IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

BILLY A. MERRIFIELD,

Plaintiff-Appellant,

v.

No. 32, 422

BOARD OF COUNTY COMMISSIONERS
FOR THE COUNTY OF SANTA FE
Defendant-Appellee.

A CERTIFIED QUESTION FROM THE
FIRST JUDICIAL DISTRICT COURT,
The Hon. Raymond Z. Ortiz, Chief District Judge
No. D-101-CV-2011-03015

DEFENDANT'S-APPELLEE'S ANSWER BRIEF

ORAL ARGUMENT IS REQUESTED

Respectfully Submitted,

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COMES NOW Defendant-Appellee Board of County Commissioners for the County of Santa Fe (hereinafter the "County"), by and through its attorneys, Brown Law Firm, Kevin M. Brown, Elizabeth V. Friedenstein, and Desiree D. Gurule, and hereby submits its Answer Brief.

I. Summary of Proceedings

A. Nature of the Case

Plaintiff-Appellant Billy A. Merrifield (hereinafter "Merrifield") failed to include a presentation of the Nature of the Case. Merrifield was employed by the County of Santa Fe as a Youth Services Administrator. [RP 26]. He was charged with sending sexually suggestive pictures via e-mail and cell phone to other County employees, including a subordinate, during working hours in violation of the County's policies. *Id.* Merrifield was provided with a pre-termination hearing and was terminated from his employment. *Id.* He appealed the termination and the Hearing Officer selected by the County heard evidence for nine days over a three-month period. *Id.* At this post-termination hearing Merrifield was represented by counsel and had the opportunity to present evidence and cross-examine witnesses. *Id.* The Hearing Officer issued her decision on July 19, 2007. *Id.*

At the outset of the proceeding, the Hearing Officer questioned the standard of review she was to utilize in making her decision. *Id.* Merrifield argued that the standard she should use was *de novo*, but in her Decision, the Hearing Officer stated that she would adopt the arbitrary and capricious standard of review. [RP 27].

B. Course of Proceedings and Disposition Below

Merrifield timely appealed the termination decision by the Hearing Officer by filing a Complaint in the State of New Mexico, First Judicial District Court, in the county of Rio Arriba on

August 16, 2007, as cause no. D-117-CV-200700362.[1] *Merrifield's Brief in Chief*, pg. 1. Merrifield voluntarily dismissed that complaint without prejudice on August 31, 2007, in order to re-file and add additional federal constitutional claims.

On February 4, 2008, Merrifield filed a complaint in the United States District Court for the District of New Mexico, as cause no. Civ. No. 08-122 RLP/ACT. *Merrifield's Brief in Chief*, pg. 1. This complaint added three federal constitutional claims (Federal equal protection claim, procedural due process claim, and first amendment right to associate with attorney claim), to his state administrative appeal. Merrifield filed this complaint outside the time limit set in Rule 1-075(D) as the decision was made on July 19, 2007 and he filed on February 4, 2008. The County filed a motion to dismiss based on untimely filing, but because Merrifield claimed it was timely pursuant to NMSA 37-1-14, it was denied. *Merrifield's Brief in Chief*, pg. 1. In that case, summary judgment was granted to Santa Fe County on all constitutional claims but the administrative decision of the hearing officer was reversed and back pay in the amount of $30,866.50 was awarded. The basis of the court's decision was that the hearing officer should have reviewed the decision of Santa Fe County *de novo* rather than applying an arbitrary and capricious standard of review.

The federal district trial court's decision was appealed and cross-appealed to the United States Court of Appeals for the 10th Circuit, as cause nos. 10-2175 and 10-2179. The summary judgment dismissing the constitutional claims was affirmed. However, the 10th Circuit reversed the court's judgment on the state-law claim and remanded with instructions to dismiss the claim without prejudice. Merrifield filed his Petition for a Writ of Certiorari in the Supreme Court of the United States as cause No. 11-881, on the issue of his right to associate with an attorney; it was denied.

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[1] The County requests this Court take Judicial Notice of the following Course of Proceedings and Disposition Below as presented and identified by cause numbers and dates of pleadings and orders issued by the various districts and courts involved in this case over the last five years, pursuant to Rule 11-201 NMRA 2012.

On September 27, 2011, Merrifield filed a Petition for Writ of Certiorari in Tierra Amarilla District Court, County of Rio Arriba as cause no. D-117-CV-201100471. Merrifield sought review of the administrative decision in this matter. The next day and prior to service on the County, on September 28, a notice of dismissal without prejudice was filed in that case. On September 28, 2011, Merrifield filed his Petition of Writ of Certiorari in Santa Fe County District Court, as cause no. D-101-CV-201103015. The County filed its motion to dismiss based on untimely filing, but it was denied on September 21, 2012, the same day the Petition was granted. The County filed its Notice of Cross-Appeal on its denied motion to dismiss on October 12, 2012. The County's Cross-Appeal Brief in Chief is filed concurrently with this Answer Brief.

C. Summary of Facts Relevant to Issue Presented for Review

In January 2007 Merrifield represented the County at a corrections conference in Florida. [RP 47]. On the afternoon of January 22, 2007, he sent a sexually graphic image to the personal cell phone of Robert Apodaca, one of his subordinates at the youth correctional facility. *Id.* Although the use of personal cell phones at the facility was prohibited, Apodaca received the image at work and displayed it to coworkers. *Id.* One became upset and complained. *Id.*

Merrifield was placed on administrative leave with pay on January 25. *Id.* On February 22 defendant Annabelle Romero, the County's Director of Corrections, issued a letter recommending Merrifield's termination. *Id.* The letter stated that an internal investigation had revealed that Merrifield had sent pornographic images to a subordinate employee via cell phone and had "participated in a sexually inappropriate environment at the facility, and participated in other improper behavior among staff at the facility." *Id.* It added that the investigation had also discovered "failings on [Merrifield's] part as a supervisor and improper conduct in [his] supervisory dealings with employees." *Id.*

By that time Merrifield had retained an attorney to represent him and had informed the County that all communications on the matter should go through his attorney. [RP 48]. On February 23 the attorney sent a letter to defendant Bernadette Salazar, the County's Human Resources Director, requesting that the County make a number of documents available for inspection and copying. *Id.* The requested documents included "[e]ach and every policy, protocol or memorandum the County claims [Merrifield] violated," and documentation of the allegations in the Romero letter. *Id.*

Salazar responded in a letter dated March 5. *Id.* The letter included copies of County policies on cell-phone use, sexual harassment, and the responsibilities of managers and supervisors, and it offered Merrifield's attorney the opportunity to review Merrifield's personnel file. *Id.* But it denied Merrifield's request for further information and documents. *Id.* It explained that both the meeting at which Merrifield had received Romero's letter and his forthcoming predisciplinary hearing afforded him the opportunity "to explore the basis for the recommendation of termination." *Id.* The letter also noted that if Merrifield chose to appeal any disciplinary action taken against him, he would be entitled to a full evidentiary hearing and that "[m]uch of [his] request is geared towards preparation for such a hearing and should be sought through appropriate procedures during the appeal process." *Id.*

Merrifield attended the March 8 pre termination hearing with his lawyer. *Id.* Afterwards Salazar agreed with Romero's recommendation to terminate Merrifield's employment. *Id.* Merrifield, through his attorney, appealed the recommendation to defendant Roman Abeyta, the County Manager. Abeyta rejected the appeal and terminated Merrifield in a March 21 letter. [RP 49]. Abeyta described Merrifield's admitted sending of the cell-phone image as action displaying "poor judgment," as "intolerable behavior," and as "an example of the unacceptable behavior [Merrifield had] displayed in [his] capacity as the Administrator." *Id.* He further found that Merrifield had

"participated in sending and receiving inappropriate e-mail utilizing County equipment while on County time," *id.*, and that he had used his County cell phone "inappropriately" by making calls that were not work-related. *Id.*

Merrifield then invoked his right under County personnel rules to appeal the termination to a hearing officer. *Id.* The hearing officer conducted a nine-day post termination hearing in April, May, and June. *Id.* On July 19, 2007, the hearing officer issued a 19–page decision affirming Merrifield's termination. *Id.* She decided that she was to review Abeyta's decision under an arbitrary-and-capricious standard, rejecting Merrifield's argument that the proper standard of review was de novo. *Id.* She said that discipline was justified by Merrifield's transmission and display of sexually explicit images via his cellphone and his work computer and by his contributing to an atmosphere of misuse of County computer equipment at the facility. *Id.* Although she held that the County had not acted arbitrarily or capriciously in deciding that the proper discipline was termination, she said that had she "been imposing discipline ab initio [, she] ... would have demoted [Merrifield] to a non-supervisory position and ... suspended him without pay for five weeks." [RP 50]. She also ruled that Merrifield had been afforded due process, stating that "[a]s to each of the matters which I have found would support discipline, [Merrifield] was given sufficient notice that these matters were the basis for termination," in part because "[h]e was given an opportunity to respond to these matters at the pre-termination hearing." *Id.*

The final termination decision was made on July 19, 2007. Merrifield has filed four separate complaints since that time.

1. On August 16, 2007 in the State of New Mexico, First Judicial District Court, in the county of Rio Arriba, as cause no. D-117-CV-200700362.

a. The parties involved in this suit were Merrifield against Annabelle Romero, Bernadette Salazar, Robert Apodaca, Roman Abeyta, Greg Parrish, and the Board of County Commissioners for the County of Santa Fe, NM.

b. The suit was for the review of the administrative decision.

2. On February 4, 2008, in the United States District Court for the District of New Mexico, as cause no. Civ. No. 08-122 RLP/ACT.

a. The parties involved in this suit were Merrifield against Annabelle Romero, Bernadette Salazar, Robert Apodaca, Roman Abeyta, Greg Parrish, and the Board of County Commissioners for the County of Santa Fe, NM.

b. The suit was for the review of the administrative decision, violation of Merrifield's federal procedural due process rights, violation of Merrifield's federal right for equal protection, and violation of Merrifield's first amendment right to associate with counsel, and a Petition for Writ of Certiorari.

3. On September 27, 2011, Merrifield filed a Petition for Writ of Certiorari in Tierra Amarilla District Court, County of Rio Arriba, as cause no. D-117-CV-201100471.

a. The parties involved in this suit were Merrifield against the Board of County Commissioners for Santa Fe County.

b. The suit was for the review of the administrative decision and for a Petition for Writ of Certiorari.

4. On September 28, 2011, Merrifield filed his Petition of Writ of Certiorari in Santa Fe District Court, County of Santa Fe, as cause no. D-101-CV-201103015.

a. The parties involved in this suit were Merrifield against the Board of County Commissioners for Santa Fe County.

b. The suit was for the review of the administrative decision and for a Petition for Writ of Certiorari.

Merrifield claims protection of the timeliness of his claim under §37-1-14 NMSA 1978 as a savings statute on three occasions: first, when the federal suit was filed on February 4, 2008: second, when the suit was filed in Tierra Amarilla on September 27, 2011: and third, when this suit was filed on September 28, 2011.

II. Legal Argument on Issue

A. Issues Challenged

i. Does this Court have subject matter jurisdiction if Merrifield brings an action before the court pursuant to Rule 1-075 past the 30 day time period by relying on §37-1-14 NMSA 1978 as a savings statute, and whether §37-1-14 NMSA 1978 may be used more than once to save a suit past its time limitations.

ii. 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 an 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?

B. Standard of Review

Attack on the subject matter jurisdiction of the court may be made at any time in proceedings, may be made for the first time upon appeal or may be made by collateral attack in the same or other proceedings long after judgment has been entered. Rules of Civil Procedure, rules 12(h)(3), 60(b), (b)(4); *Chavez v. Valencia County*, 86 N.M. 205, 521 P.2d 1154 (1974). "When facts

relevant to a statute of limitations issue are not in dispute, the standard of review is whether the district court correctly applied the law to the undisputed facts." *Haas Enters., Inc. v. Davis,* 2003–NMCA–143, ¶ 9, 134 N.M. 675, 82 P.3d 42 (citing *Inv. Co. of the Sw. v. Reese,* 117 N.M. 655, 657, 875 P.2d 1086, 1088 (1994)). Questions of law are reviewed *de novo. State v. Kerby*, 2007-NMSC-014, 141 N.M. 413, 416, 156 P.3d 704, 707.

The Court reviews de novo whether a ruling by an administrative agency is in accordance with the law. *Clark v. N.M. Children, Youth & Families Dep't,* 1999–NMCA–114, ¶ 7, 128 N.M. 18, 988 P.2d 888. Although the Court is not bound by the agency's ruling on a matter of law, the Court nevertheless may take into account the nature of the agency and the scope of its power to determine fundamental policy. *See. Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n,* 120 N.M. 579, 904 P.2d 28 (1995). If an administrative agency decision is based upon the interpretation of a particular statute, the court will accord some deference to the agency's interpretation, especially if the legal question implicates agency expertise; however, the court may always substitute its interpretation of the law for that of the agency's because it is the function of the courts to interpret the law. *Regents of Univ. of New Mexico v. New Mexico Fed'n of Teachers*, 1998-NMSC-020, 125 N.M. 401, 962 P.2d 1236. "We should reverse the ruling if the agency unreasonably or unlawfully misinterprets or misapplies the law, but we may recognize agency expertise." *Id. Archuleta v. Santa Fe Police Dept. ex rel. City of Santa Fe*, 2005-NMSC-006, 137 N.M. 161, 108 P.3d 1019.

C. Preservation of the Issue

On September 28, 2011, Merrifield filed his Petition of Writ of Certiorari in Santa Fe County District Court, as cause no. D-101-CV-201103015. The County filed its motion to dismiss based on untimely filing, but it was denied on September 21, 2012, the same day the Petition was granted.

The First Judicial District Court through its Order Granting Request for Certification to the New Mexico Court of Appeals [RP 305-306], preserved this issue for the New Mexico Court of

Appeals. The County's opposition to the certification was preserved through its Answer to Petition for Writ of Certiorari [RP 105-108], Motion to Dismiss Merrifield's Petition for Writ of Certiorari [RP 139-143], Defendants Response to Merrifield's Request for Certification to the New Mexico Court of Appeals [RP 146-148], and Defendants Reply to Response to Motion to Dismiss [RP 200-203].

D. Arguments

i. This Court Lacks Subject Matter Jurisdiction Over this Case

Merrifield brought this action before the district court, pursuant to Rule 1-075 NMRA 2012, to review the hearing officer's decision and reverse the hearing officer's finding that Merrifield's termination was justified. Merrifield further requests damages in the form of back pay, front pay and benefits. The district court should have dismissed the petition because this action is not timely filed under Rule 1-075(D). Merrifield has not filed this action within the thirty (30) day time period provided by Rule 1-075(D), thereby depriving the district court and this appellate court of subject matter jurisdiction.

a. The First Suit in State Court was Timely Filed, But the Second Suit in Federal Court Was Not

The New Mexico Rules of Civil Procedure provide the mechanisms for a proper review of the administrative decision to terminate Merrifield. Rule 1-075 governs writs of certiorari to administrative agencies pursuant to the New Mexico Constitution and requires filing the petition in the district court within thirty (30) days of the administrative final decision. Rule 1-075(A, B, D) NMRA. The final administrative decision against Merrifield was delivered on July 19, 2007, more than thirty (30) days prior to the filing of the instant petition. Under the rule, this action was not timely filed.

The administrative decision was issued on July 19, 2007. Merrifield then filed suit with the district court on August 16, 2007, within the thirty (30) day limitation under Rule 1-075. Thereafter, Merrifield voluntarily dismissed the state claim on August 31, 2007. Merrifield then filed suit in federal court on February 4, 2008 well after the 30 day limit for his appeal passed. This action was not timely.

In *Smith v. City of Santa Fe,* 142 N.M. 786, 793, 171 P.3d 300, 307 (2007), the court stated that "having first chosen to pursue administrative relief, we hold that the [plaintiffs] were then required to comply with the applicable time frames that would otherwise govern judicial review of the administrative decision that the [plaintiffs] themselves requested. To hold otherwise would invite chaos and preclude certainty in the finality of administrative decisions that might otherwise be subject to multiple avenues of judicial review at unpredictable times." In this case, Merrifield has chosen to pursue administrative relief and was required by New Mexico law to comply with the thirty (30) day time limitation and requirement to file in the district court as provided by Rule 1-075. Where Merrifield did not file within thirty (30) days, the requirements of Rule 1-075 (D) and (W) were not met and the action should be dismissed as untimely.

Merrifield has chosen to rely upon §37-1-14 NMSA 1978 which states that,

> If, after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first.

Here, Merrifield timely filed his administrative appeal but then voluntarily dismissed the case in order to combine the appeal with a federal civil rights suit. Merrifield's reliance on the statute is misplaced because §37-1-14 NMSA 1978 cannot operate when there is a specific statute which creates a different time to file suit or a specific limitation period.

In *Estate of Gutierrez by Haney v. Albuquerque Police Dept.*, 104 N.M. 111 (1986) Judge Garcia rejected an attempt to continue a suit under §37-1-14 NMSA 1978 when a specific statute of limitation was provided under the Tort Claims Act and stated:

> Where a statute grants a new remedy, and at the same time places a limitation of time within which the person complaining must act, the limitation is a limitation of the right as well as the remedy, and in the absence of qualifying provisions or saving clauses, the party seeking to avail himself of the remedy must bring himself strictly within the limitations. 104 N.M. at 115.

Judge Garcia noted that the same standard had been applied for a wrongful death claim and an action brought under the Workers Compensation Act. The same analysis should be applied here where Rule 1-075 creates a 30 day period for an action to be brought based upon an administrative appeal. Merrifield's petition should be dismissed as untimely.

In a 2010 unpublished opinion, the Court of Appeals recognized that *Gutierrez* still stands for the proposition that §37-1-14 does not apply to claims brought under the Tort Claims Act. *Arasim v. Martinez*, 2010 WL 4160977 (Ct. App. 2010). The Court of Appeals of New Mexico held that where a defendant agreed to dismiss his case without prejudice in federal district court, because of the defendant's assertion of qualified immunity, and then re-filed in state court, equitable tolling would not toll the statute of limitations. *See Arasim v. Martinez*, No. 30,160, 2010 WL 4160977, at *2 (Ct.App. Apr. 23, 2010)(unpublished). *Wilson v. Jara*, CIV 10-0797 JB/WPL, 2012 WL 1684595 (D.N.M. May 10, 2012). *Gutierrez* is still good law and applicable to this case.

Merrifield claims §37-1-14 NMSA 1978 should save his cases, however, it is limited by §37-1-17 NMSA 1978 which states:

> "None of the preceding provisions of this chapter shall apply to any action or suit which, by any particular statute of this state, is limited to be commenced within a different time, nor shall this chapter be construed to repeal any existing statute of the state which provides a limitation of any action; *but in such cases the limitation shall be as provided by such statutes.*" Emphasis added.

In *Gutierrez*, §37-1-14 was not applied because the Tort Claims Act had a separate limitation period which was applicable. Here, Rule 1-075 NMRA also provides a separate limitation period and requires that Merrifield's appeal must be filed within 30 days of the date of the administrative decision. The New Mexico Supreme Court stated "[w]here a statute limits the time for appeal . . . [t]he statute in prescribing a time for appeal gave the appellants an adequate remedy, and they can not be heard to complain if they did not take advantage of that remedy." *Leavell v. Town of Texico*, 63 N.M. 233, 236, 316 P.2d 247, 249 (1957). Here, Merrifield filed his appeal within the 30 days prescribed by Rule 75 and then voluntarily dismissed his case. Under §37-1-17, the 30 day limitation of Rule 1-075 applies and §37-1-14 cannot be used as a savings statute for a later filed case by Merrifield.

Additionally §37-1-14 has limited use for identically filed cases. That was not the case here. "Action was not prior action for purpose of avoiding statute of limitations where first action had one party defendant, while second action added three additional parties defendant and first action had one cause of action while second action had seven counts." *Rito Cebolla Investments, Ltd. v. Golden West Land Corp.*, 94 N.M. 121, 607 P.2d 659 (1980).

Here, on August 16, 2007 in the State of New Mexico, First Judicial District Court, in the county of Rio Arriba, as cause no. D-117-CV-200700362, Merrifield filed his complaint for the review of the administrative decision. The parties involved in that suit were Merrifield against Annabelle Romero, Bernadette Salazar, Robert Apodaca, Roman Abeyta, Greg Parrish, and the Board of County Commissioners for the County of Santa Fe, NM. On February 4, 2008, in the United States District Court for the District of New Mexico, as cause no. Civ. No. 08-122 RLP/ACT, Merrifield filed suit against the same parties as the State suit. However, the suit was for the review of the administrative decision, violation of Merrifield's federal procedural due process rights, violation of Merrifield's federal right for equal protection, and violation of Merrifield's first

amendment right to associate with counsel, and a Petition for Writ of Certiorari. Merrifield had added four additional causes of action. Pursuant to *Rito*, the savings statute would not apply to this case and Merrifield would have been outside of the time limits required by Rule 1-075.

Filing of the complaint is commencement of the action which generally tolls the applicable statute of limitations. *Prieto v. Home Ed. Livelihood Program*, 94 N.M. 738, 616 P.2d 1123 (Ct.App.1980). "In deciding this case, [the court] must necessarily decide whether the statute of limitations is tolled by a suit which is dismissed without prejudice, or whether [the court] treat[s] a dismissal without prejudice as actually leaving the situation as though suit had never been brought and the statute of limitations never tolled. A party who has slept on his rights should not be permitted to harass the opposing party with a pending action for an unreasonable time." *King v. Lujan*, 98 N.M. 179, 181, 646 P.2d 1243, 1245 (1982). A dismissal without prejudice operates to leave parties as if no action had been brought at all; thus, following such dismissal, statute of limitations is deemed not to have been suspended during a period in which suit was pending. *King v. Lujan*, 98 N.M. 179, 646 P.2d 1243 (1982).

The second suit had substantially different causes of action. It could not have been a continuation of the first suit, and the first suit, as dismissed without prejudice, operated as if no action had been brought at all. Therefore, the second, third and fourth suits were untimely filed according to the requirements of Rule 1-075 NMRA 2012.

b. The Third and Fourth Suits in State Court are Not Contemplated Under the Savings Statute

Merrifield claims protection of the timeliness of his claim under §37-1-14 NMSA 1978 as a savings statute on three occasions: first, when the federal suit was filed on February 4, 2008; second, when the suit was filed in Tierra Amarilla on September 27, 2011; and third, when this suit was filed on October 4, 2011. The New Mexico State statute specifically reads:

37-1-14. [When second suit deemed continuation of first action.]

If, after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the *second* suit shall, for the purposes herein contemplated, be deemed a continuation of the first. (emphasis added)

The primary indicator of legislative intent is the plain language of the statute. *Holguin v. Fulco Oil Services L.L.C.*, 2010-NMCA-091, 149 N.M. 98, 245 P.3d 42.

"In construing a statute, [the court's] charge is to determine and give effect to the Legislature's intent." *City of Albuquerque v. Montoya*, 2012-NMSC-007, 274 P.3d 108, 111-12; *quoting Marbob Energy Corp. v. N.M. Oil Conservation Comm'n,* 2009–NMSC–013, ¶ 9, 146 N.M. 24, 206 P.3d 135. "In discerning the Legislature's intent, [the court is] aided by classic canons of statutory construction, and [the court] look[s] first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Id.* (alteration in original) (internal quotation marks omitted). "[The court] will not depart from the plain wording of a statute, unless it is necessary to resolve an ambiguity, correct a mistake or an absurdity that the Legislature could not have intended, or to deal with an irreconcilable conflict among statutory provisions." *City of Albuquerque v. Montoya*, 2012-NMSC-007, 274 P.3d 108, 111-12; *quoting Regents of University of New Mexico v. New Mexico Federation of Teachers,* 1998–NMSC–020, ¶ 28, 125 N.M. 401, 962 P.2d 1236. The plain language of this statute only contemplates and applies to a second suit, not a third or fourth suit.

Other states' similar statutes also reflect this view. In *Thomas v. Freeman,* 79 Ohio St.3d 221, 227, 1997–Ohio–395, 680 N.E.2d 997, the Ohio Supreme Court indicated that "the savings statute can be used only once to re-file a case." *Hamrick v. Ramalia*, 2012-Ohio-1953. "A plaintiff is limited to a single use of the savings provision of K.S.A. 60-518 after a statute of limitations has run. K.S.A. 60-518 does not allow a plaintiff unlimited dismissals and refilings to preserve a lawsuit barred by

the applicable statute of limitations." *Clanton v. Estivo*, 26 Kan. App. 2d 340, 988 P.2d 254, 255 (1999). The savings statute in Mississippi, however, applies only to the "abatement or other determination of the original suit." Miss.Code Ann. § 15-1-69. "The effect of this limitation on the application of the statute is to prohibit repeated refilings of the same cause of action. Once a party has utilized the benefit of the savings statute, it is not available to her again, as a second or third complaint can never be the original suit. When the language used by the Legislature is plain and unambiguous and the statute conveys a clear and definite meaning, as here, we will have no occasion to resort to the rules of statutory interpretation." *Marx v. Broom,* 632 So.2d 1315, 1318 (Miss.1994). *See, e.g.,* Ga.Code Ann. § 9-2-6 (Supp.1995) ("[I]f the dismissal or discontinuance occurs after the expiration of the applicable period of limitation, this privilege of renewal shall be exercised only once."). "In summary, we conclude the Saving Statute does not operate to "save" the third lawsuit filed in this case." *Vandergriff v. Vandergriff*, 106 S.W.3d 682, 688 (Tenn. Ct. App. 2003). "A plaintiff may receive the benefit of one-year savings statute, for actions which suffer a nonsuit, only once." *Williams v. S. Union Co.*, 364 S.W.3d 228 (Mo. Ct. App. 2011), transfer denied (Jan. 31, 2012), reh'g and/or transfer denied (Dec. 20, 2011). "Although we refrain from addressing the merits of whether Utah Code Ann. § 78-12-40 permits unlimited successive dismissals and re-filings, we note that many of the courts that have been faced with a similar question have concluded that in the interest of finality and judicial economy, a plaintiff is only allowed one refiling pursuant to a savings statute." *See, e.g., Hunter v. Ward,* 15 F.2d 843, 844 (8th Cir.1926); *Marangio v. Shop Rite Supermarkets, Inc.,* 11 Conn.App. 156, 525 A.2d 1389, 1391 (1987), *cert. denied,* 204 Conn. 809, 528 A.2d 1155 (1987); *Sylvester v. Steinberg,* 152 Ill.App.3d 962, 105 Ill.Dec. 902, 903, 505 N.E.2d 28, 29 (1987); *United States Fire Ins. Co. v. Swyden,* 175 Okla. 475, 53 P.2d 284, 288 (1935). "This conclusion is consistent with the language of the Utah saving statute as the statute speaks in terms of a singular

rather than multiple dismissals: '*a* new action,' '*the* reversal or failure'." *Meadow Fresh Farms, Inc. v. Utah State Univ. Dept. of Agric. & Applied Sci.*, 813 P.2d 1216, 1221 (Utah Ct. App. 1991).

This statute plainly reads that a "second suit shall, for the purposes herein contemplated, be deemed a continuation of the first." The New Mexico legislature did not contemplate a third and fourth suit, or unlimited suits for that matter, to be continuations of the first. It is strictly and unambiguously clear that the New Mexico legislature contemplated only saving a second suit. Pursuant to *Guitierrez* or *Rito*, the second suit should have been time barred by the federal district court. Even if the second suit was "saved", surely the plain language of the statute does not "save" the unlimited filings of Merrifield. The County is clearly prejudiced by having to defend an administrative appeal which was not timely filed in the second, third and fourth suits, and therefore, this court lacks subject matter jurisdiction over this case.

ii. Arguments Abandoned by Merrifield

Merrifield has abandoned certain arguments by not raising them in his brief in chief and should be prohibited from raising the same in his reply brief. Ordinarily, an issue is abandoned on appeal if it is not raised in the brief in chief. *Barreras v. N.M. Motor Vehicle Div.*, 2005–NMCA–055, ¶ 1, 137 N.M. 435, 112 P.3d 296; *Magnolia Mountain Ltd., P'ship v. Ski Rio Partners, Ltd.*, 2006-NMCA-027, 139 N.M. 288, 297, 131 P.3d 675, 684, *citing Rhode Island Dept. of Envtl. Mgmt. v. United States*, 304 F.3d 31 (1st Cir. 2002), (Appellants abandoned argument raised before district court when their only attempt to preserve issue on appeal consisted of single footnote in appellate brief purporting to incorporate argument by reference to a brief filed before district court, inasmuch as filing brief that merely adopted by reference previously-filed district court memorandum did not comply with appellate rules.); *Cain v. Champion Window Co. of Albuquerque, LLC*, 2007-NMCA-085, 142 N.M. 209, 218, 164 P.3d 90, 99, (Plaintiffs' brief in chief and reply brief fail to mention the warranty and loss of

chance theories. Therefore, they have abandoned any arguments in support of those claims.) *See also. Bauer v. Coll. of Santa Fe,* 2003–NMCA–121, ¶ 17, 134 N.M. 439, 78 P.3d 76.

Specifically, Merrifield failed to brief the arguments and authorities made and decided by Federal District Judge Puglisi regarding statutory review of the New Mexico Administrative Procedures Act and the cases Judge Puglisi cited from three other jurisdictions with similar acts. [RP 27-32]. Because these arguments are not included in his brief-in-chief, he is deemed to have abandoned these arguments. *State v. Aragon,* 109 N.M. 632, 788 P.2d 932 (Ct.App.1990) (defendant's attempt to incorporate arguments and authorities contained in his docketing statement but not in his brief is ineffective). *State v. Ciarlotta,* 110 N.M. 197, 201, 793 P.2d 1350, 1354 (Ct. App. 1990).

iii. This Question is not of Substantial Public Interest

Merrifield is limited to his argument that: the New Mexico State Constitution grants greater procedural due process than that of its federal counterpart, and that in a situation where the pre-termination hearing satisfied the procedural due process rights of the employee, and a municipality's ordinance requires a review de novo of all evidence in a post termination hearing, but the hearing officer does not have a set standard of review of an employer's decision and penalty, this Court should set in stone a default municipal administrative procedure for the hearing officer to review an employer's decision and penalty de novo. Any decision here will not change the present case, as the Tenth Circuit has already upheld these pre-termination and post termination hearings as proper procedural due process. It should also be noted that this issue has already been resolved in Santa Fe County. The Santa Fe County Human Resources Handbook of 2008, under 7.8.13, states that a hearing officer "shall not substitute his or her discretion for that of the employers."[2] Consequently, the only remaining employee to be impacted by this Court's decision will be Merrifield. Further, should this Court adopt the *de novo* review of post-termination proceedings, this Court will

[2] Pursuant to Rule 11-201 NMRA 2012, the County requests this court take Judicial Notice of this County policy.

effectively overrule ordinances, statutes, and administrative regulations that are not before this Court and effecting entities that are not parties to this suit.

iv. Interstitial Approach

The Court analyzes state constitutional claims raised in conjunction with their federal analogues using the so-called "interstitial approach" adopted in *State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1. Unfortunately, Merrifield has utterly failed to argue and analyze this approach in his brief in chief. However, should this Court find some analysis and argument in Merrifield's brief in chief, the County herein responds.

After applying the interstitial approach for the past fourteen years, New Mexico appellate courts have identified a limited number of situations where the New Mexico Constitution provides greater protection than the United States Constitution, most of which involve Fourth Amendment rights related to criminal investigations. None of the situations identified by the court justifies extending heightened protection under the New Mexico Constitution to the claims presented by Merrifield in this lawsuit.

The Supreme Court of New Mexico has held that it has the power to "provide more liberty than is mandated by the United States Constitution." *Gomez*, 1997-NMSC-6 ¶ 17, 122 N.M. 777, 782, 932 P.2d 1. When analyzing the extent to which the New Mexico Constitution provides more protection of rights than the United States Constitution, New Mexico courts engage in a so-called interstitial analysis. *Id.* at ¶ 19, 122 N.M. 777, 783, 932 P.2d 1. In a critical threshold inquiry, the court first asks whether the right being asserted is protected under the federal constitution. If the answer to the threshold inquiry is affirmative, then the state constitutional claim is not reached. If the answer to the threshold inquiry is negative, then the state constitution is examined.

Merrifield states the truisms that

> The New Mexico Constitution's due process clause requires that to have a fair and impartial hearing, the hearing officer is vested with the constitutional obligation to

> review the matter a fresh and render an independent decision based on the evidence heard and to determine what discipline, if any, is warranted independently of the government employer's assessment. *Merrifield's Brief in Chief*, pg. 4.
>
> and
>
> "While there are no reported cases on point, New Mexico's jurisprudence on interpreting Article II, Section 18 of the New Mexico Constitution supports the proposition that the administrative hearing officer is supposed to be not only impartial and detached but also act as an independent decisionmaker when sitting in judgment on whether the termination was justified." *Merrifield's Brief in Chief*, pg. 5.

However, none of Merrifield's present specific facts justify extension of the heightened protection available under sections 18 of Article II of the New Mexico Constitution to his federal claim of procedural due process. A complete failure to state a claim under the United States Constitution as decreed by the Federal District Court in cause CIV. No. 08-122 RLP/ACT, and upheld in the Tenth Circuit in cause nos. 10-2175 and 10-2179, is not the same as satisfying the threshold inquiry for the interstitial analysis set forth in *Gomez*.

Merrifield's Brief in Chief is completely bereft of facts revealing why he should be entitled to the heightened protection available under Article II, Section 18. The New Mexico Constitution provides in pertinent part that "[n]o person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person." N.M. Const. Art. II, Sec. 18. The parallel language of the Fourteenth Amendment to the United States Constitution reads: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., Amend. XIV. It is apparent that the right for procedural due process is protected under the federal constitution, and pursuant to *Gomez*, the state constitutional question should not be reached.

If established precedent construes the provision to provide more protection than its federal counterpart, the claim may be preserved by (1) asserting the constitutional principle that provides the protection sought under the New Mexico Constitution, and (2) showing the factual basis needed

for the trial court to rule on the issue. *State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 784, 932 P.2d 1, 8. However, when a party asserts a state constitutional right that has *not* been interpreted differently than its federal analog, a party also must assert *in the trial court* that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart *and* provide reasons for interpreting the state provision differently from the federal provision. *State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 784, 932 P.2d 1, 8. Unfortunately, Merrifield failed to even cite this approach and thus failed to provide reasons for interpreting the state provision differently – other than his above referenced truisms.

However, a New Mexico state court may diverge from federal precedent for three reasons: a flawed federal analysis, *e.g., Campos v. State,* 117 N.M. 155, 158, 870 P.2d 117, 120 (1994) ("[W]e must decline to adopt the blanket federal rule that all warrantless arrests of felons based on probable cause are constitutionally permissible in public places.... [W]e believe that each case must be reviewed in light of its own facts and circumstances."); *State v. Gutierrez*, 116 N.M. 431, 446-47, 863 P.2d 1052, 1067-68 (1993) (rejecting "good faith" exception to exclusionary rule), or because of distinctive state characteristics, *e.g, State v. Cordova,* 109 N.M. 211, 216-17, 784 P.2d 30, 35-36 (1989) (concluding that New Mexico has not experienced rigidity and technicalities leading to federal abandonment of two-part test of informer's veracity and basis of knowledge as probable cause to issue warrant); *State v. Sutton,* 112 N.M. 449, 455, 816 P.2d 518, 524 (Ct.App.1991) (noting in dicta that the federal "open fields" doctrine might clash with privacy exceptions in New Mexico where "lot sizes in rural areas are often large, and land is still plentiful"), or because of undeveloped federal analogs, *e.g., State v. Attaway,* 117 N.M. 141, 151, 870 P.2d 103, 113 (1994) (holding New Mexico Constitution embodies a knock-and-announce requirement for entry to execute warrant-federal constitution only later interpreted similarly in *Wilson v. Arkansas,* 514 U.S. 927, 115 S.Ct. 1914, 1916 (1995)). *See. State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 783, 932 P.2d 1, 7.

a. *This New Mexico state court may not diverge from federal precedent because there is no "flawed federal analysis."*

This New Mexico state court may not diverge from federal precedent because there is no "flawed federal analysis." There are no bright line rules for the type of post-termination process a public employee must receive, because the post-termination process is evaluated in light of the pre-termination procedures it follows. The Tenth Circuit has recognized, however, that "[w]here ... the pre-termination process offers minimal opportunity for the employee to present her side of the case, the procedures in the post-termination hearing become much more important." *Copelin–Brown v. New Mexico State Personnel Office,* 399 F.3d 1248, 1255 (10th Cir. 2005) (citing *Benavidez v. City of Albuquereque,* 101 F.3d 620, 626 (10th Cir.1996)). The converse is also true. "[W]hen the employee has had a meaningful opportunity to explain his position and challenge his dismissal in pre-termination proceedings, the importance of the procedures in the post-termination hearing is not as great." *Benavidez,* 101 F.3d at 626.

In deciding whether due process has been afforded through the totality of the pre- and post-termination proceedings, courts apply the three-factor balancing test articulated by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Although *Mathews* involved the termination of social security disability benefits, the Tenth Circuit has held that the *Mathews* factors should be considered when assessing any type of procedural due process claim, including due process claims involving public employee terminations and suspensions. *Skogen v. City of Overland Park*, CIV.A. 08-2657-DJW, 2010 WL 973375 (D. Kan. Mar. 16, 2010) *aff'd sub nom. Skogen v. City of Overland Park, Kan.*, 404 F. App'x 327 (10th Cir. 2010). The three *Mathews* factors are: 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. *Mathews,* 424 U.S. at 335.

Finally, the Tenth Circuit "ha[s] repeatedly emphasized the Supreme Court's admonition that the procedural due process analysis is not a technical conception with a fixed content unrelated to time, place and circumstances, but rather is flexible and calls for such procedural protections as the particular situation demands." *Ward v. Anderson,* 494 F.3d 929, 935 (2007) (internal quotations and citations omitted). There are no strict guidelines as Merrifield encourages this court to compel on New Mexico's counties and municipalities. The *Mathews* balancing test is therefore an important tool in helping the court decide whether, under the particular facts of the case, due process has been satisfied.

As to the first factor, clearly, the County has a significant interest in preserving the integrity of its department and maintaining public trust in its youth development program by prohibiting sexual harassment, preventing the risk of children viewing pornographic materials, and prohibiting the misuse of government equipment. To this end, the County has a substantial and important interest in ensuring that its employees comply with the County's policies. This governmental interest is as significant, if not more significant, than Merrifield's interest in his continued employment. The first prong of this factor thus tips the scale slightly in favor of the County. *Skogen v. City of Overland Park*, CIV.A. 08-2657-DJW, 2010 WL 973375 (D. Kan. Mar. 16, 2010) *aff'd sub nom. Skogen v. City of Overland Park, Kan.*, 404 F. App'x 327 (10th Cir. 2010).

The second factor focuses on the risk of erroneous deprivation; however, in this case, Merrifield received extensive procedural protections. In January 2007 Merrifield represented the County at a corrections conference in Florida. [RP 47]. On the afternoon of January 22 he sent a sexually graphic image to the personal cell phone of Robert Apodaca, one of his subordinates at the youth correctional facility. *Id.* Although the use of personal cell phones at the facility was

prohibited, Apodaca received the image at work and displayed it to coworkers. *Id.* One became upset and complained. *Id.*

Merrifield was placed on administrative leave with pay on January 25. *Id.* On February 22 defendant Annabelle Romero, the County's Director of Corrections, issued a letter recommending Merrifield's termination. *Id.* The letter stated that an internal investigation had revealed that Merrifield had sent pornographic images to a subordinate employee via cell phone and had "participated in a sexually inappropriate environment at the facility, and participated in other improper behavior among staff at the facility." *Id.* It added that the investigation had also discovered "failings on [Merrifield's] part as a supervisor and improper conduct in [his] supervisory dealings with employees." *Id.*

By that time Merrifield had retained an attorney to represent him and had informed the County that all communications on the matter should go through his attorney. [RP 48]. On February 23 the attorney sent a letter to defendant Bernadette Salazar, the County's Human Resources Director, requesting that the County make a number of documents available for inspection and copying. *Id.* The requested documents included "[e]ach and every policy, protocol or memorandum the County claims [Merrifield] violated," and documentation of the allegations in the Romero letter. *Id.*

Salazar responded in a letter dated March 5. *Id.* The letter included copies of County policies on cell-phone use, sexual harassment, and the responsibilities of managers and supervisors, and it offered Merrifield's attorney the opportunity to review Merrifield's personnel file. *Id.* But it denied Merrifield's request for further information and documents. *Id.* It explained that both the meeting at which Merrifield had received Romero's letter and his forthcoming predisciplinary hearing afforded him the opportunity "to explore the basis for the recommendation of termination." *Id.* The letter also noted that if Merrifield chose to appeal any disciplinary action taken against him,

he would be entitled to a full evidentiary hearing and that "[m]uch of [his] request is geared towards preparation for such a hearing and should be sought through appropriate procedures during the appeal process." *Id.*

Merrifield attended the March 8 pretermination hearing with his lawyer. *Id.* Afterwards Salazar agreed with Romero's recommendation to terminate Merrifield's employment. *Id.* Merrifield, through his attorney, appealed the recommendation to defendant Roman Abeyta, the County Manager. Abeyta rejected the appeal and terminated Merrifield in a March 21 letter. [RP 49]. Abeyta described Merrifield's admitted sending of the cell-phone image as action displaying "poor judgment," as "intolerable behavior," and as "an example of the unacceptable behavior [Merrifield had] displayed in [his] capacity as the Administrator." *Id.* He further found that Merrifield had "participated in sending and receiving inappropriate e-mail utilizing County equipment while on County time," *id.*, and that he had used his County cell phone "inappropriately" by making calls that were not work-related. *Id.*

Merrifield then invoked his right under County personnel rules to appeal the termination to a hearing officer. *Id.* The hearing officer conducted a nine-day posttermination hearing in April, May, and June. *Id.* On July 19, 2007, the hearing officer issued a 19–page decision affirming Merrifield's termination. *Id.* She decided that she was to review Abeyta's decision under an arbitrary-and-capricious standard, rejecting Merrifield's argument that the proper standard of review was de novo. *Id.* She said that discipline was justified by Merrifield's transmission and display of sexually explicit images via his cellphone and his work computer and by his contributing to an atmosphere of misuse of County computer equipment at the facility. *Id.* Although she held that the County had not acted arbitrarily or capriciously in deciding that the proper discipline was termination, she said that had she "been imposing discipline ab initio [, she] ... would have demoted [Merrifield] to a non-supervisory position and ... suspended him without pay for five weeks." [RP 50]. She also ruled that

Merrifield had been afforded due process, stating that "[a]s to each of the matters which I have found would support discipline, [Merrifield] was given sufficient notice that these matters were the basis for termination," in part because "[h]e was given an opportunity to respond to these matters at the pre-termination hearing." *Id.*

In this case, Merrifield received substantial pre-termination notice and hearing of his employment by three individuals at separate times who each determined that termination was based on just cause. Merrifield was able to address his concerns and contest the recommendation of termination to each of these individuals. Then the Hearing Officer conducted a full evidentiary pre-termination hearing and undertook a complete *de novo* review of the facts. Based on that evidentiary hearing—which involved attorneys for both Merrifield and the County, opening and closing arguments, cross examination of County witnesses, exhibits — the Hearing Officer made her own factual findings. Most importantly, the Hearing Officer found that Merrifield had transmitted and displayed various sexually explicit images and materials to his subordinates, and Merrifield contributed to the atmosphere of misuse of County equipment at the facility.

The magnitude of the pre-termination process Merrifield received minimized any risk of the Hearing Officer erroneously depriving Merrifield of his employment through her use of the arbitrary and capricious standard. As discussed above, Merrifield (1) knew he was the subject of an investigation and was allowed to provide his version of the Incident to the Director of Corrections; (2) he received notice from the Director of Corrections of the alleged misconduct and specific violations of the County's policies that he was being charged with; (3) he met personally with the Director of Human Resources to explain his version; (4) received notice of the recommendation of termination; (5) had his counsel conduct initial discovery; (6) attended a pre-termination hearing and had the opportunity to contest the termination recommendation; (7) appealed the termination decision to the County Manager, and thereafter appealed to the Hearing Officer. Had the County's

pre-termination procedures been cursory, Merrifield would have a stronger argument that the Hearing Officer's deferential standard of review increased the risk of an improper determination. *Skogen v. City of Overland Park*, CIV.A. 08-2657-DJW, 2010 WL 973375 (D. Kan. Mar. 16, 2010) *aff'd sub nom. Skogen v. City of Overland Park, Kan.*, 404 F. App'x 327 (10th Cir. 2010). Here, however, Merrifield received extensive, pre-termination procedures and post-termination procedures. Given the magnitude of those procedures, the risk of the Hearing Officer erroneously depriving Merrifield of his employment was minimized.[3] In a recent Tenth Circuit decision, in *Skogen v. City of Overland Park*, CIV.A. 08-2657-DJW, 2010 WL 973375 (D. Kan. Mar. 16, 2010) *aff'd sub nom. Skogen v. City of Overland Park, Kan.*, 404 F. App'x 327 (10th Cir. 2010), the post-termination hearing was required by statute to conduct a de novo review of the facts, followed by reversal or modification only if the pre-termination decision was arbitrary or capricious. The District Court, in cause no. Civ. No. 08-122 RLP/ACT, upheld the decision as not violating due process, and the Tenth Circuit, in cause nos. 10-2175 and 10-2179, affirmed. This factor weighs in favor of the County.

As to the third *Matthews* factor regarding the government's interest, the additional burden of having the Hearing Officer substitute her judgment for the County would be unreasonable. Requiring the Hearing Officer to use her own judgment in deciding whether Merrifield's termination was proper, based on the Hearing Officer's *de novo* factual findings, would impose a significant burden on the County. In the *Skogen* case, the court determined that it would not be unreasonable to have the Commission step in the shoes of the Police Chief after the pre-termination procedures and make its own decision. The Hearing Officer in this case would not be stepping into the shoes of one party as what would have happened in *Skogen*, rather she would have had to step into the shoes of three separate individuals (the Director of Corrections, Director of Human Resources, and

[3] In this case, the only shred of hope that Merrifield has is that the Hearing Officer stated in a footnote that had she been able to substitute her judgment on the penalty for that of the employer, she would have given a different ruling as to the termination.

the County Manager) at three separate points in the pre-termination procedures and overrule them all with her substituted judgment on the penalty. Regardless of the level of penalty, everyone agreed a penalty to his employment status was warranted and there was just cause.

In this case the Hearing Officer was required to hold a full evidentiary hearing with witnesses, exhibits, and the participation of the parties' counsel, and was required to make her own de novo factual findings based on that hearing. The Hearing Officer, under the County's specific ordinance, is required to be a third-party, ie. not a County employee. Although the hearing officer is required to be a human resource professional, or be familiar with public or private human resource systems, or have pertinent experience in the fields of management, labor relations or law; there is good reason for this outside individual to not make ab initio business decisions for the County. [RP 93]. It is also a "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Benavidez v. City of Albuquerque*, 101 F.3d 620, 627 (10th Cir. 1996), *quoting Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989) (*quoting Connick v. Myers*, 461 U.S. 138, 143, 103 S.Ct. 1684, 1688 (1983)). This prong of the third factor thus weighs in favor of the County.

The *Matthew* prongs weigh in the favor of the County in this case, as seen by the federal District Court, as cause no. Civ. No. 08-122 RLP/ACT, and Tenth Circuit, as cause nos. 10-2175 and 10-2179, and did not violate Merrifield's procedural due process. However, regardless of the outcome, the focus of the interstitial approach is to determine if the federal analysis is flawed. The federal analysis in *Matthews* is not flawed, but rather, flexible and acknowledges that each governmental entity should have autonomy in determining its own procedures and policies, as long as it does not overstep an individual's rights to procedural due process.

b. This New Mexico state court may not diverge from federal precedent because there are no "distinctive state characteristics."

This New Mexico state court may not diverge from federal precedent because there are no "distinctive state characteristics." No New Mexico case has diverged from the *Matthews* case in reviewing procedural due process. While there are several New Mexico Statutes and administrative code provisions that have given varying legal standards for post-termination hearing officers/arbitrators/boards to different professions, this court need not address this issue where the state legislature has not determined it to be a state wide necessity. For example, the legislature has chosen to provide school teachers and administrators a more expansive standard of de novo review by an arbitrator for their post termination hearing. *See.* §§22-10A-25 and 22-10A-28 NMSA 1978. Yet, the legislature has determined to allow cities and municipalities to have autonomy and flexibility that the federal and state constitution and case precedent envision them to have to determine its own standard of review, so long as a governmental entity does not overstep an individual's guarantees of procedural due process.

c. This New Mexico state court may not diverge from federal precedent because the federal analogs are well developed.

This New Mexico state court may not diverge from federal precedent because the federal analogs are well developed. "Due process ... is a flexible concept that varies with the particular situation." *Zinermon v. Burch,* 494 U.S. 113, 127, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). And when the employee has had a meaningful opportunity to explain his position and challenge his dismissal in pre-termination proceedings, the importance of the procedures in the post-termination hearing is not as great. *Benavidez v. City of Albuquerque*, 101 F.3d 620, 626 (10th Cir. 1996). In this type of post-termination hearing, simply giving the employee "some opportunity" to present his side of the case "will provide a meaningful hedge against erroneous action." *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 n. 8 (1985). Each New Mexico case upon review by the appropriate state district

court, to which an administrative hearing is appealed, uses the standard procedural due process analysis found in *Matthews* and expanded in *Loudermill.*

Merrifield obviously strongly disagrees with his termination, and perhaps the County made a severe personnel decision in terminating him. But the Due Process Clause in the United States Constitution and New Mexico Constitution do not protect against severe personnel decisions. It only guarantees adequate procedural safeguards. *Biggs v. Town of Gilbert*, CV11-330-PHX-JAT, 2012 WL 94566 (D. Ariz. Jan. 12, 2012).

v. Merrifield has no Authority for his Description of a Proper Disciplinary Process, and Fails to Explain his Allegation that the Hearing Officer was Prejudiced

Merrifield begins his brief in chief argument with a "brief general background of the disciplinary process." *Merrifield's Brief in Chief*, pg.5. However, he fails to cite any authority for this general background. Again, there are no bright line rules for the type of post-termination process a public employee must receive, because the post-termination process is evaluated in light of the pre-termination procedures it follows. *Skogen v. City of Overland Park*, CIV.A. 08-2657-DJW, 2010 WL 973375 (D. Kan. Mar. 16, 2010) *aff'd sub nom. Skogen v. City of Overland Park, Kan.*, 404 F. App'x 327 (10th Cir. 2010). As described above at length, Merrifield received extensive pre-termination procedures and post-termination procedures.

Merrifield claims he was deprived of due process because he did not receive a fair and impartial appeal hearing by the Hearing Officer.[4] He contends he was deprived of a fair and impartial hearing because the Hearing Officer applied a highly deferential standard of review to the

[4] The County assumes that was the purpose of the two page discussion and history review of the Workmen's Compensation Act, New Mexico Constitution Article V §1, *State ex rel Hovey Concrete Products Co. v. Mechem*, 63 NM 250 (1957), *Wylie Corp. v. Mowrer*, 104 NM 751 (1986), *Ferguson-Steere Motor Co. v. State Corp. Comm'n*, 63 NM 137 (1957), *Board of Educ. Of Carlsbad Mun. Schools v. Harrell*, 118 NM 470 (1994), and *New Mexico Bd of Veterinary Medicine v. Riegger*, 2007-NMSC-044. Merrifield also refers to *State v. Pacheco*, 85 NM 778 (1973) and *State v. Orquiz*, 2003-NMCA-089 in his brief in chief, but these cases are highly irrelevant as they deal with criminal proceedings, not employment proceedings.

decision to terminate him and she was handpicked by the County. That standard of review (1) required the Hearing Officer to uphold the County's decision unless she found the decision was arbitrary and capricious or without just cause, and (2) prohibited the Hearing Officer from substituting her independent judgment for that of the Director of Corrections, Director of Human Resources, and the County Manager, each of whom Merrifield had an opportunity to contest his termination. Indeed the Hearing Officer, Sarah Singleton a current 1st Judicial District Court Judge, was handpicked by the County as given their procedural process to identify impartial highly qualified third-party hearing officers. Again, the Hearing Officer, under the County's specific ordinance, is required to be a third-party, ie. not a County employee. And the hearing officer is required to be a human resource professional, or be familiar with public or private human resource systems, or have pertinent experience in the fields of management, labor relations or law. [RP 93].

The "[i]mpartiality of the tribunal is an essential element of due process." *Skogen v. City of Overland Park*, CIV.A. 08-2657-DJW, 2010 WL 973375 (D. Kan. Mar. 16, 2010) *aff'd sub nom. Skogen v. City of Overland Park, Kan.*, 404 F. App'x 327 (10th Cir. 2010). Typically, claims that a tribunal lacks impartiality relate to a personal bias on the part of the tribunal or a member of the tribunal. A party claiming bias on the part of an administrative tribunal "must overcome a presumption of honesty and integrity in those serving as adjudicators." *Id.* For example, bias may be implicated when a member of the tribunal has made prior statements that the employee should be terminated or the tribunal member is prejudiced or has a financial stake in the outcome of the proceeding. *Id.* Merrifield in this case, however, does not allege any such *personal* bias.[5]

[5] Thus Merrifield's reliance on cases like *Los Chavez Community Ass'n. v. Valencia County*, 2012-NMCA-044, is misplaced because he is not arguing that the Hearing Officer was personally prejudiced. Specifically, in *Reid v. New Mexico Bd. of Examiners of Optometry*, 92 NM 414 (1979), the board did not disqualify a member who had made and admitted to making statements of his bias and pre-judgment, that is not the case here. And again, Merrifield raises *State v. Pacheco*, which is a criminal case that has fundamental differences in criminal hearing procedures than an employment hearing procedure.

Rather, the issue this Court must decide is whether a terminated public employee who has received adequate notice and the opportunity to be heard is nevertheless deprived of due process where the officer hearing a post-termination appeal chooses, without a policy in place, to defer to the initial termination decision unless it finds that decision was arbitrary or capricious or undertaken without just cause. Merrifield's concern of employers making "whimsical terminations in retaliation for a personal vendetta" is protected by the standard of review used by the Hearing Officer in this case. *Merrifield's Brief in Chief,* pg. 15. Again, in this situation, the Hearing Officer reviewed *de novo* and afresh all of the evidence and made her own findings of fact. By refraining from substituting her judgment and deferring to a level of review appropriate did not deprive Merrifield of due process. The United States District Court for the District of New Mexico, as cause no. Civ. No. 08-122 RLP/ACT, and the Tenth Circuit Court of Appeals, as cause nos. 10-2175 and 10-2179, have both agreed that this did not violate Merrifield's right to procedural due process.

IV. Conclusion

Merrifield could have maintained his timely filed state court appeal under Rule 1-075 and pursued a federal claim in a separate suit but chose not to do so. Instead, Merrifield chose to voluntarily dismiss the state appeal and combine it with three additional federal civil rights claims in federal district court. Pursuant to *Guitierrez* or *Rito*, the second suit should have been time barred by the federal district court. Even if the second suit was "saved", surely the plain language of the statute does not "save" the unlimited filings of Merrifield. The County is clearly prejudiced by having to defend an administrative appeal which was not timely filed in the second, third and fourth suits, and therefore, this court lacks subject matter jurisdiction over this case.

Many cases in New Mexico have answered Merrifield's question by acknowledging that there "is a sound basis to afford substantial deference to an agency's ruling . . . and *reverse the ruling only for an abuse of discretion that is arbitrary or capricious or contrary to law.*" *Archuleta v. Santa Fe Police Dept. ex rel.*

City of Santa Fe, 2005-NMSC-006, 137 N.M. 161, 168, 108 P.3d 1019, 1026. (Emphasis added.) In the light of the cases cited herein, the uncontroverted facts of the case show that Merrifield was afforded procedural due process in this case. If this court determines that a default standard of review for post-termination hearings is needed, then the standard of review requiring substantial evidence, not arbitrary or capricious or contrary to law should be adopted by this Court as it has been proven time and again to be acceptable for the protections of government and municipal employees rights to procedural due process. Also, by adopting this standard, it allows the legislature, administrative agencies, and municipalities to choose to adhere to a *de novo* review if desired, rather than being made compulsory.

V. Request for Oral Argument

Defendant-Appellee, Board of County Commissioners for the County of Santa Fe respectfully requests this Court to allow oral argument in this case. Defendant-Appellee believes oral argument will allow the parties to address the factual evidence in greater detail, including any misapprehensions thereof, and thereby assist the Court's understanding of the legal issues to be resolved.

Respectfully Submitted:

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I HEREBY CERTIFY that on the 22nd day of January, 2013, the foregoing was served on the following via facsimile:

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