

IN THE SUPREME COURT OF THE STATE OF NEVADA

LYNDA PARVEN, IN HER
CAPACITY AS THE
ADMINISTRATOR OF THE STATE
OF NEVADA DEPARTMENT OF
EMPLOYMENT, TRAINING &
REHABILITATION, EMPLOYMENT
SECURITY DIVISION; J. THOMAS
SUSICH, IN HIS CAPACITY AS
CHAIR OF THE STATE OF NEVADA
DEPARTMENT OF EMPLOYMENT,
TRAINING & REHABILITATION,
EMPLOYMENT SECURITY
DIVISION; AND STATE OF NEVADA
DEPARTMENT OF EMPLOYMENT,
TRAINING & REHABILITATION,
EMPLOYMENT SECURITY
DIVISION,

Petitioners,

vs.

THE 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.

Supreme Court Case No.:
83797

Electronically Filed
Apr 04 2022 02:57 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
District Case No.
A-21-835176-J

REAL PARTY IN INTEREST SELVIN MENDEZ'S ANSWER

Reid Rubinstein & Bogatz
I. SCOTT BOGATZ, ESQ. (3367)
BRAD LIPMAN, ESQ. (14567)
300 South 4th Street, Suite 830
Las Vegas, Nevada 89101
Telephone : (702) 776-7000
Facsimile : (702) 776-7900
sbogatz@rrblf.com
blipman@rrblf.com
*Attorneys for Real Party in
Interest Selvin Mendez*

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in Nevada Rules of Appellate Procedure (“NRAP”) 26.1(a) and must be disclosed. These representations are made so this Court may evaluate possible disqualification or recusal.

1. Parent Corporation of Respondents: N/A.
2. Publicly Held Shareholders of Respondents: N/A.
3. Law firms who have appeared for Respondent in this matter:
 - Reid Rubinstein & Bogatz
300 South 4th Street, Suite 830
Las Vegas, Nevada 89101

Dated this 4th day of April, 2022.

By: /s/ Brad Lipman, Esq.
I. Scott Bogatz, Esq. (3367)
Brad Lipman, Esq. (14567)
REID RUBINSTEIN & BOGATZ
300 South 4th Street, Suite 830
Las Vegas, Nevada 89101
*Attorneys for Real Party in
Interest Selvin Mendez*

TABLE OF CONTENTS

NRAP 26.1 Disclosure Statement	i
Table of Contents	ii
Table of Authorities	ii
I. STATEMENT OF THE ISSUES	1
A. Whether NRS 612.525(2) Requires the Specific Naming of the ESD’s Administrator to Afford a District Court Subject Matter Jurisdiction Over an Action for Judicial Review of a Decision Determining Benefits Under the Discharge Provisions of NRS 612.385?	1
II. STATEMENT OF THE CASE	1
III. STATEMENT OF RELEVANT FACTUAL BACKGROUND ..	3
A. The Action for Judicial Review	3
IV. SUMMARY OF THE ARGUMENT	4
A. This Court’s Holdings Seek to Ensure All Litigants Are Afforded Due Process Through Notice	5
V. CONCLUSION	9
Certificate of Compliance	11
Certificate of Service	13

TABLE OF AUTHORITIES

CASES

<i>Board of Review v. Second Judicial Dist. Court of Nev.</i> , 113 Nev. 253, 296 P.3d 795 (2017)	3, 5, 6, 9
<i>Otto</i> , 128 Nev. at 430, 282 P.3d at 724	8
<i>Washoe County v. Otto</i> , 128 Nev. 424, 282 P.3d 719, 725 (2012)	8, 9

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

STATUTES

612.525(2).....9

NRS 612.049.....6

NRS 612.525(2).....3, 4, 7

RULES

NRAP 28(e)(1)..... 11

NRAP 32(a)(4)..... 11

NRAP 32(a)(5)..... 11

NRAP 32(a)(6)..... 11

NRAP 32(a)(7)..... 11

I. STATEMENT OF THE ISSUES

A. WHETHER NRS 612.525(2) REQUIRES THE SPECIFIC NAMING OF THE ESD’S ADMINISTRATOR TO AFFORD A DISTRICT COURT SUBJECT MATTER JURISDICTION OVER AN ACTION FOR JUDICIAL REVIEW OF A DECISION DETERMINING BENEFITS UNDER THE DISCHARGE PROVISIONS OF NRS 612.385?

II. STATEMENT OF THE CASE

Real Party in Interest Selvin Mendez worked as a painter for 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, after having received benefits for many months, Mr. Mendez was notified that his unemployment benefits had been cancelled, and that he owed back the payments that had be received because he had been terminated for cause. The “cause” allegedly cited 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.

Importantly, and to highlight just how outrageously incorrect the Decision was, Newage contacted and then **re-hired** Mr. Mendez to his same position, with no loss of seniority, once the COVID-19-related restrictions began being lifted and business started 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.

///

III. STATEMENT OF RELEVANT FACTUAL BACKGROUND

A. THE ACTION FOR JUDICIAL REVIEW

Following the Division Appeals referee's Decision, Mr. Mendez sought the Division's reconsideration; however, the Division refused. Thereafter, Mr. Mendez timely filed a Petition for Judicial Review to have the Eighth Judicial District Court overturn the decision. *See* Appendix 1–11.

Petitioner in this action sought dismissal of the underlying action for judicial review on the extraordinarily-technical grounds that the district court was without subject matter jurisdiction as a result of individuals and/or divisions of the Nevada Department of Employment, Training and Rehabilitation not having been specifically named as parties therein. *See* Appendix 10–14. Petitioner's claims were based on this Court's prior ruling in *Board of Review v. Second Judicial Dist. Court of Nev.*, 113 Nev. 253, 296 P.3d 795 (2017) and NRS 612.525(2). *See id.*

Real Party in Interest opposed dismissal, stating to the underlying court that *Board of Review* was entirely distinguishable from the appeal and that NRS 612.525(2) did not require the specific naming requirements as alleged. The district court agreed with Real Party in Interest Selvin Mendez, finding (1) that *Board of Review* was distinguishable from the present case,

(2) that Mr. Mendez named and served the DETR, (3) that the ESD is a division entirely within the DETR, (4) that serving the DETR was sufficient to provide notice and an opportunity to be heard to the ESD and its officials, (5) that it would be unjust to deprive Mr. Mendez the opportunity to have his petition heard simply because the ESD was not named separately from its parent department, and (6) that failure to name the ESD Administrator does not divest the district court of jurisdiction under NRS 612.525(2). *See* Appendix 48–52.

IV. SUMMARY OF THE ARGUMENT

The Division, hoping to avoid a reversal of the clearly erroneous Decision, seeks to rely on a non-existent technicality and its own self-serving interpretations of this Court’s prior holdings. The Division’s position that the lower court was divested of its subject matter jurisdiction based on a failure to name the ESD’s Administrator and Board of Review has no precedent in Nevada jurisprudence and would achieve only a deprivation of Mr. Mendez’s due process rights. This Court should reject the Division’s argument and allow the underlying petition for judicial review to move forward and be decided on the merits.

///

///

1 **A. THIS COURT’S HOLDINGS SEEK TO ENSURE ALL**
2 **LITIGANTS ARE AFFORDED DUE PROCESS**
3 **THROUGH NOTICE**

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

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

21 *Id.* at 256

 The *Board of Review* decision is further accompanied by a
concurrency 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 this 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 and served 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] Administrator [or] the Board of Review” seeks to turn the *Board of Review* holding on its head. DETR and the ESD are represented by the same counsel—specifically, in the underlying action for judicial review, by Mr. Jordan whose title is “Division Sr. Legal Counsel, State of Nevada, DETR/ESD.” It remains

unclear whether the Division is asserting notice of suit served on the DETR is insufficient to provide notice to its subdivision handling the matter, but that is the kind of procedural gamesmanship that Justice Pickering’s concurrence warns against.

Moreover, the Division inaccurately asserts that “Mendez performed the trick of not naming ANY party in his caption, other than his former employer.” *See* Petition for Writ of Mandamus at 7. Had the Division’s patently false assertion actually occurred, and Mendez had named only his employer, the underlying petition for judicial review would have unequivocally deprived the State notice of the pending action; however, that is not the case. Mendez named and served the DETR, and without any further notice, the ESD responded to the petition for judicial review by seeking its dismissal. *See* Appendix 1–11; *see also* Appendix 10–14. Patently obvious in its timely responsive filing is the adequacy of notice on the ESD—the true concern underlying this Court’s holdings.

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....”

1 Looking at the ordinary definitions of the plain language, this statute should
2 be interpreted to mean that the ESD Administrator must be considered a
3 party in any petition for judicial review, whether named or unnamed. Under
4 that interpretation, a court conducting judicial review is directed to deem the
5 Administrator a party to the proceeding—not to dismiss the petition for a
6 petitioner having failed to specifically name the Administrator.

7 The Division also seeks to stretch this Court’s holding in *Washoe*
8 *County v. Otto*, 128 Nev. 424, 282 P.3d 719, 725 (2012) wherein this Court
9 found that an omission in its entirety to name a party to the action divested
10 jurisdiction from the district court. In *Otto*, Washoe County sought judicial
11 review of the Board of Equalization’s adjusted of a property tax, and in
12 doing so named respondents as “Certain Taxpayers (Unidentified)”, and
13 subsequently amended its petition to name them “Certain Taxpayers.” *Otto*,
14 128 Nev. at 430, 282 P.3d at 724. The anonymously-named parties in *Otto*
15 are patently different from the present case, where Mr. Mendez specifically
16 named and served the DETR.

17 Perhaps most importantly, the interests of justice counsel against
18 dismissing Mr. Mendez’s petition for judicial review based on the Division’s
19 dubious procedural arguments. There has been no prejudice to the ESD, the
20 ESD Administrator, or the ESD Board as they are all adequately represented

1 by the Division's counsel. Mr. Mendez named the parties included on the
2 "Recipient List" attached to the Division's Decision. *See* Appendix 27. He
3 also included the DETR because that is the agency with whom Mr. Mendez
4 and his counsel corresponded with throughout the process. The Nevada
5 Supreme Court's holding in *Board of Review* is clearly grounded in the need
6 to ensure that parties who will be affected by judicial review are given notice
7 that such petition has been filed and is being considered. It is undeniable
8 that naming and serving the Nevada DETR provided that notice.

9 **V. CONCLUSION**

10 The Division's skewed interpretations of this Court's precedents do
11 not hold water and should not be given credence. Unlike the situation in
12 *Board of Review* and *Otto*, here, all parties have been afforded the notice as
13 required by Nevada law. Moreover, there is no technical defect in Mr.
14 Mendez's underlying petition for judicial review stemming from NRS
15 612.525(2) as an interpretation of its plain language reveals no mandatory
16 requirement to name the ESD Administrator in the caption of the petition.
17 Ultimately, there is no precedent or prejudice that would demand dismissal
18 of Mr. Mendez's underlying petition for judicial review.

19 This case is a prime example of why due process is of utmost
20 importance. The Division's appeal referee made a clearly erroneous

decision given that **Mr. Mendez has since been re-hired to his same position, with no loss of seniority**, following his employer's recovery from the COVID-19-related restrictions. The Division thereafter refused to reconsider that decision. And now, having sought the court's redress, the Division seeks to dismiss his petition on entirely technical grounds to impose a baseless \$16,247 fine. Mr. Mendez deserves his day in Court and has taken every necessary step to ensure the other parties have had their similar due process. Therefore, Mr. Mendez respectfully requests that the Court deny Petitioners' petition for writ of mandamus and allow the lower court proceeds to continue through litigation.

Dated this 4th day of April, 2022.

By: /s/ Brad Lipman, Esq.
I. Scott Bogatz, Esq. (3367)
Brad Lipman, Esq. (14567)
REID RUBINSTEIN & BOGATZ
300 South 4th Street, Suite 830
Las Vegas, Nevada 89101
*Attorneys for Real Party in
Interest Selvin Mendez*

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Brief 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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point 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 of the brief exempted by NRAP 32(a)(7)(C), it:

[X] Does not exceed 14,000 words – specifically, it contains approximately 1,950 words within the pertinent sections.

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

1 accompanying Brief is not in conformity with the requirements of the
2 Nevada Rules of Appellate Procedure.

3 Dated this 4th day of April, 2022.

5 By: /s/ Brad Lipman, Esq.
6 I. Scott Bogatz, Esq. (3367)
7 Brad Lipman, Esq. (14567)
8 REID RUBINSTEIN & BOGATZ
9 300 South 4th Street, Suite 830
10 Las Vegas, Nevada 89101
11 *Attorneys for Real Party in*
12 *Interest Selvin Mendez*
13
14
15
16
17
18
19
20
21

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April, 2022, our office served a copy of the foregoing **REAL PARTY IN INTEREST SELVIN MENDEZ’S ANSWER** upon each of the following parties electronically, through the Nevada Supreme Court’s e-filing system:

HONORABLE BITA YEAGER
Regional Justice Center
200 Lewis Ave., RJC Courtroom 16A
Las Vegas, NV 89155

David K. Neidert, Esq.
Deputy Counsel
State of Nevada DETR/ESD
500 East Third Street
Carson City, Nevada 89713
Attorneys for Petitioner

/s/ Brad Lipman, Esq.

An employee of Reid Rubinstein &
Bogatz