

**IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Opinion Number: \_\_\_\_\_

Court of Appeals of New Mexico  
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Mark Reynolds

**No. A-1-CA-40106**

**NEW MEXICO EDUCATIONAL  
RETIREMENT BOARD,**

Plaintiff-Appellee,

v.

**DEBBIE ROMERO, in her official capacity  
as Acting Secretary of the New Mexico  
Department of Finance and Administration;  
and NEW MEXICO DEPARTMENT OF  
FINANCE AND ADMINISTRATION,**

Defendants-Appellants.

**APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

**Francis J. Mathew, District Court Judge**

Peifer, Hanson, Mullins & Baker, P.A.

Mark T. Baker

Rebekah A. Gallegos

Albuquerque, NM

for Appellee

Hinkle Shanor, LLP

Jaclyn M. McLean

Chelsea R. Green

Santa Fe, NM

for Appellants

1 **OPINION**

2 **YOHALEM, Judge.**

3 {1} We are asked to determine whether the New Mexico Department of Finance  
4 and Administration (DFA) has the authority to reject pay raises for employees of the  
5 New Mexico Educational Retirement Board (the Board), which have been approved  
6 by the Board and are paid from the educational retirement fund. The educational  
7 retirement system is governed by the New Mexico Constitution, Article XX, Section  
8 22, and the Educational Retirement Act (the Act), NMSA 1978, §§ 22-11-1 to -55  
9 (1967, as amended through 2023). It was the practice of DFA between 2016 and  
10 2020, before the declaratory judgment was entered in this case, to require Board-  
11 approved salary increases to comply with the governor’s exempt salaries plan, a plan  
12 prepared annually under Section 10-9-5 of the Personnel Act, NMSA 1978, §§ 10-  
13 9-1 to -25 (1961, as amended through 2014). Raises exceeding the percentage of  
14 increase in salary adopted by the governor’s exempt salaries plan or found by DFA  
15 to be insufficiently justified under the plan’s performance measures were either  
16 rejected by DFA or submitted to the governor for approval. We agree with the district  
17 court that the Board “has the sole and exclusive authority to set salaries and make  
18 personnel decisions related to its administration of its funds under its constitutional  
19 and statutory authority and [DFA] does not have the authority to either reject

1 approved salary increases or seek the governor’s approval before implementing such  
2 approved salary increases.” We, therefore, affirm.

3 **DISCUSSION**

4 {2} DFA contends on appeal that the Act’s designation of the state treasurer as the  
5 “custodian” of educational retirement system funds, *see* § 22-11-11(A), (B), and the  
6 Act’s provision for disbursement of funds on warrants issued by DFA, *see* § 22-11-  
7 12, authorize DFA to impose the same financial controls on the Board that DFA  
8 exercises over state executive branch agencies. According to DFA, the provisions of  
9 Article XX, Section 22(B) of the New Mexico Constitution, providing that the Board  
10 has the “sole and exclusive” fiduciary authority to administer the educational  
11 retirement system, and the provisions of Section 22-11-10(A), authorizing the Board  
12 to set the amount of its employees’ salaries by regulation, convey only limited  
13 authority, tempered by the statutory designation of the state treasurer as the  
14 “custodian” of the system’s funds and by DFA’s authority to issue warrants to  
15 authorize the disbursement of funds.

16 {3} The Board, in response, contests both DFA’s construction of Article XX,  
17 Section 22 of the New Mexico Constitution, and of the Act’s provisions creating and  
18 implementing the educational retirement system. The Board focuses on the plain  
19 meaning of the constitutional and statutory provisions, which together govern the  
20 educational retirement system. These provisions give the Board the sole and

1 exclusive responsibility to administer the fund in the interests of the retirement  
2 system’s beneficiaries. The Act further specifies that the amount of salaries and fees  
3 to be paid by the Board—the very type of payments at issue here—“shall be fixed  
4 by the regulations of the [B]oard.” Section 22-11-10(A). Reading these  
5 constitutional and statutory provisions together, the Board argues that it has no  
6 obligation to answer to DFA, or to submit for the approval of the governor, the  
7 amount it sets for its employees’ salaries. According to the Board, the educational  
8 retirement system is designed to operate separately from executive branch agencies.  
9 DFA’s authority to reject salary increases, according to the Board, is not supported  
10 by the language of Article XX, Section 22 of the New Mexico Constitution, by the  
11 language of the Act, or by the purposes sought to be achieved by the framers and the  
12 Legislature. We agree with the Board and explain our reasoning.

13 **I. Applicable Principles of Statutory Construction**

14 {4} The question presented for our review—whether DFA has the authority to  
15 either reject salary increases for Board employees adopted by the Board and  
16 authorized by the Board for payment out of the educational retirement fund, or to  
17 require the governor’s approval for these raises—is a question of both constitutional  
18 and statutory construction. Our review, therefore, is *de novo*. *See State v. Boyse*,  
19 2013-NMSC-024, ¶ 8, 303 P.3d 830 (“We review questions of statutory and

1 constitutional interpretation de novo.” (alteration, internal quotation marks, and  
2 citation omitted)).

3 {5} We note that the rules of statutory construction “apply equally to  
4 constitutional construction.” *State ex rel. Richardson v. Fifth Jud. Dist. Nominating*  
5 *Comm’n*, 2007-NMSC-023, ¶ 17, 141 N.M. 657, 160 P.3d 566. Well-established  
6 rules of statutory construction guide our review. “The principal command of  
7 statutory construction is that the court should determine and effectuate the intent of  
8 the Legislature, using the plain language of the statute as the primary indicator of  
9 legislative intent.” *State v. Gutierrez*, 2023-NMSC-002, ¶ 22, 523 P.3d 560  
10 (alteration, internal quotation marks, and citation omitted). When we construe the  
11 Constitution, we similarly look to the provision’s plain language, exercising care to  
12 use that language as the primary indicator of the framers’ intent and of the purposes  
13 they sought to achieve. *See State v. Ball*, 1986-NMSC-030, ¶ 16, 104 N.M. 176, 718  
14 P.2d 686 (“[I]t is our duty to give effect to the spirit and intent of the Constitution’s  
15 framers.”). Where, as is the case here, both constitutional and statutory provisions  
16 address the same subject, we will read the two together, giving effect to both, “unless  
17 [legislative intent] clearly appears to be in conflict with the Constitution.” *State ex*  
18 *rel. Off. of State Eng’r v. Lewis*, 2007-NMCA-008, ¶ 37, 141 N.M. 1, 150 P.3d 375  
19 (internal quotation marks and citation omitted).

1 **II. The Provisions Creating the Board and the Fund and Defining Board**  
2 **Authority**

3 {6} Because the educational retirement system was created by statute before the  
4 New Mexico Constitution was amended to add Article XX, Section 22, we begin our  
5 analysis by looking first to the words chosen by our Legislature. *See State v. Farish*,  
6 2021-NMSC-030, ¶ 11, 499 P.3d 622 (“We first look to the plain meaning of the  
7 statutory language.”). The educational retirement system was created by the  
8 Legislature in 1967. *See Pierce v. State*, 1996-NMSC-001, ¶ 34, 121 N.M. 212, 910  
9 P.2d 288. It was not until thirty years later, in 1998, that the voters approved the  
10 constitutional amendment, codified as Article XX, Section 22 of the New Mexico  
11 Constitution, clarifying both the authority of the Board and the nature of the  
12 educational retirement fund.

13 {7} The Act provides retirement benefits to a wide range of members, regular  
14 members, and participants; terms that are defined broadly to include persons  
15 employed by a state educational institution, a junior or community college, a  
16 technical or vocational institute, a state institution with an educational program, by  
17 the department of education, or by programs licensed by the department of  
18 education. *See* § 22-11-2(A), (B), (W). Section 22-11-11(A) created the educational  
19 retirement fund to pay retirement benefits to the members, and provided that  
20 expenditures by the Board for the administration of the system, as well as for the  
21 payment of benefits, would be made from this fund. Section 22-11-3(A), (B) creates

1 a nine-member Board composed of five individuals selected by state officials and  
2 four individuals who are members of the retirement system, elected by their peers.

3 {8} The Board is designated as the trustee of the system’s funds. *See* § 22-11-  
4 11(B) (providing the Board “shall be the trustee of the funds”). In the same section,  
5 the state treasurer is designated as “the custodian of the funds” and, in the next  
6 section, § 22-11-12, the state treasurer is directed to make disbursements “only on  
7 warrants issued by [DFA] or through any other process as approved by [DFA].”  
8 DFA, in turn, is authorized to issue warrants for disbursements from the fund, “only  
9 upon voucher of the [educational retirement<sup>1</sup>] director.” Section 22-11-12. Finally,  
10 the Act specifically authorizes the Board to hire employees, to delegate  
11 administrative authority to those employees, and to set their salaries. *See* § 22-11-  
12 10.

13 {9} Thirty years after the Act was adopted, Article XX, Section 22 of the New  
14 Mexico Constitution expanded upon and clarified the provisions of the Act creating  
15 the fund and the Board. Article XX, Section 22(A) provides that all funds held by  
16 the educational retirement system “shall be held . . . in a trust fund to be administered  
17 and invested by [the educational retirement] system for the sole and exclusive benefit  
18 of the members, retirees and other beneficiaries of that system.” Article XX, Section

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<sup>1</sup>*See* § 22-11-2(Q) (defining “director” to mean “the educational retirement director”).

1 22(A) further provides that “[e]xpenditures from [the fund] shall only be made for  
2 the benefit of the trust beneficiaries and for expenses of administering the system.”  
3 Finally, this provision restates the statutory directive that the Board “shall be the  
4 trustees for [the educational retirement system], and further explains that the Board  
5 shall “have the sole and exclusive fiduciary duty and responsibility for  
6 administration and investment of the trust fund.” N.M. Const. art. XX, § 22(B).  
7 Article XX, Section 22(D) creates a “vested property right,” protected by due  
8 process, in the trust fund once an eligible member meets the minimum service  
9 requirements of their retirement plan. Finally, Article XX, Section 22(A) authorizes  
10 the Legislature to provide for the investment of funds and the administration of the  
11 system, stating that “[t]o the extent consistent with the provisions of this section,  
12 each trust fund shall be invested and the systems administered as provided by law.”

13 **III. The District Court Did Not Err in Granting Declaratory Judgment in**  
14 **Favor of the Board**

15 {10} DFA’s argument focuses on the language of Section 22-11-12, the section  
16 addressing the method of making disbursements from the fund. That provision  
17 states:

18 The state treasurer shall make disbursements from the education  
19 retirement fund . . . only on warrants issued by [DFA] or through any  
20 other process as approved by [DFA]. Warrants for disbursements from  
21 the educational retirement fund . . . shall be issued by [DFA] only upon  
22 voucher of the [educational retirement] director.”



1 The state treasurer is made the “custodian of the funds” by the preceding statutory  
2 section, § 22-11-11(B).

3 {11} Although acknowledging that the Act makes the Board the “trustee” of the  
4 fund, that the Constitution gives the Board “the sole and exclusive fiduciary duty  
5 and responsibility for administration and investment of the trust fund,” N.M. Const.  
6 art. XX, § 22(B), and that the Act explicitly provides that “[t]he amount of salaries  
7 and fees to be paid by the [B]oard shall be fixed by the regulations of the [B]oard,”  
8 § 22-11-10(A), and “shall be paid out of the fund,” § 22-11-10(B), DFA contends  
9 that these provisions do not give the Board the “*sole* authority on *all* matters,” and  
10 argues that construing these provisions to give the Board authority over salary  
11 increases for its employees would render the language of Section 22-11-12,  
12 authorizing DFA to issue warrants for the disbursement of funds, superfluous.

13 {12} We do not agree that the language of the Act and of Article XX, Section 22  
14 of the New Mexico Constitution, making the Board the trustee of the fund with “sole  
15 and exclusive fiduciary duty and responsibility for administration and investment of  
16 the trust fund,” was intended to include only limited authority to make administrative  
17 decisions. Nor do we agree with DFA that Section 22-11-12 is rendered superfluous  
18 by a construction of the Act that recognizes the Board’s broad authority to set  
19 salaries and otherwise make all administrative decisions for the educational  
20 retirement system.

1 **A. The Board’s Fiduciary Authority as Trustee of the Fund**

2 {13} We first note that both the Act, § 22-11-11(B), and Article XX, Section 22(B)  
3 of the New Mexico Constitution, make the Board the “trustee” of the funds. To the  
4 extent there is any confusion or ambiguity about the Legislature’s intent in making  
5 the Board the “trustee of the funds” in Section 22-11-11(B), that ambiguity is  
6 clarified by Article XX, Section 22(B) of the Constitution. Article XX, Section  
7 22(B) not only restates and confirms the Legislature’s designation of the Board as  
8 the trustee for what the Constitution now designates as the educational retirement  
9 trust fund; it assigns to the Board, as trustee, “the sole and exclusive fiduciary duty  
10 and responsibility for administration and investment of the trust fund held by [the  
11 educational retirement system].” A “fiduciary duty” is defined by our precedent as  
12 a duty of loyalty; “[a] fiduciary is obliged to act primarily for another’s benefit in  
13 matters connected with such undertaking.” *Kueffer v. Kueffer*, 1990-NMSC-045,  
14 ¶ 12, 110 N.M. 10, 791 P.2d 461 (internal quotation marks and citation omitted).  
15 Consistent with this definition of fiduciary duty, Article XX, Section 22(A) of the  
16 Constitution provides that the Board is charged with the fiduciary duty to administer  
17 the trust fund “for the sole and exclusive benefit of the members, retirees and other  
18 beneficiaries of that system.” The Board may authorize “[e]xpenditures . . . only . . .  
19 for the benefit of the trust beneficiaries and for expenses of administering the  
20 system.” *Id.*

1 {14} The Legislature, perhaps anticipating some confusion about DFA’s and the  
2 Personnel Board’s role in setting the salaries of Board employees, singled out  
3 expenditures for salaries and consulting fees, specifically providing that “[s]alaries  
4 and fees paid . . . shall be paid out of the fund,” § 22-11-10(B), and further providing  
5 that “[t]he amount of salaries and fees to be paid by the [B]oard shall be fixed by the  
6 regulations of the [B]oard,” § 22-11-10(A). This language plainly provides that  
7 salaries are to be treated the same as other expenditures controlled by the Board.  
8 Like other expenditures, the Board is authorized, and indeed required, to set their  
9 amount based on its determination of what best serves the interests of the  
10 beneficiaries of the fund. The amount set for salaries and fees is critical to the  
11 Board’s ability to hire and retain highly qualified financial managers. Subjecting the  
12 Board to the fiscal restraints on the state budget, set by the governor and enforced  
13 by DFA, would, as the district court noted, authorize DFA and the governor to set  
14 the educational retirement system’s salaries based on the interests of their broad  
15 constituency, in direct contradiction to the clearly expressed intent of the framers  
16 and the Legislature that these rates be set “for the sole and exclusive benefit of the  
17 members, retirees and other beneficiaries of [the retirement] system.” N.M. Const.  
18 art. XX, § 22(A).

19 {15} Although this Court has not previously addressed this question, the New  
20 Hampshire Supreme Court has considered whether the governor of that state has

1 authority similar to that claimed by DFA for itself and for our governor. Like the  
2 Board of our retirement system, the New Hampshire retirement board has a fiduciary  
3 duty to administer the system for the sole benefit of its members. The New  
4 Hampshire Supreme Court held that review by the governor would interfere with the  
5 exercise by the board of its fiduciary duty to trust beneficiaries. *See N.H. Ret. Sys. v.*  
6 *Sununu*, 489 A.2d 615, 619 (N.H. 1985).

7 **B. The State Treasurer’s Role, as Custodian of the Fund, Is Not Superfluous**

8 {16} We do not agree with DFA that Sections 22-11-11(B) and -12, making the  
9 state treasurer the custodian of the funds and requiring distribution of funds upon  
10 warrant by DFA, override the Board’s constitutional and statutory authority to set  
11 the amount of its employees’ salaries. These sections direct the state treasurer, with  
12 DFA’s assistance, to serve as the “custodian” of the funds. The term “custodian” is  
13 not defined by the Act. As the starting point for interpreting undefined terms  
14 contained in a statute, “our courts often use dictionary definitions to ascertain the  
15 ordinary meaning of words that form the basis of statutory construction inquiries.”  
16 *State v. Lindsey*, 2017-NMCA-048, ¶ 14, 396 P.3d 199 (alteration, internal quotation  
17 marks, and citation omitted). *Webster’s Third New International Dictionary*, defines  
18 the term “custodian” as “one that guards and protects or maintains,” and, when used  
19 in relation to as to property, “one entrusted officially with guarding and keeping (as

1 property, artifacts, or records).” *Custodian, Webster’s Third New Int’l Dictionary*  
2 (Unabridged ed. 2002).

3 {17} The statutory authority given to the state treasurer to disburse funds on  
4 warrants issued by DFA when an expenditure is authorized by voucher of the Board  
5 is consistent with the limited role of a custodian in safeguarding funds and ensuring  
6 that they are not fraudulently disbursed by someone without authority to do so. This  
7 ministerial role of protecting the funds and safely processing payments to the  
8 Board’s staff and other expenditures authorized by the Board stands in contrast to  
9 the role assigned to the Board, as trustee of the fund, with the sole authority to invest,  
10 administer, and authorize expenditures from the fund. A fund can have both a trustee  
11 and a custodian without either provision being superfluous; the roles are quite  
12 distinct.

13 **C. DFA’s Reliance on the Statutory Provisions Giving DFA Authority to**  
14 **Supervise Accounting Methods for State Agencies, and on Section 10-9-5**  
15 **of the Personnel Act, Which Concerns Raises for Executive Branch**  
16 **Employees, Is Misplaced**

17 {18} To the extent DFA relies on NMSA 1978, Sections 6-5-1 to -6 (1957, as  
18 amended through 2003), a provision that gives DFA the authority to supervise the  
19 general accounting methods and procedures of state agencies and to work with the  
20 state treasurer to issue warrants for distribution of budgeted funds, to argue that it  
21 has the authority to reject Board-authorized salary increases, we agree with the  
22 district court that “[s]uch general accounting methods and procedures are for the

1 purpose of safeguarding funds from erroneous or unauthorized disbursements, not  
2 granting approval authority.”

3 {19} Looking in particular to Section 10-9-5 of the Personnel Act, we note that the  
4 district court concluded that this statute applies only to the employees of executive  
5 branch agencies, and not to the Board. DFA has not presented any argument or  
6 authority to the contrary on appeal. We, therefore, apply our presumption of  
7 correctness to the decision of the district court. *See State v. Aragon*, 1999-NMCA-  
8 060, ¶ 10, 127 N.M. 393, 981 P.2d 1211 (explaining that “[t]here is a presumption  
9 of correctness in the district court’s rulings,” and it is the burden of the appellant to  
10 show that the district court has erred (alterations, internal quotation marks, and  
11 citation omitted)).

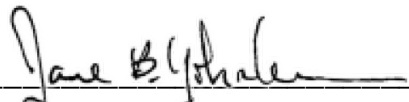
12 {20} In any event, as to both the financial control provisions found in Sections 6-  
13 5-1 to -6, and those found in Section 10-9-5 of the Personnel Act, the rule of statutory  
14 interpretation providing the more specific statute prevails over a general statute also  
15 requires us to reject DFA’s arguments. “A statute enacted for the primary purpose  
16 of dealing with a particular subject prescribing terms and conditions covering the  
17 subject-matter supersedes a general statute which does not refer to that subject  
18 although broad enough to cover it.” *See Lopez ex rel. Lopez v. Barreras*, 1966-  
19 NMSC-209, ¶ 12, 77 N.M. 52, 419 P.2d 251 (internal quotation marks and citation  
20 omitted). We agree with the district court that this principle applies here and provides

1 yet another basis for concluding that the terms of Article XX, Section 22 of the  
2 Constitution and the terms of the Act, directed as they are specifically to the  
3 educational retirement system and to its employees, prevail over any conflicting  
4 terms in the general financial statutes cited by DFA.


5 **CONCLUSION**

6 {21} For the foregoing reasons, we affirm.

7 {22} **IT IS SO ORDERED.**

8   
9 **JANE B. YOHALEM, Judge**

10 **WE CONCUR:**

11   
12 **J. MILES HANISEE, Judge**

13   
14 **JACQUELINE R. MEDINA, Judge**