

IN THE SUPREME COURT OF THE STATE OF NEVADA

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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

PETITION FOR *EN BANC* RECONSIDERATION

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Elizabeth A. Brown
Clerk of Supreme Court
Supreme Court No. 83797
District Court No.: A-21-835176-J

/s/ David K. Neidert

DAVID K. NEIDERT, ESQ.

Nevada State Bar No. 4342

Deputy Counsel

State of Nevada DETR/ESD

500 East Third Street

Carson City, Nevada 89713

(775) 684-3996

Attorney for ESD Respondents

PETITION FOR *EN BANC* RECONSIDERATION

The Petitioner, Lynda Parven, in her capacity as Administrator of the Employment Security Division of the Nevada Department of Employment, Training and Rehabilitation (“ESD”), respectfully petitions this Court, Pursuant to Rule 40A of the Nevada of Appellate Procedure, for *en banc* reconsideration of the panel’s decision to deny a *Petition for Writ of Mandamus* compelling the District Court to dismiss the *Petition for Judicial Review* for lack of subject matter jurisdiction.

The panel denied a *Petition for Rehearing* on October 31, 2022. Thus, a *Petition for En Banc Reconsideration* must be filed no later than 14 days after that ruling, which would be November 14, 2022. NRAP 40A(b).

Statement for Why this Court, Sitting *en banc*,

Should Reconsider the Panel Decision

In its initial *Petition for Writ of Mandamus*, ESD argued that because the ESD Administrator and the Board of Review were not named in the caption of the case in the District Court, the District Court lacked subject matter jurisdiction to consider the underlying case. To this end, ESD primarily relied upon a line of cases starting with *Washoe Cnty. v. Otto*, 128 Nev. 424, 282 P.3d 719 (2012) and ending with *Whitfield v. State Pers. Comm.*, 492 P.3d 571 (Nev. 2021).

The panel held that *Whitfield* and its predecessor cases did not apply.

The rationale of the decision is that 1) the more specific provisions of NRS 612 control over NRS 233B's as to who the party is to a judicial action, citing NRS 233B.039(3)(a); 2) the Administrator is a party by operation of law pursuant to NRS 612.525(2); 3) but *Whitfield's* naming requirement do not apply to cases under chapter 612.

ESD agrees with the first two portions of the panel analysis. However, its conclusion that *Whitfield's* naming requirements therefore do not apply to Chapter 612 is at odds with controlling authority of the *en banc* Court: *Board of Review v. Second Judicial District Court*, 133 Nev. 253, 396 P.3d 795 (2017).

Board of Review involved a *Petition for Judicial Review* filed under NRS 612. 133 Nev. at 254, 396 P.3d at 797. The case framed in *Board of Review* was what the panel found dispositive in this case: "The district court decided that the naming of all relevant parties, pursuant to NRS 612.530(1), was not a jurisdictional requirement." *Id.* On THAT basis, ESD sought a *Writ of Mandamus* in the *Board of Review* case. On THAT basis, this Court GRANTED a *Writ of Mandamus*, holding that the district court erred. 133 Nev. at 256, 397 P.3d at 797.

ESD must acknowledge Justice Pickering's concurrence in *Board of Review*:

I write separately only to note that the employer did not argue, and so we do not have occasion to decide, whether the failure to name a person who was a party to an agency proceeding in the caption of a petition for judicial review is jurisdictionally fatal. In that regard, I note that the rules of procedure for reviewing an administrative decision are the same as in civil cases, unless

expressly provided otherwise or the civil rules conflict with the state's administrative procedure act. If the body of a civil complaint "correctly identifies the party being sued or if the proper person actually has been served," the defendant is adequately identified as a party to the litigation.

133 Nev. at 256-57, 396 P.3d at 798 (Pickering, J., concurring) (citations omitted).

However, *Whitfield* decided the question that Justice Pickering stated was not asked in *Board of Review*.

Over Justice Pickering's dissent, *Whitfield* held that NRS 233B.130(2)(a)'s plain language requires that "a petitioner must name as respondents, within the caption or petition itself, every party of record to the underlying administrative proceeding." 492 P.3d at 575.

NRS 612.495(1) provides, "Any person entitled to 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."

While ESD agrees with the panel that the more specific provisions of NRS 612 control over the more general provisions of NRS 233B, that does not mean NRS 233B is inapplicable to NRS 612 cases. Indeed, when a provision of NRS 612.530 is silent, then this Court has looked to NRS 233B.130 for guidance. *See Spar Bus. Serv. v. Olson*, 135 Nev. 296, 298, 448 P.3d 539, 541 (2019) (applying NRS 233B.130 to ESD case).

While NRS 612.530(1) requires naming “any other party to the proceedings before the Board of Review” as a party, and NRS 612.495(1) makes the Administrator a party at the referee stage¹, it defies logic and common sense that while the “Administrator shall be deemed a to be a party to any judicial action” there is no requirement that the Administrator be named with the other parties in the district court or that *Whitfield* is inapplicable. Indeed, ESD must respectfully note that a *Petition for Judicial Review*, is captioned “Petitioner” and “Respondent” and not “Plaintiff” and “Defendant.” It defies common sense even further that ESD and its Administrator, who actually **defends** *Petitions for Judicial Review* and are bound by the district court’s decision, should, alone in the litigation universe, be immune from being named as a party when being sued.

Additionally, as ESD noted in its initial application, the only party listed in the *Petition for Judicial Review* is the Department of Employment, Training, and Rehabilitation, of which ESD is only a subdivision, and Newage Lake Las Vegas, LLC, the real party in interest’s former employer. Consequently, with due respect, footnote one of the panel’s opinion makes little sense.

Because the panel did not distinguish, let alone cite, *Board of Review* in its decision or explain how *Whitfield* is inapplicable when the Administrator is a party

¹ NRS 612.495 to NRS 612.510 describe the Appeal Tribunal process. These are colloquially referred to as “referee hearings” and the Appeal Tribunal “examiners” identified in NRS 612.490 are colloquially referred to as “referees.”

at the referee level, ESD respectfully believes this Court, sitting *en banc*, should reconsider the panel's ruling, vacate it, and grant ESD the relief it seeks.

Additionally, because this Court now allows the citation of unpublished opinions, this case sitting alone, will cause chaos and confusion among practitioners in other areas of administrative law, specifically those listed in NRS 233B.039(3), as to the tensions between NRS 233B and those specific statutes, since the panel created a glaring exception otherwise unsupported by Nevada law.

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 4,667 words.

DATED this 14th day of November, 2022.

/s/ David K. Neidert
DAVID K. NEIDERT, ESQ.
Nevada State Bar No. 4342
Deputy Legal Counsel
State of Nevada DETR/ESD

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 *EN BANC* RECONSIDERATION**, either electronically through the Court's e-Flex system and/or by placing the same within an envelope which was thereafter sealed and deposited for postage and mailing with the State of Nevada Mail at Carson City, Nevada, addressed for delivery as follows:

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

REID RUBINSTEIN & BOGATZ
I. Scott Bogatz, Esq.
Kerry E. Kleiman, Esq.
300 South 4th St., Suite 830
Las Vegas, NV 89101
sbogatz@rrblf.com
Attorney for Real Party in Interest

DATED this 14th day of November, 2022.

/s/ Ginger Besasparis-Dondero
GINGER BESAPARIS-DONDERO