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IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

JAN 31 2013

Wendy E. Jones

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 BRIEF IN RESPONSE TO AMICUS CURIAE BRIEF

ORAL ARGUMENT IS REQUESTED

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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. Friedenstien, and Desiree D. Gurule, and hereby submits its Brief in Response to the Amicus Curiae Brief.

I. Summary of Proceedings

A. Nature of the Case

This case arises from the termination of Plaintiff-Appellant Billy A. Merrifield (hereinafter “Merrifield”) from his position as the only Youth Services Administrator for the County of Santa Fe. [RP 46]. After appealing his termination, a post-termination hearing was held over nine days in 2007. [RP 49]. The hearing officer determined in a 19 page decision, that the sending of sexually explicit images to Merrifield’s subordinate, along with Merrifield’s contribution to an atmosphere of misuse of County equipment, justified termination and issued a decision on July 19, 2007. [RP 49]. The United States District Court for the District of New Mexico, as cause no. Civ. No. 08-122 RLP/ACT, determined and the Tenth Circuit, as cause nos. 10-2175 and 10-2179, upheld the decision that Merrifield received procedural due process.

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.

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 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 (Fourteenth Amendment equal protection claim, Fourteenth Amendment procedural due process claim, and First Amendment right to associate with attorney claim), and a Petition for Writ of Certiorari, to his state administrative appeal. Merrifield filed this complaint outside the 30 day time limit set in Rule 1-075(D) as the decision was made on July 19, 2007 and he filed on February 4, 2008.² 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 United States District Court in its Memorandum Opinion and Order entered on August 14, 2009, as Doc. 106, also determined that on March 8, 2007 Merrifield was provided with a pre-termination hearing, was represented by counsel, did respond to the charges and evidence, he appealed the decision to terminate him, and was afforded a full evidentiary hearing with an unbiased hearing officer.

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. Merrifield appealed the procedural due process decision based on his argument that the County violated his due-process rights by failing to provide him with pre termination notice of both the charges and the evidence against him. This was the only issue upon which he appealed the due process decision. The

² In the County's Answer Brief to Merrifield's Brief In Chief, it raises the issue of whether this Court has jurisdiction over this case due to the untimely filings of Merrifield. The County, in Responding only to the issues raised by the Amicus Curiae, does not waive this argument as it has been fully briefed in its Answer Brief, and incorporated herein by this reference.

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. This decision may be found as *Merrifield v. Bd of County Commissioners for the County of Santa Fe*, 654 F.3d 1073 (10th Cir. 2011), cert. denied, 132 S.Ct. 1991 (2012). 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; as noted above, it was denied.

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, 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 Brief-in-Chief in this case was filed on Thursday, December 6, 2012. Counsel for ACLU filed its notice on Monday, December 3, 2012, four days after it was due. ACLU filed their motion on Monday, December 17, 2012, four days after it was due. The County filed its Response in Opposition to Motion for Leave to File Brief as Amicus Curiae on December 20, 2012. This Court granted the Motion for Leave to File Brief as Amicus Curiae on December 21, 2012. The County filed its Answer Brief in this case on January 22, 2013.

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.³

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

³ Amicus does not raise any information that would help Merrifield in this issue, therefore, the County will not discuss this issue in this Response Brief. However, the County does not in any way waive or abandon this issue as it has been briefed in its Answer Brief, and incorporated herein by this reference.

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 Morningsstar 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

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], Defendants Reply to Response to Motion to Dismiss [RP 200-203], and Response in Opposition to Motion for Leave to File Brief as Amicus Curiae, filed in this case on December 20, 2012.

D. Arguments

i. The Arguments presented by Amicus Curiae are barred by the doctrine of res judicata.

The arguments presented by Amicus Curiae are barred in their entirety by the doctrine of res judicata. Claim preclusion, or res judicata, precludes a subsequent action involving the same claim or cause of action. *Bank of Santa Fe v. Mary Plaza Associates*, 2002-NMCA-014, 131 N.M. 537, 540, 40 P.3d 442, 445. It applies where there is “(1) identity of parties or privies, (2) identity of capacity or character of persons for or against whom the claim is made, (3)[the] same cause of action, and (4)[the] same subject matter.” *City of Las Vegas v. Oman*, 110 N.M. 425, 432, 796 P.2d 1121, 1128 (Ct.App.1990) (quoting *Three Rivers Land Co. v. Maddoux*, 98 N.M. 690, 694, 652 P.2d 240, 244 (1982), overruled on other grounds by, *Universal Life Church v. Coxon*, 105 N.M. 57, 58, 728 P.2d 467, 469 (1986)).

Res judicata precludes a claim when there has been a full and fair opportunity to litigate issues arising out of that claim. *Myers v. Olson*, 100 N.M. 745, 747, 676 P.2d 822, 824 (1984). Res judicata bars not only claims that were raised in the prior proceeding, but also claims that could have been raised. *State ex rel. Martinez v. Kerr-McGee Corp.*, 120 N.M. 118, 121, 898 P.2d 1256, 1259 (Ct.App.1995). This principle ensures finality, advances judicial economy, and avoids piecemeal litigation. *First State Bank v. Muzio*, 100 N.M. 98, 101, 666 P.2d 777, 780 (1983), overruled on other grounds by, *Huntington Nat. Bank v. Sproul*, 116 N.M. 254, 263, 861 P.2d 935, 944 (1993); *Myers*, 100 N.M. at 747, 676 P.2d at 824. Under the transactional test adopted by our Supreme Court in *Three Rivers*, to determine whether a later claim is precluded, we must “examine the operative facts

underlying the claims made in the two lawsuits.” *City of Sunland Park, Santa Teresa Services Co., Inc. v. Macias*, 2003-NMCA-098, 134 N.M. 216, 75 P.3d 816, 821-22, quoting *Anaya v. City of Albuquerque*, 1996-NMCA-092, ¶ 8, 122 N.M. 326, 924 P.2d 735.

In their Amicus Curiae brief, the ACLU presents its argument in two sections. The first section focuses on the County’s rules on the procedure for termination of classified employees, and then the second section argues that the County rules fail to afford sufficient procedural due process protections to terminated public employees. Specifically, throughout their argument, Amicus Curiae state:

This case involves the termination of a public employee without due process of law. *Amicus Brief*, pg. 1.

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. *Amicus Brief*, pg. 8.

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. *Amicus Brief*, pg. 17.

This argument must fail because it has been previously litigated, a final decision was made by a court of competent jurisdiction, appealed and the court of appeals upheld the decision that Merrifield was afforded due process sufficient to satisfy the United States Constitution.

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 had three federal constitutional claims (Fourteenth Amendment equal protection claim, Fourteenth Amendment procedural due process claim, and First Amendment right to associate with attorney claim), a Petition for Writ of Certiorari, and a state administrative appeal. 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 United States District Court entered its Memorandum Opinion and Order on August 14, 2009, as Doc. 106. Merrifield argued that the pre-termination hearing did not comply with the requirements set forth in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). *Loudermill* holds that a "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence and an opportunity to present his side of the story." *Id.* at 546. The Court held that on March 8, 2007 Merrifield was provided with a pre-termination hearing, was represented by counsel, and did respond to the charges and evidence. He had appealed the decision to terminate him and was afforded a full evidentiary hearing with an unbiased hearing officer.

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. Merrifield appealed the procedural due process decision based on his argument that the County violated his due-process rights by failing to provide him with a pre-termination notice of both the charges and the evidence against him. This was the only issue upon which he appealed the due process decision. 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. This decision may be found as *Merrifield v. Bd of County Commissioners for the County of Santa Fe*, 654 F.3d 1073 (10th Cir. 2011), cert. denied, 132 S.Ct. 1991 (2012). 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; as noted above, it was denied.

Based on the foregoing, Merrifield has already had his day in court regarding his claim that his procedural due process rights were violated, the 10th Circuit affirmed that he received adequate due process. The Amicus Curiae may not now re-litigate on Merrifield's behalf, these already decided issues of procedural due process where it has already been decided to meet federal requirements.

ii. Arguments raised by Amicus Curiae are outside the scope of the issues raised by Merrifield

Additionally, the argument presented in regard to the County not meeting the minimum requirements of procedural due process is not the object of this case, the purpose of this case is to determine whether the interstitial approach adopted by the State of New Mexico warrants this Court to diverge from federal precedent. The function of amicus curiae is to call the court's attention to the facts or situations that may have escaped consideration. *State ex rel. Burg v. City of Albuquerque*, 31 N.M. 576, 249 P. 242, 243 (1926). Where a contention raised by amicus curiae was not within issues raised by alternative writ and the response, the Court shall not express any opinion as to the contention. *State ex rel. Castillo Corp. v. New Mexico State Tax Commission*, 79 N.M. 357, 443 P.2d 850 (1968). Rule 12-215 NMRA 2012.

“Amicus must accept the case on the issues as raised by the parties, and cannot assume the functions of a party.” *State ex rel. Castillo Corp. v. New Mexico St. T. Com'n.*, 79 N.M. 357, 362, 443 P.2d 850, 855 (1968). The parties here have not briefed, nor have they requested a resolution of the allegation that the County failed to provide procedural due process raised by amicus in the appellate court, nor any issue regarding whether Merrifield was to receive *de novo* review at all appeal stages, nor any issue regarding whether Merrifield's due process rights were violated by allegedly having to bear the burden of proof in the post termination hearing. *St. Vincent Hosp. v. Salazar*, 95 N.M. 147, 149, 619 P.2d 823, 825 (1980). As discussed above, the argument regarding the procedural due process afforded to Merrifield was fully resolved by the 10th Circuit and was not appealed to the

Supreme Court. The Court should ignore any point asserted by amicus curiae, unless Merrifield has properly raised it.

iii. Even if the arguments are not barred, Amicus Curiae have failed to provide any support to Merrifield's argument that the interstitial approach would warrant a departure from federal precedent.

Even if the arguments are not barred, the Amicus Curiae have failed to provide any support to Merrifield's argument that the interstitial approach would warrant a departure from federal precedent. Amicus noted in a footnote that "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." *Amicus Brief*, pg. 8 n. 1. Then Amicus directs the Court to *State v. Gomez* and notes that this case adopted and explains the interstitial approach, the approach that Merrifield failed to brief in his Brief in Chief. *Amicus Brief*, pg. 8 n. 1. However, nowhere in its brief does Amicus lend its support to the argument that the interstitial approach should allow this Court to diverge from federal precedent.

In *City of Albuquerque v. Chavez*, 1998-NMSC-033, 125 N.M. 809, 811, 965 P.2d 928, 930, upon which Amicus Curiae heavily rely, the plaintiffs did not argue that Article II, Section 18 of the New Mexico Constitution should be interpreted any more expansively than the Fourteenth Amendment to the United States Constitution. See *State v. Gomez*, 1997-NMSC-006, ¶ 23, 122 N.M. 777, 932 P.2d 1 (noting preservation requirements for assertion of a state constitutional right that has not been interpreted differently than its federal analog). Amicus states that "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." *Amicus Brief*, pg. 9. The textual source does not suggest any difference between the state and

constitutional due process provision: both prohibit a taking of property or a property right arbitrarily, or without due process. *See, e.g., State v. Cardenas-Alvarez*, 130 N.M. 386, 407-408 (2001) (comparing language of state and federal constitutional language to see if there are specific textual differences). Thus, there is no structural difference between the two and there is no argument or reasons stated in support of Merrifield's contention that the New Mexico Constitution offers greater protection than its federal counterpart. *See ACLU of NM v. City of Albuquerque*, 139 N.M. 761, 770 (Ct. App. 2006) (the burden is on the party seeking relief under the state constitution to provide reasons for interpreting the state provisions differently from the federal provisions when there is no established precedent); *cmp. id.* at 770 (where plaintiff failed to make the required showing for a divergence from federal precedent, court limited due process and equal protection analysis to the federal constitution, unpersuaded that the state constitution affords any greater protections); *E-Spire Communications, Inc. v. Baca*, 269 F. Supp.2d 1310, 1324 (D.N.M. 2003) (plaintiff failed to present any authority that the standard for substantive due process under the New Mexico Constitution differs from the standard for substantive due process under the United States Constitution, where plaintiff did not allege protectable property interest). 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.

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." In fact, by using the *Mathews v. Eldridge*, 424 U.S. 319 (1976) test and analysis, Amicus Curiae has shown support to the County in that the *Mathews* test is alive and well used in New Mexico cases. In *City of Albuquerque v. Chavez*, 1998-NMSC-033, 125 N.M. 809, 965 P.2d 928, 931, the Supreme Court concluded "that the *Mathews* test provides the appropriate framework for analysis of the burden of proof issue as it relates to the question of due process." *Cf.*

State v. Woodruff, 1997-NMSC-061, ¶ 27, 124 N.M. 388, 951 P.2d 605 (noting that the *Mathews* test “provides a useful framework for determining the amount of process appropriate to protect a liberty or property interest as a matter of constitutional right”); *Board of Educ. v. Harrell*, 118 N.M. 470, 478, 882 P.2d 511, 519 (1994) (utilizing *Mathews* test to determine whether discharged school district superintendent was afforded due process).

Regardless of the outcome of the test as outlined and argued by Amicus in their brief (and not argued in anyway by Merrifield, including the issue of whether Merrifield was deprived of due process by allegedly having to carry the burden of proof in the post-termination hearing)⁴ and the analysis by the County in their Answer Brief to Merrifield’s brief in chief filed in this Court on January 22, 2013, the focus of the interstitial approach is to determine if the federal analysis of the constitutional provision under review is flawed. The federal analysis in *Mathews* as it relates to procedural due process 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. No departure from federal law is needed or required as the *Mathews* test is not flawed.

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.” Amicus states that New Mexico courts consider pre- and post-

⁴ In *Chavez*, the pre-termination hearing officer was in a direct conflict of interest and biased due to the defense of plaintiff that the pre-termination hearing officer himself was the cause of the incident, plus the post termination hearing officer did not consider or address the defenses in his final report, and plaintiff was required to carry the burden of proof in the post-termination hearing. “In sum, we have not considered whether imposing the burden of proof on a public employee in post-termination proceedings is by itself enough to amount to a violation of federal due process. That broader question is not presented for our review under the facts of this case, and we expressly decline to reach it.” *City of Albuquerque v. Chavez*, 1998-NMSC-033, 125 N.M. 809, 813, 965 P.2d 928, 932. See *Lavine v. Milne*, 424 U.S. 577, 585, 96 S.Ct. 1010, 47 L.Ed.2d 249 (1976) (remarking that the burden of proof generally carries few constitutional implications in civil, as opposed to criminal, proceedings); *Doe v. Roman Catholic Church of the Archdiocese of Santa Fe, Inc.*, 1996-NMCA-094, ¶ 12, 122 N.M. 307, 924 P.2d 273 (“[C]ourts traditionally do not reach out to decide issues unnecessarily.”); and *Benavidez v. City of Albuquerque*, 101 F.3d 620, 627-28 (10th Cir. 1996) (plaintiffs’ procedural due process rights were not violated by the City requiring them to bear the burden of proof at their post-termination hearings).

termination procedures as a whole, by citing *Chavez*. *Amicus Brief*, pg. 10. However, Amicus fails to mention that the federal courts do this as well. 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 Albuquerque*, 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. There is no reason to see this as a distinctive state characteristic.

Amicus also outlines “essential elements of the adversary process” of procedural due process proceedings. What Amicus fails to mention is that the “essential elements” outlined by the court in *Bd. of Educ. of Carlsbad Mun. Sch. v. Harrell*, 118 N.M. 470, 479, 882 P.2d 511, 520 (1994), are statutorily imposed on educational institutions. In that case a teacher was challenging the constitutionality of the statutorily imposed compulsory arbitration as the exclusive method by which a certified school employee may obtain review of his or her discharge from employment and the constitutionality of restricting judicial review to issues involving “corruption, fraud, deception or collusion.” *Bd. of Educ. of Carlsbad Mun. Sch. v. Harrell*, 118 N.M. 470, 474, 882 P.2d 511, 515 (1994). These “essential elements” and the standard of review involved in that case are statutorily imposed. 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 the government entity 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. There is no reason to see this as a distinctive state characteristic that would enable this Court to diverge from federal precedent to impose a compulsory standard of review for post-termination hearings.

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. As described above and through the cases provided by Amicus, 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*. The federal analogs are well developed and depend entirely on a case, by case analysis.

iv. *Amicus does not allege that the hearing officer was prejudiced and the Hearing Officer did review all of the evidence and the arguments of the parties de novo.*

Amicus echoes the concern of Merrifield as to the need of an impartial adjudicator:

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." *Amicus Brief*, pg. 7.

During the termination process, no decision-maker reviewed all of the evidence *de novo*. *Amicus Brief*, pg. 8.

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. *Amicus Brief*, pg. 8.

An unbiased employment decision must, at some point, derive from a proceeding that afforded the employee a meaningful opportunity to be heard. *Amicus Brief*, pg. 17.

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, and neither does Amicus identify any facts that would lend support to this allegation.

Rather, the issue this Court is urged by Merrifield to 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. Amicus, in its conclusion states that:

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 the evidence and the arguments of the parties.

Unfortunately, Amicus fails to understand that the three individuals involved in the pre-termination procedures and the Hearing Officer did review all the evidence and the arguments of the parties *de novo*.

As discussed in the County's Answer Brief filed on January 22, 2013 in this case, 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 personally; (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 (8) thereafter appealed to the Hearing Officer. 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 as to the penalty 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 process did not violate Merrifield's right to procedural due process.

III. Conclusion

Amicus Curiae's arguments based on whether procedural due process was afforded in this case should be disregarded as the argument is barred by the doctrine of res judicata. Further, any issue brought forth that was not identified in Merrifield's brief in chief should also be ignored by this court, pursuant to *Castillo*. Even if the arguments are not barred, Amicus Curiae failed to provide justification to extend heightened protection under the New Mexico Constitution to the claims presented by Merrifield in this lawsuit. If this court determines that a default standard of review for post-termination hearing decisions 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

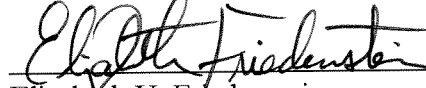
been proven time and again to be acceptable for the protections of government and municipal employees rights to procedural due process. Also, by adopting this standard, it allows the legislature, administrative agencies, and municipalities to choose to adhere to a *de novo* review if desired, rather than being made compulsory.

IV. Request for Oral Argument

Defendant-Appellee-Cross Appellant, 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 31st day of January, 2013, the foregoing was mailed to the following:

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