

**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**

COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE  
FILED

NOV 15 2013

*Wendy Egnor*

**NEW MEXICO DEPARTMENT  
OF WORKFORCE SOLUTIONS  
and  
THE NEW MEXICO  
RACING COMMISSION**

**Respondents-Appellants.**

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

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**NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS  
REPLY BRIEF**

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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. References to the Answer Brief filed by the Respondent will be cited as (“AB” and include the page number).

## **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

#### The Department's Interpretation of the Statute Is Reasonable.

The parties agree 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. The parties also agree, the determination of whether NMSA 1978, § 51-1-44(A)(5)(a) can be interpreted to apply to Respondent's former position as Executive Director of the New Mexico Racing Commission is a non-tenured, major policy-making or advisory position, is a question of statutory interpretation.

The Department's findings that criteria two and three have been met are supported by substantial evidence, are not arbitrary or capricious, and are consistent with law. Based on the record and the nature of Hatch's job as Executive Director of the New Mexico Racing Commission, the Petitioner was in a major non-tenured advisory or policymaking position. Respondent admits that her former position was non-tenured, [AB 12] and that the position involved policy-making and providing limited advice to the Racing Commissioners. [AB 7]. The District Court found that Director of the Racing Commission is indeed a "major 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. [RP 294].

The New Mexico Supreme Court held in *State ex rel. Duran v. Anaya*, 102 N.M. 609, 698 P.2d 882 (1985), that positions such as Respondent’s (boards and commissions and agency heads appointed by a board or commission) are policy-making positions. Respondent’s answer presented nothing to refute these facts and legal conclusions.

The third criterion that the position be designated as major non-tenured policy-making or advisory position under or pursuant to state law does require statutory interpretation. “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 Supreme Court in *Duran* construed the legislative intent of the exemptions from the State Personnel Act contained in NMSA 1978, Section 10-9-4 means that by exempting members of boards and commissions and heads of agencies appointed by boards or commissions from the Personnel Act, the Legislature intended that such policy-making positions are different from other types of employment positions. *Id.* 612, 698 P.2d 885.

Respondent argues that policy-making and advisory duties are expressly given to cabinet secretaries and their designees under the Executive Reorganization Act. [AB 18] Because the Racing Commission is not included in the hierarchy of the Governor’s cabinet, Respondent contends that policy-making and advisory duties apply only to positions in the Governor’s cabinet and not to positions with Boards or Commissions. Respondent’s argument is in conflict with the plain language of the State Personnel Act § 10-9-4(C)<sup>1</sup> and the Supreme Court’s opinion in *Duran*. The Personnel Act applies to **all** state positions except positions such as Respondent’s because she was appointed by the Racing Commission. The Supreme Court’s opinion in *Duran* stated that positions designated by the Legislature under Section 10-9-4 of the State Personnel Act are policy-making positions. Thus, policy-making positions are not limited to those positions in the Governor’s cabinet.

Respondent argues that the American Heritage Dictionary definition of designate provides three plain language definitions of the word “designate.”

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<sup>1</sup>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; ...

Respondent's opinion is that only the first makes sense with the preposition "as". [AB 11]. This is simply incorrect. In fact, the second definition makes sense with the preposition "as" (characterize as) and is the only definition with an example including the words "designated as". Although the parties disagree on the interpretation of the language of the statute, 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**

For the foregoing reasons, the Department respectfully requests that the Court reverse the District Court in all respects.

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

Pursuant to Rule 12-213(G) NMRA, the Department hereby certifies that the body of the brief consists of 1,314 words written in 14-point Times New Roman font. The word count was obtained from Microsoft Word 2007. The Reply Brief 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,

OFFICE OF GENERAL COUNSEL  
NEW MEXICO DEPARTMENT OF  
WORKFORCE SOLUTIONS

A large, stylized handwritten signature in black ink, appearing to read 'Marshall Ray', is written over the text of the office name.

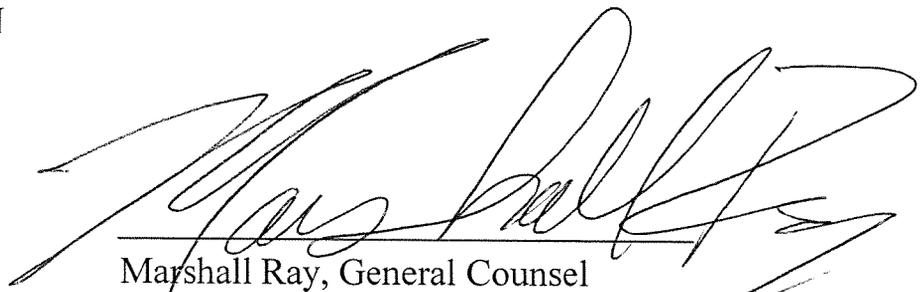
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 15 day of November, 2013, the foregoing was served on the following parties via first class mail:

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