

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

DEC 17 2012

Wendy Jones

BILLY A. MERRIFIELD

Plaintiff-Petitioner,

v.

Ct. App. No. 32-422

BOARD OF COUNTY COMMISSIONERS
FOR THE COUNTY OF SANTA FE.

Defendants-Respondents.

ON WRIT OF CERTIORARI
TO THE FIRST JUDICIAL DISTRICT COURT
OF THE STATE OF NEW MEXICO

AMICUS CURIAE BRIEF OF
THE AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO

Maureen A. Sanders
Cooperating Attorney
ACLU of New Mexico
Sanders & Westbrook, P.C.
102 Granite Ave. NW
Albuquerque, NM 87102
505-243-2243

Katherine Wray
Cooperating Attorney
ACLU of New Mexico
Wray & Girard, P.C.
102 Granite Ave. NW
Albuquerque, NM 87102
505-842-8492

TABLE OF CONTENTS

Interest of Amicus 1

Statement of the Case 1

Introduction to the Argument of Amicus 7

Argument of Amicus 9

A. The County Rules’ Procedure for Termination
Of Classified Employees 11

B. The County Rules Fail to Afford Sufficient
Procedural Due Process Protections to
Terminated Public Employees 13

Conclusion 17

TABLE OF AUTHORITIES

New Mexico Case Law

Bd. of Educ. v. Harrell,
118 N.M. 470, 882 P.2d 511 (1994) 10

City of Albuquerque v. Chavez,
1998-NMSC-033, ¶ 10, 125 N.M. 809, 965 P.2d 928 *passim*

In re Termination of Boespflug,
114 N.M. 771, 845 P.2d 865 (Ct. App. 1992) 1

Lovato v. Albuquerque,
106 N.M. 287, 742 P.2d 499 (1987) 9

Santa Fe Exploration Co. v. Oil Conservation Comm’n,
114 N.M. 103, 835 P.2d 819 (1992) 9

State v. Gomez,
1997-NMSC-006, ¶ 21, 122 N.M. 777, 932 P.2d 1..... 8

Zamora v. Village of Ruidoso Downs,
120 N.M. 778, 907 P.2d 182 (1995) 7, 10

Federal Case Law

Matthews v. Eldridge,
424 U.S. 319 (1976) 13-17

Merrifield v. Bd. of County Comm’rs of Santa Fe County
654 F.3d 1073, 1085-86 (10th Cir. 2011) 6

Constitutional Provisions

U.S. Const. Amend XIV, § 1..... 9

Article II, § 18 of the New Mexico Constitution 9

County Rules

County Rule 8.2	11, 13
County Rule 8.3	4, 12
County Rule 8.7	12
County Rule 8.8	12
County Rule 8.9	12
County Rule 8.10	12
County Rule 8.11	12

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles embodied in the Bill of Rights. The American Civil Liberties Union of New Mexico is one of ACLU’s statewide affiliates with approximately 7000 members. Since its founding in 1920, the ACLU has been deeply involved in securing the liberties embodied in the Bill of Rights. This case is of particular concern to our organization because government employers have an obligation to afford public employees with sufficient procedural safeguards to protect the constitutionally protected property interest in public employment. As this Court has observed, “[a]lthough an administrative body is not required to follow the formal rules of evidence, adjudicatory proceedings which involve substantial rights are bound by the fundamental principles of justice and procedural due process.” In re Termination of Boespflug, 114 N.M. 771, 774, 845 P.2d 865, 868 (Ct. App. 1992).

STATEMENT OF THE CASE

This case involves the termination of a public employee without due process of law. The public employee, Billy Merrifield, was employed by the Santa Fe Corrections Department, as the Youth Services Administrator. [RP

000280]. On January 25, 2007, the County Corrections Director placed Mr. Merrifield on paid administrative leave, pending the outcome of an investigation of possible misconduct. [Id.]. Mr. Merrifield attended a meeting on February 19, 2007, where he was able to respond to the recommendation of termination and at which time he received a letter recommending his termination. [RP 000285].

On February 22, 2007, the Corrections Department Director notified Mr. Merrifield that she would recommend his termination, based on findings resulting from a Santa Fe County investigation, Mr. Merrifield had engaged in sexually inappropriate behavior and the transmission of sexually inappropriate images to a county employee during working hours. [RP 000281]. The Director informed Mr. Merrifield that he could request a pre-disciplinary grievance hearing within three days. [Id.].

Mr. Merrifield immediately hired an attorney, who requested a pre-disciplinary grievance hearing, as well as a great deal of specific documentation, including the relevant policies, investigation reports supporting the charges, any disciplinary file, progress evaluations, disciplinary actions taken against other employees, and information relating to Mr. Merrifield's replacement. [RP 000282-84]. In response to Mr. Merrifield's request for documents, the Human Resources Director provided

some documents, but informed Mr. Merrifield's attorney that there was "no procedure set forth in the employee discipline and grievance process component of the Santa Fe County Procedures and Policies which entitles Mr. Merrifield to the requested information." [RP 000285]. The Human Resources Director provided the following explanation of the process:

An evidentiary hearing on any disciplinary action taken against Mr. Merrifield will occur if Mr. Merrifield appeals the disciplinary action taken. At the disciplinary hearing before an arbitrator Mr. Merrifield has the opportunity to present witnesses and physical evidence and cross-examine County witnesses. Much of your request for information is geared towards preparation for such a hearing and should be sought through appropriate procedures during the appeal process. Paragraph 8.7 of the Santa Fe County Procedures and Policies governs discovery during the appeal before an arbitrator.

[RP 000285-86].

The Human Resources Director conducted the pre-disciplinary hearing on March 8, 2007. At that hearing, the Corrections Department Director made a statement, and Mr. Merrifield and his attorney were permitted to respond to the allegations. [RP 000287-88]. By letter dated March 13, 2007, the Human Resources Director upheld the decision to terminate Mr. Merrifield and notified Mr. Merrifield that he could appeal the decision to the County Manager. [RP 000288]. Mr. Merrifield again appealed. [RP 000289]. The County Manager reviewed the documents

from previous hearings, and in a letter dated March 21, 2007, upheld the termination decision. [RP 000289-90].

Pursuant to County Human Resource Management Rules and Regulations, (“County Rules”) Rule 8.3, Mr. Merrifield initiated the post-termination hearing process. [RP 000006]. This hearing was conducted by a hearing officer, who received evidence over nine days in April, May, and June 2007. [Id.]. Both the County of Santa Fe (“the County”) and Mr. Merrifield were represented by counsel, who presented argument, briefing, and proposed findings and conclusions. [Id.]. Mr. Merrifield argued to the hearing officer that the standard for her review should be *de novo*. [RP 000011]. The hearing officer disagreed. [Id.]. In her view, the matter to be reviewed was whether the choice of discipline was arbitrary, capricious, or unreasonable. The hearing officer determined that

The issue of whether a particular level of discipline is appropriate depends on resolutions of questions of fact and on the application of judgment and discretion. The exercise of judgment and discretion will be reviewed under the arbitrary, capricious, discriminatory, or unreasonable standard. Included within this concept is the idea that the penalty should not be disproportionate to the offense and that like offenses should receive like penalties. This review will be undertaken, however, with appropriate deference to the primary discretion that is vested in the County. This deference requires that the selection of discipline be sustained unless it is clearly erroneous.

[RP 000011-12]. After reviewing a great deal of evidence, the hearing officer stated that she could not say “that the County’s decision to terminate Mr. Merrifield’s employment was clearly erroneous, and therefore, must accord it deference.” [RP 000022]. This conclusion was footnoted with the following caveat:

Had I been imposing discipline *ab initio*, I would have suspended and demoted Mr. Merrifield for this conduct. I mention this so that if Mr. Merrifield prevails on his claim that the arbitrator was required to make a *de novo* decision on the level of discipline, a further hearing can be avoided. Specifically, I would have demoted Mr. Merrifield to a non-supervisory position and I would have suspended him without pay for five weeks.

[RP 000022, n. 2].

Mr. Merrifield appealed the hearing officer’s decision to the United States District Court for the District of New Mexico (“U.S. District Court”), which determined that the proper standard for review for the hearing officer should have been *de novo*. [RP 000032]. The U.S. District Court went on to uphold the hearing officer’s alternate conclusion, found in footnote 2, which would have instituted suspension and demotion. [RP 000038]. The U.S. District Court ordered the County to re-employ Mr. Merrifield. [Id.].

Eighteen months later, the matter was back before the U.S. District Court on Mr. Merrifield’s motion because the County did not re-employ Mr.

Merrifield. [RP 000039]. Mr. Merrifield sought monetary damages in the form of backpay and front pay. [Id.]. The U.S. District Court ordered the County to pay an amount of backpay, which was calculated based on the salary he would have received had he been demoted instead of terminated. [RP 000042]. Among other issues, the County appealed the award of backpay, and Mr. Merrifield appealed the Court’s calculation of backpay. [RP 000046].

The Tenth Circuit Court of Appeals (“the Circuit”) reversed the U.S. District Court’s decision on the state-law issues—the standard for review and the award of backpay. See Merrifield v. Bd. of County Comm’rs for the County of Santa Fe, 654 F.3d 1073, 1085-86 (10th Cir. 2011); see also RP 000071. The Circuit reasoned that because Mr. Merrifield’s claims for violations of 42 U.S.C. § 1983 had already been dismissed on summary judgment when the U.S. District Court ruled on the state-law issues, the U.S. District Court should have declined to exercise its supplemental jurisdiction over “novel questions of state law.” [Id.]. The Circuit therefore reversed with instructions to dismiss the state-law claims without prejudice. [Id.].

After the U.S. District Court entered judgment, Mr. Merrifield initiated the current proceedings, seeking certification from the First Judicial District to this Court, in order to address the questions left outstanding by

the Circuit. [RP 000001]. The First Judicial District certified the following question:

If the standard of review is not specified in an ordinance or policy, what is the appropriate standard of review that a hearing officer is to follow in a public employee termination hearing of the public employer's decision: Is the hearing officer to review the evidence and discipline *de novo* without deference to the public employer's decision? Or is the hearing officer to give deference to the public employer's decision on the evidence and the disciplinary sanction and review the public employer's decision for whether it is supported by substantial evidence, is arbitrary and capricious, or contrary to law?

[RP 000305-06]. The Court of Appeals subsequently granted Mr. Merrifield's petition for certiorari on the same question.

INTRODUCTION TO THE ARGUMENT OF *AMICUS*

“A public employee who successfully can assert a property interest in employment is entitled to due process before he or she can be terminated.” Zamora v. Village of Ruidoso Downs, 120 N.M. 778, 781, 907 P.2d 182, 185 (1995). Due process, at minimum, includes notice and a meaningful opportunity to be heard, either before or after termination. Id. The failure to provide for a *de novo* review of the employee's defense and evidence, at any phase of the pre- or post-termination proceedings, renders the employee without any assurance that the employee will be meaningfully heard by an impartial adjudicator. The County of Santa Fe failed to provide Mr.

Merrifield a *de novo* review at all appeal stages. Thus, because the initial steps in the termination process did not allow Mr. Merrifield an opportunity to review or present evidence and the final stages did not provide for *de novo* review, Mr. Merrifield did not receive due process of law before deprivation of a constitutionally protected property interest in public employment.

Although Mr. Merrifield received a pre-termination hearing and a nine-day post-termination hearing, the County Rules failed to afford him due process sufficient to satisfy the New Mexico and United States constitutions.¹ During the termination process, no decision-maker reviewed all of the evidence *de novo*. Instead, Mr. Merrifield had a series of pre-termination hearings without the benefit of all of the evidence and a post-termination hearing in which the hearing officer gave deference to the previous—ill-informed—decisions. The County Rules fail to ensure that at any point in the grievance process, a terminated employee will receive a hearing with an adjudicator who receives evidence and testimony and based on that record, makes a *de novo* determination.

¹ Mr. Merrifield has made his argument entirely pursuant to the New Mexico Constitution. Any reference by *amicus* to the Federal Constitution or federal case law is made with the understanding that the federal analysis outlines the minimum constitutional standard and that in some circumstances, the state constitution affords even greater protection. See State v. Gomez, 1997-NMSC-006, ¶ 21, 122 N.M. 777, 932 P.2d 1 (explaining the interstitial approach and recognizing “the responsibility of state courts to preserve national uniformity in development and application of fundamental rights guaranteed by our state and federal constitutions”).

ARGUMENT OF *AMICUS*

Article II, § 18 of the New Mexico Constitution, as well as the Fourteenth Amendment to the United States Constitution guarantees that the states shall not deprive citizens of property without due process of law. U.S. Const. Amend XIV, § 1; N.M. Const., Article II, § 18. New Mexico Courts recognize that “[due] process safeguards are particularly important in administrative agency proceedings because many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed.” Santa Fe Exploration Co. v. Oil Conservation Comm’n, 114 N.M. 103, 109, 835 P.2d 819, 825 (1992) (internal quotation marks and citation omitted).

There is no dispute that Mr. Merrifield was a classified county employee and that he had a state constitutionally protected property interest in continued employment. See City of Albuquerque v. Chavez, 1998-NMSC-033, ¶ 10, 125 N.M. 809, 965 P.2d 928 (“Chavez”); Lovato v. Albuquerque, 106 N.M. 287, 289-90, 742 P.2d 499, 501-02 (1987). As a result, the County was required to afford Mr. Merrifield procedural safeguards adequate to protect his right to due process. Chavez, 1998-NMSC-033, ¶ 10.

At a minimum, “due process must include notice and opportunity to respond prior to termination.” Zamora, 120 N.M. at 781, 907 P.2d at 185. When evaluating whether a state employee received adequate procedural safeguards, however, New Mexico courts consider pre- and post-termination procedures as a whole. Chavez, 1998-NMSC-033, ¶ 14. Due process requires the government to afford an individual, over the course of the proceedings, the essential elements of the adversary process, including the following:

- (1) adequate notice of the charges or basis for government action;
- (2) a neutral decision-maker;
- (3) an opportunity to make an oral presentation to the decision-maker;
- (4) an opportunity to present evidence or witnesses to the decision-maker;
- (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual;
- (6) the right to have an attorney present the individual's case to the decision-maker;
- (7) a decision based on the record with a statement of reasons for the decision.

Bd. of Educ. v. Harrell, 118 N.M. 470, 479, 882 P.2d 511, 520 (1994)

(internal quotation marks and citation omitted).

At some point during the pre- and post-termination process, the employee must have an opportunity to alert the decision-makers to the employee’s defenses and to invoke the discretion of the decision-makers on the appropriateness or necessity of the discharge. Chavez, 1998-NMSC-033 ¶ 15. The County of Santa Fe Rules, however, do not provide for such an

opportunity. The Rules do not define the scope of review at the various levels of appeal, and the hearing officer determined that the County's exercise of judgment and discretion to terminate Mr. Merrifield would be reviewed under the "arbitrary, capricious, discriminatory, or unreasonable standard." [RP 000011]. During Mr. Merrifield's termination, he did not have an opportunity to have the entire record before a *de novo* decision-maker—a decision maker who would review the entire record and rule without deferring to the weight of a previous decision.

A. The County Rules' Procedure for Termination of a Classified Employee

The County Rules provide for pre- and post-termination procedures. Prior to termination, but after receiving notice of a recommended termination, the employee is entitled to request a pre-termination hearing with the Director or a designated official. County Rule 8.2(A). At that hearing, the Director meets with the employee and the employee's representative, and the employee has an opportunity to respond to the recommended termination. County Rule 8.2(C). After the hearing, the Director issues a written decision. County Rule 8.2(D). The employee can then appeal the Director's decision to the County Manager. County Rule 8.2(E). The County Manager's decision is based on a review of all documentation. County Rule 8.2(F). It appears from the record in this case,

that the County Manager's decision is the end of the pre-termination process. [See RP 000289-90].

Post-termination, the employee may request a disciplinary hearing, also referred to as an appeal to a hearing officer, who is appointed by the County Manager. County Rule 8.3(A) & (C). The disciplinary hearing is an adversary process, involving discovery, pre-hearing motions, the opportunity to issue subpoenas for witnesses, and an evidentiary hearing. County Rules 8.7 through 8.11. At the evidentiary hearing, both parties have the opportunity to make opening statements, present testimony and cross-examination, and closing statements. County Rule 8.11.

The hearing officer is directed to "issue a written ruling, including findings of fact which form the basis of the hearing officer's conclusions of law." County Rule 8.11(A)(3)(e). The hearing officer "may uphold, modify, or reverse the decision of the County Manager, and may reinstate the employee and award back pay and benefits." County Rule 8.11(C). After the disciplinary hearing, either party may appeal the hearing officer's decision in the First Judicial District Court. County Rule 8.11(D)(1).

This multi-tiered, carefully designed process contains no standard of review for an appeal to the County Manager and no standard of review for the post-disciplinary hearing. Thus, nowhere does any appeal afford any *de*

novus review without deference to the initial decision-maker, who made the initial decision without affording the employee the opportunity to receive and review documents supporting the termination, the applicable policies and procedures, and disciplinary actions taken against other employees.

B. The County Rules Fail to Afford Sufficient Procedural Due Process Protections to Terminated Public Employees

Although the County Rules provide three levels of review for a terminated employee, the pre-termination procedures, by design, do not contemplate the employee's presentation of evidence or testimony in those appeals. See County Rule 8.2; RP 000285-86. Ultimately, the post-termination disciplinary hearing affords employees the opportunity to conduct discovery and mount a defense. The County Rules, however, fail to state that the disciplinary hearing is a *de novo* proceeding. As a result, an otherwise excellent post-termination procedure will morph into battle against a presumption of correctness, in which the employee must overcome the underlying termination decision, which was made without the employee having an opportunity to meaningfully respond.

New Mexico courts employ the long-standing test found in Matthews v. Eldridge, 424 U.S. 319 (1976) to analyze the sufficiency of process afforded. Chavez, 1998-NMSC-033, ¶ 12. Under Matthews, the "specific dictates of due process" requires the balancing of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. ¶ 14 (emphasis omitted) (internal quotation marks and citation omitted).

The private interest that will be affected by the official action is clear: in a *de novo* proceeding, the employee has an opportunity to protect his public employment with evidence and testimony before an adjudicator who will consider all the evidence and allegations without preconception. The government's interest is also clear: clarifying the standard of review imposes no additional fiscal or administrative burden because the procedures are already in place. Indeed, the County Rules already require the hearing officer to make "findings of fact which form the basis of the hearing officer's conclusion of law." The only change necessary is a shift of the hearing officer's perspective. In the present case, the hearing officer made clear by her alternate findings that such a shift is entirely feasible and generates no undue burden.

The primary issue in the present case is the second Matthews interest: the risk of erroneous deprivation inherent in the current procedure and the probable value of the additional requested safeguard. Thus, the Court must

consider the risk of erroneous deprivation of the protected property interest in public employment absent a *de novo* hearing with the full panoply of evidence, as well as the probable value of that *de novo* hearing.

The Chavez Court considered this second *Matthews* factor when it considered circumstances in which an employee received pre- and post-termination procedures, but “procedural irregularities at the pre-termination proceeding had the effect of increasing, and not decreasing, the risk of error present at the post-termination hearing.” Id. ¶ 1. The Chavez employee was not permitted to make a record or have his attorney speak at the pre-termination hearing, nor was he permitted to present mitigation evidence. Id. ¶ 5. Subsequently, at the post-termination hearing, the employee was permitted to present his evidence, but he was required to carry the burden of proof. Id. ¶ 6. Considering both processes together, the New Mexico Supreme Court concluded that the employee was not afforded a fair opportunity to invoke the discretion of any decision maker and that “these circumstances, together with the requirement that [the employee] shoulder the burden of proof in the initial post-termination hearing, created an impermissibly high risk that [the employee] would be erroneously terminated from his employment.” Id. ¶ 15.

Mr. Merrifield similarly was not afforded a fair opportunity to invoke the discretion of the decision makers, either pre- or post termination. The Santa Fe County Rules, as currently written, can be read to break up the process so that the initial decision is made without the benefit of the employee's evidence and defenses. That initial decision is then reviewed with deference to the government employer at the time the employee finally has the opportunity to be meaningfully heard. Pre-termination, Mr. Merrifield was not permitted to present evidence or to review the documents related to his termination. Post-termination, the hearing officer viewed the evidence and testimony through the lens of the pre-termination decisions—the hearing officer did not exercise her own discretion with respect to Mr. Merrifield's defenses. Considering the entire pre- and post-termination process, the risk that Mr. Merrifield would be erroneously terminated is impermissibly high when post-termination deference is given to a pre-termination decision made without the employee having an opportunity to mount or present a defense. See id. ¶ 15.

Balancing the Matthews factors, the undeniable private interest in public employment and the significant probative value of a *de novo* hearing weigh heavily against the County's threadbare governmental interest in its current silent regulation. The balancing demonstrates that the failure of the

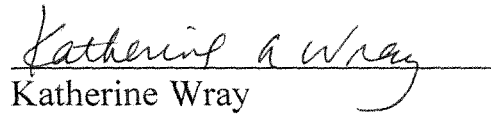
County Rules to iterate the proper scope of the hearing officer's review of the evidence presented at the post-termination disciplinary hearing deprives the employee of constitutionally guaranteed due process protections. The employee cannot fairly invoke the discretion of either the pre- or the post-termination decision-makers. The pre-termination decision-maker does not receive evidence. The post-termination decision-maker views the evidence she receives through a lens that is clouded by the pre-termination decision. The County Rules, without requiring a *de novo* review of the evidence, fail to ensure that employees are not deprived of a state constitutionally protected property interest without due process of law.

CONCLUSION

An unbiased employment decision must, at some point, derive from a proceeding that afforded the employee a meaningful opportunity to be heard. The disciplinary hearing set forth in the Santa Fe County Rules affords an excellent procedure for an employee to mount his defense, but the failure to require that the hearing be conducted as a *de novo* review of the pre-termination decision renders the entire process insufficient to satisfy due process requirements. This Court should, therefore, recognize the importance of governmental employees' providing a disciplinary procedure which affords the constitutionally guaranteed due process elements. The

process in the County of Santa Fe Rules did not provide Mr. Merrifield with the requisite due process. This Court should therefore answer the certified question in the following manner: During the termination process, a public employee is entitled to due process of law in order to preserve constitutionally protected property interests, and due process requires a procedure that ensures a *de novo* review of all of the evidence and the arguments of the parties.

Respectfully submitted,


Katherine Wray
Cooperating Attorney
ACLU of New Mexico
Wray & Girard, P.C.
102 Granite Ave. NW
Albuquerque, NM 87110
505-842-8492

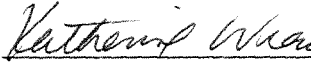
Maureen A. Sanders
Cooperating Attorney
ACLU of New Mexico
Sanders & Westbrook, P.C.
102 Granite Ave. NW
Albuquerque, NM 87110
505-842-8492

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was mailed on December 17, 2012, to counsel of record as follows:

Michael Schwarz, Esq.
P.O. Box 1656
Santa Fe, NM 87504-1656
*Attorney for Plaintiff-Petitioner, Billy
A. Merrifield*

Kevin Brown, Esq.
Brown Law Firm
2901 Juan Tabo Blvd. NE, #208
Albuquerque, NM 87112-1885
*Attorney for Defendant-
Respondent*



Katherine Wray