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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.

REPLY BRIEF

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ARGUMENT

The District Court entered its Order disposing of Appellant Complete Care Consulting, LLC's ("CCC") Petition for Judicial Review after Respondents, the Labor Commissioner and her office (collectively referred to as the "LC"), filed a Motion to Dismiss based on CCC failing to exhaust administrative remedies. The District Court then entered its Order disposing of the matter.

1. The District Court dismissed CCC's Petition for Judicial Review.

The Order entered by the district court is clear that it dismissed Appellant CCC's Petition for Judicial Review. The LC does not dispute this issue and thus concedes it.

2. The Dismissal was erroneous.

While the LC concedes that the district court dismissed CCC's Petition, the LC argues that "the District Court's Order does not contain a specific finding that the dismissal was due to CCC failing to exhaust its administrative remedies." Answering Brief at 9:5-6. Apparently, the purpose of this argument is to imply that while the Petition was dismissed, the dismissal was not erroneous, and there is no error to review. The argument is meritless and the error on review is indeed a reality.

The LC cites no authority that requires a district court to enter a “specific finding” when granting a motion to dismiss for failure to exhaust administrative remedies and CCC is unaware of any such authority. Regardless, any such omission is cured by the record.

The district court acknowledged the basis for the motion to dismiss: failure to exhaust administrative remedies. AA at 55:11-13. The district court granted the motion. AA at 56:13. It did so after canvassing the exhaustion doctrine. AA at 55.

From these facts, the Court can see the district court made the implied finding that CCC did not exhaust its administrative remedies. *Pease v. Taylor*, 86 Nev. 195, 197, 467 P.2d 109, 110 (1970) ("It is true that this court has repeatedly held that even in the absence of express findings, if the record is clear and will support the judgment, findings may be implied."). *Griffin v. Westergard*, 96 Nev. 627, 632, 615 P.2d 235, 238 (1980) ("Where the record and evidence therein is clear as to the required specific findings, the court will examine the decision and record and imply the findings.")

Therefore, there is no merit to the LC’s assertion that there is no “specific finding” that undergirds the claim of error in this appeal. As presented in CCC’s Opening Brief, a dismissal on the basis of not exhausting administrative

remedies is erroneous and must be reversed. This issue in and of itself is dispositive in this matter.

3. The Dismissal divested the District Court of jurisdiction to issue a remand.

The LC misapplies both CCC's arguments as well as the case law CCC presented regarding the District Court's subject matter jurisdiction when the LC alleged, and the District Court found, that CCC had not exhausted its administrative remedies. CCC argued in its Opening Brief that when exhaustion is statutorily required, as in the matter at bar, it is the foundation of the district court's jurisdiction.

The LC had two counters to CCC's argument: 1) that CCC failed to identify any statute that required the exhaustion of administrative remedies, and 2) this Court has held that that failure to exhaust administrative remedies renders the matter nonjusticiable. Answering Brief at 13:12-16. Both of these arguments fail. Regardless, once a case is dismissed (as it was here), the file is closed and there is nothing that can be done to "fan the ashes of that action into life and the court has no role to play." *Federal Sav. and Loan Ins. Corp. v. Moss*, 88 Nev. 256, 259, 495 P.2d 616, 618 (1972) (internal citations omitted). Thus, once dismissed, there was no ability or jurisdiction for the district court to issue the remand.

a. A statutory remedy existed for CCC to challenge the LC's Determination.

The LC's argument that CCC did not present that it was statutorily required to exhaust administrative remedies is a play on words that does not go to the legal issue. It is not whether a statute forces a party to exhaust or to avail itself to a statutory remedy, but instead it is whether a statutory remedy exists that a party can avail itself to. This is the premise of CCC's argument -- that when a statutory procedure exists to contest a determination, that procedure must be followed. *Nevada Dep't of Taxation v. Scotsman Mfg. Co.* cited by CCC (a case involving a tax payer) made clear that the issue is whether a statutory procedure exists to contest a determination. If so, failure to follow it deprives a court of subject matter jurisdiction. *Nevada Dep't of Taxation v. Scotsman Mfg. Co.*, 109 Nev. 252, 254-55, 849 P.2d 317, 319 (1993) (internal citations omitted). The two exceptions to this requirement (that are not applicable with CCC's case at bar) is if the statutory remedy would be futile, or if the issue relates solely to the interpretation or constitutionality of a statute. *Id.*

A taxpayer must exhaust its administrative remedies before seeking judicial relief; failure to do so deprives the district court of subject matter jurisdiction. *County of Washoe v. Golden Road Motor Inn*, 105 Nev. 402, 403-404, 777 P.2d 358, 359 (1989). *If a statutory procedure exists for the recovery of taxes erroneously collected, that procedure ordinarily must be followed before commencing suit in district court.* 105 Nev. at 404, 777 P.2d at 359. Under certain circumstances, however, the district court's

jurisdiction attaches notwithstanding a party's failure to exhaust its administrative remedies. The exhaustion doctrine will not deprive the court of jurisdiction "where the issues relate solely to the interpretation or constitutionality of a statute." *State of Nevada v. Glusman*, 98 Nev. 412, 419, 651 P.2d 639, 644 (1982), appeal dismissed, 459 U.S. 1192, 103 S.Ct. 1170, 75 L.Ed.2d 423 (1983). Neither will the exhaustion doctrine deprive the court of jurisdiction where initiation of administrative proceedings would be futile. See *Engelmann v. Westergard*, 98 Nev. 348, 353, 647 P.2d 385, 389 (1982).

Nevada Dep't of Taxation v. Scotsman Mfg. Co., 109 Nev. 252, 254-55, 849 P.2d 317, 319 (1993) (emphasis added)

In this matter, there clearly exists a statutory remedy for CCC to contest the LC's determination. To be precise, within 15 days after the LC issued and served the determination pursuant to NAC 607.060 and 607.065, CCC had the opportunity to object to the determination and request a hearing pursuant to NAC 607.070(1). This was the statutory remedy available to CCC and CCC availed itself to it. The LC is to then either hold a hearing or issue a final order. NAC 607.070(3). In this matter, the LC chose not to hold a hearing and decided to issue a final order. There were no other statutory remedies available to CCC. CCC then had 30 days to file its Petition for Judicial Review or lose that right. NRS 233B.130(2)(d). CCC timely filed its Petition. Thus, there was clearly a statutory requirement at play to exhaust administrative remedies prior to filing a petition for judicial review.

b. This Court has not overruled longstanding law.

The LC also states that this Court has *held* failure to exhaust does not deprive a district court of jurisdiction, and instead only renders a matter nonjusticiable. Such a statement necessitates a finding that longstanding caselaw has been overruled. This has not occurred and no case cited by the LC made such a holding. In *Allstate Ins. Co. v. Thorpe*, this Court’s discussion is clearly shown to be dicta as this Court discussed the principle that was to be followed, regardless of “whether couched in terms of subject-matter jurisdiction or ripeness.” *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007). Furthermore, this Court took the opportunity to “expressly overrule” part of its decision in *Rosequist v. International Ass'n of Firefighters*, 118 Nev. 444, 49 P.3d 651, (2002) (n. 22). But it did not overrule the portion in *Rosequist* holding that “Failure to exhaust administrative remedies generally deprives a district court of subject matter jurisdiction.” 118 Nev. at 448, 49 P.3d at 653.

But again, regardless, this matter can be dealt with by simply determining whether CCC’s Petition was dismissed, and whether the grounds for dismissal was error. The answer to both questions is “yes.”

c. The remand would have been premature.

While a remand is a possible remedy, the LC did not fully address it in its Answering Brief. A remand is not to happen in a vacuum. It needs to be fully considered issue and properly analyzed -- which did not occur in this matter. In this matter, any remand would be premature.

i. There was no request for a remand.

In its Answering Brief, the LC did not address or analyze either the merits of the remand or the procedure for a remand, including how a remand is initiated. It is undisputed that the LC did not request a remand and instead only moved for a dismissal alleging CCC did not exhaust its administrative remedies. AA 4-5. Therefore, the issue of the remand was not placed before the District Court by the LC.

In its Opening Brief, CCC presented and argued that the District Court issued the remand *sua sponte*. The LC does not dispute this and thus concedes this is what occurred. Instead of addressing the *sua sponte* decision in its Answering Brief, the LC summarily argues that the District Court simply has inherent authority to remand. Answering Brief at 9:1-2, 9:14-16, and 14:5-6. This argument improperly implies that a remand may be done on a whim without more. This is not so. Inherent authority cannot simply be alleged by

the LC and summarily disposed of. A remand must be fully considered and weighed after it has been placed in front of the court. It is basic due process that for a court to make a determinative ruling, the issue must be placed before the court by a party, or even by the court itself with it giving notice to all parties. See Sierra Nev. Stagelines, Inc. v. Rossi, 111 Nev. 360, 364, 892 P.2d 592, 595 (1995) (“A district court must not elevate “promptness and efficiency” over fairness and due process by entering summary judgment before claims are properly before it for decision.”) Neither of this occurred in this matter.¹ Had the District Court not dismissed this matter and had it retained jurisdiction, then it should have held briefing to determine if a remand would have been proper. This is especially true considering the options the District Court had available to it. Specifically, a district court

may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the agency;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;
- (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) Arbitrary or capricious or characterized by abuse of discretion.

N.R.S. § 233B.135(3)

¹ The only time the remand issue appears is in the Order of the District Court.

As listed in N.R.S. § 233B.135(3), many factors should be taken into consideration, including whether unlawful conduct occurred at the administrative level including unlawful procedures or violations of constitutional or statutory provisions – all of which has been shown to have occurred in this matter and which CCC alleged in its Petition for Judicial Review. (AA 2). Regarding the LC’s decision and conduct, in its Petition for Judicial Review, CCC alleged that:

10. Said decisions were based upon, and made after Complete Care’s rights to due process were violated.
11. The OLC did not follow required processes, procedures, and legal obligations.
12. Said decisions were made and based upon unlawful procedure(s), and violated statutory, legal, and/or constitutional provisions or requirements.
13. Said decisions were not supported by proper, relevant and/or substantial evidence.

(AA 2:9-14)

As presented in the Opening Brief, 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. CCC both requested a hearing and objected to the DPRA on several grounds including that it had issued an invalid subpoena and that it lacked enough specificity to permit any

meaningful objection in violation of the LC's statutory obligation. AA 47-48.

The LC aggravated this concern by proceeding to issuing a final decision without a hearing as requested, not to mention that the LC further ignored the statutory time frame in which to issue the final decision by issuing the FFCL on November 12, 2020 (AA 29) -- more than three (3) weeks after the 15-day deadline.² See NAC 607.070(3) (within 15 days, the Commissioner is to either schedule a hearing or dismiss the objection and issue an order affirming the findings). The LC ignored multiple statutory duties. *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 962-964, 194 P.3d 96, 103-104 (2008) (Commissioner is duty-bound to conduct hearings on labor complaints). Given the LC's flagrant violation of its statutory obligations, had the District Court not dismissed this matter, it should have held briefing and considered the record as well as the conduct of the LC in this matter prior to considering a remand.

Contrary to the LC's argument, a remand had to be fully considered and not arbitrarily issued. Part of this consideration was to consider whether the LC's

² The LC suggests CCC should have "stayed" the petition instead of appealing the dismissal. The LC cites no authority for this option and there is none found. The reality was CCC had a jurisdictional deadline for filing the petition and filing the petition divested the LC of jurisdiction to hold a hearing. It was not until after CCC filed its Petition for Judicial Review and requested a trial de novo (well after the deadline mandated in NAC 607.070(3)) did the LC conveniently allege it wanted a hearing and then disingenuously allege that it was CCC that had failed in its obligations to exhaust its administrative remedies.

final decision should be set aside in whole based upon substantial rights of CCC's being violated, thus not warranting any remand.

d. A trial de novo was requested, lawfully authorized, and should have been considered in lieu of a remand.

In addition to the merits not being considered before issuing a remand, and contrary to the LC's assertion that a district court may only conduct a *review* of the LC's decision, as the LC is well aware, when it comes to matters involving petitions for judicial review involving the Labor Commissioner, the Nevada Legislature specifically codified that a district court has specific authority to conduct a trial de novo in these important matters. See NRS 607.215(3).

CCC's Petition sought a trial de novo before the district court and specifically alleged:

1. This action is brought pursuant to N.R.S. § 607.215 and N.R.S. § 233B.130.
2. **A Trial De Novo is proper and is requested pursuant to N.R.S. § 607.215(3).**

(AA at 1:21-22, emphasis in original)

CCC also paid the additional fee to the District Court for a trial de novo³.

³ For completeness of the record, there was an additional separate trial de novo request filed based on further procedural instructions from the district court so that it would have a separate filing to initiate a trial de novo fee. Appellant's Reply Appendix (ARA) at 1. It was at this time that CCC paid the fee for this request as evidenced by "Program Deposit." ARA 2.

This trial de novo procedure is unique in administrative law. The Legislature has given district courts the power to “order a trial de novo” in regards to petitions for judicial review stemming from decisions of the Labor Commissioner. NRS 607.215(3). In such a case, the record would be developed before the district court in a trial. Remand would thus be improper and unnecessary. So again, the district court’s order for remand was premature for this additional reason: it had not decided whether to hold a trial de novo on the merits as specifically contemplated by the Legislature.

In considering instructions on remand, the Court should consider this procedure, mainly because remand would be futile. “Under "general principles of futility" . . . a court need not remand a case to an agency for further fact finding or analysis "if the remand would be pointless because it is clear that the agency would adhere to its prior decision in the absence of error." *Alam v. Gonzales*, 438 F.3d 184, 187-88 (2d Cir. 2006) (quoting *Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 161 (2d Cir. 2006)).

As previously discussed, the LC refused to perform several of its statutory obligations. It is unlikely and improbable that CCC would have a fair chance before an agency that has shown it is only interested in issuing a decision adverse to CCC with a headstrong to rush to judgment where it has violated its

statutory obligations, rejected CCC's objections to its DPRA, and then blamed CCC for failing to exhaust administrative remedies when it clearly had not. The LC is not a typical administrative agency such as the Nevada State Board of Medical Examiners. It is instead an agency that focuses on statutory interpretation and application. Yet with this knowledge and background, it fragrantly refused to follow its statutory obligations, thus further showing futility in this matter. A trial de novo avoids this futility of effort.

While the trial de novo option is discretionary, CCC submits that discretion can be curbed when remand would be an exercise in futility. For example, in *Baldonado*, the statutes regarding Commissioner hearings used the discretionary "may" language. This Court had no problem declaring this language ambiguous when viewed against other provisions that addressed the Commissioner's enforcement power. A corollary to that view is that the discretionary language in NRS 607.215(3) becomes ambiguous when viewed against the LC's prior abdication of their statutory duty. In considering how to remand this matter in the event the Court reverses, CCC urges the Court to instruct the district court to hold a trial de novo in lieu of any remand back to the LC should the district court consider a remand.

CONCLUSION

The district court erred in granting the motion to dismiss. Appellant CCC exhausted administrative remedies. Once dismissed, the District Court was without jurisdiction to remand to the Labor Commissioner, *sua sponte* or otherwise. For the forgoing reasons, the order of dismissal should be reversed. Additionally, prior to the district court considering a remand, the issue should be briefed and heard accordingly, including whether a remand would be futile and whether a trial de novo should be conducted in lieu of a remand. CCC requests that such instructions be included in any reversal.²

DATED March 7, 2022

/S/ BRIAN MORRIS
BRIAN MORRIS

² CCC is not raising a new issues argument for the first time on reply. The argument regarding instructions on remand are in response to the LC's remand arguments and involve an issue of case management not related to the merits.

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 15 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 March 7, 2022

/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 March 7, 2022

/S/ BRIAN MORRIS
BRIAN MORRIS

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(b), I certify that on March 7, 2022, 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 March 7, 2022

/S/ BRIAN MORRIS
BRIAN MORRIS