

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

Court of Appeals of New Mexico

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**EMIL MOTTOLA,**

Petitioner-Appellant,

v.

**No. A-1-CA-41722**

**TRIAD NATIONAL SECURITY, LLC,**

Respondent-Appellee.

**APPEAL FROM THE DISTRICT COURT OF LOS ALAMOS COUNTY**

**Kathleen McGarry Ellenwood, District Court Judge**

Emil Mottola

Santa Fe, NM

Pro Se Appellant

Bardacke Allison Miller LLP

Justin Miller

Michael Woods

Santa Fe, NM

for Appellee

**MEMORANDUM OPINION**

**MEDINA, Chief Judge.**

{1} This case arises out of Respondent Triad National Security's termination of  
the employment of Dr. Emil Mottola, Ph.D (Petitioner). Petitioner was employed at  
Los Alamos National Laboratory (LANL) for over thirty years as a research  
scientist. The ostensible reason for the termination was Petitioner's failure to satisfy  
one requirement of his position, which was to seek and obtain funding to support his

1 research projects. However, Petitioner believed his employment was terminated due  
2 to his age or in retaliation for his union activities. Pursuant to the employment  
3 contract between the parties the dispute was submitted to an arbitrator for binding  
4 arbitration. Following discovery and motion practice, the arbitrator granted  
5 summary judgment to Respondent on both claims. Petitioner filed an action in  
6 district court challenging the arbitrator's decision, but the district court denied his  
7 request to vacate the arbitration decision. This appeal followed. Although Petitioner  
8 was represented by union counsel below, he is representing himself on appeal. We  
9 affirm the district court.

## 10 **BACKGROUND**

11 {2} As noted above, Petitioner was a long-term employee at LANL at the time of  
12 the events in question. In November 2018, Respondent, a federal contractor,  
13 assumed management control of LANL, replacing the previous managing entity.  
14 Petitioner signed a new employment contract with Respondent. Under that contract,  
15 as was the case with his previous employment contracts, Petitioner's scientific  
16 research did not constitute his only job duty. He was also required to seek funding  
17 from both outside sources, such as the federal Department of Energy (DOE), and  
18 from internal LANL funding that was allocated from a central pot of money through  
19 a competitive committee process. Essentially, therefore, he was required to fully  
20 fund his own salary as well as the salaries of subordinates working with him through

1 this combination of external grants and LANL funds. In March 2021, following  
2 years of funding shortfalls, Respondent terminated Petitioner's employment and  
3 informed him that he could apply for other positions with LANL, which presumably  
4 carried no requirement that he raise funds to support his work. Petitioner objected to  
5 the termination and, represented by his union, filed an arbitration claim.

6 {3} As noted earlier, Petitioner raised two assertions in his arbitration claim: first,  
7 that he was terminated due to his age, in violation of the Age Discrimination in  
8 Employment Act (ADEA), 29 U.S.C. §§ 621 to -34; and second, that he was  
9 terminated in retaliation for his union activities, specifically a trip to Washington,  
10 D.C., with other union personnel, for the purpose of meeting with Senator Ben Ray  
11 Luján of New Mexico to express concern over LANL's treatment of older  
12 employees. One of his primary contentions was that his failure to obtain adequate  
13 funding was caused by Respondent itself, in that upper management (in particular  
14 an individual named John Sarrao, a management-level employee of Respondent)  
15 interfered with his efforts to obtain both external and internal funding. The  
16 arbitration was conducted in accordance with rules established by the American  
17 Arbitration Association, which allow for summary disposition of an arbitration case.  
18 Summary disposition of a claim is also authorized by New Mexico's Uniform  
19 Arbitration Act (UAA), NMSA 1978, §§ 44-7A-1 to -32 (2001).

1 {4} Following discovery that included depositions, extensive production of  
2 documents, and written interrogatories, Respondent moved for summary judgment  
3 with supporting documentation. Petitioner filed a response, also including  
4 supporting documents, which did not contest the fact that funding shortfalls had  
5 regularly occurred, including the 2021 shortfall that ostensibly led to the termination.  
6 However, the response maintained that Respondent management was responsible for  
7 the lack of funding, that Respondent favored younger scientists in allocating internal  
8 LANL funding, and that Respondent had a policy of developing younger scientists  
9 and pushing out older scientists. The response also raised the issue of retaliation,  
10 pointing out that one individual who attended the meeting in Washington, D.C.,  
11 Todd Ringler, was acting in a dual capacity; he was a staffer for Senator Luján, but  
12 was also listed as a subordinate of John Sarrao. Petitioner contended that John Sarrao  
13 was most likely made aware of the D.C. meeting by Ringler and took adverse action  
14 against Petitioner due to this union activity.

15 {5} Having considered the submissions of the parties, the arbitrator issued an  
16 opinion addressing Petitioner's claims in detail. The arbitrator determined that  
17 Petitioner had failed to raise a genuine issue of material fact concerning either the  
18 ADEA issue or the retaliation claim, and granted summary judgment to Respondent.  
19 Petitioner filed a petition in district court, seeking to vacate the arbitration decision;  
20 the district court denied the petition, and this appeal followed.

## 1 **DISCUSSION**

### 2 **I. Standard of Review of Arbitration Cases**

3 {6} This Court’s review of arbitration decisions, as was the district court’s, is  
4 severely limited by statute. Neither the district court nor this Court may review the  
5 substantive validity of the arbitration decision. *See State v. Am. Fed’n of State, Cnty.,*  
6 *& Mun. Emp. Council 18 (AFSCME)*, 2012-NMCA-114, ¶ 13, 291 P.3d 600. If the  
7 arbitrator commits errors of fact or law, such mistakes are not reviewable by, and  
8 may not be overturned in a court of law. *Id.* The UAA establishes the only aspects  
9 of an arbitration decision that are legally reviewable in the district court or on appeal.  
10 *Fernandez v. Farmers Ins. Co. of Ariz.*, 1993-NMSC-035, ¶ 9, 115 N.M. 622, 857  
11 P.2d 22 (“[UAA] controls the scope of the district court’s review of an arbitration  
12 award.”); *see* § 44-7A-24. An arbitration award may be vacated by a court only if  
13 the arbitrator commits corrupt acts, fraud, or other “undue means”; exhibits evident  
14 partiality, misconduct, or corruption; refuses to consider evidence that is material to  
15 the controversy; conducts the arbitration hearing contrary to the provisions of the  
16 UAA; or exceeds their powers. *See* § 44-7A-24(a). It is important to note that this  
17 Court cannot review the merits of the arbitrator’s decision under the guise of  
18 analyzing one of the above statutorily-authorized bases for review; for example, we  
19 cannot review the merits of the arbitrator’s decision, conclude that the decision was  
20 legally wrong, and then use that conclusion to say that the arbitrator exhibited

1 partiality or exceeded his powers. In sum, as we stated above, we are strictly  
2 forbidden from assessing the legal or factual merits of the arbitrator's decision, and  
3 must limit our consideration to the structural issues set out in the UAA. *See*  
4 *Fernandez*, 1993-NMSC-035, ¶ 9.

## 5 **II. Issues Not Preserved Below**

6 {7} Petitioner raises several issues in his briefing, including a number that were  
7 not raised in the district court. We briefly dispose of those issues, as the failure to  
8 raise them in district court, and thus allow that court an opportunity to rule on them,  
9 renders them unpreserved for appeal. *See, e.g., Valerio v. San Mateo Enters., Inc.*,  
10 2017-NMCA-059, ¶ 27, 400 P.3d 275 (refusing to address the merits of an argument  
11 raised for the first time on appeal).

12 {8} Petitioner's unpreserved issues include his contention that statutory rights,  
13 such as those established by the ADEA, cannot be superseded by arbitration  
14 agreements, and therefore his ADEA claim should not have been subject to  
15 arbitration at all. This argument was never made to the district court, either in the  
16 petition to vacate the arbitration decision or at the hearings held on that petition. We  
17 note also that, while we do not intend to definitively decide the question given the  
18 fact it was not raised below, it appears to be legally settled that the ADEA and other  
19 federal antidiscrimination claims are subject to arbitration where the contract  
20 between the parties contains an arbitration clause covering such claims. *See, e.g., 14*

1 *Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009) (noting that the ADEA does not  
2 preclude arbitration); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-35  
3 (1991) (containing an extensive discussion of the issue).

4 {9} Another issue Petitioner argues on appeal, but failed to argue below, is that  
5 the arbitrator showed evident partiality during the discovery process by, for example,  
6 allowing Respondent to file late discovery responses. Again, this argument was not  
7 made to the district court; the question of discovery during the arbitration process  
8 was not mentioned in the petition to vacate or at the hearings. We will therefore not  
9 address it on appeal. *See Valerio*, 2017-NMCA-059, ¶ 27.

10 {10} Petitioner also raises a new legal theory in his appeal, arguing that a court has  
11 the power to overturn an arbitration decision for manifest disregard of the law.  
12 Petitioner contends the arbitrator disregarded the law because he mistakenly found  
13 that Petitioner was not qualified for his position, due to his failure to satisfy one of  
14 the requirements of his position: the mandate that he raise funds to support his unit's  
15 work. We will discuss this claimed legal error below. At this point, however, we  
16 need point out only two things: first, Petitioner did not mention this "manifest  
17 disregard of the law" theory in the district court, and therefore failed to preserve it  
18 for appeal, and second, manifest disregard of the law is not one of the statutory  
19 grounds upon which a court in New Mexico can overturn an arbitrator's decision.

{11} The final unpreserved argument Petitioner now raises is one that is not only directly contrary to his own briefing on appeal but is contrary to statements he made, through counsel, at the district court hearing. Petitioner contends that allowing summary judgments in arbitration cases, where a statutory antidiscrimination right such as that protected by the ADEA is involved, denies him of his right to a full and fair hearing of such a claim. Yet Petitioner also conceded in his brief in chief that the rules applicable to his arbitration case did allow for summary disposition of the case. Furthermore, in the district court, Petitioner's counsel conceded that he was not arguing that summary judgment should not have been allowed in the arbitration case. Instead, he maintained only that in reviewing an arbitration decision, courts should not accord the same deference to a decision arising out of a summary judgment as they do to a decision made following a full hearing of the case. Since Petitioner did not claim below that an arbitration summary judgment is categorically inappropriate for ADEA or other discrimination claims, we will not address that argument on appeal. *See id.* We do note that, while we need not decide the issue in this case, the UAA specifically provides for summary dispositions in arbitration cases, without limiting that principle to certain types of cases. *See* § 44-7A-16(b)(2).



### 1 **III. Preserved Issues**

#### 2 **A. Failure to Hold an Evidentiary Hearing**

3 {12} We now turn to the issues that Petitioner did preserve below. The first claim  
4 of error involves a procedural issue: the district court's failure to hold an evidentiary  
5 hearing. Our Supreme Court has stated that in reviewing an arbitration award, the  
6 district court should hold an evidentiary hearing concerning any issues presented by  
7 the petition to vacate the arbitration decision. *See Medina v. Found. Rsrv. Ins. Co.*,  
8 1997-NMSC-027, ¶ 12, 123 N.M. 380, 940 P.2d 1175; *Melton v. Lyons*, 1989-  
9 NMSC-027, ¶ 7, 108 N.M. 420, 773 P.2d 732. This hearing is not an opportunity to  
10 relitigate the arbitration case, and is not to be used to rehash the evidence presented  
11 to the arbitrator. *See Melton*, 1989-NMSC-027, ¶ 7. Instead, it is limited to any  
12 evidence that might bear on the statutory grounds for vacating an arbitration award,  
13 as raised in the petition to vacate. *Id.* In this case, the parties and the district court  
14 were aware of the hearing requirement, but ultimately no evidentiary hearing was  
15 held. Our review of the record, however, reflects that the main reason for this was  
16 Petitioner's explicit admission, in response to the district court's inquiries, that he  
17 had no evidence to offer that was relevant to the issues raised in the petition to vacate.  
18 The district court inquired directly of the parties as to what evidence they would  
19 present if an evidentiary hearing was held. In response, Petitioner's counsel stated  
20 that at such a hearing he could walk the judge through the evidence submitted during

1 the arbitration process or guide the court through some of that evidence if the court  
2 would find that helpful. Counsel then explicitly waived the occurrence of an  
3 evidentiary hearing, telling the court that “if you feel like you have the record in  
4 front of you and all the arguments you need, we will step down and allow you to  
5 make your decision. But we could kind of give you kind of a guide through some of  
6 the evidence, if that, just if that’s helpful [inaudible].”

7 {13} Three considerations apply here. First, even statutory and constitutional rights  
8 are subject to waiver, if the waiver is knowing and voluntary. *See, e.g., State v.*  
9 *Chavarria*, 2009-NMSC-020, ¶ 9, 146 N.M. 251, 208 P.2d 896 (pointing out that a  
10 guilty plea waives statutory and constitutional rights, including the right to appeal).  
11 Petitioner waived the evidentiary-hearing requirement in this case by informing the  
12 district court that he would “step down” and allow her to make the decision on the  
13 current record and arguments.

14 {14} In addition, the “evidentiary hearing” referenced by *Medina* and *Melton*, *see*  
15 *Medina*, 1997-NMSC-027, ¶ 12; *Melton*, 1989-NMSC-027, ¶ 7, suggests a hearing  
16 at which evidence is offered by the parties. Here, however, while the parties asserted  
17 they had additional arguments, they informed the district court that they had no  
18 evidence to offer if an evidentiary hearing were to be held. Absent evidence, the rote  
19 occurrence of an “evidentiary hearing” was not necessary under the circumstance of  
20 this case. We conclude the district court did not err in refusing to perform an empty

1 procedural act. *Cf. Kysar v. BP Am. Prod. Co.*, 2012-NMCA-036, ¶ 16, 273 P.3d  
2 867 (refusing to require a trial that would serve no useful purpose and would waste  
3 scarce judicial resources, simply to preserve a right to appeal).

4 {15} Finally, Petitioner has failed to show how he was prejudiced by the failure to  
5 hold an evidentiary hearing. In particular, he has not directed our attention to any  
6 evidence that he would have offered at such a hearing. Instead, he maintains in  
7 conclusory fashion that the failure to hold a hearing “denied Petitioner the  
8 opportunity to demonstrate to the [district c]ourt that the [a]rbitrator had: (a) refused  
9 to consider material evidence, and manifestly disregarded the law; (b) exhibited  
10 evident partiality by summary judgment and other actions; and (c) denied Plaintiff  
11 due process for a full and fair hearing of material testimony.” These contentions,  
12 which are mainly restatements of the statutory grounds of review contained in the  
13 UAA, are mere assertions of prejudice that carry no weight in the absence of  
14 specifics. *See Deaton v. Gutierrez*, 2004-NMCA-043, ¶ 31, 135 N.M. 423, 89 P.3d  
15 672 (noting that “an assertion of prejudice is not a showing of prejudice” (alteration,  
16 internal quotation marks, and citation omitted)). Where no prejudice has been  
17 shown, this Court will not find reversible error. *Id.* (stating that “in the absence of  
18 prejudice, there is no reversible error” (alteration, internal quotation marks, and  
19 citation omitted)).

**B. Refusal to Consider Material Evidence**

{16} As we noted above, an arbitrator's refusal to consider material evidence is one of the statutory grounds upon which a vacation of an arbitration award can be based. Section 44-7A-24(a)(3). Petitioner makes two main arguments in support of his contention that the arbitrator did so in this case. First, he contends that by granting summary judgment and canceling the scheduled hearing on the merits, the arbitrator refused to consider evidence that Petitioner was planning to present at that hearing. Second, he maintains that, after erroneously determining that Petitioner was not qualified for his position, the arbitrator refused to consider the evidence in the record concerning Respondent's interference with Petitioner's efforts to obtain funding as well as evidence that younger scientists were treated more favorably than he was.

{17} Petitioner's first argument amounts to a contention that a party can avoid summary judgment by the simple expedient of informing the presiding authority that they are aware of evidence and testimony that they would like to present at a merits hearing. This is not how the summary judgment process works. Once a motion for summary judgment has been filed, the party opposing summary judgment must come forward with evidence in the form of affidavits, depositions, answers to interrogatories, or responses to requests for admission; and this evidence must establish that genuine issues of fact exist that would preclude the grant of summary judgment. *See* Rule 1-056(C), (E) NMRA. It is not sufficient to merely point to

evidence or testimony that might be forthcoming at a trial or evidentiary hearing. *See Little v. Baigas*, 2017-NMCA-027, ¶ 6, 390 P.3d 201 (“During summary judgment proceedings, a party cannot rely on allegations of the complaint or argument that facts may exist, but instead must provide evidence to justify a trial on the issues.”). A party opposing summary judgment cannot meet their burden “with allegations or speculation but must present admissible evidence demonstrating the existence of a genuine issue of fact requiring trial.” *Kreutzer v. Aldo Leopold High Sch.*, 2018-NMCA-005, ¶ 27, 409 P.3d 930.

{18} For example, in this case, Petitioner asserted that he wished to call two Respondent employees, Dr. Paris and Dr. Freese, as witnesses at the hearing, as well as a former employee of Respondent, Todd Ringler. He also expressed a desire to cross-examine John Sarrao and other witnesses. However, Petitioner did not explain to the arbitrator why he could not obtain an affidavit from any of these individuals, or take a deposition of one or more of them. Instead, he speculated that Mr. Ringler might have evidence relevant to the retaliation claim and argued that Dr. Freese and Dr. Paris would present evidence relevant to the ADEA claim. These indications of a desire to in effect hold witnesses in reserve, and then call them at an evidentiary hearing, were not sufficient to require denial of the motion for summary judgment. *See Baigas*, 2017-NMCA-027, ¶ 6; *Kreutzer*, 2018-NMCA-005, ¶ 27.

{19} Petitioner’s second refusal-to-consider-evidence contention requires a brief discussion of summary judgment procedure in an ADEA case. In the absence of direct evidence of age discrimination, courts utilize a well-worn framework to determine whether summary judgment is appropriate, called the *McDonnell Douglas* burden-shifting approach. *See, e.g., Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 9, 139 N.M. 12, 127 P.3d 548 (addressing a discrimination claim under the New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 to -15 (1969, as amended through 2024), and discussing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973)). Under this approach, an employee claiming discrimination must first establish a prima facie case of discrimination. *Id.* If the employee succeeds in doing so, the burden shifts to the employer to provide a nondiscriminatory reason for its actions. *Id.* Finally, if the employer does so, the burden shifts back to the employee to present evidence that the purported nondiscriminatory reason is a pretext for discrimination. *Id.* In a termination-of-employment case, the employee establishes a prima facie case by presenting evidence of four factors: (1) they were a member of a protected class; (2) they were qualified to continue working in their position; (3) their employment was terminated; and (4) their position was filled by someone not a member of the protected class. *See Cates v. Regents of N.M. Inst. of Mining & Tech.*, 1998-NMSC-002, ¶ 17, 124 N.M. 633, 954 P.2d 65.

1 {20} According to Petitioner, what occurred in the arbitration case was as follows:

2 (1) as a person in his late sixties, he was a member of the class protected by the  
3 ADEA, and he did lose his position; (2) the arbitrator erroneously found he was not  
4 qualified for his position; and (3) the arbitrator then refused to consider Petitioner's  
5 evidence regarding two matters—that Respondent prevented him from obtaining  
6 funding and treated younger scientists more favorably with respect to funding issues.  
7 Although the arbitrator's decision indicates that Petitioner was eminently qualified  
8 for his position as a scientist, the arbitrator did ultimately determine that he was  
9 unqualified due to his failure to satisfy a requirement of that position—that he obtain  
10 funding sufficient to support his work and his unit, either from sources outside  
11 LANL or from the internal funding mechanisms available at LANL. The arbitrator  
12 therefore found that Petitioner had failed to make out a prima facie case of age  
13 discrimination and granted summary judgment.

14 {21} It is important to point out, again, that we are not in a position to review the  
15 merits of the arbitrator's decision, either factually or legally. *See AFSCME*, 2012-  
16 NMCA-114, ¶ 13. The arbitrator's importation of job performance into the  
17 qualifications factor may have been legally suspect, an issue we need not decide; we  
18 do note, however, that federal courts often discuss deficient job performance in the  
19 context of the “nondiscriminatory reason for the adverse employment action”  
20 portion of the burden-shifting framework, rather than as part of the prima-facie-case

1 analysis. *See, e.g., Walkingstick Dixon v. Okla., ex rel. Reg'l Univ. Sys. of Okla. Bd.*  
2 *of Regents*, 125 F.4th 1321, 1336 (10th Cir. 2025) (internal quotation marks and  
3 citation omitted). The question before us, however, is whether there is any evidence  
4 that this claimed error caused the arbitrator to refuse to consider Petitioner's  
5 proffered evidence regarding his discrimination claim or his retaliation claim.

6 {22} It should be noted that the evidence concerning alleged funding interference  
7 was relevant to the question of whether Petitioner's funding issues were addressed  
8 as a matter of qualification for the position or were considered as a potential  
9 nondiscriminatory reason for Respondent's actions. In other words, the funding  
10 issues, as the explicit justification given by Respondent for terminating Petitioner's  
11 employment, were the crux of the entire case, and the arbitrator therefore had every  
12 reason to consider all evidence bearing on those issues. As Respondent points out,  
13 the arbitrator did not explicitly exclude any of Petitioner's evidence from the case.  
14 In addition, Petitioner has not directed our attention to any statements made by the  
15 arbitrator indicating that he was refusing to consider evidence offered by Petitioner.  
16 Instead, Petitioner relies on assumptions and speculation to argue that such a refusal  
17 occurred. He in essence contends that the arbitrator must have refused to consider  
18 his evidence concerning Respondent's interference with his funding, and its  
19 favorable treatment of younger scientists, or the arbitrator would not have granted  
20 the motion for summary judgment. He also points out that the arbitrator's written



1 decision does not mention the evidence upon which Petitioner relies, which  
2 according to Petitioner must mean he refused to consider it. We disagree with  
3 Petitioner's arguments.

4 {23} It is apparent that the arbitrator was aware of Petitioner's contention that  
5 Respondent interfered with his funding efforts; the arbitration decision specifically,  
6 although briefly, discusses the issue. We cannot infer, from the arbitrator's failure  
7 to explicitly discuss particular evidentiary items in his decision, that the arbitrator  
8 refused to consider them; to do so would be nothing more than speculation. It is just  
9 as possible that the arbitrator considered Petitioner's evidence and found it to be  
10 insufficient to overcome Respondent's showing. As one example, many of  
11 Petitioner's complaints, set out in his affidavit filed in the arbitration proceeding,  
12 involve DOE funding and Respondent's refusal to submit his funding proposals to  
13 DOE. However, Respondent introduced evidence, which was not refuted by  
14 Petitioner with any admissible evidence from persons with direct knowledge, that  
15 DOE was no longer interested in funding Petitioner's research. Furthermore, as the  
16 arbitrator's decision stated, many of the incidents discussed in Petitioner's affidavit  
17 concerned events occurring well prior to November 2018 when Respondent assumed  
18 management duties over LANL.

19 {24} Finally, a number of assertions made in Petitioner's affidavit contain hearsay  
20 statements allegedly made by other individuals, or refer to supposedly younger


1 scientists without providing evidence of their ages, or make conclusory assertions  
2 rather than stating facts. Such evidence is not sufficient to overcome a properly  
3 supported motion for summary judgment. *See, e.g., Wood v. City of Alamogordo*,  
4 2015-NMCA-059, ¶ 15, 350 P.3d 1185 (pointing out that a nonmovant in a summary  
5 judgment case cannot rely on speculation or conclusions and that affidavits  
6 containing hearsay are not sufficient evidence of a fact). By mentioning the above  
7 examples, we emphatically do not intend to comment on the legal or factual validity  
8 of the arbitrator's decision, or upon the adequacy of Petitioner's evidentiary  
9 showing; we mean only to refute Petitioner's argument that the arbitrator must have  
10 necessarily refused to consider his evidence.

11 {25} At bottom, Petitioner's argument is a contention that the arbitrator's grant of  
12 summary judgment was wrong on the merits, and therefore must be reversed. We  
13 are precluded by both statute and case law from taking such action. *See id.*;  
14 *AFSCME*, 2012-NMCA-114, ¶ 13.


15 **CONCLUSION**

16 {26} Based on the foregoing, we affirm the district court's decision in this case.

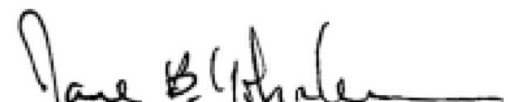
17 {27} **IT IS SO ORDERED.**

18   
19 **JACQUELINE R. MEDINA, Chief Judge**

1 **WE CONCUR:**

2 

3 **J. MILES HANISEE, Judge**

4 

5 **JANE B. YOHALEM, Judge**