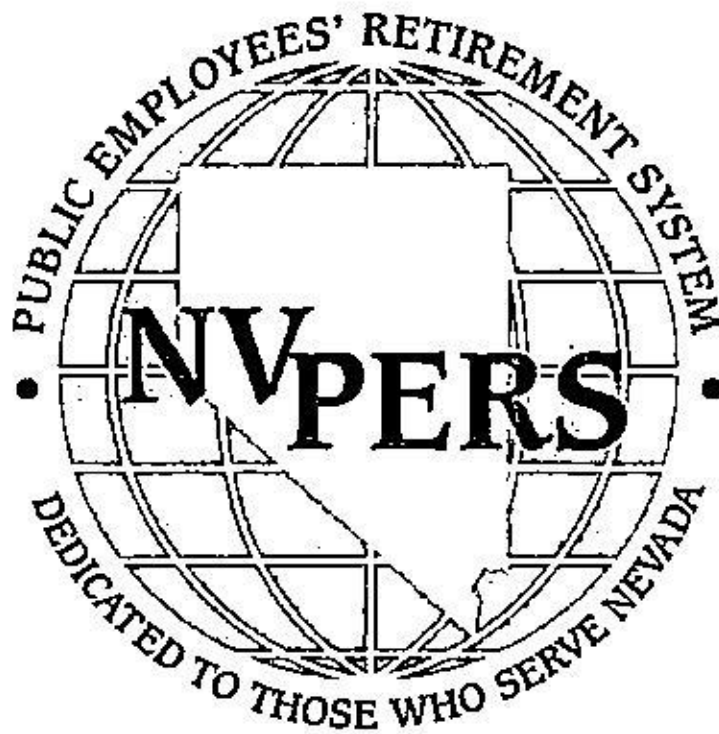
Appreciate it. Anything else? Anyone want to make a motion?

Kathy Ong:

Motion to follow staff's recommendation.

Vote took place.

**EXHIBIT 3:  
NEVADA PERS  
OFFICIAL POLICY  
MANUAL  
EXCERPTS**



*Official Policies*

*Of the*

**PUBLIC EMPLOYEES' RETIREMENT  
SYSTEM OF NEVADA**

693 West Nye Lane  
Carson City, Nevada 89703

Effective: July 1, 2019

## TABLE OF CONTENTS

Definitions.....	1
Membership .....	8
Contributions.....	11
Monthly Retirement Reports.....	22
Service Credit.....	25
Purchase of Service.....	28
Refunds & Repayment of Contributions.....	36
Disability Retirement .....	40
Survivor Benefits .....	47
Service Retirement .....	53
Police and Firefighters .....	68
General.....	81
Public Employers .....	86
Domestic Relations Order.....	94
Benefit Restoration Plan and Trust.....	96
Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) .....	104

## GENERAL

- |                    |      |                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|--------------------|------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 286.200            | 12.1 | All policies previously adopted are hereby rescinded.                                                                                                                                                                                                                                                                                                                                                                                                   |
| 286.200            | 12.2 | Policies 1.1 through 15.11 reflect staff procedures, Board policy, Attorney General Opinions, Board interpretation of Chapter 286 of NRS, and the procedures necessary to implement the intent of the Nevada Revised Statutes.                                                                                                                                                                                                                          |
| 286.170(1)         | 12.3 | The Executive Officer is responsible for the administration of the System in accordance with the Nevada Revised Statutes, Retirement System Policies, and directives approved by the Board.                                                                                                                                                                                                                                                             |
| 286.200<br>286.190 | 12.4 | Under certain circumstances, the Board has the authority to adjust the service or correct the records, allowance or benefits after an error or inequity has been determined. The Board also may require repayment of money that was paid within 6 years before demand for its repayment. A member, retired employee, or beneficiary (collectively referred to as "member") having a request denied by Staff may petition a Staff decision to the Board. |

In addition, Staff may submit to the Board a petition if they believe an error or inequity has occurred or records needs to be corrected and Staff does not have the authority to make such correction. Requests for a petition shall be processed as follows, subject to the following limitations:

- a. A petition regarding the constitutionality or legality of any provision of Chapter 286 of NRS cannot be granted by the Board and, therefore, will be denied by Staff after consultation with the general counsel. The Board will be provided with a copy of the denial. If a Board member disagrees with the denial, that Board member may request that the matter be presented for Board consideration at a future meeting.
- b. A petition that disputes Staff's interpretation of the Retirement Act, including the challenge of a Board Policy not specific in the Retirement Act, shall be submitted to the Board for their consideration if the general counsel agrees there is a bona fide dispute involving interpretation of a statute or Board Policy and it could lead to the adjustment of service credit, records or allowance of benefits. If the general counsel does not agree, staff will deny the petition and the Board will be provided with a copy of the denial. If a Board member disagrees with the denial, that Board member may request that the matter be presented for Board consideration at a future meeting.

- c. A petition involving a claim of "error or inequity" shall be submitted to the Board if there is a compelling reason that an "error or inequity" exists. "Error or inequity" means the existence of extenuating circumstances including, but not limited to, a member's reasonable and detrimental reliance on representations made by the System or by the public employer pursuant to NRS 286.288 which prove to be erroneous, or the mental incapacity of the member. One example of "error or inequity" can be found in the case *Nevada Pub. Employees' Retirement Bd v. Byrne*, 96 Nev. 276 (1980). In the event Staff, after consultation with the general counsel, determines there is not a compelling reason that an error or inequity as defined above exists, the Board will be provided a copy of the denial and, if a Board member disagrees with Staff determination, that Board member can request that the matter be presented for Board consideration at a future meeting.
- 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.

286.200 286.190	12.5	Any person whose petition was denied by the Board shall have the right to one reconsideration of the petition if he can present new evidence which was not available or the existence of which was not known to him at the time the matter was originally presented.
286.200 286.190	12.6	<p>The presentation of a petition before the Board shall be conducted as follows:</p> <ul style="list-style-type: none"> <li>a. The Chairman shall instruct all parties involved in the presentation of a petition to confine their remarks to the subject at hand, be concise, and acknowledge rather than repeat previous testimony. The Chairman has the prerogative to interrupt a speaker if, in the Chairman's mind, the speaker has deviated from the instructions.</li> <li>b. Staff will provide a brief objective summary of the problem and the reasons for Staff decisions. Also, Staff must submit a written statement for the record listing the legal basis for their determination, the chronological development of events, the situation as indicated by the records and documents submitted, and any legal references which may be relevant to the decision making process.</li> </ul>



- c. The member, or his representative, will give a brief presentation advising the Board of the basis for the petition and the legal or equity reason for requesting relief, together with the specific relief being requested from the Board.
- d. Upon request, the general counsel shall provide a legal interpretation and state whether or not he feels the board has the authority to act in the matter.
- e. Individual Board members may then ask questions of Staff, the member, or his representative, and/or the general counsel.
- f. The Board Chairman may then request whether or not Staff, the member or his representative, or the general counsel have any additional statements to make.
- g. The Board Chairman will then state that the matter will be taken under advisement by the Board and that a decision will probably be made before adjournment of the meeting, with the decision to be provided to the member or his representative in writing, by Staff in consultation with the general counsel, in the form of findings and opinions.

286.190 (3&4)	12.7	<p>The Board may:</p> <ul style="list-style-type: none"> <li>a. Require an annual notarized statement from a retired employee or beneficiary that he is in fact receiving an allowance or benefits and withhold the payment if he fails to provide the statement.</li> </ul>
286.669	12.8	Any person convicted of the murder or voluntary manslaughter of a member of the System is ineligible to receive any benefit conferred by any provision of Chapter 286 of NRS by reason of the death of that member. The System may withhold the payment of any benefit otherwise payable under Chapter 286 of NRS by reason of the death of any member from any person charged with the murder or voluntary manslaughter of that member, pending final determination of those charges, the resolution of any and all appeals, and/or the time to file an appeal or any type of request for reconsideration or rehearing has expired.
286.6703	12.9	The System will not make payment of a member's contributions or benefits to any community property claimant until and unless the member applies for a refund, retirement benefit, or dies.
286.200	12.10	The System will not provide estimates of the present or future value of an individual's retirement benefits.
286.820	12.11	Any person who knowingly makes a false statement, certifies to an incorrect document, or withholds information for the purpose of receiving or assisting another person in receiving benefits under

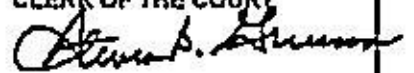
Chapter 286 of NRS to which the person is not entitled is guilty of a misdemeanor.

- |         |       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
|---------|-------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 286.117 | 12.12 | All records maintained for a member, retired employee, or beneficiary may be reviewed and copied only by the System, the member, the member's public employer, spouse or registered domestic partner, the retired employee, or the retired employee's spouse, or pursuant to a court order, or by a beneficiary after the death of the employee on whose account benefits are received.                                                                                                                      |
| 286.117 | 12.13 | Any member, retired employee, beneficiary, or respective spouse or registered domestic partner must submit a written authorization to the System before a representative of said individual will be allowed to review or copy records. An attorney who has provided written notice of representation of a member, retired employee, benefit recipient, respective spouse or registered domestic partner may review and copy the records of the client without further written authorization from the client. |
| 286.200 | 12.14 | After the System has received an official written notice from the member, retired employee, benefit recipient, or the legal representative, the System will provide future consultation and correspondence directly with the legal representative until the matter in question has been resolved or until a written cancellation of legal representation is received from the member, retired employee, or benefit recipient.                                                                                |
| 286.117 | 12.15 | The official correspondence records, minutes, and books of the System, except for the files of individual members and retired employees and certain documents related to investments, are public records and are available for public inspection.                                                                                                                                                                                                                                                            |
| 286.665 | 12.16 | Any contributions remaining in a deceased member's, retired employee's, or beneficiary's individual account will be transferred to the Public Employees' Retirement Fund or the Police and Firefighter's Retirement Fund upon the death of the individual if there is no heir, devisee, or legatee capable of receiving the money.                                                                                                                                                                           |

Any check for benefits or a refund not paid within five years after being transferred to unclaimed benefits or refunds will be transferred to the Public Employees' Retirement Fund or the Police and Firefighter's Retirement Fund.

Under conditions outlined in NRS 286.665, subsections 2, 3, and 4, petitions may be filed with the Carson City District Court to claim money so transferred.

- 286.670      12.17      The member's rights, employee contributions, and benefits are:
- a.    Exempt from all State, county, and municipal taxes.
  - b.    Not subject to execution, garnishment, attachment, or any other process.
  - c.    Not subject to the operation of any bankruptcy or insolvency law.
  - d.    Not assignable by power of attorney or otherwise.
  - e.    Subject to withholding for support of a child pursuant to NRS 31A.150.
- 286.670      12.18      The System may withhold money from a refund or benefit when the person applying for or receiving that refund or benefit owes money to the System.
- 286.200      12.19      Effective July 2, 1991, part-time employees enrolled in the System who regularly work 20 hours or less per week shall be exempt from the federal retirement system dual coverage prohibition.



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12 *State of Nevada and the Public*  
13 *Employees' Retirement System*  
14 *of Nevada*

15 DISTRICT COURT  
16 CLARK COUNTY, NEVADA

17 REGINALD BINGHAM,

18 Petitioner,

19 vs.

20 STATE OF NEVADA, PUBLIC  
21 EMPLOYEES' RETIREMENT SYSTEM  
22 OF THE STATE OF NEVADA,

23 Respondents.

Case No.: A-21-832163-W

Dept. No.: XXIX

RESPONDENTS' REPLY IN SUPPORT  
OF MOTION TO DISMISS

24 Respondents, the State of Nevada and the Public Employees' Retirement System of  
25 Nevada (PERS), by and through counsel, Aaron D. Ford, Attorney General of the State of  
26 Nevada, and Deputy Attorney General Ian Carr, hereby reply in support of their Motion  
27 to Dismiss pursuant to Nevada Rule of Civil Procedure (NRCP) 12.

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1 This Reply is based on the following Memorandum of Points and Authorities and  
2 all papers and pleadings on file in this case.

3 DATED this 14th day of June, 2021.

4 AARON D. FORD  
5 Attorney General

6 By: 1st Ian Carr  
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10 MEMORANDUM OF POINTS AND AUTHORITIES

11 I. ARGUMENT

12 A. Bingham's Mandamus Arguments

13 Bingham first argues that that the current PERS Board (not a party to this case)  
14 abused its discretion by arbitrarily and capriciously ignoring his demand for a disability  
15 retirement application rehearing. See Opp'n Mot. Dismiss at 5.<sup>1</sup> However, the attached  
16 PERS Official Policies show that PERS Staff had no obligation to refer Bingham's demand  
17 to the current PERS Board. See *id.* at 37 ("In addition, Staff *may* submit to the Board a  
18 petition *if they believe* an error or inequity has occurred" (emphasis added)). Mandamus  
19 relief can only lie where "the respondent has a *clear, present legal duty to act . . .*  
20 [m]andamus will not lie to control discretionary action . . . unless discretion is manifestly  
21 abused or is exercised arbitrarily or capriciously." See *Round Hill Gen. Improvement Dist.*  
22 *v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981) (emphasis added). PERS Staff  
23 rejected Bingham's attempt to gain a rehearing because it was clearly time-barred (see  
24 Opp'n Mot. Dismiss at 20), as Bingham had 45 days from his original denial to request  
25 reconsideration. See NRS 286.630(4). Bingham's failure to properly avail himself of a plain,  
26 speedy, and adequate remedy at law that existed at time does not justify extraordinary writ

27 <sup>1</sup> Respondents cite to the .pdf page number of Petitioner's Opposition to the Motion  
28 to Dismiss and its exhibits throughout.

1 relief as matter of law. See *Walker v. Second Judicial Dist. Court*, 136 Nev. \_\_\_, 476 P.3d  
2 1194, 1198 (Adv. Op. 80, December 10, 2020) (internal citation omitted) ("our concern is  
3 with the existence of a remedy and not whether it will be unproductive in [any] particular  
4 case").

5 Bingham concedes that former Chairman Vincent's (not a party to this case) status as  
6 City of Las Vegas CFO at the time was publicly known, available, and not a secret when the  
7 original hearing occurred. See Opp'n Mot. Dismiss at 4:13-18. On that basis, Bingham  
8 could have requested a rehearing within the 45-day timeframe pursuant to NRS 286.360(4),  
9 or he could have raised the issue in *Bingham v. PERS*, Nevada Court of Appeals Case No.  
10 69927, during his appeal of the original petition for judicial review. The existence of an  
11 appellate mechanism alone almost always obviates a claim for extraordinary writ relief. See  
12 *Walker*, 136 Nev. at \_\_\_, 476 P.3d at 1197 ("that the right to appeal is generally an adequate  
13 legal remedy that precludes [mandamus] relief"). Bingham cannot use a petition for writ of  
14 mandamus to circumvent a statute of limitations that has run in a case he fully litigated to  
15 a final judgment upon appeal. See *Rawson v. Ninth Judicial Dist. Court*, 133 Nev. 309, 314,  
16 396 P.3d 842, 846 (2017) (internal citation omitted) ("a writ petition may not be used a  
17 substitute to correct a party's failure to timely appeal"). Bingham's petition for writ of  
18 mandamus is facially deficient, and the Court should dismiss it as a matter of law.

#### 19 B. Bingham's Conflict of Interest Arguments

20 Bingham next argues that former Chairman Vincent should have disclosed his status  
21 as CFO of the City of Las Vegas at the time during the original hearing and recused himself  
22 from participating. See Opp'n Mot. Dismiss at 6-7. However, a disqualifying conflict of  
23 interest is a matter in which a public officer has (1) received a gift or loan, (2) a "significant  
24 pecuniary interest," (3) judgment reasonably affected by a "commitment in a private  
25 capacity to the interests of another person," or (4) a matter "reasonably . . . related to the  
26 nature of any representation or counseling that the public officer or employee provided to a  
27 private person for compensation before another agency within the immediately preceding  
28 year[.]" See NRS 281A.420(1). Here, Bingham applied for a disability retirement benefit,



1 which would be paid for by PERS from the Public Employees' Retirement Fund, not by the  
2 City of Las Vegas. See NRS 286.220(4)(b). Neither former Chairman Vincent nor the PERS  
3 Board (current or former) had or has any pecuniary interest or a "commitment in a private  
4 capacity to the interests of another person" in either granting or denying Bingham's  
5 disability retirement application, because neither implicated the City of Las Vegas'  
6 pecuniary interests or "commitment[s] in a private capacity to the interests of another  
7 person." See *id.* Therefore, former Chairman Vincent's dual status as a member of the  
8 former PERS Board as well as the City of Las Vegas CFO at the time presented no conflict  
9 of interest subject to disclosure or requiring recusal. See NRS 281A.420(1). Bingham's  
10 allegations fail to state a claim upon which relief can be granted, and the Court should  
11 dismiss it as a matter of law.

### 12 C. Bingham's Official Policies Arguments

13 Bingham further argues that PERS Official Policies may allow him a rehearing. See  
14 Opp'n Mot. Dismiss at 7-8. However, Bingham concedes that such policies are  
15 discretionary. See *id.* at 7: 18-20 ("Pursuant to PERS' own regulations, the Board *may*  
16 *allow for the discretionary placement* of a hearing matter request from a System  
17 member for consideration by the Board" (emphasis added)). Mandamus can only lie when  
18 "the respondent has a clear, present legal duty to act . . . [*m*]andamus *will not lie to*  
19 *control discretionary action* . . . unless discretion is manifestly abused or is exercised  
20 arbitrarily or capriciously." See *Round Hill Gen. Improvement Dist.*, 97 Nev. at 603-04,  
21 637 P.2d at 536 (emphasis added). As argued above, PERS Staff did not abuse discretion  
22 in declining to submit Bingham's demand for a rehearing to the current PERS Board,  
23 because the demand is patently time-barred.

24 Bingham additionally argues the 45-day reconsideration statute of limitations does  
25 not apply in the instant case, because he newly discovered former Chairman Vincent's  
26 supposed conflict of interest (see Opp'n Mot. Dismiss at 8:1-11); but the 45-day rule  
27 specifically applies in this scenario, because Bingham now attempts reconsideration of his  
28 disability retirement application denial based on what he asserts to be newly-discovered



1 evidence. See NRS 286.630(4) ("A member may apply to the Board for one  
2 reconsideration within 45 days after the denial by the Board of the member's application,  
3 *if the member can present new evidence which was not available* or the existence of  
4 which was not known to the member at the time the Board originally considered the  
5 member's application" (emphasis added)). Here, Bingham concedes that the information  
6 regarding former Chairman Vincent's role as City of Las Vegas CFO was publicly  
7 available, placing this case within the purview of the 45-day time-bar. See Opp'n Mot.  
8 Dismiss at 4:13-18 ("Bingham concedes that Mr. Vincent's City employment status, though  
9 unknown at the time by both Bingham and his Counsel, was not hidden from the public and  
10 his City employment was disclosed at the time on the PERS[-]based website for public  
11 viewing"). In either event, Bingham reasonably should have known about former Chairman  
12 Vincent's employment status as CFO of City of Las Vegas at the time of his original hearing;  
13 because Bingham's attempt to secure a rehearing is barred by NRS 286.630(4)'s 45-day  
14 statute of limitations, the Court should dismiss this case as a matter of law.

15 D. Bingham's Res Judicata/Issue Preclusion Arguments

16 Bingham further argues that issue preclusion does not apply to this case, because the  
17 issue of former Chairman Vincent's supposed conflict of interest was not raised and litigated  
18 during the prior judicial review and appellate proceedings. See Opp'n Mot. Dismiss at 8-9.  
19 However, Bingham fully litigated his request for equitable relief pursuant to NRS  
20 286.190(3)(a) in the prior case to a final decision on the merits. See Exh. 1 at 3-5. Because  
21 Bingham's disability retirement application was untimely from inception (see Exh. 1 at 1-3),  
22 and his only viable argument before the current PERS Board during a hypothetical  
23 rehearing would be for equitable relief pursuant to NRS 286.190(3)(a), his attempt to  
24 resurrect his disability retirement application is futile. See Exh. 1 at 3-5 (affirming the  
25 denial of Bingham's requested equitable relief pursuant to NRS 286.190(3)(a)'s "errors and  
26 inequities" clause). Bingham's only known mechanism for relief is already barred by the  
27 doctrine of issue preclusion. See *id.* A writ of mandamus must be denied if a petitioner  
28 would gain no direct benefit from the writ's grant and suffer no direct detriment from its

1 denial. See *ANSE, Inc. v. Eighth Judicial Dist. Court*, 124 Nev. 862, 868, 192 P.2d 738, 742  
2 (2008) (internal citation omitted). Here, granting Bingham's writ petition based on the  
3 supposed conflict of interest on behalf of former Chairman Vincent would confer no benefit  
4 upon Bingham, because his underlying substantive argument for equitable relief is barred  
5 as res judicata. Therefore, the Court should dismiss this case as a matter of law.

#### 6 E. Bingham's Laches Arguments

7 Bingham finally argues that the doctrine of laches does not apply in this case,  
8 because PERS and/or the current PERS Board would not be disadvantaged or prejudiced by  
9 granting a rehearing of his disability retirement application. See Opp'n Mot. Dismiss at 9-  
10 10. However, the current PERS Board would be hamstrung by Bingham's allegations,  
11 because a rehearing would require the current PERS Board to disavow the vote of former  
12 Chairman Vincent based on post facto allegations, while simultaneously denying former  
13 Chairman Vincent a reasonable opportunity to defend himself. Any prospective action  
14 taken by the current PERS Board would be made under the duress or implied threat of  
15 facing similar allegations in the future. Specifically, Bingham would be able to assert  
16 conflict of interest claims against current PERS Board members years after a decision (even  
17 after the expiration of their terms) with impunity, enabling him to reopen his case at whim  
18 in the event of an unfavorable decision. Holding a rehearing under these circumstances  
19 would irreparably taint any decision on a prospective basis; therefore, Bingham has  
20 permanently disadvantaged the current and future PERS Boards by virtue of his delay in  
21 bringing this case. Bingham's requested relief must be denied and this case must be  
22 dismissed.

#### 23 II. CONCLUSION

24 Bingham candidly acknowledges that former Chairman Vincent's employment status  
25 as CFO of the City of Las Vegas at the time of Bingham's original disability retirement  
26 application hearing was publicly known, available, and not a secret. That fact, and  
27 Bingham's acknowledgment of that fact, confirms that Bingham is procedurally barred from  
28 requesting a rehearing under the applicable 45-day reconsideration period. See NRS

1 286.630(4). However, this revelation is superfluous in its substantive context because  
2 former Chairman Vincent's employment status did not generate a conflict of interest that  
3 would have required him to disclose it or recuse himself as a matter of law; Bingham's  
4 disability retirement application presented no pecuniary threat to the City of Las Vegas in  
5 any event. See NRS 286.220(4)(b); cf. NRS 281A.420(1). Bingham's petition for writ of  
6 mandamus is fundamentally flawed and is nothing more than an attempt to evade the  
7 numerous procedural bars that categorically disqualify him from entitlement to a rehearing.  
8 For these reasons, those set forth above, and those set forth in Respondents' Motion to  
9 Dismiss, Respondents respectfully request that the Court grant their Motion to Dismiss and  
10 dismiss Bingham's case in its entirety, with prejudice.

11 DATED this 14th day of June, 2021.

12 AARON D. FORD  
13 Attorney General

14 By: /s/ Ian Carr  
15 IAN CARR  
16 Deputy Attorney General  
17 Nevada Bar # 13840  
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20 *Attorneys for Respondents*  
21  
22  
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28

**AFFIRMATION**  
(Pursuant to NRS 239B.030)

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

DATED: June 14, 2021

AARON D. FORD  
Attorney General

By: /s/ Ian Carr  
IAN CARR, Bar No. 13840  
Deputy Attorney General  
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1 CERTIFICATE OF SERVICE

2 I certify that I am an employee of the Office of the Attorney General, State of  
3 Nevada, and that on June 14, 2021, I filed the foregoing, RESPONDENTS' REPLY IN  
4 SUPPORT OF MOTION TO DISMISS, via the Court's CM/ECF system. Parties will  
5 be notified by the Court's electronic notification system.

6 Kirk T. Kennedy, Esq., Bar No. 5032  
7 815 Casino Center Blvd.  
8 Las Vegas, NV 89101  
9 [kkennedylaw@gmail.com](mailto:kkennedylaw@gmail.com)  
10 *Attorney for Petitioner*

11 */s/ Karen Easton*  
12 KAREN EASTON  
13 Office of the Attorney General  
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*Steven D. Grierson*

1 RTRAN

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4  
5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA

7  
8 REGINALD BINGHAM,  
9 Petitioner,

CASE#: A-21-832163-W  
DEPT. XXIX

10 vs.

11 STATE OF NEVADA, PUBLIC  
12 EMPLOYEES' RETIREMENT  
13 SYSTEM OF THE STATE OF  
14 NEVADA,

Respondents.

15 BEFORE THE HONORABLE DAVID M. JONES, DISTRICT COURT JUDGE  
16 TUESDAY, JUNE 22, 2021

17 **RECORDER'S TRANSCRIPT OF HEARING**  
18 **RESPONDENTS' MOTION TO DISMISS**

19 **APPEARANCES:**

20 For the Petitioner:

KIRK T. KENNEDY ESQ.  
(in person)

21  
22 For the Respondents:

IAN CARR, ESQ.  
(via BlueJeans)

23  
24 RECORDED BY: MELISSA DELGADO-MURPHY, COURT RECORDER  
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INDEX

Motion, granted

Page  
11

81



1 Las Vegas, Nevada, Tuesday, June 22, 2021

2  
3 [Case called at 9:03 a.m.]

4 THE CLERK: Page 10, Judge.

5 THE COURT: Page 10. 10 is A21-832163, Bingham versus  
6 State of Nevada.

7 MR. KENNEDY: Good morning, Your Honor. Kirk Kennedy,  
8 5032 for Petitioner.

9 THE COURT: Who do I have here on behalf of State of  
10 Nevada?

11 MR. KENNEDY: I see him on the list.

12 THE COURT: Yeah, just waiting for him to push off mute.

13 Mr. Carr, are you present?

14 MR. CARR: Good morning, Your Honor, this is Ian Carr with  
15 the Attorney General's Office --

16 THE COURT: Okay.

17 MR. CARR: -- on behalf of the State of Nevada.

18 THE COURT: This is the Motion to Dismiss.  
19 Counsel?

20 MR. CARR: Thank you, Your Honor, and may it please the  
21 Court. I'll refer to the Public Employees' Retirement System of Nevada  
22 as PERS for the purposes of this hearing.

23 Your Honor, PERS respectfully requests that the Court  
24 dismiss Mr. Bingham's petition for *writ of mandamus* and this case. The  
25 case presents the Court with a [indiscernible] run-around a host of

1 procedural issues that should preclude it.

2 And granting Mr. Bingham *mandamus* relief would circumvent  
3 the blatant statutory bar and reconsideration of disability retirement  
4 applications, as well the prior decision by the Court of Appeals among  
5 other issues, but specifically, I'll discuss the five main reasons provided  
6 in the written briefs.

7 And the first, Your Honor, is that extraordinary writ relief is not  
8 appropriate in this context. We know that a petition for a writ of  
9 *mandamus* is an action to compel a statutory duty. And here, there's no  
10 known statutory duty of the PERS Board to re-hear Mr. Bingham's  
11 disability retirement application.

12 Mr. Bingham identified a few discretionary mechanisms in the  
13 PERS official policies about reconsideration of a previously heard  
14 matter. Those are overridden by NRS Chapter 286, Section 630,  
15 subsection (4), which is the 45 day statute of limitations here.

16 That's specifically germane to what Mr. Bingham is seeking,  
17 which is reconsideration of a denied disability retirement application. So  
18 PERS didn't abuse its discretion in not granting him a re-hearing  
19 because he's time barred. And so, PERS had no duty to refer him to the  
20 PERS Board for re-hearing.

21 The case law regarding extraordinary writ relief is cited in the  
22 opening and the reply briefs. And it requires urgency and strong  
23 necessity to grant *mandamus* relief. It's difficult to justify that here when  
24 we're discussing an allegation against a PERS Board member that  
25 accrued six years ago.

1 And the allegation is regarding the former Chairman's  
2 employment, which wasn't a big secret. I think the parties can agree  
3 that it was publicly known.

4 The cases cited in the Reply also imply that a writ petition is  
5 isn't viable when it won't resolve lingering uncertainty for the Petitioner  
6 and that language is to the effect of a writ must be denied if the  
7 Petitioner stands to gain nothing directly and suffer nothing directly from  
8 the denial.

9 So even if the Court granted Mr. Bingham's requested relief,  
10 what does he gain? A re-hearing in which his application will be denied  
11 again for untimeliness, which was the fundamental problem with the  
12 original disability retirement application.

13 And he loses nothing if this writ petition is denied because his  
14 disability application was already denied six years ago and it's been  
15 denied since. That hasn't changed.

16 The allegation about the conflict of interest hasn't gotten any  
17 less stale.

18 As a final note on the *mandamus* aspect of this Motion to  
19 Dismiss, I would reiterate that the case law cited in the Reply stands for  
20 the direct proposition that you can't use a writ petition to circumvent a  
21 time bar. So granting Mr. Bingham extraordinary writ relief here isn't  
22 copacetic with the case law and his writ petition should be denied.

23 The next point is that statute of limitations itself that we just  
24 mentioned, Your Honor, which is NRS Chapter 286, Section 630,  
25 subsection (4) that we just discussed. It's the 45-day reconsideration

1 period specifically applicable to disability retirement applications.

2 Because statutes have primacy over regulations, that  
3 supersedes any provision in the PERS official policies notwithstanding  
4 any provisions regarding discretionary re-hearing.

5 And the statute has to be applicable here, Your Honor,  
6 because Mr. Bingham is asserting he has newly discovered evidence.  
7 He's alleging that he just discovered that former Chairman's conflict of  
8 interest last year.

9 The statute squarely addresses that scenario and it still only  
10 allows for 45 days. So the case is absolutely time barred because we  
11 have a controlling statute of limitations directly on point.

12 And Your Honor, I would move to the gravamen of this  
13 particular case regarding failure to state a claim. PERS does indeed  
14 argue that this case fail states — fails to state a claim.

15 The allegation of a disqualifying conflict of interest that the  
16 former Chairman had back when Mr. Bingham's disability retirement  
17 application was heard is unavailing.

18 The statutes under NRS Chapter 281(a) requires some sort of  
19 pecuniary interest at stake in a private capacity to generate a conflict.  
20 And we know that wasn't present, Your Honor.

21 The Chairman had no reason to deny Mr. — excuse me, Mr.  
22 Bingham's application just because he was the City of Las Vegas CFO  
23 at the time.

24 The City had nothing at stake and that is NRS Chapter 286,  
25 Section 220, Subsection 4(d). If Mr. Bingham did qualify for retirement,

1 it would have been paid out of the PERS Trust Fund, not out of the City's  
2 coughers.

3 And Mr. Bingham wasn't working for the City any more at that  
4 point. So the City wasn't even making retirement contributions on his  
5 behalf.

6 So the idea that the former chairman had a conflict of interest  
7 while he was hearing Mr. Bingham's disability retirement application is  
8 way, way too attenuated to state a claim in this case, because he had  
9 nothing at stake in granting or denying that application.

10 The City had nothing to lose. And therefore by proxy, the  
11 Chairman had nothing to lose as well. The Chairman's employment by  
12 the City as CFO at that point was strictly irrelevant.

13 And Mr. Bingham attached the minutes of the original hearing  
14 to his opposition, which I think was page 29 of the PDF file on that  
15 opposition.

16 And there's a quote in the minutes where the Chairman said if  
17 Mr. Bingham was harmed because the City didn't do something  
18 properly, then his course of action should be against the City, not  
19 against PERS.

20 So the Chairman openly contemplated liability against his own  
21 employer. No doubt it wouldn't have phased him to grant Mr. Bingham's  
22 disability retirement application if it was a viable application, which would  
23 have cost the City again nothing. So because this case failed to state a  
24 claim, Your Honor, the Court should dismiss it.

25 Regarding the last two bases for dismissal articulated in the

86

1 written briefs, I briefly mention the *res judicata* aspect. I do concur with  
2 Mr. Bingham that this new allegation of the conflict of interest wasn't  
3 raised and wasn't litigated in the original case.

4 That allegation isn't mentioned by the Court of Appeals order  
5 that was attached to the opening and reply briefs. But that order does  
6 show that the issues that were raised and actually litigated were the  
7 issues of the underlying application's timeliness and the entitlement  
8 through equitable relief before the PERS Board.

9 Those issues were ruled upon. The Court of Appeals ruled  
10 that the retirement application was untimely then. Therefore, it would be  
11 untimely now.

12 And also, the PERS Board wasn't required to grant Mr.  
13 Bingham equitable relief. Those are the same issues that Mr. Bingham  
14 would have to argue in a re-hearing.

15 And those issues are the issues that he's forbidden from  
16 resurrecting under issue preclusion, the *res judicata* doctrine. We  
17 address the elements of that item in the briefs. And so, I would just  
18 reiterate that granting Mr. Bingham a re-hearing would be totally futile  
19 under these circumstances.

20 And, finally, Your Honor, I'll touch on the laches equitable  
21 defense, which I think is applicable here because of the type of relief that  
22 Mr. Bingham is seeking.

23 These new — these are new allegations in an old case. And  
24 we know that the PERS Board members have rotated since then. The  
25 membership has changed.

1           There's no way for the former Chairman to defend himself  
2 against these allegations as a practical matter. And granting a re-  
3 hearing would put the current PERS Board members in the enviable  
4 position of having to second-guess a decision that they weren't a part of,  
5 they weren't involved in making.

6           So the major, major delay in bringing this case is going to  
7 cause prejudice to the PERS Board prospectively going forward. And  
8 PERS maintains that laches bars the type of relief that Mr. Bingham is  
9 seeking here.

10           To conclude, Your Honor, this case is certainly creative, a  
11 creative way of attempting to procure a re-hearing for Mr. Bingham, but it  
12 does subvert the *writ of mandamus* mechanisms because it's an attempt  
13 to dodge a decision that took place six years ago, which was indeed  
14 affirmed by the Court of Appeals.

15           It's a fundamentally defective writ petition for those reasons  
16 we just covered, barred by the statute of limitations. It fails to state a  
17 claim. It's precluded as *res judicata* due to the underlying issues raised  
18 and also by the doctrine with laches.

19           Therefore, Your Honor, for the reasons we discussed today,  
20 and those set forth in PERS' briefs, PERS would respectfully request  
21 that the Court grant the Motion to Dismiss and dismiss this case in its  
22 entirety with prejudice. Thank you, Your Honor.

23           THE COURT: Thank you, counsel.

24           Mr. Kennedy?

25           MR. KENNEDY: Thank you, Your Honor. I'm not going to

JS



1 read through my whole brief. I know you already prepared and read  
2 through everything.

3 Just quickly, this was -- as -- I can acknowledge the status  
4 where the case is. I was his counsel with PERS and we fought this all  
5 the way through the Supreme Court and all of that. I got the files. I got  
6 the boxes on it.

7 This is a new issue that came up. Wasn't litigated. I sent  
8 letters to PERS to request a new hearing. They had discretionarily had  
9 the discretion to deny the request. This is my own plain speedy remedy  
10 I have is under NRS 34 to file this writ.

11 THE COURT: And how do we claim this is new information? I  
12 mean --

13 MR. KENNEDY: It's new --

14 THE COURT: -- the conflict was there from the beginning.  
15 This is a public official. His status as CFO was known by everybody.

16 MR. KENNEDY: Well, it's easy to say --

17 THE COURT: Including yourself.

18 MR. KENNEDY: It's easy to say -- no, I did not have  
19 knowledge of that myself. And I didn't know that at the time when we did  
20 the PERS hearing back in '15 and Mr. Bingham didn't either.

21 If I had known that, that Mark Benson [phonetic] was the CFO,  
22 an executive position with the City of Las Vegas, where we were arguing  
23 at a hearing misconduct by the City of Las Vegas, I think, at a minimum,  
24 I would have raised it at the hearing as an issue to request him to recuse  
25 himself.

89

1 I did not because we didn't know it. We filed a petition for  
2 judicial review. This issue was never raised, go to the appeal, never  
3 raised.

4 Find out years later. I understand the whole -- everything that  
5 counsel just reiterated that was in his brief. I totally understand it, but  
6 this is our remedy. We're asking for extraordinary relief here to allow us  
7 to go forward. That's all I can really add other than what's in the brief we  
8 have here before you.

9 THE COURT: Thanks, counsel.

10 MR. KENNEDY: Yes, sir.

11 THE COURT: The issue the Court has with it is the time  
12 restraint. If this was something within a year, I wouldn't have an issue,  
13 but we're talking about six years later to resurrect.

14 And I understand the conflict may have been unknown, but it  
15 was clearly within the purview of all the parties available.

16 Therefore, the Motion to Dismiss is hereby granted based  
17 upon the fact that this is basically an issue going to the statute of  
18 limitations argument that should have been raised years ago in regards  
19 to this matter.

20 Counsel for this State, please go ahead and prepare the  
21 order.

22 MR. KENNEDY: Could I get a -- see a copy of it before?

23 THE COURT: Absolutely. Absolutely.

24 MR. CARR: Understood.

25 THE COURT: That's an automatic standing. I don't know why

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1 counsels don't know that. Automatically every order must go to the  
2 other side for review before it comes to me.

3 MR. KENNEDY: All right.

4 THE COURT: Thank you, counsel.

5 MR. KENNEDY: Have a good day. Take care.

6 MR. CARR: Understood, Your Honor. Thank you.

7 [Proceedings concluded at 9:15 a.m.]

8 \* \* \* \* \*

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11 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
12 audio/video proceedings in the above-entitled case to the best of my ability.

13 a H

14 \_\_\_\_\_  
15 Chris Hwang  
16 Transcriber  
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*Steven D. Grierson*

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13 *Employees' Retirement System*  
14 *of Nevada*

15 DISTRICT COURT  
16 CLARK COUNTY, NEVADA

17 REGINALD BINGHAM,

18 Petitioner,

19 vs.

20 STATE OF NEVADA, PUBLIC  
21 EMPLOYEES' RETIREMENT SYSTEM  
22 OF THE STATE OF NEVADA,

23 Respondents.

Case No.: A-21-832163-W

Dept. No.: XXIX

24 NOTICE OF ENTRY OF ORDER

25 PLEASE TAKE NOTICE that an Order Granting Respondents' Motion to Dismiss was  
26 signed in the above-entitled matter on the 25th day of June, 2021.

27 A copy of said Order is attached hereto as Exhibit 1.

28 DATED this 7th day of July, 2021.

AARON D. FORD  
Attorney General

By: */s/ Ian Carr*  
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**Is/ Karen Easton**  
An employee of the Office of the  
Nevada Attorney General

INDEX OF EXHIBITS

EXHIBIT No.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1	Order Granting Respondents' Motion to Dismiss	4

## EXHIBIT 1

## EXHIBIT 1



1 ORDM  
2 AARON D. FORD  
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12 *State of Nevada and the Public*  
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14 *of Nevada*

15 DISTRICT COURT  
16 CLARK COUNTY, NEVADA

17 REGINALD BINGHAM,

18 Petitioner,

19 vs.

20 STATE OF NEVADA, PUBLIC  
21 EMPLOYEES' RETIREMENT SYSTEM  
22 OF THE STATE OF NEVADA,

23 Respondents.

Case No.: A-21-832163-W

Dept. No.: XXIX

ORDER GRANTING RESPONDENTS'  
MOTION TO DISMISS

24 This matter comes before the Court pursuant to Respondents' Motion to Dismiss,  
25 which was filed on May 27, 2021. On June 8, 2021 Petitioner filed his Opposition to  
26 Respondents' Motion to Dismiss. On June 14, 2021, Respondents filed their Reply in  
27 Support of the Motion to Dismiss. The Court heard oral argument on the matter on the  
28 morning of June 22, 2021. After reviewing the relevant papers, the Court finds Petitioner  
Reginald Bingham's case to be wanting, at law. Accordingly, the Court finds and concludes  
as follows:

A. This Case Is Barred by the Applicable Statute of Limitations

Under NRS Chapter 286, a PERS member can only qualify for disability retirement  
if still employed by a PERS-eligible employer at the time of application. See NRS  
286.620(1)(b). Furthermore, a PERS member may only apply for reconsideration of a PERS  
Board's denial of a disability retirement application within 45 days, if the member discovers

1 evidence which was not known during the original hearing. See NRS 286.630(4).

2       The Court finds that Bingham's original hearing regarding his disability retirement  
3 application occurred on January 21, 2015. In February 2020, Bingham corresponded with  
4 PERS requesting a rehearing; in March 2020 and August 2020, Bingham and PERS  
5 exchanged correspondence regarding PERS' rejection of Bingham's request due to  
6 untimeliness. In January 2021, Bingham corresponded with the PERS Board with the  
7 same request, but the PERS Board did not respond. Bingham should have sought a  
8 rehearing within the 45-day timeframe prescribed by NRS 286.630(4), but did not, instead  
9 filing this writ petition seeking a rehearing on April 1, 2021, more than six years untimely.  
10 Therefore, the Court concludes that this case is time-barred pursuant to NRS 286.630(4),  
11 notwithstanding Bingham's allegations of a conflict of interest against the former PERS  
12 Board Chairman that presided over his original disability retirement application hearing.  
13 The Court finds that the former PERS Board Chairman's employment as City of Las Vegas  
14 CFO at the time was publicly known; Bingham should have raised the issue at the original  
15 hearing or during the 45-day reconsideration period as prescribed by NRS 286.630(4).

16       Therefore, this case is time-barred, and must be dismissed in its entirety, with  
17 prejudice.

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1 B. Order

2 Therefore, after reviewing all the papers relevant to Respondents' Motion to Dismiss  
3 and hearing the arguments of the parties, the Court hereby **GRANTS** Respondents' Motion  
4 to Dismiss and dismisses this case in its entirety, with prejudice.

5 IT IS SO ORDERED.

Dated this 25th day of June, 2021

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8   
9 HONORABLE DAVID JONES  
DISTRICT COURT JUDGE  
63B BFA 530A 9EE8  
David M Jones  
District Court Judge

10  
11  
12  
13  
14  
15  
16 Submitted by:

17 AARON D. FORD  
18 Attorney General  
19 /s/ Ian Carr  
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24 Approved as to form and content by:

25 /s/ Kirk Kennedy  
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1 CSERV  
2

3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA  
5

6 Reginald Bingham, Plaintiff(s)

CASE NO: A-21-832163-W

7 vs.

DEPT. NO. Department 29

8 State of Nevada, Defendant(s)  
9

10 AUTOMATED CERTIFICATE OF SERVICE

11 This automated certificate of service was generated by the Eighth Judicial District  
12 Court. The foregoing Order of Dismissal was served via the court's electronic eFile system to  
13 all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 6/25/2021

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DISTRICT COURT  
CLARK COUNTY, NEVADA

REGINALD BINGHAM,  
Petitioner/Claimant,

Case No: A-21-832163-W  
Dept. No: 29

vs.

STATE OF NEVADA,  
Respondent,

PUBLIC EMPLOYEES RETIREMENT  
SYSTEM,  
Administrative Agency.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the Petitioner, REGINALD BINGHAM, by and through his undersigned counsel, KIRK T. KENNEDY, ESQ., does hereby appeal to the Nevada Supreme Court from the district court's decision and order granting the Respondent's motion to dismiss the above-entitled matter, filed by notice of entry of order on July 7, 2021. See Notice and Order, attached.

Dated this 6<sup>th</sup> day of August, 2021.

/s/Kirk T. Kennedy  
KIRK T. KENNEDY, ESQ.  
Nevada Bar No: 5032  
815 S. Casino Center Blvd.  
Las Vegas, NV 89101  
(702) 385-5534  
Attorney for Petitioner

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CERTIFICATE OF SERVICE

I hereby affirm that on this 6<sup>th</sup> day of August, 2021, I mailed via first class U.S. Mail and served via electronic service a copy of the foregoing to Respondents at the address below:

Ian Carr  
Deputy Attorney General  
100 N. Carson St.  
Carson City, NV 89701-4717

/s/Kirk T. Kennedy  
Law Office of Kirk T. Kennedy

AFFIRMATION REGARDING SOCIAL SECURITY NUMBERS

I hereby affirm that this document contains no social security numbers.  
Dated this 6<sup>th</sup> day of August, 2021.

/s/Kirk T. Kennedy  
KIRK T. KENNEDY, ESQ.  
Nevada Bar No: 5032  
815 S. Casino Center Blvd.  
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(702) 385-5534  
Attorney for Petitioner

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*Steven D. Grier*

1 NEOJ  
2 AARON D. FORD  
3 Attorney General  
4 IAN CARR, Bar No. 13840  
5 Deputy Attorney General  
6 State of Nevada  
7 100 N. Carson Street  
8 Carson City, Nevada 89701-4717  
9 Tel: (775) 684-1250  
10 Email: ICarr@ag.nv.gov

11 *Attorneys for Respondents, the*  
12 *State of Nevada and the Public*  
13 *Employees' Retirement System*  
14 *of Nevada*

15 DISTRICT COURT  
16 CLARK COUNTY, NEVADA

17 REGINALD BINGHAM,

18 Petitioner,

19 vs.

20 STATE OF NEVADA, PUBLIC  
21 EMPLOYEES' RETIREMENT SYSTEM  
22 OF THE STATE OF NEVADA,

23 Respondents.

Case No.: A-21-832163-W

Dept. No.: XXIX

24 NOTICE OF ENTRY OF ORDER

25 PLEASE TAKE NOTICE that an Order Granting Respondents' Motion to Dismiss was  
26 signed in the above-entitled matter on the 25th day of June, 2021.

27 A copy of said Order is attached hereto as Exhibit 1.

28 DATED this 7th day of July, 2021.

AARON D. FORD  
Attorney General

By: *Isi Ian Carr*  
IAN CARR  
Deputy Attorney General  
State of Nevada  
(775) 684-1250  
ICarr@ag.nv.gov  
*Attorneys for Respondents*



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 this 7th day of July, 2021, I filed the foregoing NOTICE OF ENTRY  
4 OF ORDER, via this Court's electronic filing system. Parties who are registered with this  
5 Court's electronic filing system will be served electronically.  
6

7 *Isi Karen Easton*

8 An employee of the Office of the  
9 Nevada Attorney General  
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INDEX OF EXHIBITS

EXHIBIT No.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1	Order Granting Respondents' Motion to Dismiss	4

## EXHIBIT 1

## EXHIBIT 1

*Alvin S. Smith*  
CLERK OF THE COURT

1 ORDM  
2 AARON D. FORD  
3 Attorney General  
4 IAN CARR, Bar No. 13840  
5 Deputy Attorney General  
6 State of Nevada  
7 100 N. Carson Street  
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*Attorneys for Respondents, the  
State of Nevada and the Public  
Employees' Retirement System  
of Nevada*

DISTRICT COURT  
CLARK COUNTY, NEVADA

11 REGINALD BINGHAM,

12 Petitioner,

13 vs.

14 STATE OF NEVADA, PUBLIC  
15 EMPLOYEES' RETIREMENT SYSTEM  
16 OF THE STATE OF NEVADA,

Respondents.

Case No.: A-21-832163-W

Dept. No.: XXIX

ORDER GRANTING RESPONDENTS'  
MOTION TO DISMISS

17 This matter comes before the Court pursuant to Respondents' Motion to Dismiss,  
18 which was filed on May 27, 2021. On June 8, 2021 Petitioner filed his Opposition to  
19 Respondents' Motion to Dismiss. On June 14, 2021, Respondents filed their Reply in  
20 Support of the Motion to Dismiss. The Court heard oral argument on the matter on the  
21 morning of June 22, 2021. After reviewing the relevant papers, the Court finds Petitioner  
22 Reginald Bingham's case to be wanting, at law. Accordingly, the Court finds and concludes  
23 as follows:

24 A. This Case Is Barred by the Applicable Statute of Limitations

25 Under NRS Chapter 286, a PERS member can only qualify for disability retirement  
26 if still employed by a PERS-eligible employer at the time of application. See NRS  
27 286.620(1)(b). Furthermore, a PERS member may only apply for reconsideration of a PERS  
28 Board's denial of a disability retirement application within 45 days, if the member discovers

1 evidence which was not known during the original hearing. See NRS 286.630(4).

2       The Court finds that Bingham's original hearing regarding his disability retirement  
3 application occurred on January 21, 2015. In February 2020, Bingham corresponded with  
4 PERS requesting a rehearing; in March 2020 and August 2020, Bingham and PERS  
5 exchanged correspondence regarding PERS' rejection of Bingham's request due to  
6 untimeliness. In January 2021, Bingham corresponded with the PERS Board with the  
7 same request, but the PERS Board did not respond. Bingham should have sought a  
8 rehearing within the 45-day timeframe prescribed by NRS 286.630(4), but did not, instead  
9 filing this writ petition seeking a rehearing on April 1, 2021, more than six years untimely.  
10 Therefore, the Court concludes that this case is time-barred pursuant to NRS 286.630(4),  
11 notwithstanding Bingham's allegations of a conflict of interest against the former PERS  
12 Board Chairman that presided over his original disability retirement application hearing.  
13 The Court finds that the former PERS Board Chairman's employment as City of Las Vegas  
14 CFO at the time was publicly known; Bingham should have raised the issue at the original  
15 hearing or during the 45-day reconsideration period as prescribed by NRS 286.630(4).

16       Therefore, this case is time-barred, and must be dismissed in its entirety, with  
17 prejudice.

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1 B. Order

2 Therefore, after reviewing all the papers relevant to Respondents' Motion to Dismiss  
3 and hearing the arguments of the parties, the Court hereby *GRANTS* Respondents' Motion  
4 to Dismiss and dismisses this case in its entirety, with prejudice.

5 IT IS SO ORDERED.

Dated this 25th day of June, 2021

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9 HONORABLE DAVID JONES  
DISTRICT COURT JUDGE  
638 BFA 530A 9EE8  
David M Jones  
District Court Judge

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16 Submitted by:

17 AARON D. FORD  
18 Attorney General

19 /s/ Ian Carr

20 IAN CARR (Bar No. 13840)  
Deputy Attorney General  
State of Nevada  
100 N. Carson Street  
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23  
24 Approved as to form and content by:

25 /s/ Kirk Kennedy

26 KIRK T. KENNEDY, ESQ. (Bar No. 5032)  
Law Office of Kirk T. Kennedy  
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1 CSERV

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

5  
6 Reginald Bingham, Plaintiff(s) | CASE NO: A-21-832163-W  
7 vs. | DEPT. NO. Department 29  
8 State of Nevada, Defendant(s)  
9

10 AUTOMATED CERTIFICATE OF SERVICE

11 This automated certificate of service was generated by the Eighth Judicial District  
12 Court. The foregoing Order of Dismissal was served via the court's electronic eFile system to  
13 all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 6/25/2021

15 Ian Carr | icarr@ag.nv.gov

16 Kirk Kennedy | ktkennedylaw@gmail.com  
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