

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEPHEN FERRARO,
Appellant,
vs.
STATE OF NEVADA, DEPARTMENT
OF AGRICULTURE,
Respondent.

No. 78963-COA

FILED

JUN 10 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Stephen Ferraro appeals from a district court order denying a motion for NRCP 60(b) relief from judgment. Sixth Judicial District Court, Humboldt County; Jim C. Shirley, Judge.

Following an investigation, Stephen Ferraro was terminated from his position as a brand inspector for the Nevada Department of Agriculture (NDA).¹ The investigation revealed that Ferraro allowed cattle to be sold without the owner's consent by incorrectly documenting the cattle and falsifying two brand inspection certificates. Ferraro appealed his termination through the administrative level and then filed a petition for judicial review. He also filed a civil complaint for damages against NDA (originally combined with his petition for judicial review but subsequently severed into a separate action by the district court and not at issue in this appeal).

Following various procedural motions, the district court ultimately reviewed the administrative record and denied the petition for judicial review. During discovery in connection with the civil lawsuit, Ferraro alleges that he uncovered new evidence that suggested that NDA

¹We do not recount the facts except as necessary to our disposition.

had failed to follow proper procedure before terminating him. Ferraro filed an NRCP 60(b) motion for reconsideration of the district court's denial of his petition for judicial review, alleging that he discovered new evidence and that NDA committed fraud by withholding the evidence. The district court entered an order denying Ferraro's NRCP 60(b) motion as untimely under NRCP 60(c). Ferraro appeals.

Petitions for judicial review challenging adverse administrative actions are governed by the procedures set forth in NRS 233B.121-.150. The Nevada Rules of Civil Procedure do not apply to such petitions to the extent they are inconsistent with anything in NRS Chapter 233B. *See* NRCP 81 ("These rules do not govern procedure and practice in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute.").

Here, the provisions of NRCP 60(b) are inconsistent with the procedures set forth in NRS Chapter 233B. In a petition for judicial review, the district court sits as an appellate tribunal, not as a finder of fact. *See* NRS 233B.135. Thus, the statutes do not allow the district court to consider new evidence not already presented first to the appeals officer. *See* NRS 233B.135(1) ("Judicial review of a final decision of an agency must be . . . confined to the record."); NRS 233B.135(3) ("The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact."). NRS 233B.131 permits a petitioner to add additional evidence into the record, but the mechanism is expressly designed for presenting new evidence to the agency, not to the district court. Moreover, such a request must be filed within 45 days of the filing and service of the petition itself, and must be made "before submission to the court," meaning before the district court decides the petition.

Accordingly, Ferraro's motion was procedurally improper because it sought to present new evidence to the district court that had never been previously presented to the administrative hearing officer, and also because the procedures set forth in NRS Chapter 233B do not provide for such a thing as "reconsideration" by the district court. Ferraro cites nothing in NRS Chapter 233B that permits the filing or granting of a motion for "reconsideration" after a district court has already denied the petition initially.

Ferraro nonetheless suggests that his motion could have been brought under NRCP 60 because the district court action was not only a petition for judicial review, but also (before the district court severed the case) a consolidated lawsuit alleging civil tort claims. However, there are two preliminary problems with this argument. First, a serious question exists whether a petition for judicial review (which asks the district court to sit as an appellate tribunal) can be consolidated or combined with a civil lawsuit (which allows a jury trial). Second, even if the two actions can be consolidated, merely adding extra claims to a petition for judicial review does not mean that the petition for judicial review itself becomes subject to different rules.² Quite to the contrary, NRS 233B.135 states that petitions


²Another potential problem exists that neither party briefed: to the extent Ferraro's civil claims cover the same subject matter, target the same allegedly wrongful conduct, and seek the same relief as the administrative adjudication, those civil claims may have been preempted by the administrative adjudication. See *Crane v. Cont'l Tel. Co. of Cal.*, 105 Nev. 399, 775 P.2d 705 (1989) (concluding that the district court properly dismissed appellant's complaint because his arguments should have been raised in a petition for judicial review); *Barta v. State, State Bd. of Equalization*, Docket No. 54631 (Order of Affirmance, April 1, 2013) (affirming a district court's dismissal of appellant's complaint when appellant argued the same arguments contained within a jointly filed


for judicial review "must" be analyzed under the provisions of the statute. Here, the only district court action for which Ferraro sought reconsideration, and the only district court action that is the subject of this appeal, was its denial of his petition for judicial review, not a decision relating to his companion civil claims.³ Thus, the motion and this appeal fall within NRS Chapter 233B, not the Rules of Civil Procedure governing civil claims.


Because NRS Chapter 233B provides no avenue or mechanism for the relief sought, the district court did not commit any error in denying Ferraro's motion.

Therefore, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Jim C. Shirley, District Judge
Smith & Harmer
Attorney General/Carson City
Attorney General/Reno
Humboldt County Clerk

petition for judicial review, determining that a petition for judicial review was the only method to challenge a final decision of the State Board).

³The district court's order also held in abeyance a motion to dismiss Ferraro's civil claims, but Ferraro does not appeal that portion of the district court's order and indeed could not as that portion of the order was not adverse to him.