

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

2 **AMERICAN FEDERATION OF STATE,**  
3 **COUNTY AND MUNICIPAL EMPLOYEES,**  
4 **COUNCIL 18, AFL-CIO, LOCAL 2851,**

5 Appellant-Petitioner,

6 v.

7 **CITY OF LAS VEGAS, NEW MEXICO,**

8 Appellee-Respondent.

9 **APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY**

10 **Abigail Aragon, District Judge**

11 Youtz & Valdez, P.C.

12 Shane Youtz

13 Stephen Curtice

14 James A. Montalbano

15 Albuquerque, NM

16 for Appellant

17 Holcomb Law Office

18 Dina E. Holcomb

19 Albuquerque, NM

20 for Appellee

21 **MEMORANDUM OPINION**

22 **HANISEE, Judge.**

23 {1} The American Federation of State, County and Municipal Employees,

24 Council 18, AFSCME Local 2851 (AFSCME) appeals from the district court's

25 order upholding the administrative decision of the City of Las Vegas Labor

Court of Appeals of New Mexico  
Filed 2/4/2019 10:56 AM



Mark Reynolds

**NO. A-1-CA-35840**

1 Management Relations Board<sup>1</sup> (the Board), which dismissed AFSCME’s petition  
2 seeking to accrete, or add, certain employees of the City of Las Vegas (the City)  
3 into the existing “blue and white collar bargaining unit.” AFSCME argues, inter  
4 alia, that the district court erred in determining that “the record supports the  
5 [Board’s] decision.” We conclude that the record as presently constituted does not  
6 support the Board’s decision and, therefore, reverse and remand for further  
7 proceedings consistent with this opinion.<sup>2</sup>

8 **BACKGROUND**

9 {2} AFSCME filed a “Petition for Clarification (Accretion)” (AFSCME’s  
10 petition) with the Board seeking to accrete various positions into an existing  
11 bargaining unit covering City employees. While all of the positions included  
12 “supervisor” as part of the job title, AFSCME asserted that the employees  
13 occupying the positions were not themselves “supervisors” as that term is defined  
14 under the Public Employees Bargain Act (PEBA), NMSA 1978, §§ 10-7E-1 to -26  
15 (2003, as amended through 2005). On March 10, 2015, the Board held an all-day  
16 hearing (merits hearing), at which employees then holding the positions at issue

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<sup>1</sup>The Board and the City were both named as defendants in AFSCME’s appeal to the district court, but the Board was dismissed as a party on its unopposed motion on August 1, 2016.

<sup>2</sup>Because we reverse on this basis, we do not reach AFSCME’s arguments that the Board (1) violated the Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4 (1974, as amended through 2013), by voting on AFSCME’s petition in closed session, and (2) improperly assigned the burden of proof to AFSCME.

1 testified, as did some of their subordinates, AFSCME officials, and managerial  
2 representatives from the City. In addition to taking witness testimony, the Board  
3 received for its consideration numerous exhibits submitted by the parties, as well  
4 as a post-hearing brief from each party.

5 {3} On April 27, 2015, the Board met to consider AFSCME's petition. When it  
6 convened, the Board's chairman called the meeting to order and stated, "[W]e  
7 haven't had a chance . . . to get together and go over the information" related to  
8 AFSCME's petition and that "[w]hat we'd like to do is call into executive session  
9 for . . . at least 15 minutes before we actually start the meeting." After an  
10 unspecified period of time, the chairman returned and announced, "[W]e are out of  
11 executive session[,]" explained that the board members had considered all of the  
12 information before them, and proceeded to allow another board member "go  
13 through the decisions" of the Board. That board member explained that the Board  
14 had "considered a number of factors . . . includ[ing] the definition of supervisor . . .  
15 [and] the relevant arguments that have been presented both in the briefs and the  
16 attached case law." He further explained that "one of the things that we keyed off  
17 on was the definition of federal law in regards to exercising independent  
18 judgment," which he described as "one of the overriding principles for all the  
19 positions that we're going to be discussing." As to each of the five individuals  
20 whose position the petition sought to accrete into the unit, the Board summarily

1 concluded that “[AFSCME] ha[d] not met its burden of proof to accrete.” For only  
2 one of the individuals, Benito Lujan, did the Board identify specific evidence—the  
3 testimony of one employee supervised by Lujan that “she had been told by Mr.  
4 Lujan that he would write her up if she did certain things”—to support its denial of  
5 the petition to accrete. The Board issued an oral ruling denying AFSCME’s  
6 petition and excluding the five positions from the bargaining unit.

7 {4} Nearly five months later, on September 10, 2015, the Board issued a two-  
8 page order, titled “Order Dismissing Clarification Petition.” The order contains  
9 neither a discussion of the evidence nor findings of fact to support the Board’s  
10 decision and provides no explanation of the Board’s ruling, despite the governing  
11 Board rule requiring that it file a report within fifteen days following the close of a  
12 hearing in which it makes findings of fact and conclusions of law and “adequately  
13 explain[s] the Board’s reasoning.” City of Las Vegas, Labor/Mgmt. Relations Bd.,  
14 Rules & Regulations, § II, Rule 2.13. Instead, the order merely states that the  
15 Board found that AFSCME “has not met its burden of proof to accrete the  
16 position[s] into the bargaining unit.”

17 {5} The next day, AFSCME filed its notice of appeal in the district court and  
18 sent a letter to the Board to request the preparation and filing of the record proper  
19 in accordance with Rule 1-074 NMRA (providing procedures to be followed in  
20 appeals from administrative agencies to the district courts). When the Board still

1 had not filed the record nearly three months later, *see* Rule 1-074(H) (providing  
2 that the agency shall file the record on appeal within thirty days, unless otherwise  
3 provided by law), AFSCME moved for an order to show cause. The day after  
4 AFSCME filed a request for hearing on its motion, the Board filed approximately  
5 two hundred pages of documents designated as the “Record Proper.” Three weeks  
6 later, the Board filed an “Amended Record Proper,” containing numerous new  
7 documents and some, but not all, of the records originally filed in the “Record  
8 Proper” and totaling nearly four hundred pages. AFSCME thereafter withdrew its  
9 motion for an order to show cause.

10 {6} The district court held a hearing on August 4, 2016. AFSCME argued that  
11 the Board’s decision “goes against the overwhelming evidence and is not based at  
12 all on substantial evidence” and that it “failed to apply the facts to black letter law  
13 when it comes to whether someone is a supervisor, manager, or confidential  
14 employee.” AFSCME noted that the Board’s decision failed to even specify what  
15 exemption—i.e., supervisor, manager, or confidential employee—it found applied  
16 to justify denying the petitioning employees their presumptive right to join a  
17 bargaining unit.<sup>3</sup> AFSCME also argued that the Board’s reliance on federal law

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<sup>3</sup> The City’s Labor Management Relations Ordinance (the Ordinance) provides that “[e]mployees, other than management, supervisory, confidential, and probationary employees, may form, join, or assist any labor organization for the purpose of collective bargaining.” Las Vegas, N.M., Code Ordinances ch. 48, Part I, § 48-5.

1 and the Board's reference to the "independent judgment" standard applied under  
2 federal law evinced a clear misapprehension of the law because New Mexico does  
3 not follow the federal definition of "supervisor." AFSCME represented to the  
4 district court that each of the employees who testified said that they did not devote  
5 more than fifty percent of their time to supervisory work, which AFSCME argued  
6 alone establishes that the five employees do not meet the applicable legal  
7 definition of "supervisor."<sup>4</sup>

8 {7} The City argued that AFSCME had not met its burden to show that there  
9 was insufficient evidence to support the Board's decision and that AFSCME was  
10 impermissibly trying to reargue the case before the district court. The City  
11 primarily focused on what it contended was AFSCME's failure to apprise the  
12 district court of the evidence AFSCME presented that the Board failed to consider.  
13 The City argued that there was substantial evidence to support the Board's  
14 decision, specifically the Board's determination that AFSCME did not "meet [its]

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<sup>4</sup>The Ordinance defines "supervisor" as "[a]n employee who devotes a majority amount of work time to supervisory duties, who customarily and regularly directs the work of two or more other employees, and who has the authority in the interest of the employer to hire, promote, or discipline other employees or to recommend such actions effectively." Las Vegas, N.M., Code Ordinances ch. 48, Part I, § 48-4. The definition further specifies that it "does not include individuals who perform merely routine, incidental, or clerical duties or who occasionally assume supervisory or directory roles or whose duties are substantially similar to those of their subordinates and does not include lead employees or employees who occasionally participate in peer review or evaluation of employees."

1 burden.” The City repeatedly asserted that AFSCME had failed to provide citations  
2 to support its assertions regarding the testimony given at the merits hearing.

3 {8} In rebuttal, AFSCME explained its failure to provide citations for its  
4 recounting of the evidence—specifically the testimony by employees at the merits  
5 hearing—by pointing out that the Board had never provided a transcript or  
6 recording of the merits hearing. The district court questioned both parties about the  
7 lack of (1) findings of fact and conclusions of law from the Board, and (2) a  
8 recording or transcript of the merits hearing. AFSCME noted that “the record is  
9 lacking a recording of the hearing or a transcript of the hearing” and that “if the  
10 court were curious, that might be helpful.” However, AFSCME also stated that it  
11 did not think the district court would be “much more enlightened by listening to  
12 the recording” given that AFSCME had made “accurate and honest”  
13 representations in its brief regarding what was said at the merits hearing. The City,  
14 for its part, told the district court that there was “about nine hours’ worth of  
15 testimony” and assured the court that it had cited to the relevant portions of the  
16 hearing in its briefing. Thus, the parties agreed on little more than that the case  
17 could be decided on the record before the district court and that the district court  
18 need not remand for findings or order the record supplemented with a recording or  
19 transcript of the merits hearing, a premise with which we disagree.

1 {9} On August 15, 2016, the district court entered its own two-page written  
2 order upholding the Board’s decision. The district court concluded that “the record  
3 supports the [Board’s] decision[,]” that the decision “is not arbitrary, capricious, or  
4 contrary to law[,]” and that the Board “acted appropriately and within its scope of  
5 authority.” We granted AFSCME’s ensuing petition for a writ of certiorari. *See*  
6 Rule 12-505(D)(2)(d) NMRA.

## 7 **DISCUSSION**

### 8 **Standard of Review**

9 {10} “Upon a grant of a petition for writ of certiorari under Rule 12-505,” this  
10 Court “conducts the same review of an administrative order as the district court  
11 sitting in its appellate capacity, while at the same time determining whether the  
12 district court erred in the first appeal.” *City of Albuquerque v. AFSCME Council 18*  
13 *ex rel. Puccini*, 2011-NMCA-021, ¶ 8, 149 N.M. 379, 249 P.3d 510 (alteration,  
14 internal quotation marks, and citation omitted). Applying that same standard, this  
15 Court reviews the action of the Board to determine whether its decision was  
16 “arbitrary, capricious, or an abuse of discretion; not supported by substantial  
17 evidence in the record; or, otherwise not in accordance with law.” *Rio Grande*  
18 *Chapter of the Sierra Club v. N.M. Mining Comm’n*, 2003-NMSC-005, ¶ 17, 133  
19 N.M. 97, 61 P.3d 806. A ruling by the Board “is arbitrary and capricious if it is  
20 unreasonable or without a rational basis, when viewed in light of the whole

1 record.” *Id.* “This standard requires that we independently review the entire record  
2 of the administrative hearing to determine whether the decision was arbitrary and  
3 capricious, not supported by substantial evidence, or otherwise not in accordance  
4 with law.” *2727 San Pedro LLC v. Bernalillo Cty. Assessor*, 2017-NMCA-008,  
5 ¶ 15, 389 P.3d 287. In an administrative appeal involving a question of substantial  
6 evidence, “we review the district court’s ruling by independently examining the  
7 entire record, keeping in mind that a reviewing court may not substitute its  
8 judgment for that of the [agency].” *Gallup Westside Dev., LLC v. City of Gallup*,  
9 2004-NMCA-010, ¶ 11, 135 N.M. 30, 84 P.3d 78. The question in a substantial  
10 evidence review is not whether a different result could have been reached but  
11 “whether the record supports the result reached[.]” *Id.*

12 **The Deficient Record Necessitates Reversal, Remand, and Further**  
13 **Proceedings**

14 {11} We begin by noting the overall failure of the Board (and the City, following  
15 the Board’s dismissal from the case) to comply with its obligations under Rule 1-  
16 074, which sets forth specific rules to be followed in administrative appeals to the  
17 district court. As noted above, it took months for the Board to file the “Record  
18 Proper” in the district court in clear violation of Rule 1-074(H) (providing that the  
19 agency shall file the record on appeal “within thirty (30) days after the filing of the  
20 notice of appeal with the agency”). The Board then filed an “Amended Record  
21 Proper” some three weeks later. On the face of the filings, neither the purported

1 record nor the amended record complies with the basic requirements of Rule 1-  
2 074(H), specifically that “the agency shall number consecutively . . . the pages of  
3 the record on appeal[,]” which are to “be organized by date submitted to the  
4 agency beginning with the earliest paper or pleading[.]” *Id.* More importantly,  
5 from a substantive standpoint, the Board’s filings fail to comply with Rule 1-  
6 074(H)(2), which provides that “the record on appeal *shall consist of* . . . a copy of  
7 *all* papers, pleadings, and exhibits filed in the proceedings of the agency, entered  
8 into or made a part of the proceedings of the agency, or actually presented to the  
9 agency in conjunction with the hearing[.]” (Emphasis added.) As an example, the  
10 Board’s “Amended Record Proper” purports to include the post-hearing briefs  
11 submitted by the City and AFSCME, relied upon by the Board in reaching its  
12 decision, and cited by the City in its brief to the district court. However, after a  
13 diligent search, this Court has been unable to locate those briefs.

14 {12} While the aforementioned deficiencies hamper efficient appellate review, it  
15 is the Board’s and the City’s failure to file a transcript or recording of the merits  
16 hearing in accordance with Rule 1-074(H)(4) (providing that the record on appeal  
17 shall consist of “the transcript of the proceedings, if any”), that renders impossible  
18 any meaningful appellate review. As stated, we are required—as was the district  
19 court in its own appellate capacity—to review the record *as a whole*. Because  
20 neither a transcript nor a recording is part of the record before us, we assume that

1 the district court did not order the City to supplement the record on appeal, despite  
2 the parties' acknowledgment and the district court's awareness that the district  
3 court did not have the complete record before it. The unexplained absence of a  
4 hearing recording or transcript necessarily forecloses effective appellate review—  
5 both at the district court and before us—of whether the Board's decision is  
6 supported by substantial evidence in the record when viewed as a whole.

7 {13} The City argues on appeal that AFSCME “bears the burden of bringing a  
8 record that is sufficient to support its contentions” and that AFSCME’s “failure to  
9 satisfy this burden” and comply with Rule 12-318 NMRA’s requirements to cite  
10 the record proper in support of any arguments made “is grounds for striking  
11 [AFSCME’s] brief in chief in its entirety or declining to address contentions made  
12 therein.” While Rule 1-074(H)(4) provides that the party “desiring a copy of the  
13 transcript of the proceedings shall be responsible for paying the cost, if any, of  
14 preparing such copy[,]” the rule is clear that it is the *agency’s* responsibility to  
15 timely file the record proper in the district court. Rule 1-074(H). The City can  
16 hardly be heard to complain that AFSCME failed to comply with applicable rules  
17 requiring it to support its arguments with citations to the record, *see* Rule 1-  
18 074(K)(3) (requiring arguments to be supported by “citations to . . . the record on  
19 appeal relied upon”) and Rule 12-318(A)(4) (requiring arguments to be supported  
20 with “citations to . . . [the] record proper, transcript of proceedings, or exhibits

1 relied on”), when it was the City’s responsibility in the first instance to provide a  
2 complete record to the district court and repeatedly failed to do so.

3 {14} Troubling also is the City’s failure to comply with its own obligations—  
4 identical to AFSCME’s—to provide citations to the record in support of its  
5 argument that there *was* substantial evidence to support the Board’s decision. *See*  
6 Rule 1-074(L) (“The appellee’s response *shall conform* to the requirements of  
7 Subparagraphs (1) to (4) of Paragraph K of this rule[.]”); Rule 12-318(B) (“An  
8 answer brief shall conform to the requirements of the brief in chief[.]”).  
9 Conspicuously absent from the City’s presentation in the district court was any  
10 discussion whatsoever of the evidence—testimonial or otherwise—that supported  
11 the Board’s decision that each of the five positions was ineligible for accretion to  
12 the unit. *See Gallup Westside Dev., LLC, 2004-NMCA-010, ¶ 11* (explaining that  
13 the question to be answered in a substantial evidence challenge is “whether the  
14 record supports the result reached”). Instead, the City merely pointed to the  
15 Board’s verbal explanation of the generic “bases”—i.e., the definition of  
16 supervisor, the parties’ arguments in their briefs, unspecified “case law,” and the  
17 testimony of one of Lujan’s employees—it relied on to conclude that AFSCME  
18 “had not met its burden of proof” to support the Board’s decision. But the question  
19 before the district court was not whether the Board properly concluded that  
20 AFSCME had not met its burden of proof. Rather, in order to affirm the Board’s

1 decision, the record on the whole had to contain substantial evidence to support the  
2 Board's ultimate determination that each of the five positions AFSCME sought to  
3 accrete to the unit was not appropriate for accretion. For the same reasons we  
4 cannot now determine this issue, neither could the district court have done so on  
5 the incomplete and inadequate record on appeal before it.

6 {15} Notably, Rule 1-074(I) provides that “[i]f anything material to either party is  
7 omitted from the record on appeal by error or accident, the parties by stipulation,  
8 or the agency on request, or the district court, on proper suggestion or on its own  
9 initiative, may direct that the omission be corrected and a supplemental record  
10 transmitted to the district court[.]” While the rule provides the district court  
11 discretion to “direct that the omission be corrected[.]” *Id.* we conclude that the  
12 district court erred here in failing to direct the City to supplement the record on  
13 appeal with the transcript or recording of the merits hearing given that the primary  
14 issue before the district court was whether there was substantial evidence to  
15 support the Board's denial of AFSCME's petition. Under different  
16 circumstances—for example, where the district court is presented with purely legal  
17 questions in an administrative appeal—the failure to correct such an omission may  
18 not constitute error. But because of the nature of AFSCME's appeal and the whole-  
19 record standard of review, the district court could not have properly carried out its  
20 responsibilities under Rule 1-074 without undertaking an independent review of

1 the entire record, including, critically, the merits hearing, as well as all evidence  
2 presented to the Board. Particularly given the absence of findings of fact and  
3 conclusions of law by the Board and the scant reasoning provided by the Board at  
4 the April 27, 2015, meeting when it rendered its decision on AFSCME's petition,  
5 the district court was not in a position to draw an informed conclusion as to  
6 whether the Board's decision was or was not supported by substantial evidence  
7 without reviewing the *whole* record as the rule requires it to do.

8 {16} We, therefore, reverse the order of the district court affirming the decision of  
9 the Board and remand to the district court with instructions that it (1) direct the  
10 City to timely file a proper and complete record in accordance with all of the  
11 requirements of Rule 1-074(H), and (2) undertake whole record review of the  
12 entire record to determine whether substantial evidence supports the Board's  
13 determination that none of the five positions is eligible for accretion. In the event  
14 that no recording of the merits hearing was ever made or currently exists, the  
15 district court shall vacate the Board's decision and remand the case to the Board  
16 with instructions that it conduct a new merits hearing that shall be recorded in  
17 accordance with the Board's rules.

18 {17} This opinion is not to be construed as restricting in any way the district  
19 court's ability to exercise its discretion under Rule 1-074 to effectuate proper  
20 appellate review of the Board's decision. *See, e.g.*, Rule 1-074(X)(4) (providing

1 that the district court may “take such action as it deems appropriate” in the event  
2 that it determines that any party has failed to comply with Rule 1-074’s  
3 requirements). Indeed, the district court may very well determine on remand that  
4 remanding to the Board for findings and conclusions is appropriate despite the  
5 parties’ contention to the contrary, *see* Rule 1-074(T)(1), or that the parties should  
6 have to rebrief their arguments following the filing of the complete record proper  
7 in order to comply with Rule 1-074(K)-(M). The critical point we emphasize is that  
8 this Court’s inability—despite our best, and, unfortunately, wasted, efforts—to  
9 even reach the merits of this appeal, much less resolve them, directly stems from  
10 the combined failures of the parties and the district court to adhere to the  
11 straightforward and sensible requirements set forth in Rule 1-074. Those  
12 requirements, as evidenced by this case, exist for a reason, and care should be  
13 taken to comply with them in order to facilitate the meaningful appellate review of  
14 administrative decisions as contemplated by the rule.

15 **CONCLUSION**

16 {18} For the foregoing reasons, we reverse the district court’s order affirming the  
17 Board’s decision and remand for proceedings in accordance herewith.

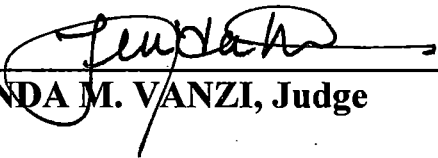
18 {19} **IT IS SO ORDERED.**

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J. MILES HANISEE, Judge

1 **WE CONCUR:**

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3 \_\_\_\_\_  
4 **LINDA M. VANZI, Judge**

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6 **JULIE J. VARGAS, Judge**