



1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO** Mark Reynolds

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

3 Filing Date: November 30, 2017

4 **No. A-1-CA-34843**

5 **ADRIAN ALARCON,**

6 Petitioner-Appellee,

7 v.

8 **ALBUQUERQUE PUBLIC SCHOOLS**

9 **BOARD OF EDUCATION and**

10 **BRAD WINTER Ph.D.,**

11 **SUPERINTENDENT OF**

12 **ALBUQUERQUE PUBLIC SCHOOLS,**

13 Respondents-Appellants.

14 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

15 **Shannon C. Bacon, District Judge**

16 consolidated with

17 **No. A-1-CA-34424**

18 **CENTRAL CONSOLIDATED SCHOOL**

19 **DISTRICT NO.22,**

20 Petitioner-Appellant,

21 v.

1 **CENTRAL CONSOLIDATED**  
2 **EDUCATION ASSOCIATION,**

3 Respondent-Appellee.

4 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**  
5 **Alan M. Malott, District Judge**

6 J. Edward Hollington & Associates, P.A.

7 J. Edward Hollington

8 Albuquerque, NM

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24 for Appellee Central Consolidated Education Association

1 **OPINION**

2 **VIGIL, Judge.**

3 {1} These consolidated cases present us with a common question: whether changes  
4 made in 2003 to the Public School Code, NMSA 1978, §§ 22-2-1 to -33-4 (except  
5 Article 5A) (1967, as amended through 2017); vest the local superintendent of a  
6 school district with plenary power and authority to act on all school personnel  
7 matters, to the exclusion of the local school board. The issue is presented in two  
8 separate contexts.

9 {2} In *Alarcon v. Albuquerque Public Schools*, (No. A-1-CA-34843), (the APS  
10 appeal), the district court concluded that the discharge hearing for a certified school  
11 employee under the School Personnel Act, §§ 22-10A-1 to -39, must be conducted  
12 by the school board. The district court issued a permanent writ of mandamus to the  
13 Albuquerque Public Schools (APS) and its superintendent, directing that a proposed  
14 discharge hearing be conducted by the APS school board.

15 {3} In *Central Consolidated School District No. 22 v. Central Consolidated*  
16 *Education Association*, (No. A-1-CA-34424), (the School District appeal), the district  
17 court affirmed the order of the Public Employee Labor Relations Board (PELRB) that  
18 the school board is required to hear and decide appeals from decisions of the school  
19 superintendent under grievance procedures set forth in the collective bargaining

1 agreement (CBA) negotiated between the Central Consolidated Education  
2 Association (Union) and the Central Consolidated School District (School District)  
3 pursuant to the Public Employee Bargaining Act (PEBA), NMSA 1978, §§ 10-7E-1  
4 to -26 (2003, as amended through 2005).

5 {4} In both cases, the respective school boards asserted that changes made to the  
6 Public School Code in 2003 divested school boards of all authority to act on any  
7 personnel matters and vested exclusive authority to act on all personnel matters in the  
8 local superintendent. The linchpins in both cases are the 2003 revisions made to the  
9 Public School Code by H.B. 212 (House Bill 212), 46th Leg., 1st Sess., ch. 153 (N.M.  
10 2003), which require us to engage in statutory interpretation. We first set forth our  
11 standard of review, then discuss House Bill 212 in general terms before addressing  
12 the specific arguments made in each appeal.

### 13 **I. STANDARD OF REVIEW**

14 {5} We are required to construe statutes enacted and amended by the Legislature  
15 in both appeals. We review questions of statutory construction de novo. *See Weiss v.*  
16 *Bd. of Educ. of Santa Fe Pub. Sch.*, 2014-NMCA-100, ¶ 4, 336 P.3d 388. Our  
17 mandated task in construing a statute is to “search for and effectuate” the intent of the  
18 Legislature. *Id.* (internal quotation marks and citation omitted). This task begins with  
19 an examination of the actual language of the statute, “which is the primary indicator

1 of legislative intent.” *Id.* “We look first to the plain language of the statute and give  
2 words their ordinary meaning unless the Legislature indicates a different one was  
3 intended, and we take care to avoid adopting a construction that would render the  
4 statute’s application absurd or unreasonable or lead to injustice or contradiction.”

5 *Miller v. Bank of Am. N.A.*, 2015-NMSC-022, ¶ 11, 352 P.3d 1162 (citation omitted).

6 When the Legislature amends a statute, we presume the Legislature is aware of  
7 existing law, including opinions of our appellate courts, and we normally presume it  
8 intends to change existing law. *Aguilera v. Bd. of Educ.*, 2006-NMSC-015, ¶¶ 19, 24,  
9 139 N.M. 330, 132 P.3d 587.

10 {6} Because we are reviewing a decision of the PELRB in the School District  
11 appeal, there is an additional dimension to our standard of review in that case. Section  
12 10-7E-23(B) of the PEBA provides for judicial review of a final decision of the  
13 PERLB, and the standard of review to be applied is as follows:

14 A person or party, including a labor organization affected by a final  
15 rule, order or decision of the board or local board, may appeal to the  
16 district court for further relief. All such appeals shall be based upon the  
17 record made at the board or local board hearing. All such appeals to the  
18 district court shall be taken within thirty days of the date of the final  
19 rule, order or decision of the board or local board. Actions taken by the  
20 board or local board shall be affirmed unless the court concludes that the  
21 action is:

22 (1) arbitrary, capricious or an abuse of discretion;

1 (2) not supported by substantial evidence on the record  
2 considered as a whole; or

3 (3) otherwise not in accordance with law.

4 *Id.* In our appellate review of whether the district court erred in affirming the  
5 PELRB's decision, we follow the same standard of review used by the district court  
6 sitting in its appellate capacity, and at the same time determine whether the district  
7 court erred. *N.M. Corr. Dep't v. AFSCME Council 18*, \_\_\_-NMCA-\_\_\_, ¶9, \_\_\_P.3d  
8 \_\_\_ (No. A-1-CA-34737, Sept. 5, 2017); see *Paule v. Santa Fe Cty. Bd. of Cty.*  
9 *Comm'rs.*, 2005-NMSC-021, ¶ 26, 138 N.M. 82, 117 P.3d 240 (stating that in  
10 administrative appeals the appellate court reviews the administrative decision under  
11 the same standard used by the district court while also determining whether the  
12 district court erred in its review); see *Regents of Univ. of N.M. v. Fed'n of Teachers*,  
13 1998-NMSC-020, ¶ 17, 125 N.M. 401, 962 P.2d 1236 (applying the general  
14 administrative standard of review applicable to appeals from administrative agencies  
15 to an appeal from a decision of the PELRB).

16 {7} Under the terms of the statute, the School Board bears the burden of  
17 demonstrating on appeal that the decision of the PELRB is "arbitrary, capricious or  
18 an abuse of discretion"; is "not supported by substantial evidence on the record  
19 considered as a whole"; or is "otherwise not in accordance with law." Section 10-7E-  
20 23(B). Our Supreme Court has recently repeated how these factors are considered on

1 appeal as follows: “An agency’s action is arbitrary and capricious if it provides no  
2 rational connection between the facts found and the choices made, or entirely omits  
3 consideration of relevant factors or important aspects of the problem at hand. An  
4 agency abuses its discretion when its decision is not in accord with legal procedure  
5 or supported by its findings, or when the evidence does not support its findings.  
6 Substantial evidence means such relevant evidence as a reasonable mind might accept  
7 as adequate to support a conclusion, and we neither reweigh the evidence nor replace  
8 the fact finder’s conclusions with our own.” *Albuquerque Cab Co. v. N.M. Pub.*  
9 *Regulation Comm’n*, \_\_\_-NMSC-\_\_\_, ¶ 8 (No. S-1-SC-36169 & S-1-SC-36174,  
10 consolidated, Sept. 18, 2017) (alterations, internal quotation marks, and citations  
11 omitted). We apply a whole-record standard of review, and we independently review  
12 the entire record of the administrative hearing to determine if the School Board has  
13 met its burden. *See AFSCME Council 18*, \_\_\_-NMCA-\_\_\_, ¶ 9. While we may give  
14 heightened deference to an agency’s determination on matters that fall within its  
15 special expertise, we still apply a de novo standard of review to statutory  
16 construction. *See Albuquerque Cab Co.*, \_\_\_-NMSC-\_\_\_, ¶ 8; *see also AFSCME*  
17 *Council 18*, \_\_\_-NMCA-\_\_\_, ¶ 9 (noting that an appellate court applies a de novo  
18 standard of review when reviewing an agency’s rulings on statutory construction).

1 **II. HOUSE BILL 212**

2 {8} Prior to the adoption of House Bill 212 in 2003, local school boards were  
3 required by Section 22-5-4 (2002), to be involved in the day-to-day operations of  
4 school districts on an operational level. For example, school boards were required to  
5 “supervise and control” all the public schools in the school district; to apply for  
6 waivers of certain provisions of the Public School Code relating to length of school  
7 day, staffing patterns, subject area or the purchase of instructional materials; to  
8 “supervise and control” all property owned or in the possession of the school district;  
9 and to “repair and maintain” all property belonging to the school district. In addition,  
10 while the 2002 version of Section 22-5-4 provided in Subsection (C) that the local  
11 school board had the powers or duties to “delegate administrative and supervisory  
12 functions of the school board to the superintendent of schools[,]” the statute failed to  
13 specify what those functions were, and certain administrative and supervisory  
14 functions, such as the power to hire, terminate, or discharge employees, could not be  
15 delegated. Section 22-5-4 (2002). For completeness, we set forth Section 22-5-4  
16 (2002) as it existed prior to the changes made by House Bill 212.<sup>1</sup>

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17 <sup>1</sup>22-5-4. Local school boards; powers; duties.

18 A local school board shall have the following powers or duties:

19 A. subject to the regulations of the state board, supervise and control



- 1 all public schools within the school district and all property belonging  
2 to or in the possession of the school district;
- 3 B. employ a superintendent of schools for the school district  
4 and fix his salary;
- 5 C. delegate administrative and supervisory functions of the local  
6 school board to the superintendent of schools;
- 7 D. subject to the provisions of law, approve or disapprove the  
8 employment, termination or discharge of all employees and certified  
9 school personnel of the school district upon a recommendation of  
10 employment, termination or discharge by the superintendent of schools;  
11 provided that any employment relationship shall continue until final  
12 decision of the board. Any employment, termination or discharge  
13 without the prior recommendation of the superintendent is void;
- 14 E. apply to the state board for a waiver of certain provisions of the  
15 Public School Code . . . relating to length of school day, staffing  
16 patterns, subject area or the purchase of instructional materials for the  
17 purpose of implementing a collaborative school improvement program  
18 for an individual school;
- 19 F. fix the salaries of all employees and certified school personnel of  
20 the school district;
- 21 G. contract, lease, purchase and sell for the school district;
- 22 H. acquire and dispose of property;
- 23  
24 I. have the capacity to sue and be sued;
- 25 J. acquire property by eminent domain as pursuant to the procedures  
26 provided in the Eminent Domain Code [NMSA 1978, Sections 42A-1-1  
27 to -33 (1974, as amended through 1981)];
- 28 K. issue general obligation bonds of the school district;

1 {9} Specific to the cases before us here, before House Bill 212 was enacted,  
2 Section 22-5-4(D) (2002) provided that a local school board had the “power or duty”  
3 to:

4 [A]pprove or disapprove the employment, termination, or discharge of  
5 all employees and certified school personnel of the school district upon  
6 a recommendation of employment, termination or discharge by the  
7 superintendent of schools; provided that any employment relationship  
8 shall continue until final decision of the board. Any employment,

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9 L. repair and maintain all property belonging to the school district;

10 M. for good cause and upon order of the district court, subpoena  
11 witnesses and documents in connection with a hearing concerning any  
12 powers or duties of the local school boards;

13 N. except for expenditures for salaries, contract for the expenditure of  
14 money according to the provisions of the Procurement Code [NMSA  
15 1978, §§ 13-1-28 to -199 (1984, as amended through 2016)];

16 O. adopt regulations pertaining to the administration of all powers or  
17 duties of the local school board;

18 P. accept or reject any charitable gift, grant, devise or bequest. The  
19 particular gift, grant, devise or bequest accepted shall be considered an  
20 asset of the school district or the public school to which it is given; and

21 Q. offer and, upon compliance with the conditions of such offer, pay  
22 rewards for information leading to the arrest and conviction or other  
23 appropriate disciplinary disposition by the courts or juvenile authorities  
24 of offenders in case of theft, defacement or destruction of school district  
25 property. All such rewards shall be paid from school district funds in  
26 accordance with regulations that shall be promulgated by the department  
27 of education.

1 termination or discharge without the prior recommendation of the  
2 superintendent is void[.]

3 Section 22-5-4(D) (2002). Thus, prior to 2003, the school board had the sole power  
4 to employ, terminate, or discharge an employee, and the superintendent only had  
5 power to recommend the employment, termination, or discharge of an employee. *See*  
6 *Daddow v. Carlsbad Mun. Sch. Dist.*, 1995-NMSC-032, ¶ 28, 120 N.M. 97, 898 P.2d  
7 1235 (noting that under this prior version of the statute, the school board was the only  
8 entity with the power to make personnel decisions, and the limited role of the  
9 superintendent was to make recommendations before a personnel decision by the  
10 board was made).

11 {10} House Bill 212, sometimes referred to as the Public School Reform Act, made  
12 sweeping changes to statutes dealing with public education, and at the same time,  
13 enacted many new statutes to reform public education in New Mexico. To this end,  
14 House Bill 212 is 107 pages long and consists of 72 sections. In stating its legislative  
15 findings and purpose for enacting House Bill 212, the Legislature determined, among  
16 other findings, that one of the keys to student success in New Mexico is “a  
17 multicultural education system that . . . elevates the importance of public education  
18 in the state by clarifying the governance structure at different levels.” NMSA 1978,  
19 § 22-1-1.2(B)(6) (2015). House Bill 212, section 2 enacted this as Section 22-1-  
20 1.2(B)(5). However, in 2007, the Legislature modified S.B. 561 (Senate Bill 561),

1 48th Leg., 1st Sess., ch. 308, Section 1 (N.M. 2007), added a new Subsection (5) and  
2 moved what was originally Subsection (B)(5) to Subsection (B)(6)). To this end:

3           The [L]egislature finds further that the public school governance  
4 structure needs to change to provide accountability from the bottom up  
5 instead of from the top down. Each school principal, with the help of  
6 school councils made up of parents and teachers, must be the  
7 instructional leader in the public school, motivating and holding  
8 accountable both teachers and students. *Each local superintendent must*  
9 *function as the school district's chief executive officer and have*  
10 *responsibility for the day-to-day operations of the school district,*  
11 *including personnel and student disciplinary decisions.*

12 Section 22-1-1.2(F) (emphasis added). In accordance with these findings, House Bill  
13 212 defined a "local school board" to mean, "the policy-setting body of a school  
14 district[.]" and a "local superintendent" to mean "the chief executive officer of a  
15 school district[.]" NMSA 1978, Section 22-1-2(H), (I) (2015). Consistent with these  
16 findings and definitions, House Bill 212 deleted Subsection (D) from Section 22-5-4  
17 quoted above, and adopted a new statute, Section 22-5-14, setting forth powers and  
18 duties of the superintendent. House Bill 212, §§ 21, 25. Section 22-5-14 in pertinent  
19 part states:

20           A. The local superintendent is the chief executive officer of the school  
21 district.

22           B. The local superintendent shall:

23                   (1) carry out the educational policies and rules of the state board  
24 [department] and local school board;

1 (2) administer and supervise the school district;

2 (3) employ, fix the salaries of, assign, terminate or discharge all  
3 employees of the school district; [and]

4 . . . .

5 (5) perform other duties as required by law, the department or the  
6 local school board.

7 {11} House Bill 212 clarified the powers and duties of local school boards and  
8 superintendents and structured their relationship in a familiar and well understood  
9 framework: the school board enacts policy of the school district and employs a  
10 superintendent as the chief executive officer to implement its policies in the day-to-  
11 day operations of the school district. That is, the local school board governs the  
12 school district through its authority to enact the regulations, standards, and rules  
13 under which the school district operates, and it employs the local superintendent as  
14 the highest ranking manager of the school district to implement them on an  
15 operational level in the day-to-day operations of the local school board. *Cf. Black's*  
16 *Law Dictionary* 289, 1345 (10th ed. 2014) (defining “chief executive officer” as “a  
17 corporation’s highest-ranking administrator or manager, who reports to the board of  
18 directors” and “policy” in part as “a standard course of action that has been officially  
19 established”); NMSA 1978, § 21-7-7 (1995) (“The board of regents shall have power  
20 and it shall be its duty to enact laws, rules and regulations for the government of the

1 university of New Mexico. The board of regents may hire a president for the  
2 university of New Mexico as its chief executive officer and shall determine the scope  
3 of the president's duties and authority."); *State ex rel. Clark v. Johnson*, 1995-NMSC-  
4 048, ¶ 33, 120 N.M. 562, 904 P.2d 11 ("[I]t is the Legislature that creates the law, and  
5 the Governor's proper role is the execution of the laws."); *Salazar v. Town of*  
6 *Bernalillo*, 1956-NMSC-125, ¶¶ 8, 11, 62 N.M. 199, 307 P.2d 186 (agreeing that as  
7 the chief executive officer of the town, a mayor has power to issue orders necessary  
8 or proper for the execution and enforcement of existing ordinances, regulations, and  
9 orders of the town council).

### 10 **III. THE APS APPEAL**

11 {12} This case requires us to determine whether the discharge hearing for a certified  
12 school employee under Section 22-10A-27 (Section 27) of the School Personnel Act,  
13 Sections 22-10A-1 to -39 must be conducted by the local school board or its  
14 superintendent. The district court concluded that the hearing must be conducted by  
15 the school board and issued a permanent writ of mandamus to APS and its  
16 Superintendent, Brad Winter, Ph.D., directing that a proposed discharge hearing for  
17 Adrian Alarcon (Teacher) be conducted by the APS School Board. APS appeals, and  
18 agreeing with the district court, we affirm.

1 **A. BACKGROUND**

2 {13} During the 2014-2015 school year, APS notified Teacher, a certified licensed  
3 school instructor, of its intent to discharge Teacher from its employment pursuant to  
4 Section 27. APS also advised Teacher that he had a right to appeal the intended  
5 discharge at a discharge hearing under Section 27, and Teacher filed a timely appeal  
6 and request for a discharge hearing. APS scheduled the hearing before an assistant  
7 superintendent, and Teacher objected on grounds that he was entitled to a discharge  
8 hearing before the school board, not the superintendent. APS responded that under  
9 its interpretation of legislative intent and implementation of Section 27, its practice  
10 beginning in 2003 was for the superintendent, or the superintendent's designee to  
11 conduct the discharge hearing and issue a written decision on the employee's appeal  
12 after the hearing. Teacher responded, again objecting to the procedure imposed by  
13 APS as contrary to the "clear, specific, and unambiguous" procedures set forth in  
14 Section 27, which require the discharge hearing to be held before the school board,  
15 and not the superintendent. Teacher said that he had "no choice but to appear at the  
16 only hearing provided to him by APS, subject to objections that [the] proceedings are  
17 contrary to state law."

18 {14} Instead of appearing at the hearing under the procedure dictated by APS, and  
19 before the hearing was scheduled to be held, Teacher obtained an alternative writ of

1 mandamus from the district court directing that the discharge hearing be held before  
2 the school board and not the superintendent, or that APS show cause for its lack of  
3 compliance and why the writ should not be made permanent. In its answer to the  
4 alternative writ, APS argued in part that the 2003 revisions to the Public School Code  
5 by House Bill 212 transferred powers previously exercised by the local school board  
6 to the local superintendent, with the result that to the exclusion of local school boards,  
7 the local superintendent has the sole authority to discharge employees. After a  
8 hearing on the merits, the district court disagreed with APS and issued a permanent  
9 writ of mandamus, directing that the discharge hearing be held before the school  
10 board, not the superintendent. The district court also ordered that Teacher remain  
11 employed by APS with all benefits and that the proposed discharge hearing be stayed  
12 during the pendency of the appeal, as stipulated by the parties. APS appeals.

13 **B. ANALYSIS**

14 {15} APS argues three reasons why it contends the district court erred, which we  
15 summarize as follows: (1) the permanent writ of mandamus disregards and renders  
16 meaningless the legislative intent of the 2003 amendments to the Public School Code,  
17 which “explicitly both divested local school boards of the authority to hire and  
18 terminate or discharge employees and vested that authority in local superintendents”;  
19 (2) the district court erred in issuing the permanent writ of mandamus because APS



1 did not have a clear legal duty to provide Teacher with a discharge hearing before the  
2 school board; and (3) the district court erred in issuing the permanent writ of  
3 mandamus because Teacher did not exhaust available plain, speedy, and adequate  
4 administrative remedies. We address each argument in turn.

5 **1. Legislative Intent**

6 {16} APS argues that the 2003 amendments to the Public School Code reflect a  
7 specific legislative intent to vest the local superintendent with plenary authority over  
8 all personnel decisions, thereby divesting local boards of authority to hold discharge  
9 hearings and the ultimate power to discharge employees. APS argues that this specific  
10 legislative intent was expressed when House Bill 212 deleted Subsection (D) from  
11 the enumerated powers of local school boards in Section 22-5-4 (providing that a  
12 local school board must approve or disapprove the employment, termination, or  
13 discharge of all employees of the school district) and simultaneously enacted a new  
14 statute, Section 22-5-14(B)(3), vesting the local superintendent with the power and  
15 duty to “employ, fix the salaries of, assign, terminate or discharge all employees of  
16 the school district.” [Emphasis omitted.]

17 {17} We conclude that APS reads House Bill 212, and the amendments it made to  
18 the Public School Code, too narrowly, without taking into account other changes  
19 made by House Bill 212 to the Public School Code, or the fact that the Legislature re-

1 codified, but did not repeal Section 27. This case involves the contemplated  
2 “discharge” of Teacher, a certified school employee. A “discharge” under the School  
3 Personnel Act is “the act of severing the employment relationship with a certified  
4 school employee prior to the expiration of the current employment contract[.]”  
5 Section 22-10A-2(A); *see* Section 22-1-2(BB) (defining a “certified school  
6 employee” as “a licensed school employee”).

7 {18} House Bill 212 re-compiled, but did not otherwise amend, the procedure for  
8 discharging a certified school employee under Section 27 of the School Personnel  
9 Act. House Bill 212, Section 72(F) (recompiling former NMSA 1978, Section 22-10-  
10 17 (2002) as Section 27). “In the absence of a clear legislative directive to abandon  
11 existing law, we continue to apply it.” *Aguilera*, 2006-NMSC-015, ¶24. Importantly,  
12 Section 27(A) explicitly states that a discharge may “only” occur according to the  
13 procedure it then sets forth in detail. Equally important, Section 27(A) states that a  
14 certified school employee may be discharged only for “just cause,” meaning “a reason  
15 that is rationally related to an employee’s competence or turpitude or the proper  
16 performance of the employee’s duties and that is not in violation of the employee’s  
17 civil or constitutional rights.” Section 22-10A-2(G); *see Aguilera*, 2006-NMSC-015,  
18 ¶¶ 16-25 (discussing “just cause” in the context of a reduction in force policy of a  
19 school district).

1 {19} The requirements for discharging a certified school employee under Section 27  
2 are clear and explicit.<sup>2</sup> Under Section 27, the local school board is vested with

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5 <sup>2</sup>Section 27 provides:

6 A. A local school board or the governing authority of a state agency  
7 may discharge a certified school employee *only* for just cause according  
8 to the following procedure:

9 (1) the superintendent *shall* serve a written notice of his intent  
10 to recommend discharge on the certified school employee in accordance  
11 with the law for service of process in civil actions; and

12 (2) the superintendent *shall* state in the notice of his intent to  
13 recommend discharge the cause for his recommendation and *shall*  
14 advise the certified school employee of his right to a discharge hearing  
15 before the local school board or governing authority as provided in this  
16 section.

17 B. A certified school employee who receives a notice of intent to  
18 recommend discharge pursuant to Subsection A of this section *may*  
19 exercise his right to a hearing before the local school board or governing  
20 authority by giving the local superintendent or administrator written  
21 notice of that election within five working days of his receipt of the  
22 notice to recommend discharge.

23 C. The local school board or governing authority *shall* hold a  
24 discharge hearing no less than twenty and no more than forty working  
25 days after the local superintendent or administrator receives the written  
26 election from the certified school employee and *shall* give the certified  
27 school employee at least ten days written notice of the date, time and  
28 place of the discharge hearing.

29 D. Each party, the local superintendent or administrator and the  
30 certified school employee, may be accompanied by a person of his  
31 choice.

1 the exclusive authority to discharge a certified school employee. Further, the school  
2 board can only discharge where "just cause" is proven by the superintendent by a  
3 preponderance of the evidence. Procedurally, the superintendent "shall" serve the  
4 employee with a written notice of his intent to "recommend" discharge, stating in the  
5 notice the cause for his recommendation, as well as informing the employee of his  
6 right to a discharge hearing "before the local school board." Section 27(A). The

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7 E. The parties shall complete and respond to discovery by deposition  
8 and production of documents prior to the discharge hearing.

9 F. The local school board or governing authority shall have the  
10 authority to issue subpoenas for the attendance of witnesses and to  
11 produce books, records, documents and other evidence at the request  
12 of either party and shall have the power to administer oaths.

13 G. The local superintendent or administrator *shall* have the burden of  
14 proving by a preponderance of the evidence that, at the time of the  
15 notice of intent to recommend discharge, he had just cause to discharge  
16 the certified school employee.

17 H. The local superintendent or administrator *shall* present his evidence  
18 first, with the certified school employee presenting his evidence  
19 thereafter. The local school board or governing authority *shall* permit  
20 either party to call, examine and cross-examine witnesses and to  
21 introduce documentary evidence.

22 I. An official record *shall* be made of the hearing. Either party may  
23 have one copy of the record at the expense of the local school board or  
24 governing authority.

25 J. The local school board *shall* render its written decision within  
26 twenty days of the conclusion of the discharge hearing.  
27 (Emphasis added.)

1 employee “may” exercise his right to a discharge hearing before the school board by  
2 giving written notice of that election, Section 27(B), and if the employee makes that  
3 election, the school board “shall” hold a discharge hearing. Section 27(C). At the  
4 hearing, the superintendent “shall” have the burden of proving that, at the time of the  
5 notice of intent to recommend discharge, he “had just cause to discharge the certified  
6 school employee.” Section 27(G). The superintendent “shall” present his evidence  
7 first, followed by the certified school employee’s proof. Section 27(H). After hearing  
8 and considering the evidence, “the local school board shall render its written  
9 decision[.]” Section 27(J); *see Larsen v. Bd. of Educ.*, 2010-NMCA-093, ¶ 7, 148  
10 N.M. 920, 242 P.3d 487 (describing in general terms the statutory process under  
11 Section 27 for discharging a certified school employee). This framework is consistent  
12 with the roles assigned to school boards and superintendents by House Bill 212, and  
13 corresponds with both the duty of the superintendent to carry out the rules of the  
14 school board and the power of the school board to adopt and interpret its own rules.  
15 {20} We also note that prior to the adoption of House Bill 212 in 2003, a hearing  
16 before the school board was always required for a discharge to take place, because  
17 the 2002 version of Section 22-5-4, quoted in footnote 1, directed that the school  
18 board had the exclusive authority to employ, terminate, or discharge a school  
19 employee, and that “any employment relationship shall continue until final decision

1 of the board.” Under Section 22-5-14(B)(3), if a certified school employee does not  
2 exercise his right to a hearing, the discharge now becomes effective without the  
3 necessity for school board action. In addition, before the Public School Code was  
4 amended in 2003 by House Bill 212, *no* employee could be employed, terminated, or  
5 discharged without the express approval of the school board. Under Section 22-5-  
6 14(B)(3), subject to any other laws or requirements that may apply, the superintendent  
7 has authority to employ, terminate and discharge all *noncertified* school employees  
8 of the school district without school board approval. However, the procedural and  
9 substantive rights contained in Section 27 are a legislative expression that the  
10 discharge of a certified school employee is anything but a managerial task to be  
11 performed by the superintendent in the day-to-day operations of the school district.

12 {21} Discharging a teacher in the middle of the school year is significant because  
13 a teacher may not have an opportunity to find other employment, causing extreme  
14 hardship to the teacher. *See Aguilera, 2006-NMSC-015, ¶ 32.* Certified school  
15 employees have historically been accorded procedural and substantive rights by the  
16 Legislature to encourage individuals to enter the profession of teaching our children  
17 and to protect educators in their employment. *See id. ¶¶ 8-15* (discussing statutory  
18 and jurisprudential goals of teachers’ tenure statutes). These goals are expressed in  
19 the Public School Code, where the Legislature finds that one of the keys to student

1 success in New Mexico is to have a multi-cultural system that “attracts and retains  
2 quality and diverse teachers[.]” Section 22-1-1.2(B)(1). In recognition of the realities  
3 attending a discharge in the middle of the school year, and consistent with its  
4 commitment to protect the rights of certified school employees, we conclude that the  
5 Legislature consciously left intact the procedural and substantive protections of  
6 Section 27, and that it intended those protections to co-exist with Section 22-5-14.

7 {22} For all the foregoing reasons, we reject the argument made by APS that there  
8 is an irreconcilable conflict between Section 22-5-14 on the one hand, and Section  
9 27, on the other hand. Section 27 under the Personnel Act and Section 22-5-14(B)(3)  
10 under the Public School Code can be construed in harmony with each other. *See*  
11 *Miller*, 2015-NMSC-022, ¶ 12 (stating that we consider statutes dealing with the same  
12 general subject together, in a way that facilitates the achievement of their respective  
13 goals when possible); *Luboyeski v. Hill*, 1994-NMSC-032, ¶ 10, 117 N.M. 380, 872  
14 P.2d 353 (“Whenever possible, we must read different legislative actions as  
15 harmonious instead of as contradicting one another.”); NMSA 1978, Section 12-2A-  
16 10(A) (1997) (“If statutes appear to conflict, they must be construed, if possible, to  
17 give effect to each.”).

18 {23} We also reject the argument that House Bill 212 repealed, by implication,  
19 Section 27. The repeal of an earlier statute by implication is not favored, and we

1 strive to construe statutes harmoniously with each other when possible. *See State ex*  
2 *rel. Brandenburg v. Sanchez*, 2014-NMSC-022, ¶¶ 11, 17, 329 P.3d 654. There must  
3 be more than a mere difference in the provisions in order for a later statute to be  
4 construed as repealing an earlier statute. *See Alvarez v. Bd. of Trs. of La Union*  
5 *Townsite*, 1957-NMSC-022, ¶ 10, 62 N.M. 319, 309 P.2d 989. “There must be what  
6 is often called such a positive repugnancy between the provisions of the old and the  
7 new statutes that they cannot be reconciled and made to stand together.” *Id.*; *see*  
8 *Stokes v. N.M. Bd. of Educ.*, 1951-NMSC-031, ¶ 5, 55 N.M. 213, 230 P.2d 243  
9 (stating that a statute is repealed by implication when the latter statute is so  
10 inconsistent with and repugnant to the former law on the same subject as to be  
11 irreconcilable with it, “and especially does this result follow where the latter act  
12 expressly notices the former in such a way as to indicate an intention to abrogate”).  
13 {24} In its final argument, APS refers us to two pages from a publication that was  
14 apparently issued in June 2003 by the Department of Education (now known as the  
15 Public Education Department) and the Legislative Education Study Committee. The  
16 document is entitled, “HB 212 Public School Reform[:] Questions & Answers for  
17 School Districts and Constituents By Section” and two pages from the document are  
18 attached as an exhibit to APS’ answer to the alternative writ of mandamus. Therein,  
19 an unknown author states that the words “local superintendent” should be substituted



1 for the words “local school board” wherever they appear in Section 22-10-17 (2002),  
2 which we have already noted, is now codified as Section 27. While conceding that the  
3 document itself is not a formal rule or regulation, APS contends that it is tantamount  
4 to an agency rule or regulation entitled to deference in interpreting Section 27. The  
5 document was not admitted into evidence at the hearing on the merits, and it is not  
6 the subject of any stipulation by the parties. Without any information concerning the  
7 document, such as how it came about, why it was published, or who wrote it, we do  
8 not further consider the two pages from the document. We would otherwise be  
9 speculating on their significance on how they relate to the question of legislative  
10 intent before us.

11 **2. Clear Legal Duty to Provide a Hearing**

12 {25} APS argues that the district court erred in issuing the permanent writ of  
13 mandamus because “[APS did] not have a clear legal duty to provide [Teacher] with  
14 a discharge hearing before the [s]chool [b]oard[.]” See NMSA 1978, Section 44-2-4  
15 (1884) (stating that mandamus may issue to a board or person “to compel the  
16 performance of an act which the law specially enjoins as a duty”); *see generally*  
17 *Mimbres Valley Irrigation Co. v. Salopek*, 2006-NMCA-093, ¶¶ 10-15, 140 N.M.  
18 168, 140 P.3d 1117 (describing in general how the statutes governing mandamus  
19 operate).

1 {26} We generally review the granting or denial of a writ of mandamus under an  
2 abuse of discretion standard. *See State ex rel. Stapleton v. Skandera*, 2015-NMCA-  
3 044, ¶ 5, 346 P.3d 1191. However, within that context, we are required to interpret  
4 Section 27, as well as the statutes relating to a writ of mandamus. Our review is  
5 therefore de novo. *See Weiss*, 2014-NMCA-100, ¶ 4.

6 {27} We begin with Section 27. We have already quoted and described the operation  
7 of Section 27. The mandatory obligation given to superintendents and school boards  
8 on the procedure to follow before a certified school employee can be discharged  
9 could not be more clearly stated. The school board “shall” hold a discharge hearing  
10 once a certified school employee demands a hearing. There is no option. And there  
11 is no room for interpretation. APS argues that the Legislature “unequivocally  
12 divested” and “eradicated” a school board of authority to discharge employees, and  
13 invested “exclusive authority” in the superintendent to discharge school personnel  
14 such as Teacher. We have already answered those arguments.

15 {28} For additional support of its argument that it had no clear legal duty to provide  
16 Teacher with a discharge hearing before the school board, APS asks us to consider  
17 two additional attachments to its answer to the alternative writ. One of the exhibits  
18 is a decision and order issued by the secretary of education suspending the “Board of  
19 Education of the Questa Independent School District.” Nothing in this decision and

1 order requires or allows a certified school employee's discharge hearing to be held  
2 before the superintendent. The second exhibit consists of the findings of fact and  
3 conclusions of law of an independent arbitrator following a de novo hearing held  
4 under Section 22-10A-28 (providing that an appeal from a discharge hearing before  
5 the school board lies with an independent arbitrator who conducts a de novo hearing).  
6 A de novo hearing is an entirely new hearing that is conducted as if there had been  
7 no prior hearing. *See State ex rel. Bevacqua-Young v. Steele*, \_\_\_-NMCA-\_\_\_, ¶ 9,  
8 \_\_\_ P.3d \_\_\_ (No. A-1-CA-34882, July 17, 2017). Therein, the arbitrator concluded  
9 that the procedure utilized by APS to hold a discharge hearing before the  
10 superintendent does not violate Section 27, on the basis that Section 27 and 22-5-14  
11 are in "direct conflict" with one another. The arbitrator did no analysis, and again,  
12 this decision does not require APS to direct that discharge hearings be held before the  
13 superintendent. To the extent APS is arguing that because it previously ordered that  
14 the discharge hearing of a certified school employee be conducted by the  
15 superintendent, it is now required to do so in all cases, we are not persuaded.

16 {29} Section 27 is clear in its mandate that a discharge hearing is to be conducted  
17 before the school board, where the superintendent has the burden of proving that, at  
18 the time of the notice of intent to recommend discharge, the superintendent had just  
19 cause to discharge the certified employee. Section 22-5-14 does not unequivocally

1 divest the school board from conducting a discharge hearing, and Section 22-5-14 can  
2 be applied harmoniously with Section 27. APS had a clear, legal duty under Section  
3 27 to provide Teacher with a discharge hearing before the school board, and it had  
4 no authority by regulation or otherwise, to violate the clear, unequivocal mandate of  
5 Section 27. The discretion otherwise afforded the Public Education Department and  
6 APS “may not justify altering, modifying or extending the reach of a law created by  
7 the Legislature.” *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 22, 125 N.M.  
8 343, 961 P.2d 768. *See In re Adjustments to Franchise Fees*, 2000-NMSC-035, ¶ 19,  
9 129 N.M. 787, 14 P.3d 525 (stating that “[w]ith respect to the principle of separation  
10 of powers, an unlawful conflict or infringement occurs when an administrative  
11 agency goes beyond the existing New Mexico statutes or case law it is charged with  
12 administering and claims the authority to modify this existing law or to create new  
13 law on its own” (internal quotation marks and citation omitted)); *Chalamidas v. Envtl.*  
14 *Improvement Div.*, 1984-NMCA-109, ¶ 13, 102 N.M. 63, 691 P.2d 64 (stating that  
15 “[a]n agency cannot amend or enlarge its authority through rules and regulations.”).

16 {30} We therefore reject the argument of APS that it did not have a clear, legal duty  
17 to provide Teacher with a discharge hearing before the school board.

### 18 3. Failure to Exhaust Administrative Remedies

19 {31} For its last argument, APS contends that because Teacher did not attend the

1 discharge hearing before the superintendent, and then appeal, the writ of mandamus  
2 was improper because Teacher failed to exhaust the plain, speedy, and adequate  
3 administrative remedies available to him. *See* NMSA 1978, § 44-2-5 (1884) (“The  
4 writ [of mandamus] shall not issue in any case where there is a plain, speedy and  
5 adequate remedy in the ordinary course of law.”). Because this argument also presents  
6 us with a question of statutory construction, our review is *de novo*. *See Weiss*, 2014-  
7 NMCA-100, ¶ 4.

8 {32} APS argues that because Teacher could appeal an adverse decision from a  
9 discharge hearing conducted by the superintendent to an independent arbitrator who  
10 hears the case *de novo*, and from there, to the district court under Section 22-10A-28,  
11 Teacher had a plain, speedy, and adequate remedy at law, which he failed to pursue,  
12 and Teacher was therefore not entitled to a writ of mandamus. For the same reason,  
13 APS argues that the district court was precluded from exercising subject matter  
14 jurisdiction over the mandamus action. We disagree with both assertions.

15 {33} APS’ argument overlooks Teacher’s assertion from the very beginning: that he  
16 was entitled to a discharge hearing before the school board, a substantive and  
17 procedural right afforded to all certified public school employees by the Legislature  
18 under Section 27. APS was acting *ultra vires* (unauthorized and beyond its power) in  
19 directing Teacher to appear at the discharge hearing before his accuser, the

1 superintendent, rather than before the school board, as required by Section 27. No de  
2 novo appeal before an independent arbitrator, and from there, to the district court, will  
3 restore Teacher to the substantive and procedural right to a discharge hearing before  
4 the school board provided by Section 27.

5 {34} The constitutional right to a pre-termination hearing afforded all school  
6 employees under *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), includes  
7 the right of an employee to present his or her side of the case because of its obvious  
8 value in reaching an accurate decision on a proposed termination. *See id.* at 543.  
9 “Even where the facts are clear, the appropriateness or necessity of the discharge may  
10 not be; in such cases, the only meaningful opportunity to invoke the discretion of the  
11 decisionmaker is likely to be before the termination takes effect.” *Id.* Under New  
12 Mexico law, this means having a fair opportunity to invoke the discretion of the  
13 individual or body charged with the pre-termination decision. *See City of*  
14 *Albuquerque v. Chavez*, 1998-NMSC-033, ¶ 15, 125 N.M. 809, 965 P.2d 928. Here,  
15 the Legislature has mandated that the discretion lies with the school board, not the  
16 superintendent, and with good reason. At the very least, there is an appearance of  
17 impropriety in requiring an employee, such as Teacher, to appear before his accuser,  
18 the superintendent. The Legislature left this decision to the elected members of the  
19 local board of education, who can take a more dispassionate view of the evidence and

1 decide if an employee's conduct warrants a discharge or some lesser sanction. When  
2 an employee, such as Teacher, is denied his rights under Section 27, an  
3 "impermissibly high risk" exists that the employee will be erroneously terminated.  
4 *See Chavez*, 1998-NMSC-033, ¶ 15.

5 {35} In addition, our case law does not require Teacher to appear in a hearing that  
6 is contrary to the requirements of Section 27, and then appeal, in lieu of seeking a  
7 writ of mandamus. We begin with our holding that Section 27 absolutely affords  
8 Teacher the right to a discharge hearing before the school board. In *Franco v.*  
9 *Carlsbad Municipal Schools*, 2001-NMCA-042, ¶¶ 4, 6-8, 130 N.M. 543, 28 P.3d  
10 531, a tenured, non-certified school employee was terminated, but not advised of his  
11 right to appear before the school board at a pre-termination hearing to give the board  
12 his explanation of why he should not be terminated. After the employee was awarded  
13 damages in a wrongful termination suit, the school district appealed, arguing that the  
14 district court erred in allowing the suit to go forward because the employee had failed  
15 to exhaust his administrative remedies. *Id.* ¶ 2. Rejecting this argument, this Court  
16 said that the issue was not whether the school district would have afforded the  
17 employee his right to a hearing before the school board or arbitration had he  
18 requested it, but whether the school district "thwarted" the school employee's ability  
19 to invoke those rights by not giving him notice of those rights. *Id.* ¶ 17. What we said

1 in *Franco* applies here:

2           Actions to terminate constitutionally protected rights must be  
3 conducted with scrupulous fairness. Such was not the case in the matter  
4 before us. [The employee] was terminated by the [d]istrict without being  
5 afforded the mandatory pre-termination or post-termination process to  
6 which he was entitled. Exhaustion of administrative remedies, as a  
7 precursor to [the employee's] suit for damages, was not required because  
8 the [d]istrict, by its actions, deprived [the employee] of his right to  
9 initiate and sustain the administrative process mandated by statute—a  
10 process which would have provided him with a meaningful opportunity  
11 to challenge the grounds for termination.

12 *Id.* ¶ 20 (citation omitted). Here the school district insisted that Teacher not be given  
13 the hearing he was entitled to receive under Section 27. Proceeding as the school  
14 district insisted would not have restored Teacher to the hearing he was entitled to  
15 receive.

16 {36} *Sanchez v. Board of Education*, 1961-NMSC-081, ¶¶ 1-4, 68 N.M. 440, 362  
17 P.2d 979, involved a dispute between a teacher and the local school board over  
18 whether he had been dismissed. The teacher sought a writ of mandamus to compel his  
19 reinstatement, which the district court granted. *Id.* ¶ 1. As in this case, the teacher was  
20 entitled to be served with a notice of dismissal in which the school board specified  
21 its reasons to terminate the teacher, followed by a hearing before the local school  
22 board *Id.* ¶ 7. Pertinent to the issue before us here, our Supreme Court said, "It should  
23 be apparent that, under the circumstances here present, there must be a notice of  
24 dismissal containing the causes therefor, and a hearing in conformity with the law.



1 A refusal to grant him such a hearing would probably warrant the granting of a writ  
2 of mandamus to require a hearing, but such was not the relief sought nor granted.  
3 Such a remedy may still be available should the board continue to refuse to follow the  
4 clear direction of the statute.” *Id.* ¶ 8. Because the teacher in *Sanchez* had not  
5 followed the required statutory procedure, our Supreme Court concluded that  
6 dismissal of the teacher’s suit was proper. *Id.* ¶¶ 14, 17. Here, in contrast, Teacher  
7 enforced his statutory right to a hearing before the school board as provided by  
8 Section 27 by seeking and obtaining a writ of mandamus.

9 {37} Finally, in *Stapleton v. Huff*, 1946-NMSC-029, ¶ 2, 50 N.M. 208, 173 P.2d 612,  
10 *superseded by statute as stated in Sanchez*, 1961-NMSC-081, the teacher had been  
11 a certified school employee for twenty-two years. *Stapleton*, 1946-NMSC-029, ¶ 2.  
12 After being advised that his contract would not be renewed, the teacher appeared at  
13 a hearing before the local school board, then appealed to the state board of education.  
14 *Id.* ¶ 3. In neither hearing was the teacher afforded his statutory right to confront and  
15 cross-examine the witnesses against him. *Id.* ¶¶ 3-4. After concluding that by  
16 appealing to the State Board of Education, the teacher waived the errors committed  
17 by the local school board, *id.* ¶ 10, our Supreme Court said that the teacher was  
18 deprived of his right to the hearing that was statutorily required before the State  
19 Board of Education. *Id.* ¶ 13. Our Supreme Court said, “What the [teacher] has been

1 denied is the hearing before [the] State Board of Education to which he was entitled  
2 under the law. This being a clear legal right is enforceable by mandamus[.]” *Id.* ¶ 14.  
3 This holding was consistent with *Brown v. Romero*, 1967-NMSC-057, 77 N.M. 547,  
4 425 P.2d 310. In *Brown*, a teacher sued a local school board and the state board of  
5 education for breach of tenure rights and for a de novo trial on the issue of her tenure  
6 rights, when her own pleadings disclosed that she was denied her statutory rights to  
7 a hearing before the local school board and the state board of education. *Id.* ¶¶ 1-5.  
8 Our Supreme Court said, “Mandamus was available as a remedy to test [the teacher’s]  
9 right to a hearing before the governing board.” *Id.* ¶ 8.

10 {38} Teacher had a clear statutory right to a hearing to contest his pending discharge  
11 before the School Board just like the teachers in *Stapleton* and *Brown*, and under the  
12 circumstances, a writ of mandamus was a proper vehicle for protecting that right. As  
13 a result, Teacher was not required to appear at the proposed discharge hearing before  
14 the superintendent, and then appeal before an arbitrator for a de novo hearing,  
15 followed by a limited appeal to the district court in lieu of seeking and obtaining the  
16 writ of mandamus.

### 17 **C. RESULT**

18 {39} For all the foregoing reasons, we conclude that the district court did not err in  
19 issuing the permanent writ of mandamus to APS.

1 **IV. THE SCHOOL DISTRICT APPEAL**

2 {40} Pursuant to PEBA, Sections 10-7E-1 to -26, the Union and the School District  
3 entered into a CBA in 2012 to provide terms and conditions of employment for all  
4 certified school employees, all transportation employees, and all educational support  
5 professionals of the School District (the bargaining unit). This appeal requires us to  
6 determine whether the changes made to the Public School Code by House Bill 212  
7 prohibit the school board of the School District from hearing and deciding the  
8 Union's grievance pursuant to the grievance procedure negotiated by the parties in  
9 the CBA.

10 **A. BACKGROUND**

11 **1. Proceedings Before the PELRB**

12 {41} The Union filed a complaint with the PELRB alleging: (1) that the school  
13 board of the School District failed and refused to process grievances as required by  
14 the CBA in violation of the PEBA (grievance complaint); and (2) that the School  
15 District gave certain employees additional work and paid them an additional,  
16 "foreman" stipend, thereby changing the terms and conditions of their employment  
17 without bargaining with the Union as required by the PEBA (foreman stipend  
18 complaint). *See* Section 10-7E-9(A)(3) and (F) (providing that the PELRB has the  
19 power to enforce the PEBA, and to this end, may establish rules necessary for the

1 filing, hearing of, and determination of complaints of practices prohibited by the  
2 PEBA).

3 {42} In its answer to the grievance complaint, the School District asserted the  
4 defense that revisions made in 2003 to the Public School Code by House Bill 212  
5 transferred powers from the school board to the superintendent of the school district,  
6 with the result that the school board had no authority to hear and decide grievances.  
7 In its answer to the foreman stipend complaint, the School District admitted that three  
8 existing employees agreed to take on additional responsibilities for an additional  
9 stipend, but denied that there was a PEBA violation because no new foreman  
10 positions were created. In addition, the School District argued that if bargaining was  
11 required, the Union waived the failure to bargain because it agreed to, and acquiesced  
12 in, the School District's long practice of paying additional stipends to employees to  
13 perform additional tasks beyond those inherent in their base job.

14 {43} An evidentiary hearing lasting more than twelve hours was held before the  
15 designated hearing officer, Thomas J. Griego. *See* Section 10-7E-12(C) (providing  
16 that the PELRB may appoint a hearing examiner to conduct an adjudicatory hearing  
17 in a dispute on whether there has been a violation of the PEBA). After the parties  
18 submitted their respective requested findings of fact and conclusions of law, the  
19 hearing officer filed a detailed thirty-nine-page report and recommended decision,

1 setting forth his findings of fact, reasoning, and conclusions of law. The hearing  
2 officer found in favor of the Union on both complaints. The hearing officer rejected  
3 the School District's defenses and concluded that the School District committed  
4 prohibited labor practices under the PEBA when: (1) the school board refused to  
5 review grievances appealed to the school board pursuant to the negotiated grievance  
6 procedure contained in the CBA; and (2) the School District gave three employees  
7 in the bargaining unit additional work and paid them an additional "foreman" stipend  
8 without bargaining those changes with the Union.

9 **2. The Grievance Complaint**

10 {44} The hearing officer found that the parties negotiated a CBA in which they  
11 agreed upon procedures for filing and processing grievances. The grievance  
12 procedure has five steps. Each succeeding step is followed if the preceding step does  
13 not resolve the issue. We summarize those steps as follows: Step 1: the "discussion  
14 level" in which a grievant meets with the immediate supervisor to attempt resolving  
15 the issue; Step 2: the "supervisor level" in which a written grievance is submitted to  
16 the immediate supervisor, and the supervisor communicates a written decision in  
17 writing; Step 3: the "superintendent level" which is invoked by appealing the  
18 immediate supervisor's decision in writing to the superintendent who renders a  
19 written decision after meeting with the grievant and the supervisor and reviewing the

1 record and information presented; Step 4: the “board level” which is invoked by  
2 appealing to the school board through the superintendent; and Step 5: the “arbitration  
3 level” after the school board renders its decision, in which the arbitrator conducts a  
4 hearing and renders a final and binding decision.

5 {45} The question before the hearing officer was whether the school board complied  
6 with Step 4 at the school board level. The CBA provides that if the Union “is not  
7 satisfied” with the superintendent’s decision, the Union “may appeal” to the board of  
8 education “through the [s]uperintendent.” The CBA further specifically provides that  
9 at Step 4:

10 The [school b]oard will review the grievance and, at the [school b]oard’s  
11 discretion, the [Union] may be invited to appear before the  
12 [s]uperintendent and the [school b]oard at their initial or subsequent  
13 meeting to present its position and respond to question[s]. The [Union]  
14 shall be advised in writing of the decision of the [school b]oard within  
15 thirty (30) days of the [school b]oard’s receipt of the request for review.

16 The hearing officer first rejected the School District’s defense that the school board  
17 had no authority to hear and decide grievances as required by Step 4 because  
18 amendments to the Public School Code enacted by House Bill 212 in 2003 transferred  
19 certain duties from the school board to the superintendent. Secondly, the hearing  
20 officer found that the School District failed to comply with its duties under Step 4.

21 {46} The hearing officer found that the school board adopted a blanket policy to  
22 send all grievances brought before it back to the superintendent. The hearing officer

1 further found that, consistent with the blanket policy, the School District violated  
2 Step 4 multiple times. In one instance, the school board placed a grievance on its  
3 agenda but took no action on the grievance and did not issue a written decision  
4 concerning the grievance to the Union. In a second instance, the superintendent  
5 refused to place a filed appeal on the school board's agenda because he summarily  
6 dismissed it himself without advising the board members; and in a third instance, the  
7 school board refused to review an appeal because the Union had also filed a  
8 prohibited practices complaint regarding the same issue.

9 {47} The hearing officer concluded that by refusing to review grievances appealed  
10 to the school board under Step 4 of the negotiated grievance procedure, the School  
11 District committed a prohibited practice in violation of Section 10-7E-19(G) and (H)  
12 of the PEBA (providing that it is a violation of the PEBA to "refuse or fail to comply  
13 with a provision of the [PEBA] or [PELRB] rule" and to "refuse or fail to comply  
14 with a [CBA]").

### 15 **3. The Foreman Stipend Complaint**

16 {48} The hearing officer found that the School District designated three bargaining  
17 employees as "transportation foreman" and made changes to their duties, hours, and  
18 pay, without bargaining with the Union, in violation of the PEBA. The hearing officer  
19 also rejected the School District's defense that the Union waived the failure to

1 bargain on grounds that the Union had acquiesced in the historical practice of  
2 “management unilaterally establishing stipends and to whom they [would] be paid.”  
3 To the contrary, the hearing officer found, in the CBA, that the Union and the School  
4 District had entered into a memorandum of understanding to create a joint committee  
5 to review the requirements to be met for an employee’s “increment, stipend, or  
6 activity allowance.”

7 {49} The hearing officer also made a specific finding that the “facts negate the  
8 [School] District’s claim of waiver.” The hearing officer concluded that evidence  
9 presented by the School District established that most of the stipends the School  
10 District referred to were of employees outside the Union’s bargaining unit. As for  
11 those employees who were in the bargaining unit and received stipends, the hearing  
12 officer found that “there is no evidence to support the proposition that the [U]nion  
13 was made aware of the payment of those stipends and given an opportunity to bargain  
14 them, a pre-requisite to waiver.”

15 {50} The hearing officer concluded that by giving three bargaining unit employees  
16 additional work and paying them an additional “foreman” stipend without bargaining  
17 those changes with the Union, the School District committed a prohibited practice in  
18 violation of Section 10-7E-19(F) and (G) of the PEBA (stating it is a violation of the  
19 PEBA “[to] refuse to bargain collectively in good faith with the exclusive



1 representative[.]” and “[to] refuse . . . to comply with a provision of the [PEBA] or  
2 [PELRB] rule[.]”).

3 {51} The School District appealed from the conclusions of the hearing officer and  
4 the findings of fact supporting them to the PELRB. The PELRB voted unanimously  
5 to adopt the hearing officer’s findings of fact, conclusions of law, and rationale as its  
6 own. *See* Section 10-7E-9(D) (providing that the PELRB shall decide issues by  
7 majority vote and shall issue its decisions in the form of written orders and opinions).

8 **B. PROCEEDINGS BEFORE THE DISTRICT COURT**

9 {52} The School District next appealed the decision of the PELRB to the district  
10 court. *See* Section 10-7E-23(B) (providing that a person or party affected by a final  
11 order or decision of the PELRB may appeal to the district court); Rule 1-074 NMRA  
12 (setting forth the procedure for an administrative appeal to the district court). After  
13 the School District filed its statement of appellate issues, the Union responded, and  
14 the School District filed its reply to the Union’s response, the district court held a  
15 hearing. Following the hearing, the district court filed a memorandum opinion and  
16 order affirming the order of the PELRB.

17 {53} Like the hearing officer and the PELRB, the district court concluded that the  
18 2003 amendments to the Public School Code did not prohibit the school board from  
19 performing its duties at Step 4 of the CBA. The district court further determined that

1 the School District contractually obligated itself to review the superintendent's  
2 decision when his decisions were appealed pursuant to Step 4 of the CBA grievance  
3 process. Because "[a]n appeal, to be meaningful, involves the exercise of independent  
4 judgment as to whether the decision rendered by the superintendent is correct[,]" and  
5 the School District failed to point to any evidence that the school board was providing  
6 meaningful review at Step 4, the district court concluded that the hearing officer's  
7 conclusion (adopted by the PELRB) that the School District violated the CBA was  
8 not arbitrary and capricious.

9 {54} In the district court, the School District no longer argued that it was not  
10 required to bargain with the Union the changes it made to the terms and conditions  
11 of employment to certain employees by giving them additional duties and paying  
12 them an additional foreman stipend. Instead, the Union relied on its defense that the  
13 Union had waived the failure to bargain. On this point, the district court found that  
14 substantial evidence supported the hearing officer's (and PERB's) finding that there  
15 was no waiver by the Union.

16 {55} The School Board filed a petition for writ of certiorari with this Court, which  
17 we granted. *See* Rule 12-505 NMRA (setting forth procedure for review by the Court  
18 of Appeals of decisions of the district court from administrative appeals). The issues  
19 presented are: (1) whether the 2003 revisions made to the Public School Code by

1 House Bill 212 stripped the school board of authority to hear and decide grievances  
2 as provided in the CBA; and (2) whether substantial evidence supports the finding of  
3 the PELRB that the Union did not waive its right to bargain the changed terms and  
4 conditions of employment of employees who were given additional duties and paid  
5 an additional stipend by the School District.

6 **C. ANALYSIS**

7 {56} The School District's argument is grounded on the same amendments made to  
8 the Public School Code by House Bill 212 that APS relies on in its appeal. To  
9 reiterate, House Bill 212 enacted a new statute, Section 22-5-14 (Section 14) which  
10 gives the superintendent the powers to "administer and supervise the school district"  
11 and to "employ, fix the salaries of, assign, terminate or discharge all employees of the  
12 school district[.]" Section 14(B)(2), (3). Secondly, House Bill 212 deleted Section 22-  
13 5-4(D) (providing that a local school board was invested with the "powers or duties"  
14 to "approve or disapprove the employment, termination, or discharge of all employees  
15 and certified school personnel of the school district upon a recommendation . . . by  
16 the superintendent") from the enumerated powers and duties of a school board. The  
17 School Board contends that because of the powers given to superintendents, and  
18 because the school board is "given no authority with respect to school personnel" that

1 “[t]he Legislature took away the power of school boards to interfere in personnel  
2 matters when it enacted [House Bill] 212.”

3 {57} We address the School District’s argument within the context of the PEBA,  
4 which like House Bill 212, was enacted by the Legislature in 2003. Public Employees  
5 were not given the right to engage in collective bargaining until 1992 when the  
6 Legislature enacted the PEBA for the first time. 1992 N.M. Laws, ch. 9; *see Regents*  
7 *of Univ. of N.M.*, 1998-NMSC-020, ¶ 3 (noting that with the passage of the PEBA in  
8 1992, public employees in New Mexico were given the right to engage in collective  
9 bargaining for the first time). However, the 1992 version of PEBA had a sunset  
10 provision that took effect in 1999, seven years later. 1992 N.M. Laws, ch. 9, § 30.  
11 Four years later in 2003, New Mexico once again recognized the right of public  
12 employees to engage in collective bargaining with the passage of the PEBA for the  
13 second time. 2003 N.M. Laws, ch. 4, § 1. (We also note that with the passage of 2003  
14 N.M. Laws, ch. 5, the Legislature also enacted the PEBA again. Several sections of  
15 Chapter 5 are identical to those contained in Chapter 4, and these are noted in the  
16 Compiler’s notes to the statutory sections. ) The 2003 version of the PEBA is the  
17 current version and is codified at §§ 10-7E-1 to -26. *See* 2005 N.M. Laws, ch. 333,  
18 § 1 (adding the statutory reference).

1 {58} One of the stated purposes of the PEBA “is to guarantee public employees the  
2 right to organize and bargain collectively with their employers,” Section 10-7E-2.  
3 “Collective bargaining” is defined to mean “the act of negotiating between a public  
4 employer and an exclusive representative for the purpose of entering into a written  
5 agreement regarding wages, hours and other terms and conditions of employment[.]”  
6 Section 10-7E-4(F). The parties to collective bargaining are the “exclusive  
7 representative” of the public employees and the “appropriate governing body” of the  
8 public employer. Section 10-7E-17(A). The “exclusive representative” is “a labor  
9 organization that, as a result of certification, has the right to represent all public  
10 employees in an appropriate bargaining unit for the purposes of collective  
11 bargaining[.]” Section 10-7E-4(I). “The appropriate governing body of a public  
12 employer is the policymaking individual or body representing the public employer[.]”  
13 and “[a]t the local level, the appropriate governing body is the elected or appointed  
14 representative body or individual charged with management of the local public body.”  
15 Section 10-7E-7.

16 {59} Consistent with its definition of “collective bargaining,” the PEBA mandates  
17 that with the exception of certain retirement programs, exclusive representatives and  
18 public employers “shall bargain in good faith on wages, hours and all other terms and  
19 conditions of employment and other issues agreed to by the parties[.]” and the parties

1 “shall enter into written collective bargaining agreements covering employment  
2 relations.” Section 10-7E-17(A)(1), (2). Pertinent here, “An agreement shall include  
3 a grievance procedure to be used for the settlement of disputes pertaining to  
4 employment terms and conditions and related personnel matters.” Section 10-7E-  
5 17(F).

6 **1. Authority of the School Board to Hear and Decide Grievances**

7 {60} With the foregoing background in mind, we now examine the School District’s  
8 arguments in detail. Specifically, the School District argues that under Step 4 of the  
9 grievance procedure in the CBA in an appeal from the decision of the superintendent,  
10 a school board is impermissibly allowed to overrule the superintendent, contrary to  
11 Section 14 which states that “[p]ersonnel decisions are in the domain of the  
12 [s]uperintendent, not the [s]chool [b]oard.” Further, the School District asserts,  
13 because Section 14 vests all hiring and firing authority with the superintendent, if the  
14 school board has authority to overrule the superintendent at Step 4 of the grievance  
15 process, “then the actual power to hire and fire was never actually changed.” This  
16 result, the School District argues, violates two principles of statutory construction:  
17 (1) that the Legislature does not intend to enact a nullity when it passes a new law;  
18 and (2) that an amendment to an act expresses a legislative intent that the amendment  
19 prevails over any remaining contradictory provisions because it is a later declaration

1 of legislative intent, and in adopting the amendment, the Legislature is presumed to  
2 have intended to change existing law.

3 {61} The School District's arguments focus on Section 22-5-4(A), which provides  
4 that a local school board has the power or duty, "subject to the rules of the  
5 department, [to] develop educational policies for the school district." While  
6 conceding that the school board is a "policy-making body," the School District asserts  
7 that under the foregoing language, the school board "only has the legal authority to  
8 make policies which are . . . subject to the rules of the department, and . . .  
9 'educational.'" Thus, the School District proclaims, the school board "is not given  
10 authority to make whatever policies it may choose on whatever subjects it may  
11 choose." The School District asserts that because the "policies" involved  
12 here—grievances under the CBA—are "labor or personnel matters, not educational  
13 issues" and because House Bill 212 "took the local school boards out of the personnel  
14 arena, except for one employee—the superintendent[,] " the school board had no  
15 authority to negotiate and sign the CBA. We are not persuaded.

16 {62} The School District's argument overlooks the fact that in addition to other  
17 changes discussed above, House Bill 212, Section 3 also enacted Section 22-1-2(H),  
18 which defines the school board as the "policy-setting body" of the school district.  
19 Simply stated, "policy" means "to organize and regulate the internal order of:

1 Govern.” *Webster’s Third New Int’l Dictionary* (Unabridged ed. 2002). As we have  
2 already pointed out, House Bill 212 reformed and restructured the relationship  
3 between the school board and superintendent, and consistent with this purpose, House  
4 Bill 212 clarified the respective duties of the school board and the superintendent.  
5 Under House Bill 212, the school board governs the school district by exercising its  
6 power to enact policy through the adoption of regulations, standards, and rules. At the  
7 same time, the school board employs the superintendent as its chief executive officer  
8 to implement and carry into effect at an operational level in the day-to-day operations  
9 of the school district.

10 {63} Section 22-5-4 does not alter or limit this relationship. To accept the School  
11 District’s arguments on their face requires us to conclude that Section 22-1-2(H),  
12 defining the school board as “the policy-setting body” of the school district, is mere  
13 surplusage to 22-5-4 (A), in providing that among the “powers and duties” of a school  
14 board is, “subject to the rules of the department, [to] develop educational policies for  
15 the school district[.]” This interpretation violates a fundamental principle of statutory  
16 construction, that we are to give effect to all parts of statutes, particularly when they  
17 are enacted together. *See Albuquerque Cab Co.*, \_\_\_-NMSC-\_\_\_, ¶ 9 (“We read  
18 related statutes in harmony and give effect to all provisions.”); *Regents of Univ. of*  
19 *N.M.*, 1998-NMSC-020, ¶ 28 (“We will construe the entire statute as a whole so that



1 all the provisions will be considered in relation to one another.”). Following this  
2 mandate, we give effect to both statutes, which we conclude are in fact  
3 complementary to each other.

4 {64} The public education department has what appears to be exclusive and plenary  
5 control over all education policies of the state. It was created pursuant to Article XII,  
6 Section 6 of the New Mexico Constitution. *See* NMSA 1978, Section 9-24-9 (2004).  
7 Among its far reaching statutory powers is the power to “determine policy for the  
8 operation of all public schools and vocational education programs in the state,” to  
9 “supervise all schools and school officials coming under its jurisdiction,” and to  
10 “prescribe courses of instruction to be taught in all public schools in the state,  
11 requirements for graduation and standards for all public schools[.]” Section 22-2-  
12 2(B), (C), (D). To achieve these ends, the secretary of education “shall have control,  
13 management and direction of all public schools, except as otherwise provided by  
14 law.” Section 22-2-1. These statutes can be read as excluding a local school district  
15 from having *any* authority to enact educational policy for its own school district.

16 {65} However, the purposes of House Bill 212 are to have a “multicultural education  
17 system” that “integrates the cultural strengths of its diverse student population into  
18 the curriculum[.]” and “recognizes that cultural diversity in the state presents special  
19 challenges for policymakers, administrators, teachers and students” and to also

1 change public school governance “from the bottom up instead of from the top down,”  
2 Section 22-1-1.2(B)(3), (4), and (F). In order to avoid any question and to be  
3 consistent with its purposes, House Bill 212 expressly and explicitly states that a local  
4 school board has the “powers or duties” to “develop educational policies for the  
5 school district” (that are “subject to the rules of the department”) in Section 22-5-  
6 4(A). Granting a school board such authority is not a limitation, but an express  
7 recognition that each local board is a partner with the public education department in  
8 making education policy for that particular school district by taking into account the  
9 state’s multicultural diversity to achieve student success. This authority is not unique  
10 to Section 22-5-4(A), as there are other additional express grants of policy-setting  
11 authority given to local school boards in the Public School Code. *See, e.g.*, Section  
12 22-5-4.3(A) (directing that a local school board “shall establish student discipline  
13 policies”); Section 22-5-4.4(A) (stating that a school employee shall report student  
14 drug or alcohol abuse “pursuant to procedures established by the local school  
15 board”); Section 22-5-4.7(A) (providing that a school district shall establish a policy  
16 providing for the expulsion of a student who knowingly brings a weapon to a school);  
17 Section 22-5-6(A) (providing that a “local school board may waive the nepotism rule  
18 for family members of a local superintendent”); Section 22-10A-5(C) (requiring a  
19 local school board, together with a regional education cooperative, to “develop

1 policies and procedures to require background checks on an applicant who has been  
2 offered employment, a contractor or a contractor's employee with unsupervised  
3 access to students at a public school"). We therefore conclude that the powers and  
4 duties granted to school boards in Section 22-5-4(A) are in addition to, and not a  
5 limitation, on the general power to enact policy for the school district recognized in  
6 Section 22-1-2(H). "Statutes must be construed so that no part of the statute is  
7 rendered surplusage or superfluous." *Regents of Univ. of N.M.*, 1998-NMSC-020, ¶  
8 28 (internal quotation marks and citation omitted).

9 {66} We therefore reject the School District's additional assertion that the PELRB  
10 and district court erred in determining that the school board is the public employer  
11 under the PEBA and that when the school board signed the CBA, it did not have  
12 authority to do so. Under the PEBA, the "appropriate governing body" to engage in  
13 collective bargaining and enter into a CBA is "the policymaking . . . body  
14 representing the public employer" that at the local level is "the elected or appointed  
15 representative body . . . charged with management of the local public body." Section  
16 10-7E-7. The school board is the policymaker here, and it satisfies the definition in  
17 all other respects. (Members of the school board are elected under Section 22-5-1.1).

18 {67} Summarizing, the PEBA provides that the locally elected body of the employer,  
19 which makes the employer's policies, is the proper party to engage in collective

1 bargaining with a labor organization which has the right to represent all the public  
2 employees of the bargaining unit in collective bargaining. Collective bargaining  
3 means negotiating for the purpose of “entering into a written agreement regarding  
4 wages, hours and other terms and conditions of employment[.]” Section 10-7E-4(F).  
5 The wages, hours, and other terms and conditions of employment between a public  
6 employer and its public employees without question implicate policies of the  
7 employer, and PEBA therefore dictates that the policymaker of the public employer  
8 is the proper party to engage in such negotiations and to enter into a CBA agreement.  
9 Here, the policymaker and employer is the school board, and it was the proper party  
10 to enter into the CBA with the Union.

11 {68} We note two more facts before concluding our discussion of this issue. By  
12 hearing an appeal at Step 4 of the grievance process, the school board is not making  
13 personnel decisions on an operational level. We agree, that as the chief executive  
14 officer of the school district, these are responsibilities of the superintendent.  
15 Moreover, by hearing an appeal at Step 4 of the grievance process, the school board  
16 is not “interfering” in personnel matters or “overruling” a personnel decision of the  
17 superintendent as suggested by the School District. These assertions overlook what  
18 a “grievance” is under the CBA. The CBA defines a “grievance” as “an allegation by  
19 an employee, group of employees, or the [Union], that there has been a violation,

1 misinterpretation, or misapplication of a specific provision of the [CBA].” Thus, at  
2 Step 4 of the grievance process, the CBA provides that the school board, as the policy  
3 maker who negotiated and agreed to the CBA, simply determines whether its own  
4 policy (i.e., a specific provision in the CBA) has been violated, misinterpreted, or  
5 misapplied. Making such a determination is not “interfering” in personnel matters nor  
6 does it constitute “overruling” a personnel decision of the superintendent. Instead, as  
7 the Union asserts, because the CBA applies to all employees, the school board is not  
8 involved in making a personnel decision on a personal basis, but under the  
9 contractual structure of the CBA through which all individual personnel matters are  
10 administered.

11 {69} Finally, the School District’s arguments completely overlook the fact that in  
12 addition to the president of the school board, the superintendent of the school district  
13 signed the CBA on behalf of the school district. While we have placed no weight on  
14 this fact in our analysis, even if we agreed with the School District’s premise that the  
15 school superintendent has the exclusive power under the CBA to hear a grievance,  
16 by signing the CBA, the superintendent could be deemed to have delegated that  
17 authority to the school board.

18 **2. Waiver of the Union’s Right to Bargain for the Stipends**

19 {70} The hearing officer found that the School District unilaterally added duties

1 and responsibilities to three hourly employees in the transportation department,  
2 designated them “transportation foreman” and changed their compensation by paying  
3 them a stipend of \$4,000 per year. The additional duties and responsibilities were  
4 different from those usually performed by bargaining unit transportation employees,  
5 and would otherwise require overtime pay. Prior to these changes, the position of  
6 “[t]ransportation [f]oreman” did not exist. The Union became aware of the increased  
7 duties and pay and requested collective bargaining over the changes, but the School  
8 District refused. The hearing officer rejected the School District’s argument that  
9 because it had previously paid stipends to other employees without negotiating them,  
10 the Union waived its right to bargain over these changes, and held that the School  
11 District violated the PEBA when it refused to bargain over the changes. The hearing  
12 officer did not, however, order rescission of the new duties and stipends because the  
13 Union did not request it, and because the CBA has in place a mechanism (discussed  
14 below) for ongoing discussions that are taking place under the CBA. The district  
15 court agreed and affirmed.

16 {71} The School District states that its argument under this point “is primarily one  
17 of law, that is, whether the merger of two unions requires that the custom and practice  
18 of the employer and the surviving union continue to be recognized as a custom and  
19 practice, or whether the merger is a merger for some purposes but not for all.”

1 However, the factual basis for this argument is not clearly presented to us by  
2 references to the transcript and record. *See* Rule 12-318(A)(3) NMRA (requiring  
3 briefs in chief to contain a summary of the facts that “shall contain citations to the  
4 record proper, transcript of proceedings, or exhibits supporting each factual  
5 representation”); *Muse v. Muse*, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104  
6 (“We will not search the record for facts, arguments, and rulings in order to support  
7 generalized arguments.”).

8 {72} From the briefs of the parties, we gather the following. The Union originally  
9 represented only certified academic employees who were paid a salary. Examples are  
10 teachers, psychologists, and nurses. The Union expanded the bargaining unit to  
11 include hourly paid maintenance and transportation employees, thereby merging two  
12 separate bargaining units into one.

13 {73} Before the bargaining units were merged, when a school required additional  
14 services to be performed beyond the salaried position, such as running the science  
15 fair, sponsoring the chess club, or coaching cross-country, academic employees were  
16 paid stipends for the additional work. The School District would have us consider  
17 Exhibit 9 as evidence that “[t]here are, in fact over a thousand such stipends currently  
18 in effect.” Exhibit 9 is a computer generated document consisting of twenty-four  
19 pages with numerous codes, but there is no evidence informing us how to understand

1 the exhibit or what the codes mean. We therefore do not consider Exhibit 9 further).  
2 The CBA at issue here is the first CBA in which negotiations for the combined unit  
3 had occurred, and during the negotiations, the duties and payment for a maintenance  
4 foreman stipend, and an asbestos inspector stipend, and an “on-call” stipend for  
5 employees that had just been merged into the unit were negotiated. The additional  
6 duties and stipends paid to academic employees before the “merger” had not been  
7 negotiated with the Union. The parties therefore also negotiated a memorandum of  
8 understanding as part of the present CBA to “examine the minimum requirements to  
9 be met for individuals to be eligible to receive their increment, stipend, or activity  
10 allowance” to be submitted to the superintendent and the Union for consideration and  
11 implementation.

12 {74} From the foregoing factual summary, gleaned from the briefs, we infer that the  
13 School District’s argument is that because of its past practice of giving salaried  
14 academic employees additional duties and pay in the form of a stipend without  
15 negotiating those changes, or an objection from the Union, the Union was bound by  
16 that practice with respect to the maintenance and transportation employees that were  
17 subsequently added to the bargaining unit. The School District contends that under  
18 federal law, which the PELRB looks to in interpreting the PEBA, the prior practice  
19 became part of the new CBA. In support of its argument, however, the School District



1 only refers us to cases that apply the concept of the “common law of the shop” to  
2 interpreting ambiguous phrases contained in a CBA. *See United Steelworkers of Am.*  
3 *v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 581-582 (1960) (holding that  
4 the interpretation of contract terms in a CBA “is not confined to the express  
5 provisions of the contract, as the industrial common law—the practices of the  
6 industry and the shop—is equally part of the collective bargaining agreement  
7 although not expressed in it”); *Webb v. ABF Freight Sys., Inc.*, 155 F.3d 1230, 1243  
8 (10th Cir. 1998) (“It is well-established that when interpreting the terms of a labor  
9 contract, a fact-finder is entitled—and indeed, in some cases required—to look to the  
10 past practices of the parties and the ‘common law of the shop’ to determine the  
11 parties’ contractual obligations.” (footnote omitted)); *Champion Boxed Beef Co. v.*  
12 *Local No. 7*, 24 F.3d 86, 88-89 (10th Cir. 1994) (“It is a well-recognized principle  
13 that, except where expressly limited by a labor agreement, an arbitrator may consider  
14 and rely upon extrinsic evidence, including negotiating and contractual history of the  
15 parties, evidence of past practices, and the common law of the shop, when  
16 interpreting ambiguous provisions.”). Because the School District neither claims nor  
17 presents any evidence of ambiguity in the CBA, these cases are inapplicable.

18 {75} Further, we conclude that the evidence supports the finding of the hearing  
19 officer that the School District failed to prove that the Union waived its right to

1 bargain the transportation stipends. *See Ortiz v. Shaw*, 2008-NMCA-136, ¶ 19, 145  
2 N.M. 58, 193 P.3d 605 (“Waiver is the intentional relinquishment of a known right.”  
3 (internal quotation marks and citation omitted)); *Magnolia Mountain Ltd. P’ship v.*  
4 *Ski Rio Partners, Ltd.*, 2006-NMCA-027, ¶ 29, 139 N.M. 288, 131 P.3d 675 (“Waiver  
5 by acquiescence arises when a person knows he is entitled to enforce a right and  
6 neglects to do so for such a length of time that under the facts of the case the other  
7 party may fairly infer that he has waived or abandoned such right.” (internal quotation  
8 marks and citation omitted)); *McCurry v. McCurry*, 1994-NMCA-047, ¶ 8, 117 N.M.  
9 564, 874 P.2d 25 (holding that the party asserting waiver as a defense bears the  
10 burden to prove the waiver).

11 {76} Finally, we agree with the observation made by the district court that it was not  
12 arbitrary or capricious for the PELRB to consider differences between paying salaried  
13 certified academic employees (white collar) for extracurricular activities such as  
14 sponsoring student clubs outside working hours and paying stipends to hourly paid  
15 maintenance and transportation employees (blue collar) for bargaining unit work that  
16 would otherwise require overtime, in concluding that the Union did not waive its  
17 right to bargaining over changes in duties and pay for the transportation employees.

18 **D. RESULT**

19 {77} Having reviewed the administrative record and the School District’s arguments,

1 we conclude that the PELRB did not err, nor did the district court err in affirming the  
2 PELRB decision.

3 **V. CONCLUSION**

4 {78} In the APS Appeal, the order of the district court issuing a permanent writ of  
5 mandamus to APS is affirmed.

6 {79} In the School District Appeal, the memorandum opinion and order of the  
7 district court affirming the PELRB decision is affirmed.

8 {80} **IT IS SO ORDERED.**

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\_\_\_\_\_  
**MICHAEL E. VIGIL, Judge**

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15

**WE CONCUR:**  
  
\_\_\_\_\_  
**JONATHAN B. SUTIN, Judge**

  
\_\_\_\_\_  
**JAMES J. WECHSLER, Judge Pro Tempore**