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**SUPREME COURT
STATE OF NEVADA**

COMPLETE CARE CONSULTING, LLC,

Appellant,

vs.

SHANNON M. CHAMBERS, in her capacity
as the Labor Commissioner of the State of
Nevada; and the STATE OF NEVADA,
OFFICE OF THE LABOR COMMISSIONER,

Respondents.

OPENING BRIEF

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DISCLOSURE STATEMENT

Appellant and counsel have no parent corporations nor is there a publicly held company that owns 10% or more of the party's or counsel's stock. The names of all law firms whose partners or associates have appeared for the Appellant in the case are Mssrs. Morris and Dickerson, and only they are expected to appear on this appeal for Appellant. Mssrs. Morris and Dickerson have no partners or associates and are performing all of the work on this appeal personally.

These counsel certify that persons and entities as described in NRAP 26.1(a), have been disclosed. This representation is made in order that the judges of this court may evaluate possible disqualification or recusal. These counsel are unaware of any reason for any recusal(s) in this appeal.

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JURISDICTIONAL STATEMENT

This is an appeal from a final order granting the Motion to Dismiss filed by Respondents. Appellant's Appendix (hereinafter referred to as "AA") 63; NRAP 3A(b)(1).

Appellant Complete Care Consulting ("CCC") appealed in a timely fashion. The district court's Order Granting Motion to Dismiss was entered on April 12, 2021. AA 54. Written notice of entry was served electronically on April 13, 2021. AA 58. The notice of appeal was filed on May 5, 2021. AA 67. The rule governing the 30 day time limit for filing the notice of appeal is NRAP 4(a)(1).

This Court has jurisdiction over this matter pursuant to NRAP 3A(b)(1) as this appeal pertains to the dismissal of a judicial review petition.

ROUTING STATEMENT

The appeal should be assigned to the Court of Appeals as it raises as a simple issue of whether the district court erred in granting Respondents' motion to dismiss based upon an alleged failure to exhaust administrative remedies. NRAP 17. However, as discussed herein, while authority exists on the question of whether the exhaustion of administrative remedies is jurisdictional, the question may not be settled. *Deja Vu Showgirls of Las Vegas, LLC v. Nev.*

Dep't of Taxation, 130 Nev. 719, 725 n. 5, 334 P.3d 392, 397 n. 5 (2014) (“We note but do not decide the question of whether the failure to exhaust administrative remedies is jurisdictional or a claim prerequisite”) citing II Richard J. Pierce, Jr., *Administrative Law Treatise* §§ 15.2, 15.3 (5th ed. 2010 & Supp. 2014). Therefore, this may be an issue of first impression requiring an assignment to a Supreme Court panel.

STATEMENT OF ISSUES

Did the district court err in determining that CCC had not exhausted its administrative remedies when CCC petitioned from the Commissioner’s Final Order Setting Forth Findings of Facts and Conclusions of Law?

Did the district court err in remanding the matter to Respondents after it had dismissed for want of subject matter jurisdiction?

STANDARDS OF REVIEW

The standard of review for appeal from an order granting a motion to dismiss is *de novo*. *Guzman v. Johnson*, 483 P.3d 531, 536, citing *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008); *Benson v. State Eng’r*, 131 Nev. 772, 776, 358 P.3d 221, 224 (2015) (*de novo*

review of order dismissing petition for judicial review for failure to exhaust administrative remedies).

Questions of statutory interpretation are questions of law subject to *de novo* review. *Thomas v. MEI-GSR Holdings, LLC*, 2018 Nev. Unpub. LEXIS 140, 413 P.3d 835, 2018 WL 1129664 (2018) citing *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009); *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 421, 426-27 (2007).¹

STATEMENT OF THE CASE

A. Pleadings and Motions.

On December 14, 2020, CCC commenced this action by filing its Petition for Judicial Review (“Petition”) in district court. AA 1. On February 9, 2021, Respondents filed their Motion to Dismiss. AA 3. On February 23, 2021, CCC filed its opposition. AA 22. On March 3, 2021, Respondents filed their reply. AA 49. On April 12, 2021, the district court entered its Order Granting Motion to Dismiss. AA 54. On April 13, 2021, Respondents served written notice of entry of that order. AA 58. On May 5, 2021, CCC filed this appeal. AA 67.

¹ The Court decided *Thomas v. MEI-GSR Holdings, LLC*, in 2018, and thus this case falls within the purview of amended NRAP 36. CCCs offer it as persuasive authority and to show the cited earlier precedents remain good law.

B. Main Point:
The district court erred in dismissing the petition for failure to exhaust administrative remedies.

The district court dismissed after accepting Respondents' argument that CCC had not exhausted its administrative remedies before Respondents. This was error. CCC did exhaust its administrative remedies when it was served with a final agency decision by the Commissioner. With CCC's time for petition now ticking, CCC had to file its petition.

STATEMENT OF FACTS

Nature of the case

This matter originated with an anonymous complaint to the Labor Commissioner regarding unpaid overtime wages. AA 29-30 (Commissioner's Final Order Setting Forth Findings of Fact and Conclusions of Law ("FFCL")). The matter meets the definition of an "employee misclassification" case:

As used in NRS 607.216 to 607.2195, inclusive, unless the context otherwise requires, "employee misclassification" means the practice by an employer of improperly classifying employees as independent contractors to avoid any legal obligation under state labor, employment and tax laws, including, without limitation, the laws governing minimum wage, overtime, unemployment insurance, workers' compensation insurance, temporary disability insurance, wage payment and payroll taxes.

NRS 607.216.

Procedure and background before filing the petition for judicial review

CCC proceeded inside the administrative process allowed for determinations made by Respondents.

Initially, Respondents issued a subpoena for records, with which Petitioner complied. AA 30:12-13. After review and audit of these materials, on September 17, 2020, the Office of the Labor Commissioner issued its Determination of Payroll Records Audit (“DPRA”). AA 40. The DPRA did not contain or discuss the factual basis of its DPRA as required by NAC 607.065(1). (a determination will contain “[a] clear and plain statement of each alleged violation” and “[t]he relevant facts”). The only facts it contained was that the Labor Commissioner received a complaint and issued a subpoena. AA 43.

On October 2, 2020, CCC timely objected to the DPRA and requested a hearing pursuant to NAC 607.070(1). AA 47-48. Within fifteen (15) days of the October 2nd Objection and request for a hearing, the Labor Commissioner was to either schedule a hearing or issue an order affirming the findings of the Determination. (NAC 607.070(3)). No hearing was scheduled and the Labor Commissioner issued her FFCL on November 12, 2020 -- more than three (3) weeks after her deadline. AA 29. On December 14, 2020, CCC timely filed its petition. AA 1. CCC also requested a trial de novo that was codified as being

proper for judicial reviews stemming from Labor Commissioner decisions. *Id.* See NRS 607.215(3) (“[u]pon a petition for judicial review, the court may order trial de novo”).

SUMMARY OF ARGUMENT

CCC exhausted all available administrative remedies prior to filing its Petition for Judicial Review, so it was error for its Petition to be dismissed.

ARGUMENT

1. CCC exhausted its administrative remedies.

CCC properly filed this petition when it did. The FFCL is a written decision adopting the DPRA. See NRS 607.215(1) (Labor Commissioner shall issue a written decision); NAC 607.070(3)(b) (if objection is denied, Commissioner “will . . . issue an order affirming the findings and proposed penalties set forth in the determination.”). “Such an order constitutes the final order of the Commissioner on the matter.” NAC 607.070(3)(b). “[A] final decision must include findings of fact and conclusions of law, separately stated.” NRS 233B.125. The final order sets out the Commissioner’s findings of fact and conclusions of law, showing that it was the final decision that brought the administrative proceedings to a close. The final order denied any administrative remedies to CCC. The final order was the exhaustion of

administrative remedies because it ended the Commissioner's work and triggered the jurisdictional clock for CCC to file a petition.

Petitioner had 30 days from service of the final order within which to file a petition for judicial review. NRS 233B.130(2)(d) ("Petitions for judicial review must: Be filed within 30 days after service of the final decision of the agency."). This deadline is jurisdictional. *Washoe Cty. v. Otto*, 128 Nev. 424, 434-35, 282 P.3d 719, 727 (2012) (filing requirements under the APA, including the time period for filing a petition, are "mandatory and jurisdictional."). "If the agency's decision is served by mail pursuant to NRCP 5(b)(2)(B), NRCP 6(e) adds three days to the time period for filing a petition for judicial review." *Mikohn Gaming v. Espinosa*, 122 Nev. 593, 598, 137 P.3d 1150, 1154 (2006). The FFCL was served by mail, AA 38, so the December 14, 2020 filing of the petition was timely in addition to December 12, 2020 being a Saturday. *See* NRCP 6(a)(1)(c) (if a filing date calculation is a Saturday, Sunday, or legal holiday, the (filing) period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday).

After Respondents issued the final order and after CCC filed its Petition for Judicial Review, Respondents set a hearing. AA 10. As previously discussed, by this time, finality had occurred because the final decision had

been issued and the petition had been filed, divesting Respondents of jurisdiction over the matter. “[T]he filing of a proper petition for judicial review divests the agency of jurisdiction. . .” *Christiansen v. Iowa Bd. of Educ. Examiners*, 831 N.W.2d 179, 190 (Iowa 2013). “The law is clear . . . that a petition for judicial review divests an administrative agency of jurisdiction to reconsider its decision.” *Friends of Croom Civic Ass’n v. Prince George’s County Planning Bd.*, 2017 Md. App. LEXIS 486 at *5 (Md. App. 2017). “[A]s a general rule the filing of a notice of appeal seeking judicial review divests an administrative agency of jurisdiction.” *Anstine v. Churchman*, 74 P.3d 451, (Colo. App. 2003) citing and quoting *Fiebig v. Wheat Ridge Reg’l Ctr.*, 782 P.2d 814 (Colo. App. 1989). The Commissioner’s setting of a hearing was thus irrelevant to whether CCC exhausted its administrative remedies.

Respondents may argue that the hearing was set before they knew of the petition. Respondents do not dispute service of the petition was timely. The fact the hearing was set before service of the petition did not renew Respondents’ jurisdiction, as evidenced by Respondents vacating the hearing date after service of the petition.

2. The dismissal was jurisdictional.

Where as here, exhaustion is statutorily required, it is a foundation for the district court's subject matter jurisdiction. *Eluska v. Andrus*, 587 F.2d 996, 999 (9th Cir. 1978) (explaining that when exhaustion is statutorily mandated, the exhaustion requirement is jurisdictional), cited in *Collins v. Ocean West Nev. Corp.*, 2015 Nev. Unpub. LEXIS 1282 at *2, 131 Nev. 1266, 2015 WL 6447548 (Nev. 2015). This Court's precedent shows that the exhaustion requirement is jurisdictional unless (1) the interpretation or constitutionality of a statute is at issue or (2) exhaustion would be futile. *Nevada Dep't of Taxation v. Scotsman Mfg. Co.*, 109 Nev. 252, 254-55, 849 P.2d 317, 319 (1993) (collecting cases), cited approvingly in *Rosequist v. Int'l Ass'n of Firefighters Local 1908*, 118 Nev. 444, 448, 49 P.3d 651, 653 (2002).

The district court granted the motion to dismiss because CCC had not participated in a hearing. AA 56:13. The district court agreed that because of this, CCC had not exhausted administrative remedies. *Id.* The district court first noted exhaustion was the basis for the motion. AA 55:11-13. The district court then canvassed case law requiring exhaustion. AA 55:14-55:2. The district court then granted the motion. AA 56:13. The sole basis for dismissal of the petition was a failure to exhaust administrative remedies. The petition did

not ask for an interpretation of or ruling on the constitutionality of a statute, and the district court made no finding of futility. Therefore, the dismissal was one for lack of subject matter jurisdiction.

3. The district court's remand order was without jurisdiction.

As such, the dismissal deprived the district court of jurisdiction to take further action on the petition. Neither CCC nor the Labor Commissioner requested an order of remand. *Id.* The district court nevertheless ordered it *sua sponte*. AA 56:14-15. The dismissal precluded the district court from remanding, *sua sponte* or otherwise, because it had already determined it lacked subject matter jurisdiction.

CONCLUSION

The district court erred in granting the motion to dismiss. Appellant exhausted administrative remedies. The district court therefore had subject matter jurisdiction. The Court should reverse the district court's order granting the motion to dismiss and remand to hear the merits of the petition. The Court should not remand with instructions to remand the matter to the Labor Commissioner, as the district court acted in this regard *sua sponte* before the parties addressed the merits, which could raise the issue of whether remand should be an option. If the Court does not wish to preclude the district court

from remanding, the parties should first have an opportunity to be heard by the district court in the first instance on that issue.

DATED November 22, 2021

/S/ BRIAN MORRIS
BRIAN MORRIS

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 this brief has been prepared in a proportionally spaced typeface using Word 2016 in 14.5 point Times New Roman 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 does not exceed 30 pages.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or imposed 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 accompanying brief is not
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in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED November 22, 2021

/S/ BRIAN MORRIS
BRIAN MORRIS

AFFIRMATION

The undersigned does hereby affirm that the preceding document
DOES NOT contain the Social Security Number of any person.

DATED November 22, 2021

/S/ BRIAN MORRIS
BRIAN MORRIS

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I certify that on November 22, 2021, I electronically filed the preceding document and the appendix with the Clerk of the Court by using the e-filing system, which will send a notice of electronic filing to Ms. Nichols.

DATED November 22, 2021

/S/ BRIAN MORRIS
BRIAN MORRIS