IN THE COURT OF APPEALS FOR

FOR THE STATE OF NEW MEXICO

ANITA REINA,
Plaintiff/Appellee,

v.

No: A-1-CA-36351

LIN TELEVISION CORPORATION,
d/b/a KRQE and LARRY BARKER,
Defendants/Appellants

DEFENDANTS/APPELLANTS BRIEF IN CHIEF

On Appeal from the Second Judicial District Court
for the State of New Mexico
The Honorable Denise Barela Shepherd

ORAL ARGUMENT IS REQUESTED

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NATURE OF CASE

This interlocutory appeal involves a question of defamation law in New Mexico involving Appellants KRQE News 13 and Larry Barker's investigative report about the performance of Appellee Anita Reina's job duties. The issue presented in this appeal is whether the Appellee, a former City of Albuquerque independent Hearing Officer, appointed by the presiding judge of the Second Judicial District Court, is a public official, thus triggering the application of the actual malice standard articulated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). While the issue of determining what constitutes a public official has been litigated in many cases involving different governmental positions across the country, the District Court in this case felt there was a lack of guidance to assess Appellee's status in this case under New Mexico law, but certified the issue for an application for interlocutory appeal. The Court of Appeals granted Appellants application and assigned this matter to its General Calendar. Appellant KRQE TV News 13 and Larry Barker assert the District Court erred in reaching its decision that Appellee is not a public official as a matter of law. The question is subject to a *de novo* review.

COURSE OF PROCEEDINGS

The case presents an unusual procedural history prior to this application for interlocutory appeal. Appellant filed a Motion for Summary Judgment on January 21, 2016 on the grounds Appellee was 1) a public official, 2) the matter reported was true, 3) Appellee could not meet its burden of proof establish to establish actual malice and actual injury to reputation pursuant to Smith v. Durden. RP 234. Appellees denied she was a public official and did not present any evidence of actual malice and injury to reputation. RP 399.

As the parties were awaiting a decision on the Appellant KRQE TV and Larry Barker's Motion for Summary Judgment and preparing for trial, Appellee Anita Reina produced a June 4, 2012, letter from the City of Albuquerque that she was going to use as a trial exhibit which had not been produced in pre-trial discovery. RP 483. The Appellee's disclosure of this proposed trial exhibit occurred on September 6, 2016, just weeks before a scheduled trial, created a concern but also furthered Appellants' argument that she was a public official. The letter from the City of Albuquerque addressed Appellee's employment status in a manner in which highlighted the uniqueness of her position. Yet, it had never been produced by her in written discovery despite earlier Requests for Production, which Appellants argued would have required its production. RP 480-482.

On September 12, 2016, Appellants filed an Emergency Motion to Vacate Trial and Have Court Consider Evidence Recently Submitted by Appellee. RP 480-482. This motion argued that the 11th hour production of the June 4, 2012, letter was "sand bagging." *Id.* It also claimed that the letter, if pursued through discovery, could actually lead to additional arguments that Appellee was a public official, thereby precluding the need for a costly trial. *Id.* This was filed prior to the determination of the Motion for Summary Judgment.

On September 13, 2016, the District Court denied Appellants' Motion for Summary Judgment finding that Appellee was not a public official on September 13, 2016, and did not have to satisfy the actual malice standard. RP 492-499. The Court decided that the issue of determining whether Appellee was a public official was a close call based on the facts and lack of New Mexico case law providing guidance on assessing whether a government employee is a public official. It indicated in its order the matter could be the subject of an interlocutory appeal. RP 499. The order did not consider the issues raised in Appellants' motion on September 12, 2016.

On September 15, 2016, the District Court then held an emergency hearing on the Appellants' Emergency Motion to Vacate Trial and Have Court Consider Evidence Recently Submitted by Appellee. RP 480-

491. The Court held that the June 4, 2012, letter was deserving of additional discovery and cancelled the jury trial set for September 20, 2016. The District Court allowed Appellants to send out additional written discovery and to conduct a second deposition of Appellee about the June 4, 2012 letter. RP 500-501. Appellants developed additional evidence in that deposition to further their argument that Appellee should be considered a public official.

On April 3, 2017, Appellants filed a Motion for Order to Allow Interlocutory Appeal with the additional facts gathered in the second deposition of Appellee. RP 512-525. The District Court continued to deny the Motion for Summary Judgment. RP 526-540. However, it orally stated from the bench that the issue of whether Appellee was a public official was a "close call" and certified this matter for interlocutory appeal under NMSA 1978, §39-3-4(A) (1971, as amended through 1999) in an order entered on April 7, 2017. RP 528. The order included additional testimony obtained from the Appellee. RP 530-540.

STATEMENT OF FACTS RELEVANT TO ISSUE

A. Appellee's Position As a City Hearing Officer

The City of Albuquerque established an Independent Office of Hearings through an amended ordinance in 2009 to address a "large number of ordinances that call for hearings to be conducted by hearing officers."

Albuquerque, N.M., Ordinances ch. 2, art. VII, §2-7-8-1 et. seq. (As amended 2009). RP 265. In the findings to create the ordinance, the Albuquerque City Council highlighted eight areas of importance with regard to the creation of the Independent Office of Hearings, including the importance of selecting neutral Hearing Officers to conduct hearings involving the violation of City ordinances in a fair and impartial manner. The findings noted that Hearing Officers formerly supervised by the executive branch of government created a perception "that the independence of Hearing Officers has been or can be compromised." §2-7-8-2(D). Accordingly, the ordinance also spoke of the public policy behind creating an independent office of Hearing Officers that allowed for ad hoc appointment which was also consistent with a New Mexico statute, requiring that certain matters "shall be held by a hearing officer appointed by the presiding judge of the civil division of the district court with jurisdiction over the municipality." §2-7-8-2(G) and NMSA §3-18-17 (2009). The City Council noted that impartiality would best be achieved by having the Court appoint the Hearing Officers. RP 266. Therefore, it is clear that the public policy behind the creation of the ordinance was to ensure that the enforcement process was fair and objective. In taking the steps to have an independent appointment by the Court, the City Council clearly appreciated

the importance of citizens being confident that the Hearing Officers are fair and impartial.

The appointment process of independent Hearing Officers is also set out in the ordinance. §2-7-8-4. RP 267. Hearing Officers are to be appointed with the process of selection being determined by the presiding judge of the Second Judicial District. RP 267. The ordinance also notes the appointments are for four years with the possibility of reappointment. RP 267. The minimum requirements for the position are ten years experience as an attorney, admission to the practice of law in New Mexico, and an understanding of administrative law and supervisory experience. RP 267.

After applying for the job, the Appellee interviewed with William F. Lang, the Presiding Judge of the Civil Division, Judge Charles Brown and Judge Elizabeth Whitefield, all of whom were in the Second Judicial District Court. RP 425, 517. The Appellee testified that the interview process with three District Court judges was more rigorous than what it would have been with the City. RP 517.

Chief Judge Lang ultimately appointed the Appellee to the position of City Hearing Officer on June 11, 2009. RP 419. In his letter of appointment, Judge Lang noted the new provision in NMSA §3-18-17 (2009), which requires the appointment of an independent Hearing Officer by the Second

Judicial Court. NMSA §3-18-17 also requires hearing officers in a municipality with a population of two hundred thousand or greater while mandating to conduct hearings which follow the rules of evidence and civil procedure of the district courts. Pursuant to §2-7-8-5(B) and (E), Appellee was appointed for a four-year term and could not be removed from the position except for misfeasance or malfeasance by a majority vote of all members of the City Council following a public hearing. RP 267

As a Hearing Officer, Appellee was vested with decision-making authority by the State District Court to make decisions about violations of city ordinances. RP 277. Appellee swore in witnesses to take testimony to resolve these disputes. RP 277. Appellee's duties as a City of Albuquerque Hearing Officer required her to determine whether the City of Albuquerque, through a preponderance of the evidence, could prove an ordinance was violated by a citizen. RP 520-21.

Among her responsibilities as a City Hearing Officer, Appellee was able to rule on the constitutionality of certain City of Albuquerque ordinances challenged by citizens. RP 518. The proper adjudication of any issue under the New Mexico Constitution is obviously a matter of critical importance to the citizens of the State of New Mexico and was reviewable by the State

District and Appellate Courts. Appellee was vested with the authority to do so, thus placing her in an important role in city government.

Appellee was also involved as hearing officer in the controversial Safe Traffic Operations Program (STOP), which was enacted in 2005. Albuquerque, N.M., Ordinances ch. 7, art. XI, §§ 7–11–1 to –6 (2005) (as amended through 2009). Commonly referred to as the red light camera program, STOP involved the use of video detection equipment to monitor compliance with traffic signals and speed limits within the city and its constitutionality was upheld by this Court. See *Titus v. City of Albuquerque*, 2011-NMCA-038, 149 N.M. 556, 252 P.3d 780 (2011). Appellee testified she was well aware of the controversial program run by the City of Albuquerque and attempted to make it more citizen friendly and professional. RP 518. While the program was discontinued, the enactment of NMSA §3-18-17 was the result of the state legislature seeking to secure a more independent process for these hearings during the 2009 legislative session.

B. Appellee's Additional Employment and News Broadcast

Appellee exclusively worked in the capacity in which she was hired by the City of Albuquerque for over a year, then decided to work a second job. RP 241. In order to obtain employment outside the City of Albuquerque, employees must satisfy certain conditions governed by Section §310 of the

City of Albuquerque Personnel Code, which states, "All employees must obtain the written permission of the department director and concurrence of the Human Resources Director allowing them to engage in outside employment." RP 241, 295-97 Section §310.1 explicitly states that the department director and Human Resources Director will assure certain provisions are met, including, "There is no conflict between the employee's official duties with the City and the proposed outside employment." *Id.* Although Appellee acknowledged receipt of these rules when she began employment, she claimed in her second deposition that she was subject to an unwritten set of personnel policies and procedures which she now cannot locate or identify. RP 527

In the late summer of 2012, Appellee pursued an opportunity to work as a tribal judge with the San Felipe Tribal Court. RP 241 On August 18, 2012, prior to receiving any official written approval from the City of Albuquerque for additional employment, *Id.* Appellee was emailing from her City of Albuquerque email address to the San Felipe Tribal Court informing that she would be available to work at certain times from August 29, 2012 to September 9, 2012. *Id.*

Appellee subsequently filled out a City of Albuquerque form to pursue the second job entitled, "Request for Permission to Engage in Employment

Outside the City of Albuquerque." RP 241, 294 Appellee represented in that form that her "City work hours are from 8:00 to 5:00," Monday through Friday. *Id.* She did not disclose her proposed outside hours even though it was requested. *Id.* Appellee denied any conflict of interest with the second job and explicitly stated, "I will be providing Interim Judge services to the Pueblo of San Felipe Tribal Court. The appointment as Judge Pro Tem will not interfere with my work as a Hearing Officer for the Office of Administrative Hearings, City of Albuquerque." *Id.* Appellee signed the document and affirmed, "I will comply with all City regulations and requirements of outside employment" even though she would later say she was not subject to these policies in the first place. *Id.*

The request was apparently approved in writing by Appellee's Supervisor Roberto Albertorio on August 30, 2011, but not approved in writing by Human Resources Director Vincent Yermal until September 28, 2012. *Id.* A date stamp on the document includes two dates: September 9, 2011 and September 28, 2011. *Id.* It is undisputed that Appellee began work with San Felipe prior to the approval from the Human Resources Department. RP 243. She initially used her leave with the City to do so. Rather than working around the City of Albuquerque hours, Appellee began dictating to City of Albuquerque Hearing Office employees what hours she

needed to work at the tribal court. RP 243, 286-93. In five memos dated November 29, 2011, January 3, 2012, January 30, 2012, March 1, 2012, and March 27, 2012. RP 244, 306-10 Appellee explicitly stated, "The following are the dates I've made myself available to cover hearings at the Pueblo of San Felipe Contemporary Tribal Court." *Id.* The memo included 45 days over that time span with two hour blocks of when she would be gone. *Id.*

In the spring of 2012, Appellant Larry Barker, an investigative journalist, began looking into Appellee's employment arrangements which included a review of certain public documents through the New Mexico Inspection of Public Records Act. RP 247-248, 366-371. In the course of their reporting, KRQE News 13 and Barker discovered Appellee was at the San Felipe Tribal Court on March 4, 5, 7, 21, 26 and 30, 2012. RP 248, 366-371 While times on her memo reflected she would be out for two hours each on these dates, Appellee later acknowledged in an interview with an investigator hired by the City that she was absent from work sometimes for five hours and not the hours indicated in her memos. RP 247, 326-330, 333-34. She did not submit leave slips for any time she was working for the San Felipe Pueblo during normal city working hours in 2012. *Id.* Barker also reviewed leave slips and memos submitted by Appellee. RP 248, 366-371 He interviewed Appellee's direct supervisor Albertorio who claimed he did not know where

Appellee was during business hours and who could provide an explanation as to how Appellee could be working a second job during normal city working hours. RP 248, 369. He also conducted an interview with the Chief Administrative Officer of the City of Albuquerque, Rob Perry, who said Ms. Reina's actions were "deceitful." RP 248, 370-71 On two occasions, Appellee refused to interview with Mr. Barker. RP 249, 279-80.

On April 10, 2012, City of Albuquerque Chief Administrative Officer Perry contacted Albertorio informing him of his concern about Appellee's outside employment during work hours. RP 244, 363. Mr. Perry advised Albertorio that there would be a formal investigation into the matter, as well as a separate investigation into performance issues related to the Office of Administrative Hearings. *Id.* On April 12, 2012, Mr. Perry informed Appellee that there would be an investigation by Robert Caswell Investigations ("RCI") regarding possible violations of the City of Albuquerque Personnel Codes. RP 244, 364

RCI subsequently investigated the matter and interviewed several employees. RP 245 Some employees stated that Appellee's secondary employment did create a problem. RP 246, 314-20-2 RCI's ultimate findings stated Appellee was employed 40-hours per week, Monday through Friday, from 8:00 a.m. to 5:00 p.m. RP 247, It also noted the following:

- Anita Reina did possibly defraud the City of Albuquerque 3.8 hours a day for dates working as a Tribal Judge on City time since late August 2011.
- She used her computer to communicate with San Felipe Pueblo of San Felipe.
- She admitted to working longer than scheduled hours at Pueblo.
- She claimed she "made up time" but had no documentation to justify the hours.

RP 247, 359-60

RCI gathered statements from nine different employees and reviewed over 1,000 documents in the course of its investigation, which was completed on April 25, 2012. RP 312. RP 247. Rather than contesting the findings or investigation into her activities, Appellee resigned her employment voluntarily on April 24, 2012 prior to any stories being broadcast by KRQE News 13. RP 247, 365.

Barker and KRQE News 13 broadcast a story about Appellee on April 26, 2012, which reported on Appellee's unusual employment situation including her absence during normal working hours at the City of Albuquerque. Appellee claims the story was introduced as "The Cheating Judge." RP 372. However, a transcript of the newscast demonstrates that no such phrase was used. *Id.* To this date, Appellee has not identified an actual defamatory statement in the stories. A subsequent story was broadcast the next day on Albertorio operating a private law practice and mentioning the prior day's investigative story by Defendant Barker. RP 380.

In light of the facts gathered in the RCI's report and other contemporaneous records in this motion, Appellee cannot demonstrate any falsity of the news broadcast she claims is defamatory or that the story was reported with actual malice. Appellee has no evidence that Defendants knew they were reporting falsehoods or recklessly disregarded the truth when they published the broadcasts. Thus, Appellee cannot meet her burden and summary judgment should have been granted.

It is undisputed that Appellee was a public official and the issue reported by Mr. Barker, a 29-year investigative reporter, was one of public concern. Thus, the claim of defamation before the court should have been reviewed under the "actual malice" standard.

STANDARD OF REVIEW

Whether a Appellee is a public official is a question of law that it reviewed de novo. See *Marchiondo v. Brown*, 1982-NMSC-076, Para. 24, 98 N.M. 394, 649 P.2d 462; see also *Davis v. Devon Energy Corp.* 2009-NMSC-048, Para 12, 147 N.M. 157, 218 P.3d 75. This Court of Appeals granted interlocutory appeal on this issue.

ARGUMENT

A. Appellee's Responsibilities For Conduct of Governmental Affairs and the Public's Interest in Her Performance and Qualifications Dictate She Is a Public Official And Subject to the Actual Malice Standard

In the landmark case of *New York Times Co. v. Sullivan,* 376 US 254 (1964), the Supreme Court of the United States declared that state-law defamation claims must be measured by standards that satisfy the First Amendment, which permits no law "abridg[ing] the freedom of speech, and of the press." 376 U.S. at 269. That holding is grounded in "a profound national commitment to the principle that debate on public issues should be unlimited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Id. at 270. The protection of speech on issues of public concern extends even to false speech, so that the First Amendment's "freedom of expression . . . ha[s] the 'breathing space'" it needs to survive. *Id.* at 271-72. See *Gertz v. Robert Welch, Inc.*, 418 U.S. at 341 ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."); *Anaya v. CBS Broad. Inc.*, 626 F. Supp. 2d 1158 *, 2008 U.S. Dist. LEXIS 108727, 2008 WL 5999652 (D.N.M. Dec. 1, 2008).

There are three categories of defamation Appellees — public officials, public figures, and private figures. See *Newberry v. Allied Stores, Inc.*, 108

N.M. 424, 429, 773 P.2d 1231 (N.M. 1989). While a private Appellee can establish a defendant's liability by showing that he negligently made a defamatory statement about the Appellee, "proof of actual malice (knowledge of the falsity of the statement or reckless disregard of the truth) applies to the public official and public figure Appellee." *Id.*

New York Times v. Sullivan also established the rule that a public official must provide clear and convincing proof of "actual malice" to recover damages for a defamatory falsehood relating to his or her official conduct. The Court did not explicitly define a bright line test for a public official. However, in *Rosenblatt v Baer* 383 U.S. 75 (1966), the court provided some guidance for determining who is a "public official" under the *New York Times* rule, holding that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. 383 U.S. at 85-86. New Mexico appellate courts have recognized the *Rosenblatt* case, but have never squarely adopted a test for the process of defining who is a public official. A United States District Court decision by the Hon. James Browning, used 10th Circuit precedent in holding that language in the Rosenblatt case had been used as a test for determining whether a New Mexico citizen was a public official under

the First Amendment. *Anaya v. CBS Broadcasting Inc.*, 626 F. Supp. 2d 1158, 1184-85 (D.N.M. 2008).

While the District Court recognized the *Rosenblatt v. Baer* decision in her initial Opinion and Order on September 13, 2016, denying Appellants' Motion for Summary Judgment, it failed to exercise the analysis contained in that case based on what she felt was a lack of facts and ambiguity of New Mexico case law presented by the parties. However, based on the record and existing case law, Appellant believes Appellee is clearly a public official and the actual malice standard should apply.

Under the *Rosenblatt* case, a Appellee should be designated a public official where she occupies a professional space "among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs," such that "the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all governmental employees." 383 U.S. 75, 85-86, 86 (1966). "The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Id.* at 86-87, n.13. See also *Anaya v. CBS Broadcasting Inc.*,

626 F. Supp. 2d 1158, 1184-85 (D.N.M. 2008) ("the Tenth Circuit has characterized certain language from *Rosenblatt v. Baer* as 'the test' for determining whether a person is a public official under the First Amendment"). While the case of *Furgason v. Clausen,* 1989-NMCA-084, 26, 109 NM. 331, 785 P.2d 242, cited to *Rosenblatt v. Baer*, it concerned the issue of whether a bar owner was a public figure. The only New Mexico case on the issue of a public official falls within the context of a deputy sheriff. *Ammerman v. Hubbard Broadcasting, Inc.* 91 N.M. 250, 572 P.2d. 1258 (Ct. App.) cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977). The District Court felt that *Ammerman* did not provide any guidance for the district court in determining this case.

Furgason does provide some guidance on the issue as it did cite to Rosenblatt for purposes of identifying a public figure, but not public official. See *Collins v. Taos Board of Education,* 893 F.Supp. 2d. 1193. In *Collins*, the United States District Court, in determining whether certain school officials were public officials, stated:

> After considering the case law, the Court predicts that the New Mexico Supreme Court would classify a public school principal as a public official within the meaning of *Rosenblatt*. New Mexico courts considering a Appellee's designation have properly relied on the Supreme Court's instruction that "public official" designation is deserved where the government employee "has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds [the position],

> beyond the general public interest in the qualifications and performance of all government employees." See, e.g., *Furgason v. Clausen*, 109 N.M. 331, 339, 785 P.2d 242 (N.M. Ct. App. 1989) (rejecting "public official" status for members of mayoral advisory committee where committee members did not fit the Supreme Court's description of public official as a government employee who "usually enjoy[s] significantly greater access to the channels of effective communication and hence [has] a more realistic opportunity to counteract false statements than private individuals usually enjoy.") (quotation and marks omitted).

Collins, 893 F. Supp. 2d 1193, 1205 (D.N.M. 2012)

While apparently recognizing the standard for a public official used in *Rosenblatt,* the District Court did not exercise the proper application of the facts to the law, especially considering the additional facts gathered by Appellants in its most recent discovery. Appellee's position did occupy a position of importance given her quasi-judicial status and the importance of her to the public as a fair and impartial judge. Her position was of such importance that it was created through findings of the Albuquerque City Council in an ordinance stressing the need for fair and impartial adjudication of alleged violation of various city ordinances. Appellee was also charged in certain cases to determine the constitutionality of various ordinances in her decision-making process. This was far from a rubber-stamping position within government. In fact as a matter of public policy, it appears that the City of Albuquerque and the New Mexico Legislature went to great lengths

to make sure that hearing officers were independent to render decisions which affected the public.

B. Appellee Had Substantial Responsibility over the Conduct of Government Affairs

A citizen's right to the proper adjudication by a fair and impartial hearing officer is clearly recognized by the City of Albuquerque Office of Independent Hearings ordinance and is vital to the operation of justice. §2-7-8-1 et. seq. (As amended 2009). While not exactly a judge, the Appellee was acting within the capacity of a judge as a Hearing Officer and her decisions were subject to appeal to the state District Court. The amount of responsibility that Appellee enjoyed in the operation of city government was substantial and was a byproduct of a City Council which recognized it as so. The touchstone for public official status is the extent to which a government position is likely to attract or warrant scrutiny by members of the public. "Such scrutiny may follow either because of the prominence of the position in the official hierarchy, or because the duties of the position tend naturally to have a relatively large or dramatic impact on members of the public." *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1611 [284 Cal. Rptr. 244] *Young v. CBS Broadcasting, Inc.*, 212 Cal. App. 4th 551 *, 151 Cal. Rptr. 3d 237, 2012 Cal. App. LEXIS 1312, 41 Media L. Rep. 1065 (Cal. App. 3d Dist. Dec. 28, 2012). In this case, Appellee's position determining whether

citizens violated ordinances and whether those ordinances could withstand constitutional challenges, placed her squarely in a position of influence in which citizens depended on her to adjudicate violations of ordinances fairly and in an unbiased manner.

Appellee's position as a Hearing Officer for the City of Albuquerque was similar to a judge adjudicating criminal charges or civil disputes. Rather than adjudicating violations of statutes, however, the Appellee was independently in charge of a process of deciding whether municipal laws passed by the City of Albuquerque were violated by citizens. In some cases, the Appellee would not only decide whether an ordinance was violated by a citizen but also whether the ordinance at issue was constitutional. The Appellee's decisions were subject to review by the State District Court pursuant to the New Mexico Rules of Civil Procedure as well as New Mexico Appellate Courts. A basic tenet of any system of adjudication is a fair and impartial trier of fact. Fitness of one holding the office of judge or hearing officer to discharge the duties of such office is a matter of public concern and should be open to legitimate public debate to the benefit of and for the public good. See *Driscoll v. Block*, 210 N.E. 2d 899 (W. Va. 1965).

Yet, it is not simply Appellee's ultimate decision-making that placed her in a position of substantial responsibility over the conduct of government affairs. It was her responsibility to ensure the ***entire process*** of considering ordinance violations was fair and impartial. To that end, the City Hearing Officer had the "responsibility to see that all administrative hearings of the city…are properly and timely conducted and may adopt and publish rules for the conduct of hearings, not inconsistent with any rules established by ordinance. §2-7-8-3 Even Appellee, in addressing concerns over one controversial program, expressed the need to make sure the process was citizen-friendly and professional. RP 514, 518.

The Appellee essentially had the responsibility to proper inform and explain to citizens the hearing process which involved an attorney or agent of the City of Albuquerque bringing its case against a citizen. This involved the City proving by a preponderance of the evidence that an ordinance was violated. RP 513. The Appellee would swear in witnesses, evaluate their testimony and evidence, and consider all legal issues raised in the process or hearing. In the highly-controversial STOP cases, which by statute required district court appointed hearing officers, the Appellee was charged with following the New Mexico Rules of Evidence and the New Mexico Rules of Civil Procedure.

While there are a number of cases determining that judges are public officials, there do not appear to be many discussing the status of a hearing officer appointed by a trial court under the present circumstances. However, in the case of *Fiacco v. Sigma Alpha Epsilon Fraternity*, 484 F. Supp. 158 (D. Me. 2007), the United States District Court addressed a similar issue regarding a university administrator who was responsible for overseeing the process through which allegations of student misconduct were investigated, adjudicated and potentially sanctioned. Specifically, this university administrator had the ability to adjudicate cases personally and to issue disciplinary sanctions even though his decisions were appealable. *Id.* at 168. In holding the university administrator was a public official, the Court held that he possessed discretion, influence and power in the community. *Id.* at 169. In its holding, the Court also noted that in the case of *Grossman v. Smart*, 807 F. Supp. 1404, 1408 (C.D. Ill. 1992) a federal district court deemed the Vice Chancellor for Research and for Graduate College and assistant to the Chancellor of the University a public official while noting that this Appellee was also the Hearing Officer in an administrative grievance hearing.

C. Public Has an Independent Interest in the Qualifications and Performance of City Hearing Officers

The Appellee was not elected to her position, but her appointment process, like that of a district court judge, was rigorous and involved an interview with three district court judges. The position also required the adherence of a state statute to make sure the hiring process was separate from the City of Albuquerque outside of executive and legislative influence. Ultimately, the position was not simply one in which the Appellee was hired by a member of the City's executive branch. Rather, it required the imprimatur of the Presiding Judge of the Second Judicial District Court. In establishing the Independent Office of Hearings Ordinance, the City of Albuquerque recognized the importance of citizens being afforded a qualified and unbiased decision-maker. The City of Albuquerque, in its findings, stated that it was critical that any city Hearing Officer act in a fair and impartial manner and also be perceived as acting in a fair and impartial manner. It found that the use of city employees created a perception that the independence as Hearing Officers has been or can be compromised. To ensure confidence in the process, it became necessary to create an independent office to protect employees acting as Hearing Officers from actual or perceived influence from the city's administration.

In order to avoid the perception of bias, the City of Albuquerque determined it was necessary to change the manner in which hearing officers were appointed while recognizing legislation adopted in 2009, which required that certain matters "shall be held by a hearing officer appointed by the presiding judge of the civil division of the district court with jurisdiction over the municipality." §2-7-8-2(G) and NMSA §3-18-17 (2009)

The ordinance also required a minimum ten years experience as an attorney. More notably, the appointment made by the Presiding Judge of the Second Judicial District Court was for a term of four years. The Hearing Officer could only be dismissed for misfeasance or malfeasance by a majority vote of all members of the City Council. Such a requirement heightened the standard of protection for Appellee while elevating her importance in performing her duties for the public. This placed her in a position different from normal city employees.

Given the City Council's and State Legislature's public policy requirements concerning the Hearing Officers application and appointment process, the public had possessed an independent interest in the qualifications and performance of this position. Policy makers realized that the public deserved hearing officers who were beyond reproach and separate from the influences of the administrative branch of government. Therefore,

the special process of appointment was an important element of this position.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that the Court of Appeals reverse the district court's order finding Appellee was not a public official for purposes of her defamation claim against Appellants. Since Appellee did not provide sufficient evidence of actual malice in her Response to Motion for Summary Judgment, the case should be remanded to the District Court with directions to enter a judgment in favor of Appellant for failure to meet its burden of proof.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(A), (F) and (G), Defendants-Appellants' counsel states that the total word count contained in the body of the brief is 5,721 words, Times New Roman 14 point font as determined by Microsoft Office Word 2007.

CERTITIFICATE OF SERVICE

I hereby certify that a true and correct copy of Defendants/Appellants' Brief in Chief was emailed on August 23, 2017 to the parties listed below:

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