IN THE SUPREME COURT FOR THE STATE OF NEW MEXICO

LUIS PENA, JR.,

Petitioner-Appellee,

v.

No.: S-1-SC-40411
Dist. Ct. No.: D-117-CV-2023-00373
Rio Arriba County

RIO ARRIBA COUNTY COMMISSIONER ALEX NARANJO,

Respondent-Appellant.

RESPONDENT-APPELLANT'S REPLY BRIEF

Appeal from the First Judicial District Court
The Honorable Judge Marie C. Ward
(sitting by designation)
D-117-CV-2023-00373

Respectfully submitted,

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STATEMENT REGARDING REFERENCES TO THE RECORDED TRANSCRIPT

Pursuant to Rules 12-318(A)(1)(a) and (b) NMRA, Respondent's citations to the recorded hearing transcripts in this matter, which were provided via Compact Disc, are made pursuant to the rules set forth in the Appendix to Rule 23-112 NMRA. Citations to the recorded transcript are made by reference to the hearing date, Compact Disc number, track number, by elapsed time from the start of the recording (e.g., the March 19, 2024, hearing on Compact Disc 3, track 1, at counter 0:13:25 is citied **[3-19-24 3-track 1 CD 0:13:25]**). The Compact Discs were played on an LG SP80NB80 Slim Portable DVD Writer.

SERPE ANDREWS, PLLC

/s/ Cody R. Rogers
Cody R. Rogers

Petitioner-Appellee Antonio DeVargas, deceased, filed his original Complaint, *pro se*, asking the First Judicial District Court to circulate a Petition to *Recall Rio Arriba County Commissioner Alex Naranjo* on October 11, 2023, based on Article X, Section 9 of the New Mexico Constitution. **[1 RP 1-2]**. Petitioner claimed Respondent-Appellee, Alex Naranjo, violated the New Mexico Open Meetings Act when he and the other County Commissioners made the decision to reinstall the Juan de Onate statue in Rio Arriba County. **[AB 3]**. During the District Court's evidentiary hearing, Petitioner failed to present evidence showing Respondent made the decision to reinstall the Onate statue. Petitioner also failed to show Respondent violated the Open Meetings Act in any way. Respondent filed his Brief-in-Chief on August 19, 2024, reiterating these points. In his Answer Brief, Petitioner again failed to establish he presented said evidence.

ARGUMENT

STANDARD OF REVIEW

In his Brief-in-Chief, Respondent argued the appropriate standard of review is de novo. **[BIC 23]**. In response, Petitioner-Appellee, Luis Pena, filed his Answer Brief on September 5, 2024. In his Answer Brief, Petitioner argues this Court should apply the "substantial evidence" standard of review, rather than a de novo standard. **[AB 16]**. Petitioner is mistaken for a few reasons.

First, as argued in his Brief-in-Chief, this a matter of first impression in New Mexico courts. **[BIC 23]**. Petitioner argues this is not a matter of first impression and cites *Dona Ana County Clerk v. Martinez* in support. 2005-NMSC-037, 138 N.M. 575. Curiously, Petitioner also cites the Pennsylvania Supreme Court for a definition of first impression. Of course, it is neither here nor there how the Pennsylvania Supreme Court defines first impression, so Respondent only addresses the *Dona Ana County Clerk* case. *Dona Ana County Clerk* does not support Petitioner's contention. In *Dona Ana County Clerk*, this Court affirmed the district court's findings *after* it reviewed all of the evidence presented in support of the recall effort. 2005-NMSC-037, ¶¶ 6-9. This Court did not apply a "substantial evidence" standard of review, but instead reviewed all the record evidence and concluded that the district court's decision to allow the recall to proceed was supported by a "sufficient factual basis." *Id.* at ¶ 6.

Second, this Court should review this case de novo because the District Court necessarily made conclusions of law in its Order allowing the recall petition to move forward. **[RP 257-60]**. As argued in his Brief-in-Chief, questions of law are reviewed de novo. **[BIC 23]**. *Boradiansky v. State Farm Mut. Auto. Ins. Co.*, 2007-NMSC-015, ¶ 5, 141 N.M. 387. Although the District Court characterized its conclusions as findings, these determinations are applications of law to the facts, which are reviewed de novo. *See Webb v. N.M. Publ'g Co.*, 47 N.M. 279, 283 (1943)

(determining that the finding that an injury was accidental was really a conclusion of law). "Conclusions of law by the trial court are reviewed de novo." *Smart v. Carpenter*, 2006-NMCA-056, ¶ 4, 139 N.M. 524, 526 (citing *Gutierrez v. Connick*, 2004-NCMA-017, P7, 135 N.M. 272 (applying a de novo standard of review to errors of law in the trial court's conclusions or in those findings that function as conclusions); *see City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009-NMCA-081, ¶ 7, 146 N.M. 717 ("If no material issues of fact are in dispute and an appeal presents only a question of law, we apply de novo review.") Here, there are no material factual disputes.[1] Instead, Respondent argues Petitioner did not meet his burden in presenting any evidence to show Respondent made the decision to reinstall the statue or violated the Open Meetings Act, and that the district court erred in determining that Respondent committed misfeasance or malfeasance based on the evidence presented. As this is a classic application of law to facts, de novo review is appropriate.

Next, Petitioner claims this Court should apply the substantial evidence standard because Respondent "did not raise any arguments below regarding the

[1] As set forth in Respondent's Brief-In-Chief, the district court made at least one factual finding that was blatantly contradicted by the record evidence, when it found that the decision not to proceed with reinstallation of the Onate statue was made in a public meeting. Indeed, the record evidence showed, and Petitioner concedes in his Answer brief, that no decision regarding the Onate statute was ever made in a public meeting. **[RP 259]**.

interpretation of any provisions of the Recall Act." **[AB 17]**. Again, Petitioner is mistaken. Respondent clearly argued, in his Brief-in-Chief, this case involves statutory interpretation since the District Court did interpret the Recall Act and how it applies in this case. **[BIC 24]**. In fact, Respondent argued the District Court misinterpreted the meaning and application of "improper motive," "misfeasance," and "malfeasance" as they are defined in the Recall Act. **[BIC 27]**; NMSA 1978, §§ 1-25-2(F) and (G) (2019). Because this case involves a substantial amount of statutory interpretation regarding the provisions of the Recall Act, the appropriate standard of review is de novo. *See generally* NMSA 1978, §§ 1-25-1 to -13.

Although Petitioner argues this Court should apply the substantial evidence standard to this case, because this is a matter of first impression in New Mexico, the District Court made conclusions of law in its Order allowing the recall petition to move forward, and this case involves statutory interpretation, the appropriate standard of review is de novo.

I. Petitioner argues there exists substantial evidence the District Court's probable cause finding Respondent *and other County Commissioners* made the decision to reinstall the Juan de Onate statue in Rio Arriba County.

Petitioner's argument is based on the substantial evidence standard, which produces a different result than applying the more appropriate de novo standard. Nonetheless, again Petitioner, and ultimately the District Court are mistaken. The issue is not whether the Rio Arriba County Commission made the decision to

reinstall the statue. The recall petition lists only Rio Arriba County Commissioner Alex Naranjo, Respondent, not the Commission as a whole. Since he filed the petition, Petitioner had the burden to prove or show Respondent committed either misfeasance or malfeasance as they are defined in the Recall Act. Petitioner attempted, but ultimately failed, to present evidence showing Respondent violated the Open Meetings Act by deciding to reinstall the Onate statue.

A. Petitioner is correct it is undisputed the decision to reinstall the Juan de Onate statue "raised highly controversial and sensitive issues."

Petitioner is correct. It is undisputed the Onate statue is controversial at least in Rio Arriba County. To support his argument, Petitioner recounts or describes much of the evidence presented during the evidentiary hearing. **[AB 20-24]**. Throughout the argument, Petitioner cites testimony from Antonio DeVargas, Nathan Bird, Luis Pena, and the Rio Arriba County Manager Jeremy Maestas. **[AB 20-24]**. Most notably, Petitioner does not point to any evidence showing Respondent made the decision, alone or in concert with others, to reinstall the statue or otherwise violate the Open Meetings Act.

B. Petitioner is incorrect in arguing the District Court's finding Respondent and the other County Commissioners made the decision to reinstall the statue is supported by substantial evidence.

Petitioner claims "the issue in this case is whether the County Commission made the decision." **[AB 25]**. This is an incorrect characterization of the issue. The issue is not whether the *County Commission* made the decision to reinstall the statue

in violation of the Open Meetings Act.[2] The issue is whether *Respondent* made the decision and, in doing so, violated the Open Meetings Act, which could qualify as misfeasance or malfeasance under the Recall Act. Petitioner seeks to circulate a recall petition only concerning Respondent, not the Rio Arriba County Commission in its entirety.

Petitioner, in his argument, makes no reference to any evidence showing Respondent made the decision to reinstall the statue. In fact, Petitioner claims he presented sufficient evidence to show "the decision to take the Onate statue out of storage and place it in front of the County Office Complex was made by the *County Commission*." **[AB 25]**. Petitioner admits his evidence did not show Respondent made the decision, either individually or along with the other County Commissioners, but only that the County Commission made the decision as a whole. Petitioner also referenced Jeremy Maestas' emails, testimony, and the fact that Respondent did not testify at the evidentiary hearing to show the *Rio Arriba County Commission* made the decision to reinstall the statue. **[AB 25-29]**. Petitioner did

[2] The evidence presented to the district court revealed that the Rio Arriba County Commission had never made any decision regarding the Onate statute (taking it down, reinstalling it, or deciding not to reinstall it), whether in the context of a public meeting governed by the Open Meetings Act or otherwise. Even if such actions should have been the subject of Commission action or a public meeting, adhering to past practice would not constitute misfeasance or malfeasance under the Recall Act.

not and could not reference any evidence showing he made the decision and, in doing so, violated the Open Meetings Act, because no such evidence was presented.

Without referencing any evidence to suggest Respondent made the decision to reinstall the statue, Petitioner summarily concludes he presented evidence to show Respondent made the decision. **[AB 31-32]**. In reality, Petitioner did not present any evidence either to suggest or show Respondent made the decision to reinstall the statue. And yet, throughout his arguments, Petitioner continually claims he presented said evidence. Petitioner filed the original recall petition claiming Respondent made the decision to reinstall the statue in violation of the Open Meetings Act which qualifies as either misfeasance or malfeasance and is grounds for recall. Since he filed the petition, it was Petitioner's burden to present the required evidence. Simply put, Petitioner failed. He did not meet his burden of proof, and the District Court incorrectly concluded otherwise.

CONCLUSION

For the reasons presented herein, Respondent respectfully requests this Court reverse the District Court's ruling and remand this matter with instructions to the District Court to enter judgment in Respondent's favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, I filed the foregoing through this Court's Odyssey e-filing system and caused a true and correct copy of the same to be served upon all parties of record as reflected more fully in the electronic Notification of Service.

/s/ Cody R. Rogers

Cody R. Rogers