

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

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Elizabeth A. Brown
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Supreme Court No.: 83797

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

REPLY TO REAL PARTY IN INTEREST'S ANSWER

The Petitioner, Lynda Parven, in her capacity as Administrator of the Employment Security Division of the Nevada Department of Employment, Training and Rehabilitation (“ESD”), respectfully replies to the Answer submitted by the Real Party in Interest, Selven Mendez (“Mendez”).

After spending two pages arguing the facts of his underlying case, which are completely irrelevant to the issue before the Court, Mendez claims that ESD sought dismissal on the “extraordinarily-technical grounds that the district court was without subject matter jurisdiction as result of individuals and/or divisions of the Nevada Department of Employment, Training, and Rehabilitation not having been specifically named as parties therein.” Answer at 3.

ESD does not believe an assertion of lack of subject matter jurisdiction is “extraordinarily technical” – rather ESD believes lack of subject matter jurisdiction is a fundamental tenet of civil procedure, usually taught in the very first weeks of law school, and which “cannot be waived and may be raised at any time.” *Vaile v. Eighth Judicial Dist. Ct.*, 118 Nev. 262, 276, 44 P.3d 506, 515-16 (2002).¹

¹ Because subject matter jurisdiction is not waivable and can be raised at any time, ESD believes it could have litigated the case on the merits in the district court and raised it for the first time on appeal in this Court. *See Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990) (lack of subject matter jurisdiction may be raised for the first time on appeal). Mendez is complaining that ESD raised the lack of subject matter jurisdiction in the first instance rather than the last.

Additionally, “[J]urisdiction of the controversy, . . . , when absent, means the court ‘cannot decide the case on the merits.’” *In re S.M.M.D.*, 128 Nev. 14, 20, 272 P.3d 126, 130 (2012) (*quoting In re Orthopedic Products Liab. Litigation*, 123 F.3d 152, 155 (3rd Cir. 1997)).

This makes subject matter jurisdiction different from personal jurisdiction. Lack of personal jurisdiction must be raised in the initial answer or the defense is waived. *Superpumper, Inc. v. Leonard*, 137 Nev. Adv. Op. 43, 495 P.3d 101, 106 (2021).

This Court has been abundantly clear that the failure to follow the tenets of the Administrative Procedures Act in seeking judicial review divests a court of subject matter jurisdiction. *Whitfield v. State Pers. Comm.*, 492 P.3d 571, 575 (Nev. 2021); *Spar Business Services v. Olson*, 135 Nev. 296, 298, 448 P.3d 539, 542 (2019); *Washoe County v. Otto*, 128 Nev. 424, 434, 282 P.3d 719, 726 (2012).

Spar Business Services also held that “NRS 233B.130(2) mandates **who must be named as respondents to a petition for judicial review**, where the petition must be filed, who must be served with the petition, and the time for filing the petition in the district court.” 135 Nev. at 298, 448 P.3d at 542 (emphasis added).

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

NRS 612.525(2) states, “The Administrator shall be deemed to be a party to any judicial action involving any such decision[.]”NRS 612.495(1) provides, “Any person entitled to a notice of determination or redetermination may file an appeal from the determination with an Appeal Tribunal, and the Administrator shall be a party respondent thereto.”²

Curiously, Mendez ignores the Administrative Procedures Act completely in his argument, as well as *Spar Business Services*, even though *Spar Business Services* discusses the interplay between NRS 233B and NRS 612:

Though special provisions of NRS Chapter 612 prevail where applicable, NRS 233B.039(3)(a), Nevada’s Administrative Procedures Act (NAPA), codified as NRS Chapter 233B, sets forth the procedural requirements for judicial review of administrative agency actions generally, NRS 233B.020(1).

135 Nev. at 298, 448 P.3d at 541.

In *Board of Review v. Second Judicial Dist. Court*, 133 Nev. 253, 396 P.3d 795 (2017), the Court held that the naming requirement must be as timely as the rest of a *Petition for Judicial Review*, 133 Nev. 253, 255, 396 P.3d 795, 797 (2017).

This Court’s holdings belie Mendez’s assertion that “this Court’s holdings seek to ensure all litigants are afforded due process through notice.” Answer at 5.

² The Appeal Tribunal is the first step to challenge an adverse determination under NRS 612, and colloquially referred to as the “referee hearing.”

To that end, Mendez cites Justice Pickering’s concurrence in *Board of Review*. See 133 Nev. at 256-56, 396 P.3d at 798. With all respect to Justice Pickering, a concurrence is not the holding of the Court. Additionally, *Board of Review* predates *Prevost v. Dep’t of Admin.*, 134 Nev. 326, 418 P.3d 675 (2018), which held that parties could be named by reference if they were include within the body of a petition for judicial review. 134 Nev. at 328, 418 P.3d at 677.

Significantly, *Whitfield* expressly overruled *Prevost*. 492 P.3d at 575. *Whitfield* also held that “the Nevada Rules of Civil Procedure will not apply if they conflict with the APA.” 492 P.3d at 576 *citing* NRCP 81(a).

In another portion of the opinion, *Whitfield* also stated, “[W]e never intended to create a sliding scale where parties are required to argue whether their case is more like *Otto* or *Prevost*, nor should courts make this determination where the statute plainly requires the petitioner to name all parties as respondents.” 492 P.3d at 575. Within the same **paragraph** of *Whitfield* is this declaration:

We hold that a petitioner must name as respondents, within the caption or petition itself, every party of record to the underlying administrative proceedings. NRS 233B.130(2)(a). If the petitioner fails to strictly comply with this requirement, the petition must be dismissed as jurisdictionally defective.

Id. Remarkably, even though ESD cited *Whitfield* in its writ petition, Mendez ignored it completely in his *Answer*. Further undercutting Mendez’s reliance on Justice Pickering’s reasoning is that Justice Pickering’s dissent in *Whitfield* makes

an argument similar to the one Mendez makes in his *Answer* which was implicitly rejected by the Court.³ *See id.* at 576-80 (Pickering, J., dissenting).

Mendez's argument that naming the Nevada Department of Employment, Training, and Rehabilitation ("DETR") somehow would put ESD on notice is equally unavailing. NRS 232.910 established DETR and expressly places the Employment Security Division, the Rehabilitation Division, the Nevada Equal Rights Commission and the Board for the Education and Counseling of Displaced Homemakers within DETR. Thus, while ESD may be the largest division within DETR, it not alone and naming the Department as opposed to the Division does not put the Division on notice.

Additionally, Mendez mistakenly argues that DETR and ESD have the same counsel. They do not. DETR is represented by the Office of the Attorney General. NRS 228.110(1). ESD has legal counsel, including undersigned counsel, only because **the Employment Security Division** is specifically authorized by statute to hire counsel. NRS 612.525(2)(a). Undersigned counsel serves as counsel for ESD and, as such, is employed by DETR. However, he only represents ESD and any other legal services DETR requires are outside the scope of his employment.⁴

³ In *Whitfield*, the Court noted and dismissed, without further discussion, the argument that "this court should give liberal discretion to a pro se petitioner to amend his petition to correct a technical deficiency when doing so would further equity, fairness, and justice." 492 P.3d at 575.

⁴ The same is true of Senior Legal Counsel Troy C. Jordan.

CONCLUSION

ESD is not making a “dubious legal argument” nor engaging in “procedural gamesmanship.” Rather, it is making one well-grounded in this Court’s decisions in *Otto*, *Spar Business Services*, *Board of Review*, and *Whitfield*. It is Mendez who wants this Court to create a “sliding scale” and have district courts decide whether or not parties were adequately named or not. This is a course of action which *Whitfield* expressly disavowed. The district court ignored *Whitfield* as much as Mendez did. While Mendez has that luxury, the district court did not – which is why a *Writ of Mandamus* is appropriate in this case directing the district court to dismiss this action for lack of subject matter jurisdiction.

DATED this 19th day of April, 2022.

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RULE 32(A)(9) CERTIFICATION

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

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

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

DATED this 19th day of April, 2022.

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CERTIFICATE OF SERVICE

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

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