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 RACING COMMISSION

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

ANSWER BRIEF

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I. SUMMARY OF PROCEEDINGS

A. The Nature of the Case

The Petitioner-Appellee India Hatch, (hereinafter "Ms. Hatch"), was the Executive Director of the New Mexico Racing (not Rancing, to correct the caption of the Brief in Chief) Commission, (hereinafter "the Racing Commission"). She was hired by the Racing Commission during the governorship of Bill Richardson, and fired by the Racing Commission during that of Susana Martinez. Her firing was for what everyone agrees were political reasons, and not for any reason of merit which would disqualify her from benefits. Both sides agree on this appeal, that she was, however, not hired by Governor Richardson, nor was she fired by Susana Martinez, nor did these governors have any legal authority to do either one. She applied for unemployment benefits to the Plaintiff-Appellant, Department of Work-Force Solutions (hereinafter "the Department").

After initially granting her benefits, her benefits were denied. She appealed, and through the myriad stages of appeal shown in the statement of procedures below, she perfected each appeal, resulting in a final denial of her benefits by the Department's Review Board. She appealed to the District Court, and the Court reversed. The Court of Appeals granted a Writ of Certiorari to the Department. This is a review de novo by the Court of

Appeals of the denial of her benefits and a demand for return of the amounts she had received before the reversal by the Board.

B. Record on Review and Abbreviated References.

The Record Proper filed by the District Court is the record on Review. Citations to the record will be (RP + the page number). When there are lines in the pages, it will be (RP + Page + line). References to the Brief in Chief filed by the Department will be cited as (BC + the page number).

C. Course of Administrative Proceedings

The course of Administrative proceedings provided by the Department, in its Brief in Chief (BC 3-4), is not entirely accurate. It either ignores or glosses over some important proceedings of which the Court of Appeals should be aware, which, as discussed below, bear upon the arbitrariness and capriciousness of the Department. The whole of the administrative proceedings, after the initial application and the original determination that Ms. Hatch was entitled to benefits, were:

> December 6, 2011-Reversal of determination of eligibility and finding of overpayment by Arthur Trujillo, Tax Representative, on appeal by the Racing Commission (RP 84-85);
>
> March 16, 2012-letter decision sustaining Arthur Trujillo's reversal by Alice Dominguez, Chief of Tax Bureau (RP 96-97);
>
> March 26- 2012- After appeal by Ms. Hatch, a telephone hearing by Administrative Judge Anthony Sanchez, Appeals Division, (RP 19-29), resulting in a March 27, 2012 decision affirming the finding of

an overpayment, based upon statutes requiring a finding of Ms. Hatch's willful and false testimony (RP 105-106)

May 17, 2012-Celina Bussey, Secretary of the Department, after appeal of Anthony Sanchez' March 27 decision, remanded the case by letter for a rehearing on the meritis to the Appeals Tribunal, and vacating a hearing already set for May 23, 2012 before Administrative Judge Steve Baca, of which Ms. Hatch had received no notice (RP 107-108);

May 24, 2012-Without notice to Ms. Hatch, (see Secretary Bussey's letter above), Steve Baca conducted a hearing and affirmed that Ms. Hatch was excluded from benefits, citing her failure to appear as the reason (RP 126);

June 6, 2012-An order reopening the case by Administrative Judge Richard Branch (RP 131).

July 2, 2012-hearing before Judge Barbara Barela (RP 33-34), resulting in a July 9, 2012 decision denying her benefits (RP 182-183 (RP 136);

November 6, 2012-Decision by the Review Board affirming Judge Barela's decision (RP 196)

November 21, 2012-Notice of Hearing set for December 11, 2012, before Administrative Judge Anthony Sanchez, to review his own earlier March 27, 2012 decision affirming an overpayment (RP 204);

December 5, 2012-Ms. Hatch's timely appeal to the District Court (RP 4);

December 7, 2012-Decision by Anthony Sanchez, affirming his own earlier March 27, 2012 decision finding that there was an overpayment, based upon statutes that required willful falsification conduct by Ms. Hatch (RP 210);

May 14, 2013-Collection action based upon Anthony Sanchez' findings, initiated by letter to Ms. Hatch indicating the intent to issue a warrant of levy and lien on her property in 15 days (RP 302);

May 23, 2013-District Court decision reversing the Review Board and finding in favor of Ms. Hatch (RP 291-296);

May 24 2013, 1:43 p.m.-Motion filed to stay levy proceeding initiated by the Department (RP 299-301);

May 24, 2013, 3:14 p.m.-Reply to Motion to Stay, agreeing to stay levy proceeding, citing as the reason, that the Court's decision reversing the Department had been filed (RP 297-298).

II. QUESTIONS FOR REVIEW

Did the District Court err in ruling that the 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. STANDARDS OF REVIEW

Ms. Hatch agrees with the standards of review set forth in the Department's brief (BC 4-6). She agrees that this is a review de novo by the Court of Appeals. The entire record should be reviewed, examining it in the light most favorable to the decision of the Board of Review. Finally, she agrees that it is her burden to show that either: the Board's decision is not supported by substantial evidence; the Board acted fraudulently, arbitrarily or capriciously; the Board acted outside its scope of authority; or it was otherwise not in accordance with law.

B. INTRODUCTION

Arguably, the Department acted within the scope of its authority, and fraud is not an issue in this case. However, it failed in all other categories, by finding unbstantiated evidence, making erroneous conclusions of law, and doing so in a manner that can only be concluded to be arbitrary and capricious. The lack of substantial evidence will be discussed first.

C. SUBSTANTIAL EVIDENCE

At every stage of the administrative procedure except the initial one granting her benefits, Ms. Hatch was determined not to be eligible for unemployment compensation based on NMSA§ 51-1-44-(A)(5)(a), (Henceforth, the "Exclusionary Statute"). It provides that certain individuals are not considered "employees" under the New Mexico Unemployment Compensation Act ("The Act"). The cited section of the statute provides that "employment" does not include, *inter alia*, service performed by an individual in the exercise of their duties:

> (5) in a position which, under or pursuant to state law, is designated as: a) a major non-tenured policy-making or advisory position; ..."

At every stage of the administrative proceeding, this conclusion was based upon two findings which will be discussed in turn. They are summarized by the Board of Review in its letter decision:

> "Here, claimant's former position of employment was as a *major, non- tenured policy-maker* for the Racing Commission. The record reflects that the *claimant was appointed to this position by Governor Richardson,* and her duties as director of this commission were, among other things, to *issue policies mandated by the commissioners.*" [italic emphasis added] (RP 196) [1]

Substantial evidence means "...evidence that a reasonable mind would regard as adequate to support a conclusion." *Regents of Univ. of N.M v. N.M Fed'n of Teachers,* 125 N.M. 401, 407, 962 P.2d 1236, 1242 (1998).

1. The finding that she was hired by governor Richardson is not supported by substantial evidence.

The applicable law here is the New Mexico Horse Racing Act (hereinafter, the Racing Act), NMSA § 60-1A- 1, *et seq* NMSA, in which all policy-making authority related to the regulation of horse racing in New Mexico is vested exclusively in the Racing Commission. Of

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[1] Anthony Trujillo, Tax Representative's decision finds that the position was a designated "non-tenured" and "policy making" position", and that Ms. Hatch was appointed by former Governor Bill Richardson." (RP 84-85).
Judge Barela's July 10, 2012 findings on these points were:
"1. On September 4, 2010, Governor Richardson appointed the claimant as the Director of the Racing Commission..."; and "5. As the Director of the Racing Agency, the claimant's duties included issuing policies mandated by the Racing Commissioners and overseeing the Racing Agency, which entailed giving directions to employees under her management." (RP 182-183).

particular importance to this case in its creation (§ 60-1A-3 NMSA 1978): it is administratively attached to the State Tourism Department (Sub-§ A); is made up of five members, no more than three of which can be from the same political party; Three of them must be horse-breeders (Sub-§ B); They are appointed by the governor and confirmed by the senate (sub-§ C) for six year terms, and serving until a successor is appointed (Sub-§ D); and finally, its Sub-§ E provides "... the **commission** may appoint an executive **director** and establish the executive **director's duties.**"

The Commission hires its Director. No-where in any statute, case, rule or regulation is there a requirement that the Commission's appointment be approved by the Governor, or even sought. The record so clearly reflects that she was appointed by the Commission, and not Governor Richardson, that the Department has, on appeal, abandoned the claim that she was appointed by Governor Richardson. (BC 13).

2. Substantial evidence does exist to support the finding that her duties included "issuing policies mandated by the Racing Commissioners and overseeing the Racing Agency, which entailed giving directions to employees under her management.". While the finding is correct, it does not lead to the legal conclusion that her position was one "under or pursuant to law designated as a non-tenured, major, policy making or advisory position", required by § 5)(a) of the exclusionary statute to exclude a person from unemployment benefits.

The Department now argues that, whether Governor Richardson hired her or not, her position was a "major policy-making or advisory position", because she implemented Racing Commission policy, directed an agency, and supervised employees. On appeal, it now argues that "...The Department's analysis of the position was based upon the duties of the position under or pursuant to state law or rules." (BC 6). That means that the Department believes that it is her job description that makes her a major policy-maker or advisor.

Reviewing the entire record in this case, it must contain "..evidence that a reasonable mind would regard as adequate to support a conclusion." *Regents of Univ. of N.M v. N.M Fed'n of Teachers,* 125 N.M. 401, 407, 962 P.2d 1236, 1242 (1998).

Ms. Hatch concedes that the finding that she was authorized to "...issue policies mandated by the commissioners" is a correct finding. Moreover, the additional findings by Judge Barela that her duties involved "...overseeing the Racing Agency" and "giving directions to employees under her management" are also correct. She has, all along, readily admitted that she did those things (RP 55-59). However, nowhere in any of the Commission's statutes, rules or regulations are the phrasing "policy-making" or "advisory" set forth in regard to the position of the

Director of the Racing Commission.

The Department argues that Ms. Hatch's claim requires that every position in government which the Legislature intends to exclude from unemployment benefits have what it calls this "magic language" in order to exclude the position from benefits. Granted, a stock, "magic language" phrase containing all of those words is not required. But there is nothing magic in the requirement that, to exclude a person from unemployment benefits, those words and phrases must exist somewhere, "under or pursuant to law". And they do, just not with regard to this position.

Ms. Hatch agrees that this is a question of statutory interpretation and that "...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 (1996, Cited by the Department (RP 4).

In determining legislative intent, the courts apply the rule that "...the plain language of a statute is the primary indicator of legislative intent. Courts are to give the words used in a statute their ordinary meaning unless the legislature indicates a different intent. The court will not read into a statute or ordinance language that is not there, particularly if it makes

sense as written." *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Util. Comm'n*, 1999-NMSC-040, 128 N.M. 309, 313, 992 P.2d 860, 864 (citations omitted)

Furthermore, the courts will "reject an interpretation of a statute that makes part of it surplusage, and ... will interpret statutes to give effect to all parts of the statute as a harmonious whole." *Souter v. Acme Heating and Air Conditioning,* 132 N.M. 608, 53 P. 3rd, 980, 983 (Ct. App. 2002).

Utilizing the "plain meaning" rules for construction, she agrees with the Department's American Heritage Dictionary definitions of "under" as "subject to the restraint or obligation of" and "pursuant to" as "in accordance with" law, as used in the exclusionary statute (BC 10). She merely asks that they be adhered to. In accordance with the law, a position must be designated as all, and just not one of the descriptors (non-tenured, major, policy making or advisory) excluding it from benefits.

She cannot agree with what follows next, though, in the Department's argument. This is an attempt to re-write the statute in a very incorrect and misleading way. The Department claims (BC 10), that § 5(a) reads: "...a position 'designated under or pursuant' to state law". It doesn't.

The Correct wording of § 5(a) is: "in a position which, under or pursuant to state law, is **designated as:** a) a major non-tenured policy-making or advisory position;".

Utilizing the same American Heritage Dictionary as that used by the Department, it provides three plain language definitions of the word "designate": 1. To indicate or specify; point out; 2. To give a name or title to; characterize; or 3. To select and set aside for a duty, office or purpose;" (http://www.ahdictionary.com/word/search.html?q=designate).

The Department's re-writing of the statute without the preposition "as", changes the meaning substantially, giving the word "designated" the meaning of the third definition: "To select and set aside for a duty, office or purpose". If this were the statutory language, then the claim that her job description defines whether she occupied a major, policy-making and advisory position, although still incorrect, would at least make some sense.

The phrase actually used in the exclusionary statute, with the verb "designated" and the preposition "as", has an entirely different meaning, requiring that a position be "indicated (as), specified (as), or pointed out (as)" a non-tenured, major, policy-making or advisory position", under or pursuant to New Mexico law.

Utilizing the correct definition of the phrase "designated as", and

principles of statutory construction, the requirements for exclusion from benefits in § 5(a) can now be discussed in turn.

The word "Non-tenured".

Ms. Hatch has never contested the fact that she was non-tenured. She agrees that, as the "...head of an agency appointed by a board or commission;..." (§ 10-9-4 (C) NMSA), she was exempt from the personnel act. She did not have the protections of the State Personnel Act against being fired without cause and without a hearing, and therefore, was non-tenured, as the Department claims. However, the fact that her position was designated as non-tenured is only one of the requirements for exclusion from unemployment benefits set forth in the statute, along with being designated as a major policy-maker or advisor.

The word "major",

Along with the correct plain meaning definition of the word "designate", any definition of the word "major", as used in the statute is omitted from the Department's Brief in Chief.

The many, many existing plain language definitions of the word "major", ranging from "military officer" to "large", are not helpful here, since they depend entirely on the context in which it is used. However, there is a definition which is applicable, and which is the only one ever

used by the Department on the record in this case.

Alice Dominguez, Chief of the Tax Bureau, reviewing and affirming Arthur Trujillo, Tax Representative's initial denial of benefits, provided this definition:

> "The Word 'major', in the phrase 'major policy-making or advisory position' most reasonably refers to high-level government positions usually filled by appointment or approval by the Chief Executive of the political entity (Governor, Mayor, etc,;) and which involves responsibilities effecting the entire political entity, whether in the state, county, or city". (RP 96).

Regretfully, Ms. Dominguez did not cite the origins of that language in her letter, and the Department chose not to mention it, nor any other, in its Brief in Chief. Nevertheless, it clearly exists, and is used by the Department when it chooses. More importantly, though, it defines exactly what the Legislature did when it established the positions it wished to exclude from unemployment benefits by designating them in the law as "non-tenured, major, policy-making or advisory".

The phrase "policy-making or advisory".

Examining the legislative intent in this case, Ms. Hatch agrees that all of the Federal Unemployment Tax Act (FUTA) legislation discussed by the Department (BC 14-15) applies to this case, and that it establishes the underlying policy of New Mexico's exclusionary statute. Noting that the language of New Mexico's exclusionary statute is exactly the same in the

Federal Statute (26 U.S.C. § 2209 (b)(3), she again agrees entirely with the legislative purpose cited by the Department, only wishing to point out that New Mexico's public policy underlying the entire unemployment law structure is set forth in the § 51-1-3 NMSA Declaration of state public policy as:

> "...the public policy of this state is declared to be as follows: economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family."

Based upon that policy, later in the same paragraph, the Legislature then called for the setting aside of reserves available "...to be used for the benefits of persons who become unemployed through no fault of their own". Excluding an employee from unemployment benefits should be considered to be a clearly defined exception, not the rule.

Looking to the statute's history and background, the exclusionary statute was enacted in 1977 (Laws 1977 § 227, § 6). It deals with all of the persons hired in New Mexico who should be excluded from unemployment benefits, and are therefore not considered "employees" eligible for them. They are (in their respective subsections of the law) 1) elected officials; 2) members of legislative bodies and judicial officers at all levels of

government; 3) members of the national and air national guard; 4) certain temporary fire and other emergency workers; and finally, in § 5 (a), those designated as non-tenured, major, policy-making or advisory ones, that we are discussing today.

The number of elected officials, judicial officers, men and women in uniform and emergency workers are easy to spot, and to count. The remaining branch, covered under § 5(a) is the executive branch. The numbers of persons who make or implement policy, and give advice of varying degrees and levels of importance, administer agencies and supervise employees are in the hundreds, if not the thousands, at the various levels of executive government hierarchy. Many, many of them have discretion built into their jobs in order to perform them.

Because of the complexity of the executive enterprise, the Federal law (§ 26 U.S.C. § 3309(b)(3)) obligating states to exclude those positions set forth in the exclusionary statute, as the Department states in its Brief, "...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 position." (BC 15).

As pointed out earlier, the exclusionary statute was enacted in 1977

(Laws 1977 § 227 § 6). Immediately after the exclusionary statute was enacted, in that very same session, the Legislature enacted the Executive Reorganization Act, (Laws 1977 Chapter 248, § 9-1-1 *et. seq*, NMSA 1978). The Executive Reorganization act created the Governor's cabinet. § 9-1-3 NMSA 1978 provides:

> **§ 9-1-3**. Cabinet created; members; powers and duties
> A. There is created the "executive cabinet" headed by the governor and consisting of, but not limited to, the lieutenant governor, and the secretaries of such departments as are hereafter created and designated as "cabinet departments" pursuant to law.
>
> B. The cabinet shall:
>
> (1) advise the governor on problems of state government;
>
> (2) establish liaison and provide communication between the executive departments and state elected officials;
>
> (3) investigate problems of public policy;
>
> (4) study government performance and recommend methods of interagency cooperation;
>
> (5) review policy problems and recommend solutions;
>
> (6) strive to minimize and eliminate overlapping jurisdictions and conflicts within the executive branch; and
>
> (7) assist the governor in defining policies and programs to make the government responsive to the needs of the people.
>
> C. The governor shall call meetings of the cabinet at his pleasure and shall seek the advice of the cabinet members.

Section 9-1-4 of the Act then establishes the hierarchical structure

of the cabinet departments. It provides:

> "A. Except otherwise provided by law for its internal structure, the executive branch shall adhere to the following standard terms:
>
> (1) the principal unit of the executive branch is a "department," headed by a "secretary," who shall be appointed by the governor with the consent of the senate and who shall serve at his pleasure;
>
> (2) the principal unit of a department is a "division," headed by a "director," who shall be appointed by the secretary with the approval of the governor and who shall serve at the secretary's pleasure;"
>
> (3) the principal unit of a division is a "bureau," headed by a "chief," who is employed by the secretary and who is covered by, and subject to, provisions of the Personnel Act;[1] and
>
> (4) the principal unit of a bureau is a "section," headed by a "supervisor," who is employed by the secretary and who is covered by, and subject to, the provisions of the Personnel Act.

In this regard, it is important to note that, down to the level of a division director, the appointments are either by the Governor (the Secretary, (Sub § A1)), or require the approval of the Governor (the Division Director, (Sub § A2)), and are non-tenured. From there on down, the Governor's approval is not required, and those employees are specifically covered under the Personnel Act (Sub-sections A3 and A4), so they are tenured. This language explains why the Department, on the record in this case, was so determined to find that Ms. Hatch was hired by Governor Richardson.

Next, § 9-1-5, defining the duties of a cabinet secretary, provides (subsection B): "...the secretary has every power expressly enumerated in the laws, whether granted to the secretary or the department, or any division of the department". Included among those "expressly enumerated powers" are the policy-making and advisory ones "under" the Executive Reorganization Act, and "pursuant to" § 9-1-3, in that Act.

Finally, this same language (subsection B) then is included in every one of the enabling statutes for every department of the Governor's cabinet.[2]

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[2] See Sections 9-2A-7 NMSA (defining the duties of the Secretary of the Children, Youth and Families Department); Section 9-3-5 NMSA (defining the duties of the Corrections Secretary); Section 9-4A-6 NMSA (defining the duties of the Cultural Affairs Secretary); Section 9-6-5 NMSA (defining the duties of the Secretary of Finance and Administration); Section 9-7-6 NMSA (defining the duties of the Secretary of the Department of Health); Section 9-7A-6 NMSA (defining the duties of the Secretary of the Environment); Section 9-8-6 NMSA (defining the duties of the Secretary of Health and Human Services); Section 9-11-6 NMSA (defining the duties of the Secretary of Tax and Revenue); Section 9-15-6 NMSA (defining the duties of the Secretary of Economic Development); Section 9-15A-6 NMSA (defining the duties of the Tourism Secretary); Section 9-16-6 NMSA (defining the duties of the Superintendent of Regulation and Licensing); Section 9-17-5 NMSA (defining the duties of the General Services Department Secretary); Section 9-18-7 NMSA (defining the duties of the Secretary of Labor); Section 9-19-16 NMSA (defining the duties of the Secretary of Public Safety); Section 9-21-6 NMSA (defining the duties of the Secretary of Indian Affairs); Section 9- 22-6 NMSA (defining the duties of the Secretary of Veteran's Services); Section 9-23-6 NMSA (defining the duties of the Secretary of Aging and Long Term Services); Section 9-24-8 NMSA (defining the duties of the Secretary of the Public Education Department); Section 9-25-8 NMSA (defining the duties of the Secretary of Higher Education).

The Racing Commission is not included in the hierarchy of the Governor's cabinet. In its statutory creation, it is administratively attached to the State Tourism Department (§ 60-1A-3 NMSA 1978). It is specifically excluded from being considered part of a cabinet department. Following the designation of the cabinet level positions down to the level of a division as non-tenured, major policy-making ones, the Executive Reorganization Act, in its § 9-1-7, titled "administratively attached agencies: relationships;" provides:

> A. An agency attached to a department for administrative purposes only shall:
>
> (1) exercise its functions independently of the department and without approval or control of the department;
>
> (2) submit its budgetary requests through the department; and
>
> (3) submit reports required of it by law or by the governor through the department.
>
> B. The department to which an agency is attached for administrative purposes only shall:
>
> (1) provide, if mutually agreed, the budgeting, record-keeping and related administrative and clerical assistance to the agency; and
>
> (2) include the agency's budgetary requests, as submitted and without changes, in the departmental budget.
>
> C. Unless otherwise provided by law, the agency shall hire its own personnel in accordance with the Personnel Act [10-9-1 NMSA 1978].

By their nature, commissions represent more than the interest of a governor. They are not bound by policies promoted by a particular Governor. In the case of the Racing Commission, it is, by law, made up of

representatives of both political parties, and specialized and knowledgeable experts (practical breeders of horses). By design, it is independent. The Governor may appoint the Commissioners, but his or her legal authority to influence the board in its decisions stops there.

This is why the Legislature, in its enabling laws, provided that the Racing Commission (and not the Governor) hire its Director. Nowhere in its statute, nor in its regulations, is a Governor's agreement, consent, or approval to any action of the Commission required by law, including its hiring of its Director. Nor does the Cabinet Secretary, or any of the hierarchy of the Tourism Department have any statutory authority to interfere with its affairs.

What the Legislature has done, including establishing the independence of commissions, tracks exactly with the definition of "major" used in the record of this case by the Department and discussed above. There is no doubt that the cabinet department positions down to the Division Director's positions are "high level". There is no doubt that they are "filled by appointment or approval by the Chief Executive of the political entity" (in this case, the Governor). There is no doubt that their responsibilities "effect the entire political entity".

In contrast, commissions are, by their nature, directed to specific enterprises of interest to some, but not all of the populace. The Racing Commission deals with horse racing. This is important to those persons (and horses) involved in it, but its decisions do not effect the entire political entity.

Other commissions, all demonstrating this same important but less that major level of impact, and established immediately after the Horse Racing Commission in that same Chapter 60 are: The Athletic Commisssion (§ 60-2A-1 et seq); the Bicycle racing commission, (§ 60-2D-1 et seq); and the Gaming Control Board (§ 60-2E-1 et seq). Indeed, commissions and boards established in New Mexico Government number perhaps in the hundreds. What they do is certainly important to those involved in their respective areas, but they do not affect the entire political entity in the way that cabinet level departments do. Nor are their directors designated anywhere as policy-makers or advisors, as cabinet department secretaries and division heads are.

This, (the dividing line between cabinet department secretaries and Division Directors excluded from unemployment benefits, and those below them or of commissions independent of them who are not) is the New Mexico path taken to define the positions it wishes to designate as excluded

from benefits. If it is not the same path taken in some other states, it is still a correct and steady one. Done in the same legislative session, it has complied with the legislative policy to protect employees fired without cause, and all Federal requirements at the same time.

Ms. Hatch considers that the above reasoning should be dispositive of this case, based upon the administrative record subject to de novo review by the Court. The Governor's cabinet departments, down to the level of Division Directors, under and pursuant to law (the Executive Reorganization Act), are designated as non-tenured, major, policy-making and advisory positions. They are excluded from unemployment compensation benefits. The Director of the Racing Commission is not.

Turning to the new record the Department wants to review now, its claim is that the mere nature of Ms. Hatch's position as a person who "issues policies mandated by the Racing Commissioners," "directs an agency", and "supervises employees", makes her a major policy-maker and advisor.

Accepting this position requires first, accepting the slight-of-hand card trick performed by the Department when it slipped the word "as" out of the exclusionary statute. What is of more concern

is that, looking at job descriptions that are not specifically designated as policy-making and advisory is a slippery slope, with no-where to go but the bottom, meaning that the exclusionary statute would exclude the director of every commission established by law, not a member of the governor's policy-making and advisory cabinet, and not appointed by the governor, from employment benefits.

The department has struggled mightily to sift through the record in this case, and through Section 15 of the New Mexico Administrative Code (§ 15.2.1. et seq, NMAC), dealing with the implementation of the Racing act, to find places where Ms. Hatch was given discretionary authority to do something. They really didn't have to. She freely admits that she hired and fired employees, assisted in the preparation of budgets, annual reports and strategic plans, escorted unruly persons off of race tracks, prepared preliminary reports, and every single other one of the issues the department raised in its Brief (BC 8-10). The Department's endeavor entirely misses the point that nowhere in the 49 pages of Section 15 of the Administrative Code, or anywhere else, for that matter, is she ever designated <u>as</u> a policy-maker or advisor.

Who would decide which employees are policy-making or advisory? The Department argues that, because it claims the exclusionary statute is ambiguous, and because it is the authority charged with administering the law, it "...has the authority to interpret it". (BC 16), citing *State ex rel. Helman v. Gallegos*, 117 NM 346, 357, 871 P, 2d 1352, 1363 (1994).

The statute is not ambiguous. Its intent is clear, and each of its definitions, when correctly cited, have only one meaning, subject to only one interpretation. Moroever, conceding that the Department has the authority to correctly determine what a law is (emphasizing the need to be correct), subject to judicial review, no-where in the law has the Department been given the authority by the Legislature to make up its own laws, simply to exclude a person legitimately claiming unemployment benefits from receiving them. Nor, given the history of arbitrariness and capriciousness demonstrated on the record in this case, should it ever be.

D. ARBITRARINESS AND CAPRICIOUSNESS

Arbitrary and capricious action by an administrative agency consists of a ruling which, when viewed in the light of the whole record, is unreasonable or does not have a rational basis. It is conduct which is the

result of unconsidered, willful choice by the agency and not the result of winnowing and sifting the facts and circumstances. *Perkins v. Dept. of Human Services,* 106 N.M. 651, 655,748 P.2d 24,28 (Ct. App 1987). That is exactly what has happened in this case.

The Department makes the baffling and totally erroneous prediction in its brief to the District Court, that:

> "Should the Court adopt Petitioner's interpretation, every non-elected position within state government would be eligible for unemployment compensation benefits, including cabinet secretaries and other high-ranking individuals. The Department believes this approach negates the intent of the Legislature. Moreover, it undermines the important federal policy expressed in 26 U.S.C. §3309" (RP 237).

Ms. Hatch's claim does nothing of the sort. To the contrary, she points out those positions, specifically including department secretaries and division heads of the Governor's cabinet, that are excluded from unemployment benefits, based upon the designations required by law.

Finally, the Department raises a totally false concern about what will happen if a Court should decide in Ms. Hatch's favor. It warns:

> "...It should be noted by the Court that when states fail to administer their unemployment compensation laws according to federal standards, the United States Department of Labor has the power to impose heavy sanctions on states, including reduction of certain tax credits a state's employers enjoy and withdrawal of federal funding to workforce agencies. *See* Social Securities Act, §303 [42 U.S.C. § 503] (discussing withdrawal of

> federal funds), and 26 U.S.C. § 3302 (indicating that a state's taxpayers may receive FUTA tax credits as long as their state's program is certified by the United States Secretary of Labor as conforming to federal law." (RP 233)

Providing Ms. Hatch with benefits does in no way undermine Congress' and the Legislature's intent. To the contrary, accepting the Department's claim by not giving credence to those laws' requirements that a position be designated as a major policy making or advisory one, created under or pursuant to state law, does.

The entire record of the proceedings in this case demonstrates willful and unreasonable choices and actions, without a rational basis, by representatives of the Department, (excepting those of Secretary Bussey and Judge Branch, for which Ms. Hatch is grateful), which can only be described as arbitrary and capricious.

The first involve Judge Anthony Sanchez, and the follow-up by unknown representatives of his efforts. A review of his demeanor and his rulings at a telephone hearing on March 23, 2012, and his March 26, 2012 decision thereafter, are distinctive for three reasons:

1) In spite of notice having been given, nobody from the Department showed up at all to express any Department position about the matter (RP 105);

2) In demeanor unbecoming of a judicial officer, and in total violation of Section 11.3.500.10 of the New Mexico Administrative Code, he refused to permit Ms. Hatch to present any testimony (he allowed her to admit that she

received $4,242.00 in payments, but did not allow her to defend against the claim that they were overpayments). She couldn't make any statement of any kind, or call witnesses addressing the findings of the Claims examiners (RP RP 21-30); [3]

3) After the hearing, in his March 29, 2012 finding, he "affirmed" the determination of the claims examiner, concluding without any evidence at all, and without allowing any opportunity to be heard, that an overpayment occurred. This was based upon two statutes which required a finding of having provided willfully false information, and ordered repayment, even though no such finding had ever been made (RP 106) [4]

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[3] Section 11.3.500.10 NMAC Hearings before the Appeals Tribunal: Conduct of adjudicatory hearings:
(1) Adjudicatory hearings before the appeal tribunal shall be conducted in such a manner that all parties are afforded basic rights of due process and that all pertinent facts necessary to the determination of the rights of the parties are obtained.
(B) Opportunity for fair hearing: In conducting adjudicatory hearings, the appeal tribunal shall afford all parties an opportunity for a full and fair hearing including an opportunity to respond and present evidence and argument on all issues involved;

[4] The two statutes cited by Administrative Judge Sanchez (RP 106) are:
"51-3-36(E) Any person who willfully violates any provision of the Unemployment Compensation Law or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of the Unemployment Compensation Law and for which a penalty is neither prescribed herein nor provided by any other applicable statute, shall be punished by a fine of not more than one hundred dollars ($100) or by imprisonment for not longer than thirty days or by both such fine and imprisonment, and each day such violation continues shall be deemed to be a separate offense"; and
"51-3-36(F) Notwithstanding any other provision of the Unemployment Compensation Law, if any individual claiming benefits or waiting period credits, in connection with such claim, makes any false statement or representation, in writing or otherwise, knowing it to be false or knowingly fails to disclose any material fact in order to obtain or increase the amount of a benefit payment, such claim shall not constitute a valid claim for benefits in any amount or for waiting period credits but shall be void and of no effect

After she received the November 6, 2012 Board of Review letter, Ms. Hatch filed her timely appeal of the Review Board's decision to the District Court, on December 5, 2012. The Department admits (BC 3), that after her appeal was filed, "the Appeals Tribunal" (not indicating which one) on December 7, 2013, "affirmed" the earlier decision of overpayment. The Department also does not indicate that it was the very same Anthony Sanchez, who now, on an appellate review of his own decision, (RP 210-211) without any hearing at all, affirmed it, rather than simply noting that the underlying issue was under appeal. In doing so, he referenced as his authority the same statutes requiring a finding of willful falsification of information by Ms. Hatch (RP. 210). He did so, in full recognition of the fact that Ms. Hatch had perfected her appeal to the District Court (noted in his language vacating the hearing set for December 11 2012 on the merits, RP 210-11).

Ms. Hatch, already having appealed the decision of the Review Board to the District Court, and noting that his decision vacated the December 11, 2012 hearing he had earlier set, took no further action of Judge Sanchez'

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for all purposes. The entire amount of the benefits obtained by means of such claim shall be, in addition to any other penalties provided herein, subject to recoupment by deduction from the claimant's future benefits or they may be recovered as provided for the collection of past due contributions in Subsection B of Section 51-1-36 **NMSA** 1978."

December 7th "affirmance". The Department, though, based upon Judge Sanchez' "affirmance", did. On May 10, 2012, it initiated a collection procedure against Ms. Hatch, sending her a notice of levy against her property in fifteen days, for the repayment of the disputed amount. (RP 302). This was done even though the District Court's decision on the merits of whether she was eligible, and therefore whether there had been an overpayment, was still pending.

The District Court's decision reversing the Review Board and finding in favor of Ms. Hatch was filed on May 23, 2013, (RP 291-296). A petition was filed by Ms. Hatch for a stay of the levy procedure and for a writ of prohibition in the District Court on May 24, 2013 (RP 299-300). Only after those two filings did the Department stop its attempt at a levy against her property. In its reply to the petition, it cited as the reason for stopping its procedure, that the District Court's decision had been entered (RP 297-298).

Next is Administrative Judge Barbara J. Barela. If Secretary Bussey, in her remand, thought that Judge Barela would adhere more than Judge Sanchez to the due process requirements of her office and of Section 11.3.500.10 of the Administrative Code, or that ordering a rehearing would cure his unseemly behavior, she was wrong. A review of the full record of Judge Barela's hearing (RP 33-74), reveals that she consistently,

throughout the proceeding acted in a way to prevent Ms. Hatch from presenting evidence on her own behalf, asked impertinent leading questions designed to trap Ms. Hatch as a witness into damaging answers (RP 53 lines 23-24, RP 54, lines 1-2, RP 54 lines 17-9, RP 57 lines 25-58), and in general, demonstrated behavior, again unacceptable as a judicial officer, in violation of the administrative code's requirements set forth earlier.

Granted that an administrative appeal does not follow the rules of evidence of a court judicial review, but it does require a judge to conduct it in a way that "...all parties are afforded basic rights of due process and that all pertinent facts necessary to the determination of the rights of the parties are obtained." (§ 11.3.500.10 of the Administrative Code").

She refused to allow a former Racing Commissioner, Ken Corraza, to give his opinion that the Director's position was not a policy-making or advisory one. (RP 58 line 20- RP 60 line 1). Instead, she allowed: 1. Lisa Lujan, who describes her position as "Human Resources Director and Governor-exempt Administrator" (RP 45 line 18-19) and "from the Department of Finance and the Governor's (Martinez') office" (RP 38 lines 15-16), and 2. Laura Valencia, Administrative Manager for the Racing Commission (RP 47 line 23-24), to opine that it was. Their opinions are not backed by any legal

authority except the exclusionary statute, and directly contradict the clear language of the Racing Commission statutes and regulations, policy and procedure. Ms. Valencia's testimony doesn't even arise to an opinion, but a "belief" (RP 48 lines 5-6).

Next comes the Board of Review. If there were ever a demonstration of arbitrariness and capriciousness, it is this review board's decision. Again, it found that Ms. Hatch had been proven by substantial evidence to have been appointed by Governor Richardson, a claim not only totally unsupported in the record, but impossible under New Mexico Law. Next, in a total mis-reading of the applicable law, the Board's decision would deny unemployment benefits not to only Ms. Hatch, but to every director of every agency of every commission or board in New Mexico because these persons implement policy mandated by their commissioners, administer agencies, and supervise employees. Implementing policy is not the same as making it. This interpretation is so far removed from what either the Federal or New Mexico legislators intended in enacting the exclusionary statute or the Executive Reorganization Act, to merit, by itself, reversal of the Board's decision.

Finally, throughout the briefing and oral presentations to the District Court, and in this Answer Brief, Ms. Hatch has been compelled to

call to the attention of the Court, the re-drafting of statutes, re-creation of records, exaggeration of the effect of her claims if supported by the Court, and what seems to be an overall visceral reaction to the fact that she wishes to assert her rights to unemployment benefits. Without repeating them again, they individually and cumulatively demonstrate the arbitrariness and capriciousness undertaken by the Department on the record in this case. Governments should not be card sharks.

Perhaps to be included in the above observations about arbitrariness and capriciousness are the mentions by the Department of the present District Court cases in its Brief (BC 12). This caprice includes their omission, at the Court of Appeals level of one decision, which was cited by the Department in its briefing to the District Court. It is *Sandra Perez v. New Mexico Department of Workforce Solutions* D-202-CV-2012-04314, Honorable Valerie Huling, DJ, decided on June 18, 2012. Judge Huling reversed the Department, which had denied benefits to the Director of the State Personnel Board, for the same reasons as Judge Backus in this one (RP 263-269).

Ms. Hatch agrees that hers is a case of first impression in New Mexico. The commissioners found by the Supreme Court not to be entitled to a hearing before removal in the *Duran* case cited by the Department (BC 12) drew no salary, and could never have drawn

unemployment. In dicta, the Court did observe that commissioners and "heads of agencies appointed by the Governor" were policy-makers. Ms. Hatch would agree. (*State ex rel. Duran v. Anaya,* 102 N.M. 609, 698 P.2d 882 (1985). There is no inconsistency in any of the district court's rulings brought to the attention of the District Court or the Court of Appeals. All of the other District Court cases cited in this record except Judge Huling's, deal with cabinet department positions down to the level of Division Directors. Ms. Hatch agrees that they are excluded from unemployment benefits under or pursuant to New Mexico Law. Those cases just don't apply to her.

IV. CONCLUSION

Ms. Hatch asks the Court to reverse the Board of Review in its *de novo* examination, and affirm the District Court's rulings. She has upheld her burden of showing that no substantial evidence exists in the entire record to be reviewed which support the findings and legal conclusions reached by the Board. She did not occupy a position designated as a "non-tenured, major policy making or advisory" position created under or pursuant to State law. Furthermore, the Department's findings, conclusions, decisions and behavior shown on the record were arbitrary and capricious. Petitioner is thus qualified for benefits, is entitled to retain those she has already received,

and her employer's account should no be longer relieved of the remainder of her benefit charges.

Ms. Hatch also agrees with the Department, (BC 4), that "...the Court's decision will provide guidance to the Department on the proper interpretation and application of NMSA 1978, Section 51-1-44 (A) (5) (a)." The record in this case provides a clear demonstration that the department needs it. When a department's representatives so arbitrarily and capriciously act, and make decisions based upon such unsubstantial evidence and erroneous conclusions as this one has on its record, it is up to the Courts to make it right.

V. STATEMENT OF COMPLIANCE.

Pursuant to Rule 12-213 (G) NMRA, the Petitioner-Respondent certifies that the body of the Answer Brief consists of 7,685 words, written in 14-point Times New Roman font. The word count was obtained using Microsoft Word 2007. The Answer brief therefore complies with the requirements of Rules 12-213(F)(3) and 12-305 NMRA.

VI. STATEMENT REGARDING ORAL ARGUMENT

The Petitioner-Appellee does not request oral argument, because she believes that the law is clear and it is un-necessary. However, in the event the Court should deem it necessary, she welcomes the opportunity.

Respectfully Submitted, this 24th day of October, 2013.

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CERTIFICATE OF SERVICE

I certify that on October 24, 2013, a copy of the foregoing was served on the following parties via first class mail:

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