In the New Mexico Court of Appeals

BILLY A. MERRIFIELD,

Plaintiff - Appellant,

vs

No. 32,422

BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF SANTA FE,

Defendant - Appellee.

ANSWER BRIEF

A Questioned
Certified to the New Mexico Court of Appeals
by the Hon. Raymond Z. Ortiz,
Chief District Court Judge
First Judicial District Court
County of Santa Fe

Michael Schwarz
NM Bar No. 2412
Counsel for Appellant
P O Box 1656
Santa Fe, NM 87504-1656
505.988.2053 ■ 505.983.8656 (F)
E-mail: barrister@pobox.com

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New Mexico Cases:

POINT ONE

THIS CASE IS A CONTINUATION OF THE FIRST CASE

Standard of Review. Challenges to appellate jurisdiction are reviewed *de novo*. Wells Fargo Bank, N.A. v. City of Gallup, 2011-NMCA-106, ¶ 6, 150 `N.M. 706, 265 P.3d 1279.

Facts:

The County provided its own rendition of procedural facts and asked this Court to take judicial notice of them under Rule 11-201. Unfortunately, the County was incomplete in its rendition. If this Court is going to take judicial notice, it should also take judicial notice of the facts set out below. Alternatively, this Court may disregard both the County's and Merrifield's stated facts under Luxton v. Luxton, 98 N.M. 276, 648 P.2d 315 (1982). Luxton further holds that there is a presumption that the lower court assessment is correct when the record before the appellate court is incomplete.

The first suit was filed on 16 August 2007 in state court (D-117-CV-2007-00362), seeking review of the hearing officer's decision under Rule 1-075 and recover of damages for violations of Merrifield's constitutional rights under the equal protection clause of the Fourteenth Amendment[1]

[1]During the pendency of the suit in federal district court, the U.S. Supreme Court issued its opinion in *Enquist v. Oregon Dept. of Agr.*, 553

and the New Mexico Constitution under Article II, Section 18 against the County, Roman Abeyta, Bernadette Salazar, Annabelle Romero, Greg Parrish, and Robert Apodaca. That case was voluntarily dismissed on 31 August 2007. In that Notice of Dismissal, it is stated: "Pursuant to Rule 1-041(A)(1)(a), Plaintiff dismisses this lawsuit without prejudice. No answer has been filed. Plaintiff intends to file this case in federal court and the filing date of this case would control under NMSA 1978, § 37-1-14".

This case was then re-filed in federal court on 4 February 2008 (Case No. 08-122 LCS/ACT) with the same identical parties and the same causes of action with the exception of adding a First Amendment association claim to the federal case. The County filed a motion to dismiss the Rule 1-075 proceeding in federal court and that motion was denied. RP 228-49, *esp.* 238-39. The case worked its way up to the United States Supreme Court where the high court denied the writ of certiorari. Merrifield v. Board of County Com'rs of Santa Fe, 654 F.3d 1073 (10th Cir. 2011), cert. denied, — U.S. —, 132 S.Ct. 1991 (2012). The federal district court entered its final order on 31 August 2011, RP 225-26, dismissing without prejudice the state pendent claim.

Based on that federal court dismissal without prejudice, Merrifield re-

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U.S. 591 (2008), holding that the class of one equal protection claim is inapplicable to employment cases.

filed his Rule 1-075 petition on 27 September 2011. Merrifield's counsel listed on the face of complaint the beginning of the case number as "D-101-CV-2011-_____" but the Clerk filed it as a Rio Arriba case because of a typographical error in the caption. On the 28 September 2011, a notice of dismissal was filed which read: "Pursuant to Rule 1-041, Plaintiff dismisses this case without prejudice since it was accidentally filed in the wrong county and the defendant has not been served. The case is being re-filed in the correct county." The case was re-filed on 28 September 2011 — still within 30 days of the federal court's dismissal without prejudice. RP 1.

Argument:

The County claims that the time period set out in Rule 1-075 NMRA is tantamount to a statute of limitation. Thus, pursuant to NMSA 1978, § 37-1-17, there can be no continuation of the first suit under § 37-1-14. The County relies upon Estate of Gutierrez v. Albuquerque Police Department, 104 N.M. 111, 717 P.2d 87 (1986), in support of its proposition. In Gutierrez, this Court held since the Tort Claims Act, NMSA 1978, § 41-4-15, has a specific period of limitation, § 37-1-17 controls and the savings statute of § 37-1-14 has no effect.

The County does not argue that the first filing of 16 August 2007 is

untimely. It is clear that case was filed within 30 days of the hearing officer's decision of 19 July 2007. RP 6-25. The County contends the voluntary dismissal and re-filing in federal court on 4 February 2008 is untimely on the basis that refiling date is more than 30 days after the issuance of the hearing officer's decision. The County further contends that once the federal district court dismissed the state claim (the Rule 1-075 proceeding) without prejudice on 31 August 2011, the filing in state court is also untimely because more than 30 days has elapsed since the hearing officer's decision of 19 July 2007. The County further contends this suit cannot be a continuation as contemplated by the statute on the basis that this is a third filing of this case. The County submits that although the filing in state court occurred within 30 days of dismissal without prejudice from federal court, it is not a "second" case under the savings statute and therefore this Court is without jurisdiction. Merrifield respectfully submits these arguments should be rejected for the following reasons:

First, Rule 1-075 is not a statute of limitation. A statute of limitations is a legislatively promulgated period of limitation to file an action in court. Cummings v. X-Ray Assocs., 1996-NMSC-035, ¶ 49, 121 N.M. 821, 918 P.2d 1321. Under the plain meaning rule, § 37-1-17 governs statutes of

limitations and not court rules. Rivera v. Flint Energy, 2011–NMCA–119, ¶ 4, 268 P.3d 525 (plain meaning rule); Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976)(Legislature lacks the constitutional authority to promulgate state rules of practice and procedure). Courts will not read additional language in a statute when the statute makes sense as written. State v. Lopez, 2011-NMCA-071, ¶ 10, 150 N.M. 34, 256 P.3d 977.

Second, unlike § 37-1-17, § 37-1-14 contains no reference to a "statute of limitations". State v. Torres, ¶ 8, 140 N.M. 230, 141 P.3d 1284 ("When a statute makes sense as written, we will not read in language that is not there.") Section 37-1-14 addresses when a suit is considered a continuation of the first. In this case, § 37-1-14 applies. This case does not involve a statute of limitations. It's a continuation of the prior case.

Third, the County broadly reads § 37-1-17 to include all periods of limitation including those promulgated by the Supreme Court. Under this estranged reading, § 37-1-14 would be rendered meaningless and superfluous. Section 37-1-14 would become devoid of any meaning and effect. State v. Johnson, 1998-NMCA-019, ¶ 22, 124 N.M. 647, 954 P.2d 79 (rejecting reading statutes that render them meaningless); Winston v. New Mexico State Police Bd., 80 N.M. 310, 311, 454 P.2d 967, 968 (1969)

(read the entire act together, giving each part meaning)

Four, unlike the Tort Claims Act, which has a substantive period of limitation, Rule 1-075 provides a "procedural mechanism" to address constitutional review of administrative decisions where there is no statutory right to appeal. Smith v City of Santa Fe, 2007-NMSC-055, 142 N.M. 785, 171 P.3d 300. Because it is procedural and not substantive, courts are more inclined to address the merits rather than procedural niceties to accomplish justice. Boudar v. E.G & G., Inc., 106 N.M. 279, 281-82, 742 P.2d 491, 493-94 (1987).

There are several instances where the Supreme Court and this Court have relaxed the time deadlines to appeal to further justice. Marquez v. Gomez, 111 N.M. 14, 801 P.2d 84 (1990)(facilitating the right of appeal by liberally construing technical deficiencies in a notice of appeal); Baker v. Sojka, 74 N.M. 587, 396 P.2d 195 (1964)(allowing the appeal to proceed even though the notice of appeal failed to designate the judgement or order); Govich v. North American Systems, Inc., 112 N.M. 226, 814 P.2d 94 (1991)(affirming the New Mexico Constitutional mandate of that party has an absolute right to one appeal[2] despite technical violations, adoption the concept of precondition instead of jurisdictional, and showing of

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[2]N.M. CONST. Art VI, § 2 ("an aggrieved party shall have an absolute right to one appeal.")

prejudice sustained by appellee); see also, Bransford-Wakefield v. State Taxation and Revenue, Motor Vehicle Div., 2012-NMCA-025, ¶¶ 10 and 13 274 P.3d 122 (the absolute right to one appeal)

Five, Gutierrez has been limited to the New Mexico Tort Claims Act. Bracken v. Yates Petroleum, 107 N.M. 463, 760 P.2d 155 (1988) held that filing of the complaint tolls the statute of limitations in the improper venue and thereby expressly overruling Estate of Gutierrez. 107 N.M. at 466, 760 P.2d at 158.

Six, the substantive grant of jurisdiction derives from Article VI, § 13 of the New Mexico Constitution. This provision contains no period of limitations to seek a constitutional writ of certiorari. The time limits for seeking statutory writs of certiorari do not apply to constitutional writs of certiorari. Clark County Pub. Utility Dist. No. 1 v. Wilkinson, 139 Wash.2d 840, 991 P.2d 1161 (2000). This is not to say that the time for filing a constitutional writ of certiorari is not without limitation — unreasonable delay, laches, and prejudice are factors to determine the timeliness of the writ. Id. at 848, 991 P.2d at 1166.

In this case, there is no delay causing the County any prejudice. The County has not alleged any and none has been shown in the record below.

The County's proffered interpretation of the § 37-1-14 will lead to

absurd results. Where the mechanical application of the rule of statutory construction leads to an absurd result, or is unreasonable, or is contrary to the spirit of the statute, that construction must be avoided. State v. Trujillo, 2009-NMSC-012, ¶ 21, 146 N.M. 14, 206 P.3d 125. Under the County's desired reading, a suit that is timely filed in state court having state claims and federal claim but then removed to federal court where the federal court dismisses the federal claims several years later and dismisses the state pendent claims without prejudice, the plaintiff can never have his or her state claims addressed because: (1) more than six months has transpired from the date of removal, and (2) this would be the "third" suit. This would be an unreasonable interpretation, contrary to the intent and spirit of the statute and just absurd.

In conclusion, this Court as well as the district court has jurisdiction over this appeal and should proceed to the answer the question certified.

POINT TWO

THE HEARING OFFICER IS CONSTITUTIONALLY REQUIRED TO REVIEW THE COUNTY'S DECISION DE NOVO

The sole question before this Court is whether the hearing officer reviews the government employer's decision *de novo* or merely acts like an appellate court reviewing an administrative determination for lack of

substantial evidence, the decision was arbitrary and capricious or was contrary to law. This is a question of significant public importance, affecting thousands of public employees throughout New Mexico.

The County, on the other hand, asks this Court to take judicial notice of a change in the County's policy which now requires a differential standard of review by the hearing officer as an attempt to moot or reduce the significance of the need to address the question. The County's attempted subsequent remedial measures do not militate against the significant importance for three reasons: One, the question still needs to be answered in this case. Two, the question remains viable for many public employers who have not articulated a standard of review a hearing officer is to follow. And finally, even if a public employer did articulate a standard of review for public employer as differential, that standard may still be unconstitutional.

The County argues State v. Gomez, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1, limits this Court's ability to decide state constitutional law claims. Under Gomez, the New Mexico Supreme Court held that New Mexico will no longer be in lock-step with its federal counterpart. Id. at ¶ 20. New Mexico may diverge from federal analysis for any one of three reasons: (1) flawed federal analysis, (2) structural differences between the

New Mexico and federal constitutions, or (3) distinctive state characteristics. Id. Gomez does not preclude a party for arguing that the New Mexico Constitution "should be interpreted more expansively than its federal counterpart" even though the interpretation has not been interpreted differently than its federal counterpart. Id. at ¶ 23. Departing from the federal model can be based on New Mexico's public policy and other reasons why the federal matrix should not be followed. Id. at ¶¶ 23, 44-46.

The County argues: (1) there is no reason to justify heightened protections available under Article II, § 18 of the New Mexico constitution, and (2) the federal calculus announced in Mathews v. Eldridge, 424 U.S. 319 (1976) governs the answer to the question.

In Board of Educ. of Carlsbad Mun. Schools v. Harrell, 118 N.M. 470, 478 882 P.2d 511, 519 (1994), our Supreme Court stated that the U.S. Supreme Court "has not formulated standards for due process in postdeprivation hearings." Harrell laid out it's own process:

> The essential elements of the adversary process, some or all of which may be required as part of the due process afforded an individual when the government deprives him of life, liberty, or property through the action of a state agency, are:
>
> (1) adequate notice of the charges or basis for government action; (2) a neutral decision-maker; (3) an opportunity to make an oral presentation to the decision-maker; (4) an opportunity

> to present evidence or witnesses to the decision-maker; (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual; (6) the right to have an attorney present the individual's case to the decision-maker; (7) a decision based on the record with a statement of reasons for the decision.

Id. at 478, 882 P.2d at 519. The Harrell Court went on to say that a fair hearing doesn't mean that the hearing has to be conducted with the same formality of a court proceeding but that procedure must be consistent with the essentials of a fair trial. Id. at 520, 882 P.2d at 479. A fair trial does not look at the prior determination with deference but rather decides the matter *de novo*. Accordingly, New Mexico does not solely rely upon the Mathews calculus when faced with a procedural due process question. Under Harrell, our state constitutional due process standard may indeed offer more protections than the federal one. The State Constitutional claim is viable.

Given New Mexico's strong public policy in ensuring a fair and impartial hearing under our State Constitution, our State Constitution mandates that hearing officer review's the matter *de novo*. This makes good jurisprudential sense and ensures public employees a fair and meaningful opportunity to be heard.

If this Court interprets Gomez as requiring the Court to look to federal law, then Mathews calculus applies and Merrifield still prevails. The

County relies upon an unpublished decision from a federal district court, Skogen v. City of Overland Park , 2010 WL 973375 (D. Kan. 2010), aff'd 404 Fed.Appx. 327 (10th Cir. 2010). The Skogen court candidly admitted that whether the hearing officer reviews management decision *de novo* or deferentially in the post termination context is a matter of first impression. Id. at *16. In Skogen, the rules and regulations require the hearing panel to review management's on an arbitrary and capricious standard — not *de novo*. The employee challenged the review standard as violating due process. The Skogen court then applied the Mathews calculus.

First Factor: The Private Interest Affected by Official Action. Merrifield's livelihood, good name, and ability to make money is affected by the County's termination. The stigma of getting fired in today's job market cannot be denied. In response to the first of the Mathews' factors, the County claims it has a "significant interest.. by prohibiting sexual harassment, preventing the risk of children of viewing pornographic materials, and prohibiting the misuse of government equipment". AB at 22. One, that statement grossly misrepresents the hearing officer's findings: Merrifield was not found to have committed any acts of sexual harassment; Merrifield was not found to have allowed children to view pornographic materials; Merrifield was found to have misused his cell

phone when he transmitted an adult image to a fellow co-worker and friend who in turn showed it to others who were offended. RP 258-59. The co-worker and friend was not disciplined; Merrifield was fired. Two, this first Mathews factor pertains to Merrifield —not to the County. Skogen also found this factor applies to the worker's interest and not the employer's.

Second Factor: Risk of Erroneous Deprivation. If a hearing officer is not allowed to review the evidence *de novo*, the risk of erroneous deprivation is great. Under the County's policies, there are three steps prior to the hearing. None of those steps allow him to see the evidence against him. None of those three steps allow him to cross examine witnesses or call witnesses. RP 272 at § 8.2 It is only at the hearing level, he is afforded those rights vouchsafed by Harrell. RP 273-78. This is unlike Skogen where there were extensive pre termination procedures and where he was informed of the evidence against him. In this case, Merrifield was not informed of all the evidence against him prior to his termination. That was sprung upon him at the post termination hearing.

The Skogen court stated, "[I]t appears highly unlikely that the Commission's decision to uphold the termination would have been any different had the Commission not applied a differential standard of review." Id at 17. This is quite different from what the hearing officer said in this

case. In this case, there is no judicial speculation — the hearing officer unequivocally stated she would not have terminated Merrifield if she were deciding this matter *de novo*. RP 267 Thus, the second factor in Skogen differs from the facts in this case. The second factor weighs in Merrifield's favour.

Third Factor: The Governement's Interest. Under the third factor, courts examine the fiscal and administrative burdens that additional or substitute procedures would entail if the hearing officer reviewed the evidence and testimony *de novo* instead of differentially. The County contends having a hearing officer substitute her judgement for that of the County would be "unreasonable" and would impose "a significant burden on the County." AB at 26. How? The County fails to provide any specifics. C.f., In re Adoption of Doe, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) ("We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority.").

The true answer to this question is NONE. The hearing officer would hear the same evidence, review the same policies and procedures and come to an independent determination, as a jury or judge would. One has to look no further than the hearing officer's footnote 2, where she said if

she were deciding this case *de novo* she would not have terminated Merrifield. Even the Skogen court found there was no significant burden upon the hearing panel to reach a *de novo* determination. Id. at 18.

The Mathews factors indicate that the proper standard of review is *de novo* by the hearing officer.

CONCLUSION

In conclusion: This Court has jurisdiction. The County's reliance upon § 37-1-17 as barring this case is misplaced and would render meaningless § 37-1-14. Two, whether under New Mexico Constitution or under the Mathews calculus, the hearing officer should review the evidence *de novo* and arrive at the appropriate sanction *de novo*. To rule otherwise, would render the idea of a fair, neutral and detached decisionmaker a sham.

Respectfully submitted

MICHAEL SCHWARZ
Counsel for Plaintiff - Appellant
NM Bar No. 2412
P O Box 1656
Santa Fe, NM 87504-1656
505.988.2053 ■ 505.983.8656 (FAX)

CERTIFICATE OF SERVICE BY MAIL

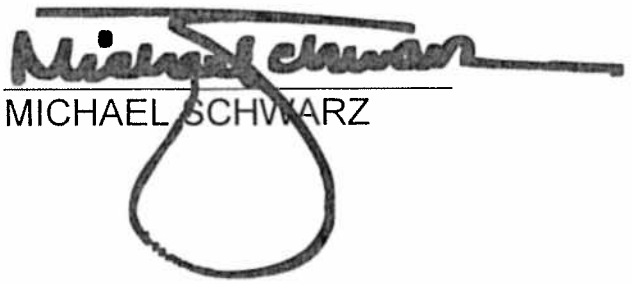
I certify that a copy of Reply Brief was sent by mail on 11 February 2013 to:

Kevin Brown
Brown Law Firm
2901 Juan Tabo Blvd. NE #208
Albuquerque, NM 87112-1885

and by e-mail to:

Katherine Way
kwray@wraygirad.com
Maureen A. Sanders
m.sanderswestbrook@questoffice.net
ACLU of New Mexico

on 11 February 2013.



MICHAEL SCHWARZ