

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

LYNDA PARVEN, in her capacity
as the ADMINISTRATOR of the
EMPLOYMENT SECURITY
DIVISION, NEVADA DEPARTMENT
OF TRAINING, EMPLOYMENT,
and REHABILITATION; J. THOMAS
SUSICH, in his capacity as Chair of the
EMPLOYMENT SECURITY DIVISON
BOARD OF REVIEW; and NEVADA
DEPARTMENT OF TRAINING,
EMPLOYMENT, and REHABILITATION,
EMPLOYMENT SECURITY DIVISION,

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT
COURT of the STATE OF NEVADA,
in and for the COUNTY OF CLARK, and
the HONORABLE BITA YEAGER,
District Judge,

Respondents,

and

SELVIN MENDEZ,

Real Party in Interest

Electronically Filed
Nov 17 2021 04:10 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No.:

District Court No.: A-21-835176-J

PETITION FOR WRIT OF MANDAMUS

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PETITION FOR WRIT OF MANDAMUS

The Petitioner, Lynda Parven, in her capacity as Administrator of the Employment Security Division of the Nevada Department of Employment, Training and Rehabilitation (“ESD”), respectfully petitions this Court for a Writ of Mandamus compelling the District Court to dismiss the *Petition for Judicial Review* for lack of subject matter jurisdiction.

I. Routing Statement

Pursuant to NRAP 17(b)(9), normally, this case would presumptively be assigned to the Court of Appeals. However, given its statewide importance for the proper application of administrative law, this Court should retain jurisdiction.

II. Relief Sought

ESD requests that this Court direct the Honorable Bitu Yeager to issue a ruling that case number A-21-835176-J be dismissed for lack of subject matter jurisdiction because not all necessary parties were named nor was the Administrator served in a timely manner.

III. Issue Presented

Did the district court err in failing to dismiss the underlying action for lack of subject matter jurisdiction?

IV. Statement of the Facts

On June 23, 2021, the Real Party in Interest, Selven Mendez (“Mendez”), filed a *Petitioner’s Brief in Support of Petition for Judicial Review* naming as parties “NEVADA DEPARTMENT OF EMPLOYMENT, TRAINING AND REHABILITATION, NEWAGE LAKE LAS VEGAS, LLC.” R.1.

No other parties were named. On August 13, 2021, the Administrator filed a *Motion to Dismiss*, arguing that necessary parties were not included, specifically, the Administrator and the Board of Review. R. 10-14.

On August 27, 2021, Mendez filed an opposition, arguing that naming the Department of Employment, Training, and Rehabilitation sufficed to provide notice to the party and that no prejudice occurred. R. 15-27.

The District Court denied ESD’s *Motion to Dismiss*, holding that it would be “unjust” to not hear the merits of the *Petition for Judicial Review* even though ESD and the Board of Review were not named and “the plain language of NRS 612.525(2) does not require dismissal.” R. 50.

V. Statement for Why a Writ Should Issue

Pursuant to NRS 233B.039(3)(a), while NRS 233B is applicable to judicial review of unemployment claims, the specific provisions of NRS 612 prevail over the more general provisions of NRS 233B.

NRS 233B.130(2)(a) requires petitions for judicial review to “[n]ame as respondents the agency and all parties of record to the administrative proceeding.”

NRS 612.525(2) provides, in relevant part “The Administrator shall be deemed to be a party to any judicial action involving any such decision[.]”

NRS 612.530(1) creates a statute of limitations.

Within 11 days after the decision of the Board of Review has become final, any party aggrieved thereby or the Administrator may secure judicial review thereof by commencing an action in the district court of the county where the employment which is the basis of the claim was performed for the review of the decision, in which action any other party to the proceedings before the Board of Review must be made a defendant.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. *See* NRS 34.160; *Int’l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). This court has broad discretion as to whether to entertain a petition for extraordinary relief. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 474–75, 168 P.3d 731, 736–37 (2007). Petitioner bears the burden of demonstrating that extraordinary relief is warranted. *See Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

As this Court held last year:

The chief requisites of a petition to warrant the issuance of a [traditional] writ of mandamus are: (1) The petitioner must show a

legal right to have the act done which is sought by the writ; (2) it must appear that the act which is to be enforced by the mandate is that which it is the plain legal duty of the respondent to perform, without discretion on his part either to do or refuse; (3) that the writ will be availing as a remedy, and that the petitioner has no other plain, speedy, and adequate remedy.

Walker v. Second Judicial Dist. Court, 476 P.3d 1194, 1196 (Nev. 2020).

In 2017, this Court issued a *Writ of Mandamus* when a necessary party was not named in a petition for judicial review involving an unemployment claim.

Board of Review v. Second Judicial Dist. Court, 133 Nev. 253, 254-55, 396 P.3d 795, 797 (2017).

This case, as originally captioned in the District Court, did not name the Administrator of the Employment Security Division, either by name or title, nor did it name the Board of Review of Employment Security Division. In 2012, this Court held that the failure to name a party required by the applicable review procedures divests the district court of subject matter jurisdiction. *Washoe Cnty. v. Otto*, 128 Nev. 424, 282 P.3d 719, 725 (2012).

Two years after deciding *Otto*, this Court explained that “the word ‘must’ which precedes paragraphs (a) through (c), imposes a mandatory requirement, that this court previously held that the requirements of paragraph (c) are mandatory and jurisdictional, and that there is no reason to construe paragraph (a) differently than paragraph (c).” *Liberty Mut. v. Thomasson*, 130 Nev. 27, 31, 317 P.3d 831, 834 (2014) (citation omitted).

Likewise, in 2018, this Court noted *Otto* and *Thomasson* with approval in holding that the service requirements of NRS 233B were also mandatory and jurisdictional. *Heat & Frost Insulators v. Labor Comm'r*, 134 Nev. 1, 4, 408 P.3d 156, 159 (2018).

It is true that in 2018, this Court also held that the failure to list the third-party administrator in the judicial review of a workers compensation case was not a fatal jurisdictional defect if the party is named in the body of the petition and that party is also properly served. *Prevost v. Dep't of Admin.*, 134 Nev. 326, 328, 418 P.3d 675, 676-77. (2018).

However, last July this Court expressly overruled *Prevost*. *Whitfield v. State Pers. Comm.*, 492 P.3d 571, 575 (Nev. 2021). In doing so, *Whitfield* plainly held, “If a party fails to strictly comply with the statutory requirements for judicial review, the courts have no jurisdiction over the case.” *Id.* at 574.

In denying ESD’s *Motion to Dismiss*, the district court found that naming the Department of Employment, Training, and Rehabilitation sufficed to put the Employment Security Division and its director on notice regarding this action.¹

¹ Taken to its absurd extreme, under the district court’s reasoning a party could simply name “the State of Nevada” since the Department of Training, Employment, and Rehabilitation is an agency within state government and naming the just the State would theoretically put all of its subdivisions on notice of litigation.

However, in ruling as it did, the district court ignored two relevant statutes: NRS 233B.130(2)(a), which requires naming “the agency *and all parties of record*” and NRS 612.525(2) which makes the Administrator a necessary party.

This Court has held:

When the words of the statute have a definite and ordinary meaning, this court will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended. However, if a statute is ambiguous, the plain meaning rule of statutory construction is inapplicable, and the drafter’s intent “becomes the controlling factor in statutory construction. An ambiguous statutory provision should also be interpreted in accordance with what reason and public policy would indicate the legislature intended. Additionally, we construe statutes to give meaning to all of their parts and language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation. Further, no part of a statute should be rendered meaningless and its language should not be read to produce absurd or unreasonable results.

Harris Assoc. v. Clark Cnty. School Dist., 119 Nev. 638, 641-42, 81 P.3d 532, 534 (2003) (footnotes and internal punctuation omitted).

Neither the language of NRS 233B.130(2)(a) nor the language of NRS 612.525(2) is ambiguous. When the two statutes are read in conjunction with each other, the purpose of NRS 612.525(2) is crystal clear: in *Petitions for Judicial Review* involving unemployment insurance benefits, the Administrator, along with the Board of Review, and not the department for which her agency is a subdivision, must be named. Otherwise, NRS 612.525(2) serves no purpose whatsoever.

As *Whitfield* expressly held, “[A] petitioner must name as respondents, with the caption of the petition itself, every party of record to the underlying administrative proceeding.” 492 P.3d at 576. Mendez performed the trick of not naming ANY party in his caption, other than his former employer.

At this point, the petition cannot be amended to cure the defects. This Court clearly stated in an unemployment compensation case that “the naming requirement must be completed as timely as the rest of the petition.” *Board of Review*, 133 Nev. at 255, 396 P.3d at 797.

Because neither the Administrator nor the Board of Review was named as a party, the district court lacks subject matter jurisdiction to proceed further.

VI. Conclusion

Because necessary parties were not named in the initial *Petition for Judicial Review*, this Court should issue a *Writ of Mandamus* directing the district court to dismiss the underlying case, A-21-835176-J, for lack of subject matter jurisdiction.

DATED this 17th day of November, 2021.

RULE 32(A)(9) CERTIFICATION

1. I hereby certify that this writ complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32 (a)(5) and the type style requirements of NRAP 32 (a)(6) because:

This writ has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32 (a)(7) because, excluding the parts exempted by NRAP 32 (a)(7)(C), it does not exceed 15 pages.

AFFIDAVIT OF ATTORNEY

I, David K. Neidert, do depose and say as follows:

1. I am an attorney licensed to practice law in the State of Nevada,
employed as such by the Nevada Department of Employment, Training,
and Rehabilitation, Employment Security Division.
2. I have verified the the factual allegations of this petition and they are true
to the best of my knowledge, information, and belief.

DATED this 17th day of November, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d)(1)(B), I hereby certify that I am an employee of the State of Nevada, over the age of 18 years; and that on the date hereinbelow set forth, I served a true and correct copy of the foregoing **PETITION FOR WRIT OF MANDAMUS**, either electronically through the Court's e-Flex system and/or by placing the same within an envelope which was thereafter sealed and deposited for postage and mailing with the State of Nevada Mail at Carson City, Nevada, addressed for delivery as follows:

HONORABLE BITA YEAGER
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DATED this 17th day of November, 2021.

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