

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENNETH PATTON,
Appellant,
vs.
THE NEVADA BOARD OF PAROLE
COMMISSIONERS; CHRISTOPHER
DERICCO; SUSAN JACKSON; AND
ADAM ENDEL,
Respondents.

No. 82921-COA

FILED

JAN 24 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Kenneth Patton appeals from a district court order dismissing his petition for a writ of mandamus under NRCP 4 and NRCP 12(b)(4). Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

In the proceedings below, Patton filed a petition for a writ of mandamus in the district court, alleging that respondents, the Nevada Board of Parole Commissioners, Commissioner Christopher Dericco, Commissioner Susan Jackson, and Commissioner Adam Endel (collectively the Board) violated the supreme court's holding in *Anselmo v. Bisbee*, 133 Nev. 317, 396 P.3d 848 (2017), by basing its decision to deny his application for parole on several impermissible aggravating factors.

As relevant here, on March 12, 2021, the Board filed a "Motion to Dismiss Petitioner's Petition for Writ of Mandamus," arguing that writ petitions are subject to the same service standards as a summons and complaint, and seeking dismissal under NRCP 4 and 12(b)(4) for Patton's failure to serve the petition within 120 days. The district court set the matter for a hearing on April 13, 2021. Patton, who is currently

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incarcerated, attempted to oppose the motion in a paper entitled “Response to Order for Writ of Mandamus” where he asks the district court to deny the Board’s motion and—although it is not entirely clear—also appears to argue that the NRCP rules for service do not apply to his writ petition. Notably, it appears that while this opposition was dated March 18 and appears to have been postmarked on March 26, the district court clerk’s office did not receive the filing until April 5, several days after the March 29 deadline to file an opposition under NRCP 6 and EDCR 2.20(e).

Despite receiving the filing on April 5, the district court clerk’s office did not file the opposition until April 13—the date the district court considered the motion in chambers. On that day, the district court entered a minute order granting the Board’s motion to dismiss under NRCP 4 and 12(b)(4) for failure to complete service of process, and also under EDCR 2.20(e) for Patton’s purported failure to file an opposition. The district court entered its written order on April 20, 2021, and dismissed the writ petition without prejudice. Patton now appeals.


“A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.” *Williams v. Eighth Judicial Dist. Court*, 127 Nev. 518, 524, 262 P.3d 360, 364 (2011) (internal quotation marks omitted); *see also* NRS 34.160. “A district court’s decision to grant or deny a writ petition is reviewed by this court under an abuse of discretion standard.” *DR Partners v. Bd. of Cty. Comm’rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). A writ of mandamus is generally available only where there is no “plain, speedy and adequate remedy in the ordinary course of law.” NRS 34.170; *see also Halverson v. Sec’y of State*, 124 Nev. 484, 487, 186 P.3d 893, 896 (2008).

On appeal, Patton first argues that it was “unfair” for the district court to dismiss his writ petition for lack of opposition as he mailed his opposition prior to the filing date. We agree. The record on appeal in this case indicates that Patton timely mailed his opposition before the filing deadline and that the district court clerk’s office had received the motion eight days before filing it. It appears from the record that Patton made every effort to timely oppose the Board’s motion but was hindered by the district court’s delay in filing the opposition prior to the hearing. *See* NRCP 5(b)(2)(C) (stating that service is complete upon mailing); NRCP 5(d)(2)(A) (stating that papers not filed electronically are filed by delivering them to the clerk). Thus, under the circumstances presented here, we conclude that dismissal under EDCR 2.20(e) was improper.

Turning now to the district court’s alternate grounds for dismissal, we also conclude that the district court abused its discretion in dismissing Patton’s writ petition under NRCP 4 and 12(b)(4), as no provision contained in NRS Chapter 34 requires personal service of a petition for a writ of mandamus upon the adverse party. Indeed, NRS 34.200 expressly recognizes that a petition for a writ of mandamus can be filed without providing any notice to the adverse parties so long as any writ granted based on such an application is issued as an alternative writ commanding the adverse parties to either perform the required act or show cause before the court why they have not done so. Moreover, the provisions regarding service of process upon the Attorney General and the head of the agency named in the suit discuss service of a complaint in a civil action, not a petition for a writ of mandamus. *See* NRS 41.031(2); *see also* NRS 34.300 (stating that the NRS and NRCP governing civil actions are applicable to petitions for a writ of mandamus “[e]xcept as otherwise provided in NRS

34.150 to 34.290, inclusive.”). Accordingly, the district court improperly denied mandamus relief based upon failure to complete service upon the Board, and therefore we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.¹


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Susan Johnson, District Judge
Kenneth Patton
Attorney General/Carson City
Eighth District Court Clerk

¹Although this court generally will not grant a pro se appellant relief without first providing respondents an opportunity to file a response, the filing of a response would not aid this court’s resolution of this case, and thus, has not been ordered. See NRAP 46A(c); see also NRAP 34(f)(3).