


1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico
Filed 4/24/2023 10:44 AM

2 **THEO LIVINGSTON,**

3 Plaintiff/Petitioner-Appellant,

4 v.



Mark Reynolds
No. A-1-CA-38427

5 **BOARD OF COUNTY COMMISSIONERS**
6 **OF THE COUNTY OF OTERO; PAMELA**
7 **HELTNER, Otero County Manager; and**
8 **SHARON SCOTT, Otero County Human**
9 **Resources Manager,**

10 Defendants/Respondents-Appellees.

11 **APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY**

12 **Manuel I. Arrieta, District Court Judge**

13 Steven K. Sanders & Associates, LLC
14 Steven K. Sanders
15 Albuquerque, NM

16 for Appellant

17 Esquivel & Howington, LLC
18 Martin R. Esquivel
19 Katherine A. Howington
20 Albuquerque, NM

21 for Appellees

22 **MEMORANDUM OPINION**

23 **DUFFY, Judge.**

24 {1} This appeal arises from the former Sheriff of Otero County's attempt to
25 promote Plaintiff Theo Livingston to a newly-created position within the Otero

1 County Sheriff’s Department. The Otero County Manager denied the promotion
2 because House had not posted the job in accordance with the County’s personnel
3 policy. The Sheriff and Livingston filed suit, seeking a writ of mandamus,
4 declaratory relief, and damages. The district court granted summary judgment for
5 the County. Livingston appeals, and we affirm.

6 **BACKGROUND**

7 {2} On appeal, neither party contests the following undisputed facts relied on by
8 the district court in its order granting summary judgment. In 2018, then-Sheriff
9 Benny House approached the Otero County Board of Commissioners about
10 including a new captain position in the next fiscal year’s budget, starting on July 1,
11 2018. At a Board meeting on April 12, 2018, the Board voted unanimously to
12 approve and “post a position with the Sheriff’s Office with the assistance of Human
13 Resources and a hiring panel to follow the personnel policy.” On June 24, 2018,
14 House sent a letter to the County Manager, informing her that he had decided to
15 promote Livingston, then a corporal, to the position. In this letter, House stated that
16 the promotion was within the power entrusted to him in accordance with the policies
17 and procedures set forth in the Otero County Personnel Handbook (Personnel
18 Policy). House also submitted a personnel action form to the County Manager for
19 her approval of Livingston’s employment status change. The County Manager
20 marked “Refused” on the personnel action form and sent a memo to House, alleging

1 that his promotion of Livingston violated multiple provisions of the Personnel
2 Policy. On July 12, 2018, the Board voted to rescind the position.

3 {3} House and Livingston jointly filed suit against the Board, the County
4 Manager, and the County Human Resources Manager. House requested a writ of
5 mandamus to compel Defendants to promote Livingston; Livingston requested back-
6 pay and retirement benefits from the County’s alleged breach of contract, and both
7 House and Livingston requested a declaratory judgment that the County violated the
8 Personnel Policy. Following discovery, both sides moved for summary judgement.

9 {4} In its order granting summary judgment for Defendants, the district court
10 determined House was required to “announce and post the position so that current
11 employees could apply” by the Personnel Policy but had failed to do so. The court
12 also concluded that even if House was not required to post the position, he had
13 otherwise “failed to coordinate the promotion with Country Manager as required.”
14 Livingston timely appealed to this Court.

15 **DISCUSSION**

16 {5} As an initial matter, because Livingston did not join in the request for a writ
17 of mandamus below and the Sheriff is not a party to this appeal, we limit our
18 discussion to Plaintiff’s claims for declaratory judgment and breach of contract.
19 Plaintiff argues that he is entitled to the promotion because House complied with the

1 Personnel Policy and the County did not. At the heart of this dispute are the
2 following sections of the Personnel Policy:

3 SECTION II–RECRUITMENT AND SELECTION

4 2.1 PURPOSE

5 It is the policy of Otero County to select and recruit the best suited
6 persons for all regular classified positions in an open and competitive
7 manner, to insure no discrimination and to insure equal employment
8 opportunity for all applicants and employees. This section applies only
9 to regular classified employees, except as specifically stated for
10 temporary employees.

11 2.2 RECRUITMENT OF APPLICANTS

12 When a classified position becomes open the Elected Official or
13 Department Head, in coordination with the County Manager, may
14 promote a qualified employee in the subject department to fill the
15 vacant position. If there is no qualified employee within the subject
16 department then, at the discretion of the Elected Official or Department
17 Head, the position may be advertised internally for five days or opened
18 to the public. The department head and/or Elected Official shall
19 document in writing to Human Resources the reasons why each step in
20 the recruitment process is deemed to appropriate for the particular
21 position.

22

23 SECTION IV–CHANGES IN EMPLOYMENT STATUS

24 4.1 PROMOTION

25 Otero County encourages the professional growth of its employees and
26 rewards the initiative, creativity, effort, commitment, and diligence of
27 its employees through the promotional process. County employees are
28 encouraged to take advantage of promotional opportunities and to apply
29 for higher paying positions for which they qualify. Any employee
30 whose job performance reflects an ability to do his or her present job in
31 an exceptional manner and to handle more difficult assignments or
32 greater responsibility may be considered eligible for promotion to
33 available positions in a higher classified level.

1 When a position within Otero County becomes available, the following
2 steps will be taken to ensure that current employees are considered for
3 the vacant position:

4 An announcement describing the position and noting the grade
5 level will be posted in each department or office. In most cases,
6 an announcement will be posted for a minimum of five
7 workdays.

8 Any employee possessing the minimum stated qualifications
9 may apply for the position. This must be done prior to the closing
10 date indicated on the announcement.

11 The district court concluded that Subsection 4.1 of the Personnel Policy was
12 controlling under the circumstances and required the Sheriff to post for the position.

13 The court concluded that the Sheriff had failed to do so. The Court also determined
14 that even if Subsection 2.2 of the Personnel Policy were applicable, Plaintiff had not
15 shown that the Sheriff “coordinated” with the County Manager as required in that
16 Subsection. Thus, regardless of which portion of the Personnel Policy was
17 controlling, the district court determined the Sheriff had not complied with the
18 requirements of either as a matter of law.

19 {6} On appeal, Plaintiff dedicates a significant portion of his briefing to the issue
20 of whether Subsection 4.1 or Subsection 2.2 of the Personnel Policy is controlling,
21 and urges us to conclude that Subsection 2.2 should prevail. For purposes of this
22 appeal, even if we were to conclude that Subsection 2.2 applies, Plaintiff has
23 nevertheless failed to persuade us of error.

1 {7} Subsection 2.2 states that the Sheriff, “*in coordination with the County*
2 *Manager*, may promote a qualified employee in the subject department to fill the
3 vacant position.” Plaintiff argues that “coordination simply means filling out the
4 proper paperwork for the promotion and documenting the reasons for the promotion
5 as stated in Subsection 2.2.” He contends the Sheriff satisfied the coordination
6 requirement by “sending [the County Manager] the appointment paperwork
7 certifying that there were funds available for the position.” The district court rejected
8 that argument, reasoning that “[w]hile Plaintiff may be correct that ‘coordination’
9 with the County Manager may not mean that the County Manager must approve or
10 consent to the selection, it does mean something more than simple consultation.”
11 The district court defined coordination as “some measure of cooperation,” “to work
12 together effectively,” and “to bring into a common action . . . a result that is
13 harmonious.” The court determined that House had failed to coordinate when he
14 “took it upon himself to unilaterally promote Livingston and simply informed the
15 County Manager of his decision.”

16 {8} On appeal, Plaintiff renews the same argument, asserting that the coordination
17 requirement in Subsection 2.2 “simply means filling out the proper paperwork for
18 the promotion and documenting the reasons for the promotion.” However, beyond
19 citing to a number of online dictionary definitions of the term “coordination”—none
20 of which contradict the district court’s interpretation of the term—Plaintiff has failed

1 to develop an argument demonstrating error in the district court’s interpretation or
2 application of the term. *Corona v. Corona*, 2014-NMCA-071, ¶ 28, 329 P.3d 701
3 (“This Court has no duty to review an argument that is not adequately developed.”).

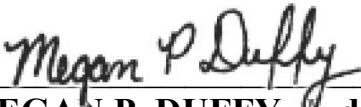
4 {9} Applying the definition offered by both Plaintiff and the district court, we
5 perceive no error in the district court’s determination that the Sheriff’s unilateral
6 decision to promote Plaintiff and tender of the personnel action form to the County
7 Manager did not amount to coordination. Plaintiff also does not point to any facts in
8 the record that might refute the district court’s ruling that House merely “informed
9 the County Manger of his decision.” Because there is no evidence tending to show
10 that the Sheriff made some other effort to coordinate as required by Subsection 2.2
11 to effectuate the promotion, Plaintiff has not shown that the district court erred in
12 granting summary judgment on his claims.

13 {10} Finally, to the extent Plaintiff suggests that the coordination requirement is
14 tantamount to granting the County Manager veto power, we reject this argument for
15 the simple reason that Plaintiff has not shown that the Sheriff attempted to coordinate
16 with the County Manager in the first place. We are faced here with a Sheriff’s failure
17 to comply with the requirements of the Personnel Policy, not a County Manager’s
18 override of the Sheriff’s otherwise compliant attempt to promote a qualified
19 employee.

1 **CONCLUSION**

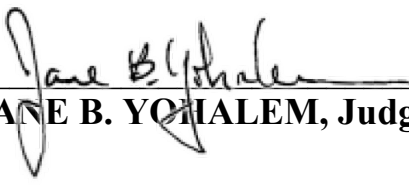
2 {11} For the above and foregoing reasons, we affirm.

3 {12} **IT IS SO ORDERED.**

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6 **MEGAN P. DUFFY, Judge**

6 **WE CONCUR:**

7 
8 _____
9 **SHAMMARA H. HENDERSON, Judge**

9 
10 _____
11 **JANE B. YOCHALEM, Judge**