IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ORAL ARGUMENT CALENDAR

WEDNESDAY, JULY 23, 2014

10:00 A.M.

No. 32,556

DEBRA GRIEGO,	**DEBRA GRIEGO**
Petitioner-Appellant,	
vs.	
NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS and NEW MEXICO DEPARTMENT OF FINANCE AND ADMINISTRATION,	**MARSHALL J. RAY**
Respondents-Appellees.	

consolidated with

No. 32,963

INDIA HATCH,	**JOSEPH E. CALDWELL**
Petitioner-Appellee,	
vs.	
NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS and THE NEW MEXICO RACING COMMISSION,	**MARSHALL J. RAY**
Respondents-Appellants.	

***PANEL: JUDGES BUSTAMANTE, SUTIN AND VIGIL**
*Court of Appeals' panel members are listed in seniority order.
Panels may be changed without notice.

Oral Argument will be held in the Albuquerque Court of Appeals Pamela B. Minzner Law Center, 2211 Tucker NE., Albuquerque, NM 87106

Please park in the "L" parking lot and go to the clerk's office counter for a parking pass. Limit one parking pass to each party arguing before the Court. Please have your driver's license with you, as you must leave your driver's license with the clerk's office to receive a parking pass.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

INDIA HATCH,

Petitioner-Appellee,

v.

No. 32,963
Taos County
D-820-CV-2012-00488

NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS
and
THE NEW MEXICO RANCING COMMISSION

Respondents-Appellants.

APPEAL FROM THE EIGTH JUDICIAL DISTRICT OF TAOS COUNTY
HON. SARAH C. BACKUS, PRESIDING

BRIEF IN CHIEF

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ORAL ARGUMENT IS REQUESTED

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I. SUMMARY OF PROCEEDINGS

A. The Nature of the Case

Appellant New Mexico Department of Workforce Solutions ("the Department") appeals from the Eighth Judicial District Court's ("District Court") reversal of the Department's decision denying unemployment insurance benefits to Respondent. The central issue before the Court is whether the Respondent's former position as the Executive Director of the New Mexico Racing Commission is a major non-tenured policymaking or advisory position.

B. Record on Review and Abbreviated References Thereto

The Record Proper ("RP") citations are to the official record proper in the New Mexico Court of Appeals.

C. Course of Administrative Proceedings

Respondent held the position of Executive Director of the New Mexico Racing Commission. Respondent was appointed to head the agency by the Commissioners of the Racing Commission. When a new Racing Commission, appointed by a new Governor, came into authority, Respondent was terminated from her position. Respondent did not dispute that the Racing Commission had the authority to terminate her employment without any finding of cause connected to her job performance.

Respondent sought unemployment compensation benefits resulting from her termination from employment as the Executive Director of the New Mexico Racing Commission and was initially awarded unemployment benefits. The employer, the New Mexico Racing Commission, challenged that determination. The claim was then referred to the Department's Tax Bureau for a determination of whether Respondent's wages were earned in covered employment making her eligible for unemployment compensation benefits. The Department's Tax Bureau found that Respondent's wages earned as Executive Director of the New Mexico Racing Commission were not covered wages for purposes of unemployment compensation eligibility.[1] (RP 84-85). The Department then sent Respondent an "overpayment notice" stating that she had received benefits to which she was not entitled and she was required to repay the Department for the benefits she had received. (RP 86-87). Respondent appealed the Tax Bureau's determination to the Department's Appeal Tribunal.

The Appeal Tribunal held a hearing on the issue of covered employment and rendered its decision on July 9, 2012, finding that Respondent was not eligible for unemployment insurance benefits because the wages earned were not considered

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[1]For purposes of the Unemployment Compensation Law NMSA 1978, § 51-1-44 the definition of employment states:

A. "employment" means service performed by and individual in the employ of a government entity unless such service is performed by an individual in the exercise of his duties:...

(5) in a position which, under or pursuant to state law, is designated as:

a. A major nontenured policy-making or advisory position;...

"employment" pursuant to the requirements of NMSA 1978, § 51-1-44(A)(5)(a). (RP 182-184). Respondent timely appealed the Appeal Tribunal's decision to the Board of Review of the Department of Workforce Solutions. On November 6, 2012, the Board of Review issued the Department's final administrative decision, regarding Respondent's eligibility for unemployment insurance benefits. The Board's decision affirmed the Appeal Tribunal's determination that Petitioner was not eligible for unemployment insurance benefits. (RP 196-197). On December 7, 2012, the Appeal Tribunal also reaffirmed that Respondent was overpaid. (RP 210-211). Respondent timely appealed the determination regarding her eligibility for unemployment benefits to the District Court pursuant to Rule 1-077 NMRA 2012.

The District Court granted the Writ for Certiorari and reversed the decision of the Department. (RP 291-296).

II. QUESTIONS PRESENTED FOR REVIEW

Did the District Court err in ruling that Respondent's former position as Executive Director of the New Mexico Racing Commission was not a major non-tenured policymaking or advisory position?

III. ARGUMENT

A. Introduction

The Court should reverse the District Court and uphold the decision rendered by the Department because the District Court's Order contravenes New Mexico statutory law and raises issues of substantial public interest. The interpretation of a statute is a question of law for the court. *Morgan Keegan Mortgage Co. v. Candelaria,* 1998-NMCA-008 ¶ 5, 124 N.M. 405,406, 951 P.2d 1066, 1067. "In interpreting statutes, courts seek to give effect to the Legislature's intent, and in determining intent [the courts] look to the language used and consider the statute's history and background." *Key v. Chrysler Motors Corp.,* 1996-NMSC-038, 121 N.M. 764, 768-69, 918 P.2d 350, 354-55 (internal citation omitted). The Court's decision will provide guidance to the Department on the proper interpretation and application of NMSA 1978, § 51-1-44(A)(5)(a), not just for Respondent, but for all future persons appointed to high-level government positions.

B. Applicable Standards of Review

Upon a grant of a petition for writ of certiorari, the Court of Appeals utilizes the same standard of review to review the decision of the district court. *San Pedro Neighborhood Ass'n v. Santa Fe County Bd. of County Comm'rs*, 2009-NMCA-045 ¶ 11, 146 N.M. 106, 110, 206 P.3d 1011, 1015, *citing Rio Grande Chapter of*

the Sierra Club v. N.M. Mining Comm'n, 2003-NMSC-005, ¶¶ 16-17, 133 N.M. 97, 103-104, 61 P.3d 806, 812-813 ("[W]e will conduct the same review of an administrative order as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal."). The Court therefore reviews whether the Board acted fraudulently, arbitrarily, or capriciously; whether, based upon the whole record on appeal, the order of the Board is supported by substantial evidence; whether the Board acted outside the scope of its authority; and whether the action of the Board was otherwise not in accordance with law.

In reviewing the evidence, the Court reviews the whole record, viewing both the favorable and unfavorable evidence in the light most favorable to the administrative decision. *Romero v. Rio Arriba County Comm'rs*, 2007-NMCA-004, ¶ 12, 140 N.M. 848, 851, 149 P.3d 945, 948, *cert. quashed*, 2007-NMCERT-009, 142 N.M. 716, 169 P.3d 409. The Court does not substitute its judgment for that of the agency, and "we only evaluate whether the record supports the result reached, not whether a different result could have been reached." *Id.* (internal quotation marks and citation omitted). The Court reviews the entire record to determine if the agency decision is supported by substantial evidence. *Paule v. Santa Fe County Bd. of County Comm'rs,* 2005-NMSC-021, ¶ 32, 138 N.M. 82, 92, 117 P.3d 240, 250. "Substantial evidence means relevant evidence that a

reasonable mind would accept as adequate to support a conclusion." *Watson v. Town Council of Bernalillo,* 111 N.M. 374, 376, 805 P.2d 641, 643 (Ct.App. 1991).

When the Court of Appeals reviews a final administrative decision concerning unemployment benefits, the Court begins by determining "'whether the decision presents a question of law, a question of fact, or some combination of the two; and whether the matter is within the agency's specialized field of expertise.'" *Mississippi Potash Inc. v. Lemon,* 2003-NMCA-014, ¶ 7, 133 N.M. 128, 130, 61 P.3d 837, 839, *citing Fitzhugh v. N.M. Dep't of Labor*, 1996-NMSC-44, ¶ 21, 122 N.M. 173,180, 922 P.2d 555, 562. The Court of Appeals may accord the agency deference in certain legal or factual matters of the agency's specialized field of expertise. *Fitzhugh*, at ¶ 22, 122 N.M. at 180, 922 P.2d at 562.

C. **Respondent is not entitled to unemployment insurance benefits.**

The whole record review of this case establishes that there is substantial evidence to support the Department's decision that Respondent's former position as the Executive Director of the New Mexico Racing Commission is a major non-tenured policy-making or advisory position. The Department's analysis of the position was based upon the duties of the position under or pursuant to state law and rules. In evaluating the position's responsibilities based upon statute and rules, the Department correctly concluded that Respondent's former position is a major

non-tenured policy-making or advisory position.

New Mexico's State Personnel Act, NMSA 1978, §§ 10-9-1 to-25 (1961 as amended through 2009) establishes a classification and tenure system with certain employment benefits and protections for employees of the state of New Mexico. The State Personnel Act, Section 10-9-4[2] exempts certain higher-level positions within state government from the Act's protections and does not give these positions tenure.

There is no dispute that Respondent's position was exempt for purposes of the State Personnel Act, that she had no property interest in her position, and served at the pleasure of the Racing Commission. Respondent had no right to continued employment, unlike classified employees who may be terminated only for just cause. There is sufficient evidence in the record to support the Department's finding that Respondent's position was non-tenured. The District Court has also acknowledged that Respondent's position was non-tenured. The District Court noted that:

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[2]10-9-4. Coverage of service.
The Personnel Act and the service cover all state positions except:
A. officials elected by popular vote or appointed to fill vacancies to elective offices;
B. members of boards and commissions and heads of agencies appointed by the governor;
C. heads of agencies appointed by boards or commissions;
D. directors of department divisions; ...
G. those in the governor's office; ...
N. state employees if the personnel board in its discretion decides that the position is one of policymaking; ...

> There is no doubt that Petitioner served in an at-will or nontenured position. Petitioner does not dispute the right of the Racing Commission to terminate her for no stated reason. She does not even dispute that her position as Executive Director of the Racing Commission was "major". She had day to day authority over Racing Commission matters. The statute that the Department relies upon states that benefits are not allowed if the position is a major policy-making or advisory position under or pursuant to state law.
> RP p.294.

Therefore, the Court should find that Respondent was in a major, non-tenured policy making or advisory position pursuant to NMSA 1978, § 51-1-44(A)(5)(a).

Respondent asserted and the District Court accepted that her role as the Executive Director of the New Mexico Racing Commission was more operational, and that her function as Executive Director was not one of policy-making because she merely advises the Racing Commission, and she did not have final approval of proposed policies or rules. Whether the Executive Director of the New Mexico Racing Commission had final approval of proposed policies before the Racing Commission is not dispositive. It is clear from the record that Respondent had a significant degree of policy-making authority as the Executive Director of the New Mexico Racing Commission.

The District Court considered the authority of the Racing Commission to suspend licenses, exclude people from racetracks, compel production of documents and summon witnesses as major policy-making or advisory powers. (RP 294-295). These same powers and more have been delegated to the position of Executive

Director of the Racing Commission pursuant to regulations. Specifically, the regulations give the Executive Director the authority to order an individual to be ejected or excluded from all or part of any premises if she believes that individual's presence is inconsistent with maintaining the honesty and integrity of racing § 15.2.1.9(C)(21)NMAC; the authority to prepare and issue preliminary reports and to determine the amounts of any penalties for violations of the Racing Act § 15.2.1.9(C)(20)(b) NMAC; in proceedings regarding violations of the Racing Act, objections to the presiding officer(s) are made to the Executive Director § 15.2.1.9(C)(7)(a)NMAC; and parties requesting the stay of a ruling by the Racing Commission stewards apply to the Executive Director for such a stay § 15.2.1.9(B)(10) NMAC. These powers, when exercised by the Executive Director rather than the Racing Commission are still major policy-making powers relating to the regulation of horse-racing.

In addition to the duties delegated to the Executive Director by regulations, Respondent acknowledged that her duties were essentially to oversee the employees and the operations of the Racing Commission staff and to enforce the rules and regulations of the Racing Commission. (RP 55:3-7). Respondent made the final managerial decisions in all the administrative areas of the Racing Commission including budget, staffing, and other operational functions. Respondent had a significant degree of managerial discretion and provided advice

and recommendations to the Racing Commission. The duties conducted by Respondent as established in the record, substantiate that she functioned in a major non-tenured policy-making or advisory position. Indeed, NMSA 1978, § 51-1-44(A)(5)(a) provides that an employee is excluded from coverage for being either a major non-tenured policy-maker or advisor. The record reflects that Respondent was both a policy-maker and an advisor.

The District Court noted that neither party could direct the Court to any statute or other authority designating Respondent's position as a major non-tenured policy-making or advisory position. Both parties agree that the Unemployment Compensation Act does not define which positions are considered major policy-making or advisory.

The exemption for positions which are "designated under or pursuant" to state law involves a question of statutory interpretation. The American Heritage Dictionary defines "pursuant to" as "in accordance with." http://www.ahdictionary.com/word/search.html?q=pursuant+to. Similarly the American Heritage Dictionary defines "under" as "subject to the authority, rule, or control of' or "subject to the restraint or obligation of." http://www.ahdictionary.com/word/search.html?q=under. Therefore, the statute must mean that the designation must be in accordance with state law or subject to the authority or restraint of state law.

In addressing the statutory interpretation issue, the District Court's analysis focused on whether the position of Executive Director of the New Mexico Racing Commission was designated under or pursuant to state law as a major, non-tenured policy making or advisory position. In reversing the decision of the Department, the District Court concluded that: "section 51-1-44 does not exempt individuals whose job duties *in practice* are policy making or advisory, only those whose job duties are policy making or advisory under or pursuant to state law." (RP 296).

The District Court's analysis that "under or pursuant to state law" means that the legislature must pass specific legislation to identify whether each and every non-tenured policy making or advisory positions created from governor to governor or by each newly appointed Board or Commission are exempt from coverage under the Unemployment Act. Such a reading of the statute is too narrow and untenable. Upon election, New Mexico governors may structure their advisory team and appoint Boards or Commissions differently. A requirement that the legislature specifically pass laws to exempt each and every non-tenured policy-making or advisory positions created from governor to governor and throughout the governor's term would be a frustration of the legislative process if not virtually impossible and would render the intent of NMSA § 51-1-44(A)(5)(a) meaningless.

Contrary to the analysis of the District Court, states are not required to expressly identify a given position as exempt from unemployment law by using the

words "major non-tenured policy maker or advisor." Rather, the unemployment law provision sets forth a general principle that, if a given position is in fact designated under or pursuant to state law as one with major policymaking or advisory duties, then that position is not covered under unemployment law. The focus by the majority of decisions of New Mexico District Courts[3] and courts in other States[4] interpreting analogous provisions is on whether the position at issue is non-tenured and whether, under or pursuant to state law, the duties for the position are consistent with major policymaking or advising. Respondent's position was in fact non-tenured and the duties for the position set forth in regulations are consistent with major policymaking or advising. In fact, the New Mexico Supreme Court has already determined that positions similar to Respondent's position were indeed policy-making positions. *State ex rel. Duran v. Anaya,* 102 N.M. 609, 698 P.2d 882 (1985), involved former members of State Board of

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[3] *See, William Taylor, Pro Se v. New Mexico Dep't of Workforce Solutions*, et al., D-101-CV-2011-03892, opinion Judge Barbara Vigil on Aug. 20, 2012; *Griego v. New Mexico Dep't of Workforce Solutions*, D-101-CV-2012-01237, opinion Judge Sarah M. Singleton on November 7, 2012; *William Verant v. New Mexico Dep't of Workforce Solutions*, D-202-2012-05014, opinion Alan M. Malott on November 7, 2012; *Michael Vinyard v. New Mexico Dep't of Workforce Solutions*, D-202-CV-2012-00524, opinion Judge Denise Barela Shepherd on March 27, 2013, attached to Petitioner's Petition for Writ of Certiorari as Exhibits D-G.

[4] *See, e.g., Brannen v. Metro. State Univ.*, A10-136, 2010 WL 4181399 (Minn. Ct. App. Oct. 26, 2010, *unpublished opinion*) ("[T]he job description for [claimant's] former position describes duties that reflect a major policy-making role . . . ."); *In re Newell*, 9 A.D.3d 559, 560, 779 N.Y.S.2d 287 (2004) ("The employer's charter delineated the powers and duties of the [Department], presumably to be carried out by its Commissioner, which included '[d]evelop[ing] and administer[ing] effective policies and programs for the prevention, control and treatment of alcoholism and drug abuse and addiction, and . . . mak[ing] appropriate recommendations to the County Executive' and legislative body.") (first brackets added); *Odato v. Unemployment Comp. Bd. of Review*, 805 A.2d 660, 662 (Pa. Commw. Ct. 2002) (noting that "[i]t is not necessary that the designation contain the precise words 'major,' 'policymaking,' or 'advisory'), *and Com., Dept. of Educ. v. Com.*, 798 S.W.2d 464, 467 (Ky. Ct. App. 1990) ("The key consideration in such cases is whether the claimant's job duties were major policymaking or advisory. The title or nonclassified status of a claimant's position are not the primary considerations.").

Barber Examiners who had petitioned for writ of mandamus due to their removal and also brought quo warranto actions against the new appointees. Both causes of action alleged that they had been improperly removed from the Board. *Id.,* 102 N.M. at 609, 698 P.2d at 882. The District Court entered judgment quashing and dismissing with prejudice the amended application for writ of mandamus and action in quo warranto. *Id.,* 102 N.M. at 610, 698 P.2d at 883. The former board members appealed. *Id.* In affirming the decision of the District Court, the Supreme Court of New Mexico found that that the former board members were not entitled to hearings before removal from their positions. *Id.* 102 N.M. at 612, 698 P.2d at 885. The Supreme Court construed the legislative intent of the exemptions from the State Personnel Act contained in NMSA 1978, Section 10-9-4 by stating:

> ... We note that in NMSA 1978, Section 10-9-4(B) the Legislature views "members of boards and commissions, and heads of agencies appointed by the governor" as a different type of employment by exempting them from coverage of the Personnel Act, NMSA. 1978, Sections 10-9-1 to -25 ... By exempting members of boards and commissions and agency heads from the Personnel Act, we note that the Legislature acknowledges that such **policy-making positions** are different from other types of employment positions and that such category of persons are not entitled to hearings before removal from their positions, (Emphasis added).
>
> 102 N.M. 609, 612, 698 P.2d 882, 885.

Although the Respondent in this matter was not appointed to her position by the governor, she was the head of an agency appointed by a Commission.

Respondent's position was exempted from coverage of the Personnel Act, by Subsection (C) of the Act and those individuals appointed by the governor are exempted from coverage by Subsection (B) of the Act. If individuals in such positions are not entitled to hearings before removal from their positions because the Supreme Court has determined that the Legislature intended the exemptions in Section 10-9-4 of the Act to apply to policy-making positions, the same positions should be determined to be policy-making positions for purposes of the Unemployment Compensation Law. The individuals occupying these positions know when they accept high-level non-tenured positions that they will likely be dismissed by a subsequent administration.

The exemption from unemployment compensation law for major non-tenured policy makers and advisors originates in the Federal Unemployment Tax Act ("FUTA"), which governs all unemployment compensation programs in the United States. States are only permitted to create exemptions to unemployment coverage if FUTA and the Social Securities Act allow for the exemptions. *See* 26 U.S.C. § 3304 (setting forth conditions for federal approval of state unemployment compensation laws), *and* Social Securities Act, §303 [42 U.S.C. § 503]. Pursuant to FUTA, states are required to exclude from coverage those positions which, "under or pursuant to the State or tribal law, [are] designated as (i) a major non-tenured policymaking or advisory position . . . ." 26 U.S.C. § 3309(b)(3).

26 U.S.C. § 3309(b)(3) obligates states to exempt from unemployment coverage major non-tenured policymakers and advisors. At the same time, this provision recognizes that the different states (and tribal entities) will shape their governments in a variety of ways, and it must be left to the states to decide which of their government positions constitute major policy making and advisory positions. New Mexico drafted its statute to directly track FUTA.

New Mexico was required under federal law to include this exclusion. The federal law requirement that led to the exclusion set forth in NMSA § 51-1-44(A)(5)(a) is itself a strong expression of federal policy that high level, non-tenured government officials are not intended to qualify for unemployment coverage. Given the language of Section 51-1-44(A)(5)(a), and the important federal policy at play in excluding major non-tenured policymakers and advisors from unemployment insurance coverage, the District Court's interpretation of the statute is not reasonable and undermines the important federal policy expressed in 26 U.S.C. §3309.

Given these statutory provisions, the Department was reasonable in concluding that the Respondent, who headed an agency appointed by the Racing Commission, in a non-tenured position, and whose job duties under state law and in practice are policy-making or advising is not eligible for unemployment insurance benefits.

The Department made a reasonable interpretation of the law. Even if the Court concludes that there may be more than one reasonable interpretation of NMSA 1978, § 51-1-44(A)(5)(a), it should defer to the reasonable interpretation of the statute by the Department. A statute is ambiguous when it can be understood by reasonably well-informed persons in two or more different senses. *State v. Elmquist,* 114 N.M. 551, 552, 844 P.2d 131,132 (Ct.App.1992). When a statute is ambiguous, it is within the authority of the agency charged with affecting that statute to interpret it. *See State ex rel. Helman v. Gallegos*, 117 N.M. 346, 357, 871 P.2d 1352, 1363 (1994). The Department is the agency delegated by the Legislature with administering New Mexico's Unemployment Compensation Law. A reviewing court may, where appropriate, accord substantial weight to the interpretation given a statute or regulation by a body charged with administering such law. *State ex rel. Battershell v. City of Albuquerque,* 108 N.M. 658, 662, 777 P.2d 386, 390 (Ct.App.1989). The Department's decision denying Respondent benefits is a reasonable interpretation of the statute, which has a rational basis resulting from consideration of the substantial evidence in the record and is therefore not arbitrary or capricious, nor contrary to law and should be affirmed on certiorari review by the Court.

IV. CONCLUSION

The Department respectfully requests this Court to enter an Order

REVERSING the District Court in all respects; and enter an order that the final administrative decision of the department be AFFIRMED, and that Respondent remains disqualified from receipt of unemployment insurance benefits and must repay the Department for the benefits she received for which she was not entitled.

V. STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(G) NMRA, the Department hereby certifies that the body of the Brief consists of 4,017 words written in 14-point Times New Roman font. The word count was obtained from Microsoft Word 2007. The Brief-in Chief therefore complies with the requirements of Rules 12-213(F)(3) and 12-305 NMRA.

VI. STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument. Appellant believes that oral argument may assist the Court in understanding the facts, analyzing the authorities, evaluating the arguments of the parties, and reaching a decision on the matters presented by this appeal.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 9th day of September, 2013, the foregoing was served on the following parties via first class mail:

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