

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 04:11 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Supreme Court No.:

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

**PETITIONER'S APPENDIX**

/s/ DAVID K. NEIDERT  
DAVID K. NEIDERT, ESQ.  
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06/29/2021

Nevada DETR/ ESD  
Office of Legal Counsel

**SUMM**

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**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

SELVIN MENDEZ,

Petitioner,

vs.

NEVADA DEPARTMENT OF  
EMPLOYMENT, TRAINING AND  
REHABILITATION; NEWAGE LAKE LAS  
VEGAS, LLC,

Respondents.

Case No.: A-21-835176-J

Dept No.: 4

**SUMMONS – CIVIL**

**NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU  
WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS.**

**READ THE INFORMATION BELOW.**

**TO RESPONDENT: EMPLOYMENT SECURITY DIVISON, STATE OF NEVADA:**

A civil complaint has been filed by the Petitioner against you for the relief set forth in the Petition.

1. If you intend to defend this lawsuit, within twenty (20) days after this Summons is served on you, exclusive of the day of service you must do the following:

- (a) File with the Clerk of this Court, whose address is shown below, a formal written response to the Petition in accordance with the rules of the Court, with the appropriate filing fee.
- (b) Serve a copy of your response upon the attorney whose name and address is shown below.

REID RUBINSTEIN & BOGATZ

300 South 4th Street, Suite 830

Las Vegas, Nevada 89101

(702) 776-7000 FAX: (702) 776-7900

2. Unless you respond, your default will be entered upon application of the Petitioner and this Court may enter a judgment against you for the relief demanded in the Petition, which could result in the taking of money or property or other relief requested in the Petition.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members, and legislator, each have forty-five (45) days after service of this Summons within which to file an Answer or other responsive pleading to the Petition.

Submitted by:

Dated June 23, 2021

REID RUBINSTEIN & BOGATZ

STEVEN D. GRIERSON,

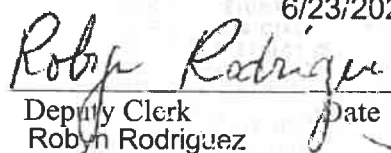
CLERK OF COURT

By:



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*Attorneys for Petitioner*

By:



Deputy Clerk  
Robyn Rodriguez

6/23/2021

Date

Regional Justice Center  
200 Lewis Avenue  
Las Vegas, NV 89155

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06/29/2021

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Steven D. Grierson  
CLERK OF THE COURT



CASE NO: A-21-835176-J  
Department 4

**PET**  
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*Attorneys for Petitioner*

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

SELVIN MENDEZ,

Petitioner,

vs.

NEVADA DEPARTMENT OF  
EMPLOYMENT, TRAINING AND  
REHABILITATION; NEWAGE LAKE LAS  
VEGAS, LLC,

Respondents.

Case No.:

Dept No.:

**PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW**

Petitioner, SELVIN MENDEZ ("Petitioner"), an individual, by and through his attorneys of record, the law firm of Reid Rubinstein & Bogatz, hereby submits this BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW.

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**I. STATEMENT OF JURISDICTION**

Pursuant to Nevada Revised Statutes, Section 612.525 through 612.530, this Court has jurisdiction over the Parties because this dispute stems from employment in Clark County, Nevada, and this Petition is timely filed within Eleven (11) days of the NEVADA DEPARTMENT OF EMPLOYMENT, TRAINING AND REHABILITATION (“DETR”) Board of Review’s decision.

**II. STATEMENT OF THE CASE**

Pursuant to Nevada Revised Statutes Section 612.525 and Section 612.530, Petitioner asks this Court to grant this Petition in Support of Judicial Review and reverse the DETR’s decision because the DETR erred as a matter of law or otherwise acted arbitrarily or capriciously.

Namely, Petitioner did not engage in “misconduct” as defined by Nevada law or otherwise act in such a manner as to later deny him unemployment benefits. Petitioner is a former employee of NEWAGE LAKE LAS VEGAS, LLC (“Newage Lake”), a hotel located in Henderson, Nevada. After being terminated without cause and being informed that he should not seek any reconsideration of the decision and would be eligible for unemployment benefits, Petitioner filed for unemployment benefits through the DETR, who disbursed unemployment benefit payments to Petitioner. Later, on August 19, 2020, the DETR issued a letter to Petitioner, which terminated ongoing unemployment benefits and sought to reclaim \$16,247.00 in benefits already paid. Accordingly, on August 31, 2020, Petitioner formally appealed the DETR’s decision.

A hearing was held on January 15, 2021, before DETR Appellate Referee, Angela Klause. Newage Lake did not attend the hearing, and to Petitioner’s knowledge, Newage Lake did not submit any information for the hearing. Ms. Klause determined that Petitioner engaged in disqualifying misconduct and that “said conduct contained an element of wrongfulness.” However, Ms. Klause erred in concluding that the Petitioner was disqualified from benefits—from March 15, 2020 onward—because Ms. Klause misapplied Nevada law to the facts at-hand and drew improper inferences from the record. Namely, under Nevada precedent, Petitioner did not engage in “misconduct,” but even if he did, such conduct was not disqualifying because it did not contain an element of wrongfulness, as he was given permission from his superiors. Accordingly,

Petitioner filed his timely notice of appeal to the Board of Review on April 05, 2021. Nevertheless, the DETR Board of Review “decline[d] further review” on May 03, 2021. Now, Petitioner timely files this Petition for Review before the Court because the DETR erred as a matter of law, or otherwise acted arbitrarily and capriciously, and Petitioner has exhausted all administrative remedies available.

### III. STATEMENT OF FACTS

On or around March 15, 2020, Mr. Mendez used his credit card to rent a room for his newly wedded friends who were away on their honeymoon. *See* Case No. V-20-A-06975, Ex. No. 8. As Mr. Mendez explained during the hearing, Mr. Mendez conversed with one of the chefs at the restaurant, who told Mr. Mendez that he was sending some complementary food and beverage to the guests, which is something that the hotel did fairly regularly. The food and beverage that was sent had a value of approximately Twenty Dollars (\$20.00). Mr. Mendez’ credit card was still open and on file for the room. Nevertheless, Newage Lake made no attempt to charge his credit card. Mr. Mendez did not have any reason to believe his actions or those of the chef were inappropriate or out of the ordinary. In fact, Mr. Mendez had no disciplinary activity in his file and the chef who actually sent the food to the room on a complimentary basis was not terminated.

The next day, Ralph Lane, a member of the Human Resources Department of Newage Lake, called Mr. Mendez and terminated him. *Id.* Although, Mr. Mendez was still *assured* by Newage Lake that he would be eligible to receive unemployment benefits. Accordingly, Mr. Mendez applied for and was granted benefits. Mr. Mendez continued to receive unemployment payments until DETR issued him a letter that terminated his benefits and further sought to reclaim more than Sixteen Thousand Dollars in disbursed payments. *See* DETR Notification of Overpayment. Accordingly, Mr. Mendez retained counsel and filed timely notice of appeal.

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#### IV. ARGUMENT

After exhausting all administrative remedies available, Petitioner seeks judicial review of the Department's decision because the DETR misapplied Nevada law, drew unreasonable inferences from the facts and circumstances, and made decisions that are not substantially supported by the evidence.

The Court reviews an administrative decision in an unemployment benefits matter as to whether the Board of Review acted arbitrarily and capriciously, or otherwise abused its discretion. *Baker v. Unemployment Sec. Div.*, 2019 WL 851687 (Feb. 14, 2019, Nev. Ct. App.). The inquiry is whether substantial evidence supports the administrative agency's decision, which means evidence that a reasonable person would find adequate to support the agency's determination. *Nevada Employment Sec. Dep't. v. Cline*, 109 Nev. 74, 76, 847 P.2d 736, 738 (1993). If the department's "decision lacks substantial evidentiary support, the decision is unsustainable as being arbitrary or capricious." *City of Reno v. Reno Police Protective Ass'n.*, 118 Nev. 889, 899, 59 P.3d 1212, 1219 (2002). Conclusions of law are reviewed de novo. *Clark County School Dist. v. Bundley*, 122 Nev. 1440, 1444-45, 148 P.3d 750, 754 (2006).

Here, Petitioner did not engage in disqualifying misconduct. It was a common occurrence for the hotel, and specifically the chef of the restaurant, to provide complimentary food and beverage. The total value of the food and beverage was approximately Twenty Dollars (\$20.00) and could have easily been charged to Mr. Mendez's open credit card, which remained open. Even if rules or policies were technically broken, there is no evidence of misconduct that involved an element of wrongfulness by Mr. Mendez, and the DETR's determination "decision lacks substantial evidentiary support, [and] the decision is unsustainable as being arbitrary or capricious."

Finally, even if this Court determines that Petitioner did engage in disqualifying misconduct, requiring Petitioner to pay back a total of \$16,247.00 in distributed unemployment benefits violates general notions of equity, and is unreasonable in light of Petitioner's income. Specifically, requiring repayment of overpaid unemployment benefits that is not proportional to a

claimant's income is not equitable and shocks the conscience. *See Mahler v. Nev. Unemployment Sec. Div.*, 2013 No. A668753 LEXIS 3904 (finding that the petitioner need only repay \$264 of overpaid unemployment benefits rather than \$5,670 because requiring petitioner, who has minimal income, to pay back all overpaid benefits violates principles of equity).

Therefore, for these reasons, this Court should grant this Petition for Judicial Review and reverse the DETL's determination that Petitioner engaged in disqualifying misconduct.

**A. The Appeals Referee erred as a Matter of Law in Determining that Petitioner Engaged in Disqualifying "Misconduct" and Drew Improper Inferences from the Facts and Circumstances.**

The Appeals Referee erred in concluding that Petitioner engaged in "misconduct" that precluded him from obtaining unemployment benefits and drew improper inferences, without considering the conduct in context.

Nevada Revised Statutes Section 612.385 provides that a person is not eligible for unemployment benefits if he or she was discharged for misconduct connected to the person's work. *See* NRS 612.385. "Disqualifying misconduct occurs when an employee deliberately and unjustifiably violates or disregards her employer's reasonable policy or standard or otherwise acts in such a careless or negligent manner as to show a substantial disregard of the employer's interests or the employee's duties and obligations to her employer." *See Kebebe v. State Dep't of Employment*, 126 Nev. 729, \*1 (2010) (finding that an employee who walked off the job disregarded her duties and obligations to her employer). In determining whether an employee engaged in disqualifying "misconduct," the trier of fact *must* consider the legal definition in context with the facts and circumstances surrounding the incident(s). *Kolnik v. Nevada Employment Sec. Dep't.*, 112 Nev. 11, 15-16, 908 P.2d 726, 729 (1996).

Here, Mr. Mendez did not engage in disqualifying misconduct, as outlined above. Instead, when Mr. Mendez was terminated by Ralph Lane of Newage Lake H.R., Mr. Lane told Mr. Mendez that he would be eligible to receive unemployment benefits and that it would not make sense to further discuss or resolve the matter with Newage Lake. Essentially, Petitioner's conduct

1 does not fall within the language of NRS 612.385 because his conduct falls short of exhibiting a  
2 “substantial disregard” for his employer’s interests. Accordingly, the Appellate Referee failed to  
3 “consider the legal definition [of misconduct] in context,” and the appropriate legal standard was  
4 not applied to the facts and circumstances of this case.

5 Therefore, the record does not provide substantial evidence to support the DETR’s findings  
6 that Mr. Mendez engaged in disqualifying misconduct, and the Appellate Referee drew improper  
7 inferences from the facts and circumstances.

8 **B. Even if Petitioner’s acts are Sufficient to Establish “Misconduct,” Petitioner**  
9 **Should Not be Disqualified from Benefits Because Misconduct Requires an**  
10 **Element of Wrongfulness, which is Absent Here.**

11 Even if a person engages in misconduct, such conduct will not disqualify him or her from  
12 unemployment benefits unless it contains an element of wrongfulness. *Bundley*, 122 Nev. at 1445,  
13 148 P.3d at 754-55. Wrongfulness must be willful and deliberate, and ordinary negligence in  
14 isolated instances or good faith errors in judgment are excluded from the definition of misconduct.  
15 *See Kolnik*, 112 Nev. at 15-16, 908 P.2d at 729. Namely, acts which are not “wrongful,” such as  
16 excusable mistakes or omissions, do not constitute misconduct so as to preclude an individual from  
17 obtaining unemployment benefits. *State Employment Sec. Dep’t. v. Hilton Hotels Corp.*, 102 Nev.  
18 606, 609, 729 P.2d 497, 499 (1986).

19 Here, there is not substantial evidence on the record to support a determination that  
20 Petitioner’s conduct contained an element of wrongfulness. Mr. Mendez’s sworn testimony at the  
21 hearing (as detailed above) was not contradicted by Newage Lake, in any way, nor was it contested  
22 by any third-party witnesses. In fact, nobody other than Mr. Mendez and his counsel attended the  
23 hearing. Moreover, the Appellate Referee found that Petitioner’s “conduct contained an element  
24 of wrongfulness,” but fails to provide *any* support or reasoning for this finding. Therefore, upon  
25 review of the record, this Court should find that the elements of disqualifying conduct are not  
26 satisfied here.

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V. CONCLUSION

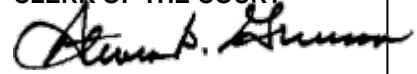
In conclusion, Petitioner's conduct does not fall within the statutory definition of misconduct under NRS 612.385. In addition, the Court has held that misconduct is not disqualifying unless it contains an element of wrongfulness, which is absent here. Finally, even if this Court finds that Petitioner engaged in disqualifying misconduct, forcing Petitioner to pay back more than \$16,000.00 in unemployment benefits already disbursed violates general notions of equity and shocks the conscience. For these reasons, this Court should grant this Petition for Judicial Review and reverse the DETR's decision because the DETR erred as a matter of law, or otherwise acted arbitrarily or capriciously.

Respectfully Submitted,

REID RUBINSTEIN & BOGATZ

By: /s/ I. Scott Bogatz

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*Attorneys for Petitioner*



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Facsimile No.: (775) 684-3992  
*Attorney for DETR/ESD*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

SELVIN MENDEZ,

Petitioner,

vs.

NEVADA DEPARTMENT OF  
EMPLOYMENT, TRAINING AND  
REHABILITATION; NEWAGE LAKE LAS  
VEGAS, LLC.,

Respondents.

CASE NO.: A-21-835176-J

DEPT. NO.: XXXI

**HEARING REQUESTED**

**MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW**

**COMES NOW**, Respondent Nevada Department of Employment, Training and Rehabilitation (DETR), by and through counsel, Troy C. Jordan, Esq., and respectfully moves this Honorable Court for an Order Dismissing the Petition for Judicial Review (Petition) based upon Petitioner Selvin Mendez's (Petitioner) failure to name all parties to the underlying Employment Security Division's (ESD) Board of Review (Board) proceeding. *See* NRS 612.350(1).

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1 This Motion is made and based upon all pleadings and papers on file herein; the supporting  
2 Points and Authorities attached hereto; and upon such other and further evidence as may be  
3 adduced at the time of the hearing on this Motion, if any.

4 **DATED** this 13th day of August, 2021.

5 /s/ TROY C. JORDAN

6 TROY C. JORDAN, ESQ.

7 *Attorney for Nevada ESD Respondents*  
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1 *Board of Review v. District Court, supra*, 133 Nev. at 255, 396 P.3d at 797 (Emphasis added).  
2 The Petition failed to name the ESD, the ESD Administrator, and the ESD Board – including its  
3 Chairperson. The deadline for accomplishing this was May 25, 2021. Accordingly, Petitioner  
4 failed to follow the statutory requirements of NRS 612.530(1), thus depriving this Court of  
5 jurisdiction.

6 In any event, under the provisions of NRS 612.530(2), the Petition had to be served on the  
7 Administrator of ESD within 45 days of its filing – July 8, 2021. Only DETR, through its Director,  
8 was served with a single copy of the Petition and a Summons. This would also compel a dismissal  
9 based upon the lack of jurisdiction.

10 Unemployment benefits have their roots in legislative enactments; they are not inherent  
11 rights of the inhabitants of the state. *Scott v. Nevada Employment Security Department*, 70 Nev.  
12 555, 557-558, 278 P.2d 602 (1954). The Legislature may lay down any reasonable and  
13 nondiscriminatory conditions it may see fit concerning eligibility and procedure. *Id.* To obtain  
14 review of an ESD decision, a petitioner must proceed under NRS Chapter 612, which governs  
15 claims for unemployment benefits. Cf. NRS 612.010. In that this Court lacks subject matter  
16 jurisdiction, it can take no action on the Petition but to dismiss it. *Scott, supra*.

17 **WHEREFORE**, Respondent DETR respectfully requests that the Court dismiss the instant  
18 Petition based upon the lack of subject matter jurisdiction – the result of Petitioner not timely  
19 naming all of the parties to the underlying Board matter. Even if such mandatory and jurisdictional  
20 requirement had been met, Petitioner failed to timely serve the Petition on the ESD Administrator  
21 pursuant to NRS 612.530(2).

22 **RESPECTFULLY SUBMITTED** this 13th day of August, 2021.

23  
24 /s/ TROY C., JORDAN

TROY C. JORDAN, ESQ.

Attorney for Nevada ESD Respondents

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of the State of Nevada, over  
3 the age of 18 years; and that on the date hereinbelow set forth, I served a true and correct copy of  
4 the foregoing MOTION TO DISMISS, *by either* electronic means (NEFCR 9), as indicated by an  
5 email address set forth below, *and/or* by placing the same within an envelope and depositing said  
6 envelope with the State of Nevada Mail for postage and mailing from Carson City, Nevada,  
7 addressed for delivery as follows:

8 REID RUBINSTEIN & BOGATZ  
9 I. Scott Bogatz, Esq.  
10 Kerry E. Kleiman, Esq.  
11 300 South 4<sup>th</sup> St., Suite 830  
12 Las Vegas, NV 89101  
13 [sbogatz@rrblf.com](mailto:sbogatz@rrblf.com)

14 NEWAGE LAKE LAS VEGAS, LLC  
15 1610 Lake Las Vegas Pkwy  
16 Henderson, NV 89011-2802 and

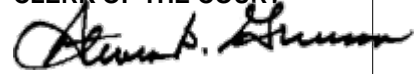
17 NEWAGE LAKE LAS VEGAS, LLC  
18 Registered Agent PARACORP INC.  
19 318 N. Carson St. #208  
20 Carson City, NV 89701

21 *And via e-file Courtesy Copy to:*

22 [Dept31LC@clarkcountycourts.us](mailto:Dept31LC@clarkcountycourts.us)

23 **DATED** this 13th day of August, 2021.

24 /s/ Tiffani M. Silva  
TIFFANI M. SILVA



**OPPM**

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*Attorneys for Petitioner*

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

SELVIN MENDEZ,

Petitioner,

vs.

NEVADA DEPARTMENT OF  
EMPLOYMENT, TRAINING AND  
REHABILITATION; NEWAGE LAKE LAS  
VEGAS, LLC,

Respondents.

Case No.: A-21-835176-J

Dept No.: 4

**PETITIONER SELVIN MENDEZ'S  
OPPOSITION TO RESPONDENT'S  
MOTION TO DISMISS**

COMES NOW, Petitioner Selvin Mendez, by and through his counsel, the law firm of Reid Rubinstein & Bogatz, and respectfully submits this Opposition to the Motion to Dismiss ("Motion") filed by Respondent the Nevada Department of Employment, Training, and Rehabilitation ("DETR") and its subdivision, the Employment Security Division ("ESD, collectively with DETR, the "Division"). This Opposition is made on the papers and pleadings on file herein, the following Memorandum and Points of Authority, any exhibits attached hereto, and any oral argument as the court may entertain at the hearing on this matter.

DATED this 27th day of August, 2021.

REID RUBINSTEIN & BOGATZ

By: /s/ I. Scott Bogatz

I. Scott Bogatz, Esq.

Nevada Bar No. 3367

300 South 4th Street, Suite 830

Las Vegas, Nevada 89101

*Attorneys for Petitioner*

## MEMORANDUM AND POINTS OF AUTHORITIES

The Motion filed by Respondents DETR/ESD is a disheartening effort to deny Mr. Mendez—a hardworking Nevadan—of more than \$16,000 *and* his day in court. Respondents ask this Court to ignore all principals of fairness and equity and, instead, adopt their skewed and improper interpretation of Nevada Supreme Court precedent. Contrary to the Respondents’ assertion, the Nevada Supreme Court’s decision in *Board of Review v. Second Judicial Dist. Court of Nev.*, 133 Nev. 253, 296 P.3d 795 (2017), does not require dismissal of Mr. Mendez’s Petition. In fact, the *Board of Review* decision strongly indicates that the Nevada Supreme Court would allow Mr. Mendez’s Petition to proceed.

### I. FACTUAL AND PROCEDURAL BACKGROUND

Mr. Mendez worked as a painter for Respondent Newage Lake Las Vegas (“Newage”) for nearly five (5) years without incident. Then, in mid-March 2020, as the COVID-19 pandemic began to ravage Southern Nevada, Newage let Mr. Mendez go. Mr. Mendez—who did not have any disciplinary records prior to his termination—was told by Newage management that he would be eligible to receive unemployment benefits. Much to Mr. Mendez’s surprise and consternation, Newage apparently contested his unemployment claim and alleged that Mr. Mendez was terminated for cause. The “cause” allegedly cited by Newage was a single incident wherein the hotel chef, who was Mr. Mendez’s friend and longtime colleague, offered to send approximately \$20.00 worth of complimentary food to Mr. Mendez’s friends who were staying at the hotel in a room that Mr. Mendez was paying for.

Months after he began receiving unemployment benefits, in late August 2020—at the height of the COVID-19 pandemic—the Division “issued a disqualifying determination and a [notice of] \$16,247 overpayment.” *See* Decision, Mar. 24, 2021, attached hereto as **Ex. 1**. The Division Appeals Referee, Angela Klaus, acted arbitrarily and capriciously, misapplied Nevada law, and drew conclusions that lack evidentiary support. Accordingly, after the Division refused to reconsider Ms. Klaus’ Decision, Mr. Mendez timely filed the underlying Petition.

Not unimportantly, and to highlight just how outrageously incorrect the Decision was, the Court must note that Newage **re-hired** Mr. Mendez to his same position, with no loss of seniority,

once the COVID-19-related restrictions began being lifted and business began returning back to normal. Surely, if his termination had truly been for cause or employee misconduct, Newage would not have offered Mr. Mendez his position back when business picked up.

## II. LEGAL ARGUMENT

The Division, hoping to avoid a reversal of Ms. Klaus' erroneous Decision, has twisted the Nevada Supreme Court's analysis and holding in *Board of Review* to an absurd conclusion. Compare *Board of Review v. Dist. Ct.*, 113 Nev. at 255, with Mot. at 4. This Court should reject the Division's argument and allow this Petition to move forward and be decided on the merits.

### A. BOARD OF REVIEW REQUIRES PARTIES HAVE NOTICE OF A PETITION

The Division boldly asserts that *Board of Review* "addresse[s] an identical situation" to the one at bar. Mot. at 3:4-5. That is hardly the case.

In *Board of Review*, the petition for judicial review was filed by an aggrieved employer. 113 Nev. at 254. In that case, an employee obtained unemployment benefits over the employer's objection. *Id.* The Division's Board of Review upheld the decision to award unemployment benefits, and the employer subsequently sought judicial review. However, when filing its petition, the employer did not name, notice, or serve the employee who would be affected by the outcome of such petition. The Nevada Supreme Court determined that the district court lacked jurisdiction to hear the employer's petition because:

[the employee] was not named. She was not made a defendant in the action, nor was she named in the body of the petition for judicial review. Further, the Certificate of Service does not indicate that [the employee] received a copy of the petition . . . She was not named as a defendant in an amended petition until months after [the employer] filed its original petition for judicial review, which defeats the expedited nature of the court's review.

*Id.* at 256. The *Board of Review* decision is further accompanied by a concurrence authored by Justice Pickering in which she notes that the rules of civil procedure allow for a defendant to be considered "adequately identified as a party to the litigation" in just circumstances, such as when the proper party is identified in the body of a pleading or "if the proper person actually has been served." *Id.* at 256-57 (internal quotation omitted). Justice Pickering further notes that she did not want to foreclose the Supreme Court's ability to allow future cases to proceed even if an

employee failed to name an employer, so long as that employer had adequate notice of the petition.

Here, Mr. Mendez’s situation is far closer to that envisioned by Justice Pickering than it is to the employer who improperly filed its petition for review. Mr. Mendez (through his pro bono counsel) filed a petition seeking review of an adverse agency action. Mr. Mendez named his employer, who would be affected by the outcome of the petition, and DETR—the governmental department listed on every communication that Mr. Mendez received. Importantly, the ESD is a division entirely within DETR. *See* NRS 612.049.

The Division’s argument that the petition must be dismissed because Mr. Mendez named DETR instead of “the ESD, the ESD Administrator, and the ESD Board (which would include its Chairperson)” seeks to turn the *Board of Review* holding on its head. DETR and the ESD are represented by the same counsel—specifically, by Mr. Jordan whose title is “Division Sr. Legal Counsel, State of Nevada, DETR/ESD.” It is unclear whether the Division is asserting that a suit against DETR is insufficient to provide notice to a subdivision, or whether the Division believes that the ESD Administrator, Board, and Chairperson of the Board must be individually named by any person challenging an agency determination. In any regard, that is the kind of procedural gamesmanship that Justice Pickering’s concurrence warns against.

Moreover, although the Division claims that NRS 612.525(2) requires that a petitioner seeking judicial redress name the ESD Administrator individually, the plain language of that provision need not be interpreted that way. NRS 612.525(2) states, in relevant part, “The Administrator shall be deemed to be a party to any judicial action involving any such decision....” Looking at the ordinary definitions of the plain language, this statute should be interpreted to mean that the ESD Administrator must be considered a party in any petition for judicial review, whether named or unnamed. Under that interpretation, the Court is directed to deem the Administrator a party to this proceeding rather than dismiss Mr. Mendez’s petition.

Perhaps most importantly, the interests of justice counsel against dismissing Mr. Mendez’s Petition based on the Division’s dubious procedural arguments. There has been no prejudice to the ESD, the ESD Administrator, or the ESD Board as they are all adequately represented by the Division’s counsel. Mr. Mendez named the parties included on the “Recipient List” attached to the

Division's Decision. *See* Ex. 1. He also included the DETR because that is the agency with whom Mr. Mendez and his counsel corresponded with throughout the process. The Nevada Supreme Court's holding in *Board of Review* is clearly grounded in the need to ensure that parties who will be affected by judicial review are given notice that such petition has been filed and is being considered. It is undeniable that naming and serving the Nevada DETR provided that notice.

For those reasons, the Motion should be denied, and Mr. Mendez's petition should be considered on its merits.

**B. IN THE ALTERNATIVE, MR. MENDEZ SHOULD BE GIVEN LEAVE TO AMEND TO CURE THIS HARMLESS PROCEDURAL DEFECT**

ESD is clearly aware of this petition for judicial review. The undersigned has been attempting to contact counsel for the Nevada ESD Respondents for nearly two weeks, to no avail. It would simply be unjust for Mr. Mendez to be deprived of his day in court, deprived of his ability to contest a clearly erroneous, arbitrary, and capricious abuse of the Division's power, and forced to repay a substantial amount of money to the DETR/ESD that he was entitled to receive. Despite the Division's procedural huffing and puffing, there has been no prejudice. Similarly, there would be no prejudice if this Court were to allow Mr. Mendez the opportunity to amend his Petition so that the ESD Respondents are properly named. To the extent that the Division complains about service upon the ESD Administrator, there is no allegation that this purported lack of service has prejudiced the Administrator in any way. The Administrator, like all ESD Respondents, has knowledge of this Petition and has the opportunity to participate and defend against it.

Thus, if the Court is at all inclined to dismiss the Petition, Mr. Mendez respectfully requests that he be given leave to amend his Petition to explicitly include the ESD Respondents.

**III. CONCLUSION**

The Division's skewed reading of *Board of Review* does not hold water and should not be given credence. Unlike the situation in *Board of Review*, here, all parties are clearly aware of this proceeding. Therefore, there is no prejudice that would preclude permitting this matter to go forward or otherwise allowing Mr. Mendez to amend his Petition to explicitly name the ESD, ESD Board, ESD Administrator, and ESD Chairman in the Caption.

1 Mr. Mendez deserves his day in Court. Therefore, Mr. Mendez respectfully requests that  
2 the Court DENY the Division's Motion to Dismiss and permit this Petition to proceed.

3  
4 Dated this 27th day of August, 2021.

5  
6 REID RUBINSTEIN & BOGATZ

7  
8 By: /s/ I. Scott Bogatz  
9 I. Scott Bogatz, Esq.  
10 Nevada Bar No. 3367  
11 300 South 4th Street, Suite 830  
12 Las Vegas, Nevada 89101  
13 *Attorneys for Petitioner*  
14  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 27th day of August, 2021 our office served a copy of the foregoing **OPPOSITION TO MOTION TO DISMISS** upon the following, in accordance with Administrative Order 14.2 and NRCP 5(b):

**STATE OF NEVADA DETR/ESD**

**Division Sr. Legal Counsel**

Troy C. Jordan, Esq.

500 East 3rd St.

Carson City, NV 89713

Tel: 775-684-3996

*Attorneys for Nevada ESD Respondents*

**NEWAGE LAKE LAS VEGAS, LLC**

c/o Jones Lovelock

Attn: Kimberley A. Hyson, Esq.

6675 S. Tenaya Way, Ste. 200

Las Vegas, NV 89113

khyson@joneslovelock.com

Tel: 702-805-8450

*/s/ Amy M. Scott*

\_\_\_\_\_  
An employee of Reid Rubinstein & Bogatz

# EXHIBIT I

# EXHIBIT I

3/29/21  
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## DECISION OF THE REFEREE

**In the Matter of:**

SELVIN MENDEZ  
3676 EL TORO ST  
LAS VEGAS, NV 89121

NEWAGE LAKE LAS VEGAS LLC  
1610 LAKE LAS VEGAS PKWY  
HENDERSON, NV 89011

**Docket Number: V-20-A-06975**

**Date Decision is Mailed:** 03/24/2021

**Date Decision is Final:** 04/05/2021

**SSN:** [REDACTED]

**Appearances:**

Interpreter, Claimant, Attorney

**Appeal Rights:** The decision is final unless a signed appeal to the Board of Review is filed within 11 days of the decision's mailing date or unless good cause for the delay is shown. An appeal may be filed in person at the Appeals Office or by letter to the address above. (Nevada Revised Statute 612.510)

**FINDINGS OF FACT:** The claimant appealed from a determination denying benefits under the discharge provisions of Nevada Revised Statutes (NRS) 612.385. The determination included a ruling that the employer's experience rating record would not be charged under NRS 612.551. The claimant appealed from a determination requiring refund of benefits under the overpayment provisions of Nevada Revised Statutes (NRS) 612.365. A hearing was held.

The claimant worked for the employer, a hotel, from June 19, 2015 through March 16, 2020 as a painter. On March 16, 2020, the claimant was discharged for violating the employer's Standards of Conduct policy; specifically, on March 14, 2020, the claimant gave away free food to his newly married friends who were staying at the hotel for their honeymoon.

On March 13, 2020, the claimant used his credit card to get his newly married friends a hotel room for their honeymoon.

On March 14, 2020, without permission from upper management, the claimant gave away free food to his newly married friends. It was not until the general manager spoke to the claimant about him giving his newly married friends free food that he offered to pay for said food. On March 14, 2020, the claimant was suspended. On March 16, 2020, the claimant was discharged.

It is universally unacceptable for an employee to give out free food without permission from upper management to do so.

The employer paid 75% or more of the claimant's base period earnings.

Received

MAR 26 2021

Docket #V-20-A-06975

Reid Rubinstein & Bogatz  
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The claimant initiated a claim for unemployment insurance benefits effective March 15, 2020 as a lack of work. On August 19, 2020, the Division issued a disqualifying determination, and a \$16,247 overpayment. The claimant filed a timely appeal.

**REASONS FOR DECISION:** NRS 612.385 provides that a person is ineligible for benefits if he has been discharged from his last or next-to-last employment for misconduct connected with the work, beginning with the week in which the claim is filed and until he earns remuneration in covered employment equal to or exceeding his weekly benefit amount in each of not more than 15 weeks thereafter according to the seriousness of the misconduct.

In *Barnum vs. Williams*, 84 NV 37, 436 P 2d 219 (1968), the Nevada Supreme Court reasoned that "misconduct," within the meaning of the unemployment compensation law, means a deliberate violation or disregard of reasonable standards. Carelessness or negligence showing substantial disregard of duties is misconduct, while failure of performance because of inability, ordinary negligence in isolated instances, and good faith errors in judgment and discretion are excluded. In a later case, the Nevada Supreme Court further refined the definition by holding that misconduct required an "element of wrongfulness." *Lellis v Archie* 89 Nev. 550, at 553, 516 P.2d 469 (1973). *Garman v State, Employment Security Department*, 102 Nev. 563, at 565 729 P.2d 1335 (1986). Most recently, the Nevada State Supreme Court has held that: "Disqualifying misconduct occurs when an employee deliberately and unjustifiably violates or disregards (his) employer's reasonable policy or standard, or otherwise acts in such a careless or negligent manner as to show a substantial disregard of the employer's interests or the employee's duties and obligations to (his) employer." *Clark County School District v Bundley*, 122 Nev. Adv. Rep. 119, 148 P. 3d 750, 754-755 (2006). The court went on to state: "The employer bears the burden of proof to show that an employee engaged in deliberate or willful misconduct sufficient to disqualify the employee from receiving unemployment benefits."

The claimant was discharged for violating the employer's Standards of Conduct policy; specifically, on March 14, 2020, the claimant gave away free food to his newly married friends who were staying at the hotel for their honeymoon. During the hearing, the claimant contended that in the past, the general manager authorized the employees to give away free food. It is important to note that it was the general manager who talked to him about giving away free food. Therefore, had the general manager authorized the employees to give away free food, he would not have talked to the claimant about doing so; thus, this tribunal finds the claimant's contention self-serving and unpersuasive. Finally, the claimant contended that without provocation, the chef just offered to make his newly married friend's food, and the claimant thanked him, and then, he left the area. This tribunal finds it improbable, that without provocation, that the chef just offered to make his newly married friend's food for free, but even IF he had, it still would have been incumbent upon the claimant to pay for it or to get permission from upper management to give out free food, something the employer would ultimately have to pay for. Therefore, as the claimant violated the employer's Standards of Conduct policy when he gave away free food to his newly married friends, a behavior less than any employer should be expected to tolerate, this tribunal finds that the claimant's actions demonstrated a deliberate violation or disregard of reasonable standards of conduct. Moreover, said conduct contained an element of wrongfulness. Therefore, this tribunal finds that disqualifying misconduct in connection with the work has been established, and benefits are denied.

**NRS 612.551 provides that the experience rating record of an employer from whom the claimant**

earned 75% or more of his wages shall not be charged if the employer provides evidence within ten working days of the Notice of Claim Filing that the claimant left without good cause, or was discharged for misconduct.

The employer has met the requirements of the law to relieve their account of charges.

**NRS 612.365 provides that: "Any person who is overpaid any amount as benefits . . . is liable for that amount overpaid unless: the overpayment was not due to fraud, misrepresentation or willful nondisclosure on the part of the recipient, and the overpayment was received without fault on the part of the recipient, and its recovery would be against equity and good conscience as determined by the Administrator."**

As the overpayment was due the claimant's fault (the claimant reported his separation as a lay off due to a lack of work-slowdown in business, when in fact he was discharged for giving away free food), there is no legal basis to waive the overpayment. Therefore, due to the aforementioned, respective to this decision, the claimant is liable for the overpayment, and the Division is hereby directed to calculate it.

**DECISION: The appealed determination issued under NRS 612.385 is affirmed. The claimant is disqualified for benefits from March 15, 2020 onward, until claimant works in covered employment and earns an amount equal to or greater than the weekly benefit amount in each of 10 weeks. Under NRS 612.551, the employer's account is not subject to charge. The appealed determination issued under NRS 612.365 is affirmed. The claimant is liable for the overpayment, and the Division is hereby directed to calculate it.**

---

ANGELA KLAUS  
/s/ APPEALS REFEREE



**For Spanish Language Interpretation  
Para la traducción al Español**

Aviso: Esta notificación contiene información importante acerca de su reclamo, incluyendo plazos para la apelación. Si Ud. tiene problemas para leer y entender Inglés, puede contactarse con un representante de la División de seguridad de empleo para asistencia en traducción. Los numeros de telefono son:

El Norte de Nevada....775-687-8148  
El Sur de Nevada.....702-486-2957  
Numero de llamada gratuita....888-687-8147

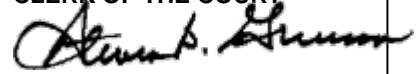
Si esta decisión establece que Ud. no tiene derecho a los beneficios del Seguro de Desempleo, usted tiene derecho a apelar esta decisión. La apelación ante el Tribunal del Distrito debe presentarse en el Condado en el que fue realizado el trabajo en la fecha correspondiente o antes de la fecha límite para la apelación ante el Tribunal tal como se establece arriba (NRS 612.525 y NRS 612.530). Si usted no la presenta dentro de este plazo, puede perder el derecho de apelar y puede perder su oportunidad de recibir los beneficios por desempleo o cuestionar un sobresueldo. Si usted no tiene derecho a los beneficios por desempleo, usted podría ser responsable del reembolso de algún beneficio que haya tenido anteriormente.

### **Recipient List**

SELVIN MENDEZ  
3676 EL TORO ST  
LAS VEGAS, NV 89121

NEWAGE LAKE LAS VEGAS LLC  
1610 LAKE LAS VEGAS PKWY  
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I SCOTT BOGATZ  
300 S 4TH STREET STE 830  
LAS VEGAS, NV 89101



**ROPP**  
TROY C. JORDAN, ESQ.  
Nevada State Bar No. 9073  
State of Nevada, Department of  
Employment, Training & Rehabilitation (DETR)  
Employment Security Division (ESD)  
500 East Third Street  
Carson City, NV 89713  
Telephone No.: (775) 684-3996  
Facsimile No.: (775) 684-3992  
*Attorney for DETR/ESD*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

SELVIN MENDEZ,

Petitioner,

vs.

NEVADA DEPARTMENT OF  
EMPLOYMENT, TRAINING AND  
REHABILITATION; NEWAGE LAKE LAS  
VEGAS, LLC.,

Respondents.

CASE NO.: A-21-835176-J

DEPT. NO.: I

**REPLY TO OPPOSITION TO DETR'S MOTION TO DISMISS**

**COMES NOW**, Respondent Nevada Department of Employment, Training and Rehabilitation (DETR), by and through counsel, Troy C. Jordan, Esq., and respectfully replies to Petitioner Selvin Mendez's (Petitioner) opposition to DETR's Motion to Dismiss the Petition for Judicial Review (Petition). DETR's Motion to Dismiss is based upon Petitioner's failure to name all parties to the underlying Employment Security Division's (ESD) Board of Review (Board) proceeding. *See* NRS 612.350(1).

///

///

This Reply is made and based upon all pleadings and papers on file herein; the supporting Points and Authorities attached hereto; and upon such other and further evidence as may be adduced at the time of the hearing on this Motion, if any.

**DATED** this 8th day of September, 2021.

/s/ TROY C. JORDAN

TROY C. JORDAN, ESQ.

*Attorney for Nevada ESD Respondents*

1                                   **POINTS AND AUTHORITIES IN SUPPORT OF**  
2                                   **REPLY TO PETITIONER’S OPPOSITION TO DETR’S MOTION TO DISMISS**

3           I.       ***THE COURT LACKS JURISDICTION BECAUSE THE PETITION***  
4                                   ***FAILS TO NAME ALL NECESSARY PARTIES***

5           Petitioner prefaces his Opposition argument by baldly asserting that *Board of Review v.*  
6 *District Court*, 133 Nev. 253, 396 P.3d 795 (2017) does not apply. He next delves into his version  
7 of the facts, despite the inability of this Court to exercise jurisdiction and the underlying facts of  
8 the case are irrelevant to issue that is the subject of the motion to dismiss.

9           Petitioner then urges this Court not to follow NRS 612.350(1), or the case law properly  
10 relied on in the Motion to Dismiss. He makes a distinction without a difference by focusing on  
11 the fact that the Petitioner is the employee/claimant. Regardless of which party is appealing the  
12 administrative decision, the party who does so must comply with NRS 612.350(1) -- mandatory  
13 and jurisdictional. Specifically, the Court held:

14                               For decades, this court has required parties to follow the express  
15 language of NRS 612.530(1). See *Caruso v. Nev. Emp’t Sec. Dep’t*,  
16 103 Nev. 75, 76, 734 P.2d 224, 225 (1987). We have consistently  
17 held that the requirements of the statute are jurisdictional and  
18 mandatory. See *Kame v. Emp’t Sec. Dep’t*, 105 Nev. 22, 24, 769  
19 P.2d 66, 68 (1989) (holding that the time limit for filing a petition  
for judicial review is jurisdictional and mandatory); *Scott v. Nev.*  
*Emp’t Sec. Dep’t*, 70 Nev. 555, 559, 278 P.2d 602, 604 (1954)  
(affirming dismissal of a petition for judicial review where  
petitioner had failed to file in the proper district court).

20                               Based on the plain language of the statute, we conclude that the  
21 naming requirement must be completed as timely as the rest of the  
petition. On its face, this statute indicates that the action must  
22 commence in a specific district court, and that the action must  
include as a defendant “any other party.” NRS 612.530(1). Further,  
the entire section begins with: “Within 11 days after the decision of  
the Board of Review has become final.” *Id.* This clause indicates  
23 that each requirement of NRS 612.530(1) must be completed within  
those 11 days.

24           *Board of Review, supra at 133 Nev. at 255*

1           Petitioner misplaces reliance on dicta from Justice Pickering’s concurring opinion.  
2           Petitioner contends that he is close enough, because DETR and ESD use the same attorney. Most  
3           attorneys in Nevada represent multiple clients. In any event, the Nevada Supreme Court held,  
4           “When a party seeks judicial review of an administrative decision, strict compliance with the  
5           statutory requirements for such review is a precondition to jurisdiction by the court of judicial  
6           review.” *Kame v. Employment Sec. Dept.*, 105, Nev. 22, at 25, 769 P.2d 66, at 68 (1998).

7           NRS 233B.039(3)(a) provides that the special provisions of NRS Chapter 612 regarding  
8           judicial review apply to the judicial review of a case concerning unemployment insurance benefits.  
9           NRS 612.525(2) states that “The Administrator shall be deemed to be a party to any judicial action  
10          involving any such decision (referring to the Board of Review’s Decisions)....Further, NRS  
11          233B.130(2)(a) requires that the Petition must name as respondents the agency and all parties of  
12          record to the administrative proceeding.

13          The Nevada Supreme Court held that the failure to name a party required by the applicable  
14          review procedures divests the District Court of subject matter jurisdiction. *Washoe County v. Otto*,  
15          128 Nev. 424, 282 P.3d 719, 725 (2012).

16          The Nevada Supreme Court later reiterated the requirement was mandatory and  
17          jurisdictional, holding:

18                   In *Otto*, this court held that NRS 233B.130(2)’s naming requirement  
19                   is mandatory and jurisdictional. 128 Nev. at 432, 282 P.3d at 725.  
20                   There, we stated that “[n]othing in the language of [NRS  
21                   233B.130(2)] suggests that its requirements are anything but  
22                   mandatory and jurisdictional,” explaining that “[t]he word “must”  
                      generally imposes a mandatory requirement.’ Id. In *Thomasson*, we  
                      reiterated that because the word “must” qualifies NRS  
                      233B.130(2)’s requirements, these requirements are mandatory and  
                      jurisdictional. 130 Nev. at 31, 317 P.3d at 834.

23                   *Heat and Frost Insulators v Labor Commission*, 134 Nev. Adv. Op. 1, 408 P.3d 156 (2018).

1           Petitioner's argument also stands in direct opposition to the Nevada Supreme Court's  
2 recent decision in *Whitfield v Nevada State Personnel Commission, et al*, 137 Nev. Adv. Op 34.  
3 In *Whitfield*, the Court in interpreting *Otto* stated that it overruled *Prevost v Department of*  
4 *Administration* and finds that the Petitioner failed to name all respondents per 233B.130(2)(a) was  
5 mandatory and jurisdictional. *Id* The failure to named all respondents or to timely amend within  
6 the prescribed period, required dismissal. *Id*.

7           Petitioner's arguments regarding dicta in the concurring opinion lack merit.  
8 Unemployment benefits have their roots in legislative enactments; they are not inherent rights of  
9 the inhabitants of the state. *Scott v. Nevada Employment Security Department*, 70 Nev. 555, 557-  
10 558, 278 P.2d 602 (1954). Hence, the Legislature may lay down any reasonable and  
11 nondiscriminatory conditions it may see fit concerning eligibility and procedure. *Id*.

12           The Nevada Supreme Court has repeatedly held that the procedural requirements of the  
13 Administrative Procedures Act must be strictly followed before a district court may review an  
14 administrative decision. *Washoe Cty. v. Otto*, 128 Nev. 424, 282 P.3d 719, 725, (2012). "When a  
15 party seeks judicial review of an administrative decision, strict compliance with the statutory  
16 requirements for such review is a precondition to jurisdiction by the court of judicial review," and  
17 "[n]oncompliance with the requirements is grounds for dismissal." *Id.*; citing *Kame v. Employment*  
18 *Security Dep't*, 105 Nev. 22, 25, 760 P.2d 66, 68 (1989); *see also, Bd. of Review, Nevada Dep't of*  
19 *Employment, Training & Rehab., Employment Sec. Div. v. Second Judicial Dist. Court of State in*  
20 *& for Cty. of Washoe*, 396 P.3d 795, 797 (Nev. 2017) (holding that "[w]e have consistently held  
21 that the requirements of the statute are jurisdictional and mandatory); *see, Kame v. Emp't Sec.*  
22 *Dep't*, 105 Nev. 22, 24, 769 P.2d 66, 68 (1989) (holding that the time limit for filing a petition for  
23 judicial review is jurisdictional and mandatory); *Scott v. Nev. Emp't Sec. Dep't*, 70 Nev. 555, 559,  
24 278 P.2d 602, 604 (1954) (affirming dismissal of a petition for judicial review where petitioner

1 had failed to file in the proper district court). Petitioner is in violation of 233B.130(2)(a) and NRS  
2 612.530(1). Therefore, the Petition must be dismissed.

3 Further, the Court has no authority to allow the Petitioner to file an Amended Petition to  
4 attempt to cure the jurisdictional defect as the final appeal date has passed. NRS 612.530(1) is  
5 entitled “Judicial review of decision of Board of Review; Commencement of action in district  
6 court; parties; service of petition; summary hearings; appeals to Supreme Court,” and states, in  
7 pertinent part:

8 **1. Within 11 days after the decision of the Board of Review**  
9 **has become final, any party aggrieved thereby or the**  
10 **Administrator may secure judicial review thereof by**  
11 **commencing an action in the district court of the county where**  
12 **the employment which is the basis of the claim was performed**  
13 **for the review of the decision,** in which action any other party to  
14 the proceedings before the Board of Review must be made a  
15 defendant. (Emphasis supplied.)

16 Based on NRS 612.530(1), no cure is available because the time to file an appropriate  
17 appeal has passed. Therefore, the Petition is fatally defective and must be dismissed.

18 Petitioner only named Nevada’s DETR and the employer in his Petition. He does not  
19 dispute that he failed to name all of the parties to the underlying administrative matter. His Petition  
20 did not name the ESD, the ESD Administrator, and the ESD Board – including its Chairperson.  
21 The deadline for doing so was May 25, 2021. Petitioner attempts an impossible stretch of NRS  
22 612.525(2). Even if the ESD Administrator is deemed a party, by this statute, she still must be  
23 named. NRS 612.530(1). Besides the ESD Administrator, the other parties to the underlying  
24 proceeding before the ESD Board had to be named. This included ESD, the Board, the Board  
Chairperson.<sup>1</sup>

---

<sup>1</sup> The parties to the underlying ESD Board matter included the Petitioner, Newage Lake Las Vegas, LLC. (employer), the ESD, the ESD Administrator (*see* NRS 612.525(2) and NRS 612.530(2)), and the ESD Board (which would include its Chairperson). The law requires, “[A]ny other party

1           II.        *THE COURT LACKS JURISDICTION BECAUSE THE PETITIONER*  
2                    *FAILED TO PROPERLY EFFECTUATE SERVICE ON THE*  
3                    *ADMINISTRATOR OR OTHER PARTIES WITHIN THE STATUTORY*  
4                    *TIME FRAMES*

5           Petitioner fails to address the service failures in this matter argued in the motion to dismiss.  
6           The Court should deem those allegations admitted. Moreover, even if the Petition was cognizable,  
7           it would have to have been served with the requisite number of copies on the Administrator of  
8           ESD within 45 days of its filing – July 8, 2021. *See* NRS 612.530(2). Only DETR, through its  
9           Director, was served with a single copy of the Petition and a Summons. NRS 612.530(2) requires

10                   In such action, a petition which need not be verified, but which must  
11                   state the grounds upon which a review is sought, **must, within 45**  
12                   **days after the commencement of the action, be served upon the**  
13                   **Administrator**, unless the Administrator is the appellant, or upon  
14                   such person as the Administrator may designate, and such service  
15                   shall be deemed completed service on all parties, **but there must be**  
16                   **left with the party so served as many copies of the petition as**  
17                   **there are defendants**, and the Administrator shall forthwith mail  
18                   one such copy to each defendant.

19           In this case, Petitioner served a single copy on the Director of DETR. See attached Exhibit  
20           1. Therefore, service did not comport with NRS 612.530. As this Court has already ruled in  
21           other cases, the service requirement in NRS 612.530 became mandatory and jurisdictional when  
22           the Nevada Legislature in the 32<sup>nd</sup> Special session amended the section to include the 45 day  
23           requirement which went into effect in August of 2020

24           In 2019, the Nevada Supreme Court, in the case of *Spar v. Olsen*, 135 Nev. 296 (2019),  
analyzed service pursuant to NRS 233B.130(5) and found it was not jurisdictional, because a good  
cause requirement was built into the statute.

The Court specifically stated in *Spar* the following:

to the **proceedings before the Board** of Review **must** be made a defendant.” NRS 612.350(1)  
(Emphasis added).

1 Pursuant to NRS 233B.130(1), an aggrieved party may petition a  
2 district court for judicial review of a final administrative decision—  
3 so long as the decision is challengeable under and challenged  
4 according to NAPA. *Otto*, 128 Nev. at 431, 282 P.3d at 724-25. A  
5 party petitioning for judicial review of an administrative decision  
6 must strictly comply with the NAPA's jurisdictional requirements.  
7 *Kame v. Emp't Sec. Dep't*, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989).  
8 NRS 233B.130(2) mandates who must be named as respondents to  
9 a petition for judicial review, where the petition must be filed, who  
10 must be served with the petition, and the time for filing the petition  
11 in the district court. Because NRS 233B.130(2) is silent on the  
12 court's authority to excuse noncompliance with those requirements,  
13 we have determined that the statute's plain language requires strict  
14 compliance and have held the requirements in NRS 233B.130(2) to  
15 be jurisdictional. *Heat & Frost*, 134 Nev. at 4-5, 408 P.3d at 159-  
16 60.

17 Conversely, NRS 233B.130(5) expressly grants the district court  
18 authority to consider whether there is good cause to extend the time  
19 to serve the petition. Specifically, NRS 233B.130(5) provides that  
20 “the petition for judicial review ... must be served upon the agency  
21 and every party within 45 days after the filing of the petition, \*299  
22 unless, upon a showing of good cause, the district court extends the  
23 time for such service.” (Emphasis added.) Accordingly, NRS  
24 233B.130(5) authorizes a district court to use its discretion to  
determine whether there was good cause for any delay in service.  
This authorization is notably absent in NRS 233B.130(2). As such,  
NRS 233B.130(5)'s plain language illustrates that the time for  
serving a petition for judicial review, unlike the requirements listed  
under NRS 233B.130(2), is not a jurisdictional requirement. See  
*Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010)  
(interpreting clear and unambiguous statutes based on their plain  
meaning).

18 *Spar*, 135 Nev. at 298-99, 468 P.3d at 542.

19 Based on a myriad of denied Motions to Dismiss by ESD for lack service including one  
20 case in which a finding of alleged “good cause” was made for a petition was served 139 days late  
21 based on *Spar*, ESD submitted SB3 during the 32<sup>nd</sup> Special Session of the Nevada Legislature.

22 SB 3 was passed unanimously in the State Senate and only had 1 no vote in the Assembly.  
23 SB3 was signed by Governor Steve Sisolak on August 7, 2020 (several months prior to the filing  
24

1 of this petition). The section of the bill amending NRS 612.530(2) (Section 11) went into effect  
2 immediately.

3 In SB3, NRS 612.530(2) was amended to include the 45 day requirement and therefore  
4 abrogated *Spar* with regard to unemployment claims by statute. No “good cause” element was  
5 included in the provision. The special provisions of NRS Chapter 612 prevail over the general  
6 provisions of NRS 233B where applicable. NRS 233B.039(3)(a). Based on the amendment in SB  
7 3 to NRS 612.530(2), service MUST be effectuated on the administrator within 45 days. No “good  
8 cause” provision allowing a court to excuse late service is included. Therefore, SB3 turned NRS  
9 612.530(2) into a mandatory and jurisdictional requirement. *See Heat & Frost Insulators v. Labor*  
10 *Comm’r*, 134 Nev. 1, 2, 408 P.3d 156, 158 (2018); *Washoe County v Otto*, 128 Nev. 424, 431, 282  
11 P.3d 719, 724 (2012), *and Spar* (statutory requirements for judicial review are mandatory and  
12 jurisdictional). Based on the lack of timely service of the Petition by Petitioner in this case, the  
13 Court lacks subject matter jurisdiction. Strict compliance with the statutory requirements for  
14 judicial review is a precondition to jurisdiction. *See Kame, supra*. NRS

15 **WHEREFORE**, Respondent DETR respectfully requests that the Court dismiss the instant  
16 Petition based upon the lack of subject matter jurisdiction – the result of Petitioner not timely  
17 naming all of the parties to the underlying Board matter. Even if such mandatory and jurisdictional  
18 requirement had been met, dismissal would be warranted because the Petition was not timely  
19 served on the ESD Administrator pursuant to NRS 612.530(2).

20 **RESPECTFULLY SUBMITTED** this 8th day of September, 2021.

21  
22 /s/ TROY C., JORDAN

TROY C. JORDAN, ESQ.

Attorney for Nevada ESD Respondents

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of the State of Nevada, over  
3 the age of 18 years; and that on the date hereinbelow set forth, I served a true and correct copy of  
4 the foregoing REPLY TO OPPOSITION TO DETR's MOTION TO DISMISS, *by either*  
5 electronic means (NEFCR 9), as indicated by an email address set forth below, *and/or* by placing  
6 the same within an envelope and depositing said envelope with the State of Nevada Mail for  
7 postage and mailing from Carson City, Nevada, addressed for delivery as follows:

8 REID RUBINSTEIN & BOGATZ  
9 I. Scott Bogatz, Esq.  
10 Kerry E. Kleiman, Esq.  
11 300 South 4<sup>th</sup> St., Suite 830  
12 Las Vegas, NV 89101  
13 [sbogatz@rrblf.com](mailto:sbogatz@rrblf.com)

14 NEWAGE LAKE LAS VEGAS, LLC  
15 1610 Lake Las Vegas Pkwy  
16 Henderson, NV 89011-2802

17 and

18 NEWAGE LAKE LAS VEGAS, LLC  
19 Registered Agent PARACORP INC.  
20 318 N. Carson St. #208  
21 Carson City, NV 89701

22 *And via e-file Courtesy Copy to:*

23 [Dept01LC@clarkcountycourts.us](mailto:Dept01LC@clarkcountycourts.us)

24 **DATED** this 8th day of September, 2021.

/s/ Tiffani M. Silva  
TIFFANI M. SILVA

# EXHIBIT 1

RECEIVED

06/29/2021

Nevada DETR/ ESD  
Office of Legal Counsel

**SUMM**

**REID RUBINSTEIN & BOGATZ**

**I. SCOTT BOGATZ, ESQ.**

Nevada Bar No. 3367

**KERRY E. KLEIMAN, ESQ.**

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sbogatz@rrblf.com

*Attorneys for Petitioner*

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

SELVIN MENDEZ,

Petitioner,

vs.

NEVADA DEPARTMENT OF  
EMPLOYMENT, TRAINING AND  
REHABILITATION; NEWAGE LAKE LAS  
VEGAS, LLC,

Respondents.

Case No.: A-21-835176-J

Dept No.: 4

**SUMMONS – CIVIL**

**NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU  
WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS.**

**READ THE INFORMATION BELOW.**

**TO RESPONDENT: EMPLOYMENT SECURITY DIVISON, STATE OF NEVADA:**

A civil complaint has been filed by the Petitioner against you for the relief set forth in the Petition.

1. If you intend to defend this lawsuit, within twenty (20) days after this Summons is served on you, exclusive of the day of service you must do the following:

- (a) File with the Clerk of this Court, whose address is shown below, a formal written response to the Petition in accordance with the rules of the Court, with the appropriate filing fee.
- (b) Serve a copy of your response upon the attorney whose name and address is shown below.

REID RUBINSTEIN & BOGATZ

300 South 4th Street, Suite 830

Las Vegas, Nevada 89101

(702) 776-7000 FAX: (702) 776-7900

2. Unless you respond, your default will be entered upon application of the Petitioner and this Court may enter a judgment against you for the relief demanded in the Petition, which could result in the taking of money or property or other relief requested in the Petition.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members, and legislator, each have forty-five (45) days after service of this Summons within which to file an Answer or other responsive pleading to the Petition.

Submitted by:

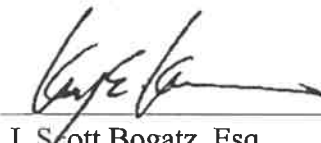
Dated June 23, 2021

REID RUBINSTEIN & BOGATZ

STEVEN D. GRIERSON,

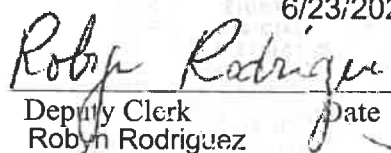
CLERK OF COURT

By:



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*Attorneys for Petitioner*

By:



Deputy Clerk  
Robyn Rodriguez

6/23/2021

Date


Regional Justice Center  
200 Lewis Avenue  
Las Vegas, NV 89155

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06/29/2021

Nevada DETR/ ESD  
Office of Legal Counsel

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5/24/2021 6:58 PM  
Steven D. Grierson  
CLERK OF THE COURT



CASE NO: A-21-835176-J  
Department 4

**PET**  
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**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

SELVIN MENDEZ,

Petitioner,

vs.

NEVADA DEPARTMENT OF  
EMPLOYMENT, TRAINING AND  
REHABILITATION; NEWAGE LAKE LAS  
VEGAS, LLC,

Respondents.

Case No.:

Dept No.:

**PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW**

Petitioner, SELVIN MENDEZ ("Petitioner"), an individual, by and through his attorneys of record, the law firm of Reid Rubinstein & Bogatz, hereby submits this BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW.

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**I. STATEMENT OF JURISDICTION**

Pursuant to Nevada Revised Statutes, Section 612.525 through 612.530, this Court has jurisdiction over the Parties because this dispute stems from employment in Clark County, Nevada, and this Petition is timely filed within Eleven (11) days of the NEVADA DEPARTMENT OF EMPLOYMENT, TRAINING AND REHABILITATION (“DETR”) Board of Review’s decision.

**II. STATEMENT OF THE CASE**

Pursuant to Nevada Revised Statutes Section 612.525 and Section 612.530, Petitioner asks this Court to grant this Petition in Support of Judicial Review and reverse the DETR’s decision because the DETR erred as a matter of law or otherwise acted arbitrarily or capriciously.

Namely, Petitioner did not engage in “misconduct” as defined by Nevada law or otherwise act in such a manner as to later deny him unemployment benefits. Petitioner is a former employee of NEWAGE LAKE LAS VEGAS, LLC (“Newage Lake”), a hotel located in Henderson, Nevada. After being terminated without cause and being informed that he should not seek any reconsideration of the decision and would be eligible for unemployment benefits, Petitioner filed for unemployment benefits through the DETR, who disbursed unemployment benefit payments to Petitioner. Later, on August 19, 2020, the DETR issued a letter to Petitioner, which terminated ongoing unemployment benefits and sought to reclaim \$16,247.00 in benefits already paid. Accordingly, on August 31, 2020, Petitioner formally appealed the DETR’s decision.

A hearing was held on January 15, 2021, before DETR Appellate Referee, Angela Klause. Newage Lake did not attend the hearing, and to Petitioner’s knowledge, Newage Lake did not submit any information for the hearing. Ms. Klause determined that Petitioner engaged in disqualifying misconduct and that “said conduct contained an element of wrongfulness.” However, Ms. Klause erred in concluding that the Petitioner was disqualified from benefits—from March 15, 2020 onward—because Ms. Klause misapplied Nevada law to the facts at-hand and drew improper inferences from the record. Namely, under Nevada precedent, Petitioner did not engage in “misconduct,” but even if he did, such conduct was not disqualifying because it did not contain an element of wrongfulness, as he was given permission from his superiors. Accordingly,

Petitioner filed his timely notice of appeal to the Board of Review on April 05, 2021. Nevertheless, the DETR Board of Review “decline[d] further review” on May 03, 2021. Now, Petitioner timely files this Petition for Review before the Court because the DETR erred as a matter of law, or otherwise acted arbitrarily and capriciously, and Petitioner has exhausted all administrative remedies available.

### III. STATEMENT OF FACTS

On or around March 15, 2020, Mr. Mendez used his credit card to rent a room for his newly wedded friends who were away on their honeymoon. *See* Case No. V-20-A-06975, Ex. No. 8. As Mr. Mendez explained during the hearing, Mr. Mendez conversed with one of the chefs at the restaurant, who told Mr. Mendez that he was sending some complementary food and beverage to the guests, which is something that the hotel did fairly regularly. The food and beverage that was sent had a value of approximately Twenty Dollars (\$20.00). Mr. Mendez’ credit card was still open and on file for the room. Nevertheless, Newage Lake made no attempt to charge his credit card. Mr. Mendez did not have any reason to believe his actions or those of the chef were inappropriate or out of the ordinary. In fact, Mr. Mendez had no disciplinary activity in his file and the chef who actually sent the food to the room on a complimentary basis was not terminated.

The next day, Ralph Lane, a member of the Human Resources Department of Newage Lake, called Mr. Mendez and terminated him. *Id.* Although, Mr. Mendez was still *assured* by Newage Lake that he would be eligible to receive unemployment benefits. Accordingly, Mr. Mendez applied for and was granted benefits. Mr. Mendez continued to receive unemployment payments until DETR issued him a letter that terminated his benefits and further sought to reclaim more than Sixteen Thousand Dollars in disbursed payments. *See* DETR Notification of Overpayment. Accordingly, Mr. Mendez retained counsel and filed timely notice of appeal.

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#### IV. ARGUMENT

After exhausting all administrative remedies available, Petitioner seeks judicial review of the Department's decision because the DETR misapplied Nevada law, drew unreasonable inferences from the facts and circumstances, and made decisions that are not substantially supported by the evidence.

The Court reviews an administrative decision in an unemployment benefits matter as to whether the Board of Review acted arbitrarily and capriciously, or otherwise abused its discretion. *Baker v. Unemployment Sec. Div.*, 2019 WL 851687 (Feb. 14, 2019, Nev. Ct. App.). The inquiry is whether substantial evidence supports the administrative agency's decision, which means evidence that a reasonable person would find adequate to support the agency's determination. *Nevada Employment Sec. Dep't. v. Cline*, 109 Nev. 74, 76, 847 P.2d 736, 738 (1993). If the department's "decision lacks substantial evidentiary support, the decision is unsustainable as being arbitrary or capricious." *City of Reno v. Reno Police Protective Ass'n.*, 118 Nev. 889, 899, 59 P.3d 1212, 1219 (2002). Conclusions of law are reviewed de novo. *Clark County School Dist. v. Bundley*, 122 Nev. 1440, 1444-45, 148 P.3d 750, 754 (2006).

Here, Petitioner did not engage in disqualifying misconduct. It was a common occurrence for the hotel, and specifically the chef of the restaurant, to provide complimentary food and beverage. The total value of the food and beverage was approximately Twenty Dollars (\$20.00) and could have easily been charged to Mr. Mendez's open credit card, which remained open. Even if rules or policies were technically broken, there is no evidence of misconduct that involved an element of wrongfulness by Mr. Mendez, and the DETR's determination "decision lacks substantial evidentiary support, [and] the decision is unsustainable as being arbitrary or capricious."

Finally, even if this Court determines that Petitioner did engage in disqualifying misconduct, requiring Petitioner to pay back a total of \$16,247.00 in distributed unemployment benefits violates general notions of equity, and is unreasonable in light of Petitioner's income. Specifically, requiring repayment of overpaid unemployment benefits that is not proportional to a

claimant's income is not equitable and shocks the conscience. *See Mahler v. Nev. Unemployment Sec. Div.*, 2013 No. A668753 LEXIS 3904 (finding that the petitioner need only repay \$264 of overpaid unemployment benefits rather than \$5,670 because requiring petitioner, who has minimal income, to pay back all overpaid benefits violates principles of equity).

Therefore, for these reasons, this Court should grant this Petition for Judicial Review and reverse the DETL's determination that Petitioner engaged in disqualifying misconduct.

**A. The Appeals Referee erred as a Matter of Law in Determining that Petitioner Engaged in Disqualifying "Misconduct" and Drew Improper Inferences from the Facts and Circumstances.**

The Appeals Referee erred in concluding that Petitioner engaged in "misconduct" that precluded him from obtaining unemployment benefits and drew improper inferences, without considering the conduct in context.

Nevada Revised Statutes Section 612.385 provides that a person is not eligible for unemployment benefits if he or she was discharged for misconduct connected to the person's work. *See* NRS 612.385. "Disqualifying misconduct occurs when an employee deliberately and unjustifiably violates or disregards her employer's reasonable policy or standard or otherwise acts in such a careless or negligent manner as to show a substantial disregard of the employer's interests or the employee's duties and obligations to her employer." *See Kebebe v. State Dep't of Employment*, 126 Nev. 729, \*1 (2010) (finding that an employee who walked off the job disregarded her duties and obligations to her employer). In determining whether an employee engaged in disqualifying "misconduct," the trier of fact *must* consider the legal definition in context with the facts and circumstances surrounding the incident(s). *Kolnik v. Nevada Employment Sec. Dep't.*, 112 Nev. 11, 15-16, 908 P.2d 726, 729 (1996).

Here, Mr. Mendez did not engage in disqualifying misconduct, as outlined above. Instead, when Mr. Mendez was terminated by Ralph Lane of Newage Lake H.R., Mr. Lane told Mr. Mendez that he would be eligible to receive unemployment benefits and that it would not make sense to further discuss or resolve the matter with Newage Lake. Essentially, Petitioner's conduct

does not fall within the language of NRS 612.385 because his conduct falls short of exhibiting a “substantial disregard” for his employer’s interests. Accordingly, the Appellate Referee failed to “consider the legal definition [of misconduct] in context,” and the appropriate legal standard was not applied to the facts and circumstances of this case.

Therefore, the record does not provide substantial evidence to support the DETR’s findings that Mr. Mendez engaged in disqualifying misconduct, and the Appellate Referee drew improper inferences from the facts and circumstances.

**B. Even if Petitioner’s acts are Sufficient to Establish “Misconduct,” Petitioner Should Not be Disqualified from Benefits Because Misconduct Requires an Element of Wrongfulness, which is Absent Here.**

Even if a person engages in misconduct, such conduct will not disqualify him or her from unemployment benefits unless it contains an element of wrongfulness. *Bundley*, 122 Nev. at 1445, 148 P.3d at 754-55. Wrongfulness must be willful and deliberate, and ordinary negligence in isolated instances or good faith errors in judgment are excluded from the definition of misconduct. *See Kolnik*, 112 Nev. at 15-16, 908 P.2d at 729. Namely, acts which are not “wrongful,” such as excusable mistakes or omissions, do not constitute misconduct so as to preclude an individual from obtaining unemployment benefits. *State Employment Sec. Dep’t. v. Hilton Hotels Corp.*, 102 Nev. 606, 609, 729 P.2d 497, 499 (1986).

Here, there is not substantial evidence on the record to support a determination that Petitioner’s conduct contained an element of wrongfulness. Mr. Mendez’s sworn testimony at the hearing (as detailed above) was not contradicted by Newage Lake, in any way, nor was it contested by any third-party witnesses. In fact, nobody other than Mr. Mendez and his counsel attended the hearing. Moreover, the Appellate Referee found that Petitioner’s “conduct contained an element of wrongfulness,” but fails to provide *any* support or reasoning for this finding. Therefore, upon review of the record, this Court should find that the elements of disqualifying conduct are not satisfied here.

///

V. CONCLUSION

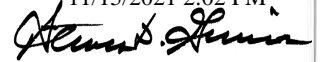
In conclusion, Petitioner's conduct does not fall within the statutory definition of misconduct under NRS 612.385. In addition, the Court has held that misconduct is not disqualifying unless it contains an element of wrongfulness, which is absent here. Finally, even if this Court finds that Petitioner engaged in disqualifying misconduct, forcing Petitioner to pay back more than \$16,000.00 in unemployment benefits already disbursed violates general notions of equity and shocks the conscience. For these reasons, this Court should grant this Petition for Judicial Review and reverse the DETR's decision because the DETR erred as a matter of law, or otherwise acted arbitrarily or capriciously.

Respectfully Submitted,

REID RUBINSTEIN & BOGATZ

By: /s/ I. Scott Bogatz

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*Attorneys for Petitioner*

  
CLERK OF THE COURT

**ORDR**

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*Attorneys for Petitioner,  
Selvin Mendez*

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

SELVIN MENDEZ,

Petitioner,

vs.

NEVADA DEPARTMENT OF  
EMPLOYMENT, TRAINING AND  
REHABILITATION; NEWAGE LAKE LAS  
VEGAS, LLC,

Respondents.

Case No.: A-21-835176-J

Dept No.: 4

**ORDER DENYING RESPONDENTS'  
MOTION TO DISMISS**

Petitioner Selvin Mendez ("Mr. Mendez", "Petitioner") filed a Petition for Judicial Review on May 24, 2021. Respondents the Nevada Department of Employment, Training, and Rehabilitation ("DETR") and its subdivision, the Employment Security Division ("ESD," collectively with DETR, the "Division", "Respondents"), filed a Motion to Dismiss a Petition for Judicial Review (the "Motion") on August 13, 2021. Petitioner filed an Opposition to the Motion (the "Opposition") on August 27, 2021. The Division filed a Reply to Petitioner's Opposition on September 8, 2021. Respondents' Motion came for a hearing before this Court on October 6, 2021 at 9:30 a.m. with I. Scott Bogatz, Esq. and Kerry E. Kleiman, Esq. of the law firm of Reid, Rubinstein & Bogatz appearing on behalf of Petitioner and Joseph Leo Ward, Esq. appearing on behalf of the Respondents. Having considered the pleadings and papers on file herein, having

considered the arguments of counsel, and being fully apprised in the facts and the law, the Court hereby finds and concludes as follows:

**FINDINGS OF FACT**

1. Mr. Mendez worked as a painter for Respondent Newage Lake Las Vegas (“Newage”) for nearly five (5) years prior to being let go in March 2020.
2. After Mr. Mendez filed for unemployment benefits, Newage contested the claim and alleged he had been fired “for cause.”
3. Ultimately, in August 2020, the Division determined Mr. Mendez was not eligible to receive unemployment benefits and issued a notice of overpayment.
4. Mr. Mendez timely appealed, however, the Division upheld the ineligibility determination.
5. Accordingly, Mr. Mendez timely filed the underlying Petition for Judicial Review.
6. In his petition, Mr. Mendez named his employer—Newage—and DETR.
7. Mr. Mendez did not, however, name the ESD specifically or certain ESD officials personally.
8. The communications that the Division had sent Mr. Mendez throughout the process named only Mr. Mendez, Newage, and DETR.
9. The Division subsequently filed a Motion to Dismiss, arguing that this Court lacked jurisdiction to hear Mr. Mendez’s petition because it did not name ESD and individual ESD officials personally.
10. The Division’s Motion was based on *Board of Review v. Second Judicial Dist. Court of Nev.*, 133 Nev. 253 (2017) and NRS 612.525(2), which states that “The Administrator shall be deemed to be a party to any judicial action involving any such decision, and may be represented in any such judicial action by (a) Any qualified attorney employed by the Administrator and designated by the Administrator for that purpose; or (b) The Attorney General, at the Administrator's request.”
11. The Division argued that this language required that Mr. Mendez name and serve the ESD, the ESD Administrator, and the ESD Chair individually.

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## CONCLUSIONS OF LAW

12. The Court disagrees with the Division's reliance on *Board of Review*, and finds that case to be sufficiently distinguishable. In *Board of Review*, an employer filed a petition for judicial review after an employee obtained unemployment benefits over the employer's objection. However, in that case, the aggrieved employer failed to name or serve the employee who would be affected by the outcome of the petition.
13. The Court finds that those facts are not "an identical situation" to the one at bar, as asserted by the Division. Here, Mr. Mendez did not formally name the ESD or specific ESD Officials, however, Mr. Mendez did name and serve DETR.
14. Pursuant to NRS 612.049, ESD is a division entirely within DETR.
15. The Court, therefore, concludes that naming and serving DETR was sufficient to provide notice and an opportunity to be heard to the ESD and its officials.
16. Unlike the situation in *Board of Review* where the affected employee had no way of knowing about the petition for judicial review, here, ESD and its officials not only knew about Mr. Mendez's petition, but filed this Motion to Dismiss in response to it.
17. The Court finds that it would be unjust to deprive Mr. Mendez the opportunity to have his petition heard simply because the ESD—a subdivision of the properly named and served DETR—was not named separately from its parent department.
18. The Court further disagrees with the Division's interpretation of NRS 612.525(2).
19. NRS 612.525(2) states, in relevant part, "The Administrator shall be deemed to be a party to any judicial action involving any such decision...." The Court does not interpret this provision to mean that failure to name the ESD Administrator divests the Court of jurisdiction. Rather, the Court interprets this provision to mean that the ESD Administrator must be considered a party in any petition for judicial review, whether named or unnamed.
20. The Court, therefore, concludes that the plain language of NRS 612.525(2) does not require dismissal of Mr. Mendez's Petition.
21. Any Finding of Fact more appropriately considered a Conclusion of Law, or any Conclusion of Law more appropriately deemed a Finding of Fact, shall be so construed.

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Based on the Court's conclusion that naming the umbrella department over the ESD is sufficient to confer jurisdiction to this Court, the Court finds and concludes that it may appropriately consider Mr. Mendez's Petition.

THEREFORE, IT IS HEREBY ORDERED that the Division's Motion to Dismiss the Petition for Judicial Review is DENIED.

Dated this 15th day of November, 2021

*Bita Yeager*

DD9 FB2 069B 9AFA  
Bita Yeager  
District Court Judge

Respectfully submitted by:

REID RUBINSTEIN & BOGATZ

/s/ Kerry E. Kleiman, Esq.  
I. Scott Bogatz, Esq.  
Kerry E. Kleiman, Esq.  
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*Attorneys for Petitioner*

Approved as to form and content:

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Troy C. Jordan, Esq.  
Joseph L. Ward, Jr., Esq.  
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Office of Legal Counsel  
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Carson City, NV 89713  
*Attorney for Respondents DETR/ESD*

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

6 Selvin Mendez, Petitioner(s)	CASE NO: A-21-835176-J
7 vs.	DEPT. NO. Department 1
8 Nevada Department of	
9 Employment, Training, and	
10 Rehabilitation, Respondent(s)	

11 **AUTOMATED CERTIFICATE OF SERVICE**

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

15 Service Date: 11/15/2021

16 Kerry Kleiman	kkleiman@rrblf.com
17 Tiffani Silva	tmsilva@detr.nv.gov
18 Troy Jordan, Esq.	ESDLegal@detr.nv.gov
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