IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GERALD R. ANTINORO,
Appellant,
vs.
NEVADA COMMISSION ON ETHICS,
Respondent.

No. 74206-COA

ORDER OF REVERSAL AND REMAND

Gerald R. Antinoro appeals from a district court order dismissing his petition for judicial review of an administrative decision. First Judicial District Court, Carson City; James Todd Russell, Judge.[1]

The Nevada Commission on Ethics (the Commission) imposed a $1,000 penalty on Antinoro—the Storey County Sheriff—for willfully violating the Nevada Ethics in Government Law.[2] Specifically, the Commission concluded that Antinoro violated NRS 281A.400(7) by endorsing former Assemblywoman Michele Fiore's run for U.S. Congress using the official letterhead of the Storey County Sheriff's Office. Antinoro then petitioned the district court for judicial review of the decision. The district court dismissed the petition, concluding that Antinoro failed to name the Executive Director of the Commission as a respondent and thereby failed to properly invoke the court's jurisdiction under NRS 233B.130. The district court also concluded that Antinoro failed to seek rehearing or reconsideration of the Commission's decision and thereby failed to exhaust his administrative remedies.

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[1]Upon further consideration, we conclude oral argument is unnecessary and so we vacate our previous order setting the matter for oral argument.

[2]We do not recount the facts except as necessary to our disposition.

On appeal, Antinoro argues that the district court erred as a matter of law because he complied with NRS 233B.130 and because he was not required to seek rehearing or reconsideration prior to seeking judicial review.

We first consider whether Antinoro complied with NRS 233B.130. At the time the district court dismissed the petition, it did not have the benefit of the Nevada Supreme Court's opinion in *Prevost v. State, Dep't of Admin.*, 134 Nev. ___, ___, 418 P.3d 675, 676 (2018), which held "that the failure to identify a party in the caption of a petition for judicial review [of an administrative decision] is not, in and of itself, a fatal jurisdictional defect," where the petitioner had attached a copy of the underlying administrative decision as an exhibit to the petition and incorporated it by reference therein, and where that decision identified all relevant parties of record required to be named under NRS 233B.130(2)(a). *Id.* at ___, 418 P.3d at 676-77. Because the administrative decision clearly identified all relevant parties and the petition was served on all of the parties, the petition complied with NRS 233B.130. *Id.*

Here, Antinoro referenced the Commission's opinion in the body of the petition, identified it as "Exhibit 1," and attached it to the petition. The petition was served upon the Executive Director.[3] This was sufficient to satisfy the requirements of *Prevost*.

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[3]The Commission briefly argues that Antinoro's failure to serve the petition on the Executive Director's counsel (who represented her in the underlying proceedings) renders service of process ineffective, citing NRCP 5, which requires that service be made upon a party's attorney if the party is so represented. NRCP 5(b)(1). While the naming requirement of NRS 233B.130(2)(a) says nothing about service, NRS 233B.130(2)(c) requires that petitions be served upon the Attorney General and "[t]he person serving in

Next, we consider whether Antinoro failed to exhaust his administrative remedies prior to petitioning for judicial review.

Before seeking judicial review of an administrative decision in district court, "a person generally must exhaust all available administrative remedies . . . , and failure to do so renders the controversy nonjusticiable." *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007). We review de novo a district court's order dismissing a petition for judicial review for failure to exhaust administrative remedies. *Benson v. State Eng'r*, 131 Nev. 772, 776, 358 P.3d 221, 224 (2015).

Any party of record in an administrative proceeding who is aggrieved by a final decision in a contested case "is entitled to judicial review of the decision." NRS 233B.130(1). Under NRS 281A.790(8), a decision of the Commission to impose a civil penalty on a public officer for a willful violation of the Nevada Ethics in Government Law "is a final decision for the purposes of judicial review pursuant to NRS 233B.130." However, NRS 233B.130(4) states as follows:

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the office of administrative head of the named agency." NRS 233B.130(2)(c)(1)-(2); *see Heat & Frost Insulators & Allied Workers Local 16 v. Labor Comm'r*, 134 Nev. ___, ___, 408 P.3d 156, 159 (2018) (holding that the service requirement of NRS 233B.130(2)(c) is mandatory and jurisdictional). The Commission does not dispute that Antinoro served the Executive Director as stated in the certificate of service attached to the petition or that the Executive Director is the administrative head of the agency. Because NRS 233B.130(2)(c) sets forth specific service requirements for petitions for judicial review, it prevails over the general service provisions for pleadings and other papers in NRCP 5 to the extent it is inconsistent with them. *See Williams v. State, Dep't of Corr.*, 133 Nev. ___, ___, 402 P.3d 1260, 1265 (2017) (noting that specific statutes take precedence and are construed as exceptions to more general provisions (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012))). Accordingly, Antinoro complied with NRS 233B.130(2)(c)(2) by serving the Executive Director's person even without also serving her counsel.

> A petition for rehearing or reconsideration must be filed within 15 days after the date of service of the final decision. An order granting or denying the petition must be served on all parties at least 5 days before the expiration of the time for filing the petition for judicial review. If the petition is granted, the subsequent order shall be deemed the final order for the purpose of judicial review.

As the Commission argues, given the use of the word "must" in this subsection, it might appear as though a party aggrieved by an agency's decision has a mandatory duty to seek rehearing or reconsideration as a prerequisite to judicial review. *See Pasillas v. HSBC Bank USA*, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011) (noting that words such as "shall" and "must" indicate a mandatory duty "unless the statute demands a different construction to carry out the clear intent of the legislature") (internal quotation marks omitted). Moreover, under the exhaustion doctrine as articulated in Nevada cases, the mere fact that parties have the administrative remedies of rehearing or reconsideration available to them suggests that such remedies should be exhausted. *See Allstate*, 123 Nev. at 571, 170 P.3d at 993 (requiring exhaustion of "*all available* administrative remedies" (emphasis added)); *see also* 73 C.J.S. *Public Administrative Law and Procedure* § 131 (2014) (noting that some authorities require parties to exhaust their administrative remedies by seeking rehearing or reconsideration while others do not).

Nevertheless, despite the breadth of the language used in Nevada cases to define the exhaustion doctrine, the language of NRS 233B.130(1) and NRS 281A.790(8) is dispositive here. *See In re Execution of Search Warrants*, 134 Nev. ___, ___, ___ P.3d ___, ___, (Ct. App., Adv. Op. No. 97, Dec. 13, 2018) (noting that "the scope of [a statute] is defined not by a few words taken from isolated cases, but rather by the words of the statute

itself"). When interpreting statutes, we look first to their plain language, and if it is unambiguous, that is where the analysis ends. *Pawlik v. Deng*, 134 Nev. ___, ___, 412 P.3d 68, 71 (2018). The plain and unambiguous language of the relevant statutes demonstrates that a party's right to judicial review of a final decision in a contested case vests immediately and is not contingent upon seeking rehearing or reconsideration.

Nothing in NRS 233B.130(4) says that a party must petition for rehearing or reconsideration to maintain his or her entitlement to judicial review; in fact, it says that "[i]f [such a] petition is granted, the subsequent order"—not the original agency decision—"shall be deemed the final order for the purpose of judicial review." This means that if a party's petition for rehearing or reconsideration is denied, or if the party simply chooses not to file such a petition, the final order for purposes of judicial review remains the agency's original decision. *See In re Orpheus Tr.*, 124 Nev. 170, 181 n.27, 179 P.3d 562, 569 n.27 (2008) (noting that, "[o]rdinarily, an order denying a motion for reconsideration is not substantively appealable" (internal quotation marks omitted)).

Accordingly, when NRS 233B.130(4) states that "[a] petition for rehearing or reconsideration must be filed within 15 days after the date of service of the final decision," it imposes a mandatory duty only upon parties who choose to file such a petition, leaving intact the entitlement to judicial review that vests when an administrative decision in a contested case becomes final.[4] Thus, the district court erred when it dismissed Antinoro's petition for judicial review.

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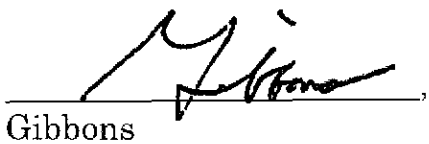
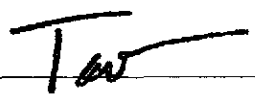
[4]Though the relevant statutes are unambiguous, we note that the legislative history of NRS 233B.130 supports this conclusion. Prior to an amendment in 1989 that added subsection 4 as it reads to this day, the

Based on the foregoing, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



_____, C.J.
Gibbons



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cc: Hon. James Todd Russell, District Judge
David Wasick, Settlement Judge
Thorndal Armstrong Delk Balkenbush & Eisinger/Reno
State of Nevada Commission on Ethics
Carson City Clerk

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statute's only reference to the remedy of rehearing or reconsideration stated that "a petition [for judicial review] must be filed within 30 days after the service of the final decision of the agency or, *if a rehearing is held*, within 30 days after the decision thereon." 1989 Nev. Stat., ch. 716, § 6, at 1651-52; NRS 233B.130(2) (1981). This language clearly demonstrates that seeking rehearing was optional prior to the 1989 amendment, and nothing in the legislative history of that amendment shows that the Legislature intended to change that. *See* Hearing on A.B. 884 Before the Assembly Government Affairs Comm., 65th Leg. (Nev., June 6, 1989) (Richard Campbell, then chairman of the state bar's Administrative Law Committee, testified that A.B. 884 merely "clarifie[d] provisions regarding petitions for rehearings as well as provisions concerning who is eligible to file petitions for judicial review."). Moreover, the Commission's own regulation pertaining to rehearing acknowledges that the remedy is optional. *See* NAC 281A.265(7) ("A party *may* file a written motion for rehearing or for the reconsideration of a written opinion of the Commission . . . ." (emphasis added)).