

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

DEBRA GRIEGO,

Petitioner-Appellant,

v

No. 32,556

D-101-CV-2012-01237

NEW MEXICO DEPARTMENT  
OF WORKFORCE SOLUTIONS  
and

DEPARTMENT OF FINANCE AND  
ADMINISTRATION,

COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE  
FILED

OCT 28 2013

Respondents-Appellees.

*Wendy E. Jones*

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APPEAL FROM THE FIRST JUDICIAL DISTRICT OF  
SANTA FE COUNTY  
HON. SARAH M. SINGLETON, PRESIDING

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RESPONDENT/APPELLEE NEW MEXICO DEPARTMENT OF  
WORKFORCE SOLUTIONS' ANSWER BRIEF

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## **I. SUMMARY OF PROCEEDINGS**

### **A. The Nature of the Case**

Debra Griego, (“Petitioner”) appeals from the First Judicial District Court's (“District Court”) decision denying her unemployment insurance benefits. The central issue before the Court is whether Petitioner's former position as Chief Financial Officer and Administrative Services Division Director for the New Mexico Department of Finance and Administration is a major non-tenured policymaking or advisory position.

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### **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**

Petitioner was employed from April 5, 2008 through December 31, 2010 as the Administrative Services Division Director of the New Mexico Department of Finance and Administration (“DFA”) at a salary of \$105,433.00. **[RP 352]** Petitioner was also named as DFA’s Chief Financial Officer. **[RP 54:7]** As part of her duties in this position, Petitioner was responsible for, among other things: managing all administrative arms of the division including fiscal, contracts, human resources, and information technology. **[RP 54:5-10]** Petitioner was also responsible for drafting policies that would be submitted for approval by the DFA Cabinet Secretary,

or in some cases, by former Governor Richardson. [RP 61:24-25, 62:1-5] Petitioner made recommendations to the Cabinet Secretary regarding the state's budget, [RP 63:11-16] and was responsible for developing and advising the Cabinet Secretary regarding cash management plans for funds received by the state pursuant to the American Recovery and Reinvestment Act of 2009. [RP 68:7-22] Each of these functions and responsibilities demonstrates a high degree of advisory or policy-making activities exercised by Petitioner in her capacity as a Division Director.

— — — — — Petitioner's application for unemployment insurance benefits was denied by the Appeal Tribunal of the Department of Workforce Solutions ("Department") and she appealed to the Board of Review. The Board of Review issued the Department's final administrative decision, affirming the Appeal Tribunal's determination that Petitioner was not eligible for unemployment insurance benefits because Petitioner's wages earned as Chief Financial Officer and Division Director were not covered wages for purposes of unemployment compensation eligibility<sup>1</sup> pursuant to NMSA 1978, Section

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<sup>1</sup>For purposes of the Unemployment Compensation Law NMSA 1978, § 51-1-44 the definition of employment states:

- A. "employment" means service performed by an individual in the employ of a government entity unless such service is performed by an individual in the exercise of his duties:
- (1) as an elected official;
  - (2) as a member of a legislative body or a member of the judiciary of a governmental entity of this state;
  - (3) as a member of the national guard or air national guard;
  - (4) as an employee serving on a temporary basis in case of fire, snow, earthquake, flood or similar emergency; or
  - (5) in a position which, under or pursuant to state law, is designated as:
    - a. a major nontenured policy-making or advisory position;

51-1-44(A)(5)(a). Petitioner timely appealed the determination regarding her eligibility for unemployment benefits to the District Court pursuant to Rule 1-077 NMRA. The District Court affirmed the decision of the Department and Petitioner filed this appeal.

## **II. QUESTION PRESENTED FOR REVIEW**

Did the District Court correctly rule that Petitioner's former position as Chief Financial Officer and Administrative Services Division Director for the New Mexico Department of Finance and Administration is a major non-tenured policymaking or advisory position?

## **III. ARGUMENT**

### **A. Introduction**

The District Court's Order should be affirmed because it correctly interpreted New Mexico's statutory law and resolves an important public issue regarding government positions. 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 (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 Petitioner, 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 as the District Court 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 “[it] only evaluate[s] whether the record supports the result reached, not whether a different result could have been reached.” *Id.*, 140 N.M. at 851, 149 P.3d at 948 (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*, 1996-NMSC-44, ¶ 22, 122 N.M. at 180, 922 P.2d at 562.

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

The District Court correctly determined that Petitioner was serving in a

position which, under or pursuant to state law, is designated as a major non-tenured policy-making or advisory position, rendering her ineligible for unemployment compensation benefits. 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, NMSA 1978, §10-9-4, exempts certain higher-level positions within state government from the Act's protections and does not give these positions tenure.<sup>2</sup>

Petitioner accepted the District Court's analysis that in order to be excluded from unemployment compensation coverage a job must meet three criteria: (1) the job must be designated pursuant to state law, (2) as a major policy-making or advisory position, which (3) is non-tenured. Petitioner also agreed that her former position was non-tenured. (*See* Petitioner's Brief in Chief, p.8). Petitioner argues that her former position was not major policy-making or advisory in nature and the position was not designated pursuant to state law. Additionally, Petitioner contends that policy-making positions must be approved by the State Personnel Board pursuant to NMSA 1978, §10-9-4(N). The District Court's opinion directly addressed and correctly refutes all

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<sup>2</sup> 10-9-4. Coverage of service. (1990)

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;...

of Petitioner's contentions.

At the hearing before the Appeal Tribunal many of the facts were disputed regarding what functions the Petitioner actually performed in her position. The District Court based its determination not upon testimony of individuals or the Petitioner but upon an examination of Petitioner's position pursuant to statute. For purposes of the Unemployment Compensation Law, neither "major" nor "advisory" are defined in NMSA 1978, § 51-1-44(A)(5)(a).<sup>3</sup> Neither word is used specifically in her duties as described by statute. Petitioner asserts that her role as a Division Director was more operational, and that her function as director was not one of policy making because the Cabinet Secretary had final approval of any proposed policies. In concluding that Petitioner held a major policy-making or advisory position, the District Court noted:

Whether the Director had final approval of proposed policies is not dispositive. Indeed, Section 51-1-44(A)(5)(a) provides that an employee is excluded from coverage for being either a major nontenured policy maker or advisor. It is clear from the record that Griego had a significant degree of policymaking authority as Division Director and Chief Financial Officer by establishing policies and budgets that affected state government and local public bodies. Additionally, Griego testified she was often called upon by the Cabinet Secretary to provide advice and guidance regarding important issues... Such advice to the Cabinet Secretary underscores the fact that, established in the record, that claimant was, at a minimum, a major non-tenured advisor, See NMSA 1978 § 51-1-42... **[RP 858]**.

There is little doubt that providing advice to the Cabinet Secretary established

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<sup>3</sup> See footnote 1.

the position as a major non-tenured advisor. As noted by the District Court, 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 exemption for positions which are “designated under or pursuant to state law” involved a question of statutory interpretation. Petitioner interprets the statute’s language “under or pursuant to state law” to mean that the legislature must pass specific legislation to identify whether each and every non-tenured policy making or advisory position created from governor to governor is exempt from coverage under the Unemployment Act. In addressing the statutory interpretation issue, the District Court’s analysis focused on whether the duties of the position were designated under or pursuant to state law. The District Court regarded Petitioner’s interpretation of the statute as too narrow, untenable, and a frustration of the legislative process that would rendered the intent of NMSA § 51-1-44(A)(5)(a) meaningless. **[RP 862]**

Contrary to Petitioner’s interpretation of the statute, the District Court reasoned that States are not required to expressly identify a given position as exempt from unemployment compensation by using the magic words “major non-tenured policy maker or advisor”. Rather, the District Court interpreted the unemployment law provision as setting 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. [RP 860]

The District Court's analysis is consistent with the opinions of the majority of New Mexico District Courts that have decided this question.<sup>4</sup> The District Court's opinion references decisions of courts in other states interpreting analogous provisions that relied upon an analysis similar to the District Court's analysis. RP 860-861.<sup>5</sup> The courts in other states and the District Court's opinion stressed that the focus should be 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.

The District Court's opinion acknowledged that federal law also supports the

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<sup>4</sup> See *William Taylor, Pro Se v. New Mexico Dep't of Workforce Solutions, et al.*, D-101--CV-2011--03892, opinion of Judge Barbara Vigil on Aug. 20, 2012; *William Verant v. New Mexico Dep't of Workforce Solutions*, D-202-2012-05014, opinion of Alan M. Malott on November 7, 2012; *Michael Vinyard v. New Mexico Dep't of Workforce Solutions*, D-202-CV-2012-00524, opinion of Judge Denise Barela Shepherd on March 27, 2013; *Jolene M. Gonzales v. New Mexico Dep't of Workforce Solutions*, D-101-2012-01350, opinion of Sarah M. Singleton on July 24, 2013; There are two District Court decision to the contrary, *Sandra Perez v. New Mexico Department of Workforce Solutions, et al.* D-202-CV-2012-04314, opinion of Valerie Huling on June 18, 2012; and *India Hatch v. New Mexico Department of Workforce Solutions, et al.* D-820-CV-2012-00488, opinion of Sarah C. Backus on May 23, 2013.

<sup>5</sup> 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 develop[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 *Corn., Dept. of Educ. v. Corn.*, 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.”).

Department's determination that Petitioner's position is a major policy-making or advisory position. The District Court noted:

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 nontenured policymaking or advisory position ...." 26 U.S.C. § 3309(b)(3). **[RP 860]**

In rejecting Petitioner's narrow interpretation of NMSA 1978, § 51-1-44 (A)(5)(a) the District Court's opinion acknowledged that New Mexico was required under federal law to include this exclusion and that the exclusion is a strong expression of federal policy that high level, non-tenured government officials are not intended to qualify for unemployment coverage. Additionally, the District Court's opinion recognized that under federal law 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. **[RP 861-862]** Given these statutory provisions, the District Court properly determined that the Department was reasonable in concluding that those individuals who are Division Directors of a cabinet department and who are expressly exempt from the State Personnel Act are major non-tenured policymakers or advisors.

Petitioner's contention that in order to be considered a policy-making position her former position as a Division Director must be approved by the State Personnel Board pursuant to NMSA 1978, §10-9-4(N) is without merit. In interpreting which positions are major policy-making or advisory positions pursuant to NMSA 1978, § 51-1-44(A)(5), the Department identified certain broad categories, such as Division Directors, that are excluded from coverage under the personnel act and determined that these positions are major policy-making or advisory positions. It is evident in the Executive Reorganization Act, NMSA 1978, §§9-1-1 to- 13 (1953 as amended through 1977), that Division Directors would be considered major non-tenured policy makers and advisors. The Act created within the executive branch the position of Division Director<sup>6</sup> and NMSA 1978, § 9-1-5B specifies that individuals appointed to be Division Directors are exempt from the provisions of the Personnel Act, NMSA 1978, §10-9-1, because they serve at the pleasure of the Cabinet Secretary.<sup>7</sup> Thus, these

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<sup>6</sup> 9-1-4. Cabinet departments; structure.

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 [10-9-1 NMSA 1978]; 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.

<sup>7</sup> 9-1-5. Secretary; duties and general powers.

A. The secretary is responsible to the governor for the operation of the department. It is his duty

positions are not considered “classified” and enjoy no tenure rights. It is apparent from the language and structure of the Executive Reorganization Act that Cabinet Secretaries and their appointed Division Directors are “major non-tenured policy-making or advisory positions,” based upon their statutory duties to advise the Governor or Cabinet Secretary and their exemption from the classification scheme of the Personnel Act. Contrary to Petitioner’s contention, the plain language of NMSA 1978, §10-9-4 excludes directors of department divisions from coverage of the State Personnel Act. Therefore, the State Personnel Board has no decision making authority regarding directors of department divisions.

The District Court’s opinion supports the Department’s analysis that the Executive Reorganization Act exempts Petitioner’s position from coverage of the State Personnel Act and any authority of the State Personnel Board. The District Court stated:

Furthermore, the Legislature identified division directors in the Executive Reorganization Act and indicated that they serve at the pleasure of their respective Cabinet Secretary. *See* NMSA 1978 § 9-1-5B... Importantly, cabinet secretaries report to and serve at the will of the Governor. Similarly, the principal unit of a cabinet agency, a division, is headed by an individual who serves at the pleasure of the secretary and is not

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to manage all operations of the department and to administer and enforce the law with which he or the department is charged

B. To perform his duties, the secretary has every power expressly enumerated in the laws, whether granted to the secretary or the department, or any division of the department, except where authority conferred upon any division therein is explicitly exempted from the secretary's authority by statute. In accordance with these provisions the secretary shall...

(10) appoint, with the governor’s consent, for each division, a “director.” These appointed positions are exempt from the provisions of the Personnel Act [10-9-1 NMSA 1978]. Persons appointed to these positions shall serve at the pleasure of the secretary;

covered by the State Personnel Act, In contrast, those heading up the next tier of agency management — bureau chiefs — are expressly covered by the State Personnel Act. **[RP 863]**

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. Heiman v. Gallegos*, 117 N.M. 346, 357, 871 P.2d 1352, 1363 (1994). 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 is the agency delegated by the Legislature with administering New Mexico's Unemployment Compensation Law. Even if the Court concludes that there may be more than one reasonable interpretation of NMSA 1978, § 51-I-44(A)(5)(a), it should defer to the reasonable interpretation of the statute by the Department. The Department's decision denying Petitioner 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.

The Department's determination that individuals who serve in positions as Division Directors are major non-tenured policy-making or advisory

*State ex rel. Duran v. Anaya*, 102 N.M. 609, 698 P.2d 882 (1985). *Duran v. Anaya* involved former members of the State Board of 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 those former members had been improperly removed from the Board. *Id.* 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.* at 610, 698 P.2d at 883. The former board members appealed. In affirming the decision of the District Court, the Supreme Court found that that the former board members were not entitled to hearings before removal from their positions. *Id.* 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, §10-9-4 and stated:

... 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.

The Supreme Court’s determination that individuals in such positions are not

entitled to hearings before removal from their positions because the legislature intended the exemptions in Section 10-9-4 of the State Personnel Act to apply to policy-making positions is applicable to the Petitioner's position. Petitioner in this matter was appointed to her position with the consent of the Governor under the same provisions of the statute as the Barber Examiners in *Duran v. Anaya supra*. Thus, the District Court correctly affirmed the Department's determination that the same position should be considered a policy-making position for purposes of the Unemployment Compensation Law. The individuals, such as the Petitioner, know when they accept high-level non-tenured positions that they will likely be dismissed by a subsequent administration.

The Supreme Court's decision is controlling on whether positions covered by the exemptions from the State Personnel Act contained in NMSA 1978, §10-9-4 are policy-making or advisory. Therefore, the District Court's determination that the Department was reasonable in concluding that the Petitioner was in a non-tenured position whose job duties under state law are policy-making or advisory should be affirmed on certiorari review by the Court.

#### **IV. CONCLUSION**

The Department respectfully requests this Court to affirm the District Court's Order that Petitioner is disqualified from receipt of unemployment insurance benefits and must repay the Department for the benefits she received for which she was not

and must repay the Department for the benefits she received for which she was not entitled.

#### **V. STATEMENT OF COMPLIANCE**

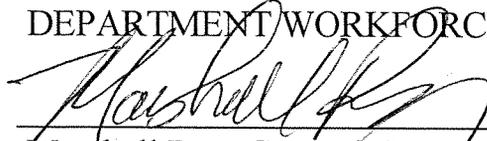
Pursuant to Rule 12-213(G) NMRA, the Department hereby certifies that the body of the Brief consists of 4,248 words written in 14-point Times New Roman font. The word count was obtained from Microsoft Word 2007. The Brief in Chief therefore complies with the requirements of Rules 12-213(F)(3) and 12-305 NMRA.

#### **VI. STATEMENT REGARDING ORAL ARGUMENT**

Appellee, New Mexico Department of Workforce Solutions, respectfully requests oral argument. Appellee 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 in this appeal.

Respectfully submitted,

OFFICE OF GENERAL COUNSEL  
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**Certificate of Service**

I hereby certify that on the 28 day of October, 2013, the foregoing was served on the following parties via first class mail:

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