IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

THE CITY OF ALBUQUERQUE,
RICHARD J. BERRY, MAYOR OF
CITY OF ALBUQUERQUE

Appellants,

v. **No. 31,075**

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
AFL-CIO, AFSCME LOCAL 3022,

Appellee.

APPELLEE'S ANSWER BRIEF

Appeal from the Second Judicial District
County of Bernalillo
Honorable Nan Nash
Cause No. D-202-CV-2010-04302

YOUTZ & VALDEZ, P.C.
Shane C. Youtz
Marianne Bowers
900 Gold Avenue S.W.
Albuquerque, NM 87102
(505) 244-1200 - Telephone
(505) 244-9700 - Facsimile
Counsel for Appellee

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COMES NOW Appellee, American Federation of State, County and Municipal Employees (AFSCME) AFL-CIO, Local 3022, by and through counsel of record Youtz & Valdez, P.C. (Shane C. Youtz and Marianne Bowers), and hereby submits this Answer Brief.

I.
SUMMARY OF PROCEEDINGS

On April 8, 2010, AFSCME filed its Verified Petition for Temporary Restraining Order, Preliminary Injunction or, in the Alternative, Writ of Mandamus seeking an order restraining the City of Albuquerque and Richard J. Berry, Mayor of the City of Albuquerque ("City") from shutting down the Albuquerque Recovery Program that treated high risk methamphetamine users until the City complied with the Collective Bargaining Agreement ("CBA") between the City of Albuquerque and the Union. (R.P. 1-16). In the Petition, AFSCME alleged that the City shut down the program and unilaterally laid off eight employees of the City of Albuquerque Behavioral Health Program without first bargaining with the Union. (R.P. 5).

The City filed its Response in Opposition to Petition for Temporary Restraining Order in which it unequivocally represented to the Court that no employee had been laid off: "Respondents ask the Court to deny the Petition on the grounds that no members of AFSCME's bargaining unit have been laid off, but were merely given notice of potential layoff . . ." (R.P. 24). The City also

submitted the Affidavit of Eugene Moser, Director of Human Resources for the City of Albuquerque who stated under oath: "No employees have been placed in actual layoff status at this time." (R.P. 33). At the evidentiary hearing on April 12, 2010, Director Eugene Moser testified that no layoffs had taken place. (April 12, 2010, Transcript 41:18-22).

In the Temporary Restraining Order and Preliminary Injunction issued by the Court, the Court declined to provide a decision as to whether the City's actions violated Section 35.1.2 of the collective bargaining agreement (Layoff/Reduction in Force and Recall), only finding that the Union was "not entitled to a temporary restraining order or preliminary injunction under Section 35.1.2 of the collective bargaining agreement." (Temporary Restraining Order and Preliminary Injunction, R.P. 62).

In the Temporary Restraining Order and Preliminary Injunction, the Court found that the City of Albuquerque did not comply with Sections 38.1.1 through 38.1.4 of the CBA (Privatization and Contracting Out) before announcing its decision to eliminate the Albuquerque Recovery Program that provided counseling and treatment services to methamphetamine abusers in the community and contracting out on a permanent basis those services that had historically been performed by bargaining unit employees. (R.P. 61-63).

Following the Court's issuance of the Temporary Restraining Order and Preliminary Injunction, AFSCME filed a Verified Motion for Order to Show Cause. (R.P. 64-75). In the Verified Motion for Order to Show Cause, AFSCME alleged that the City had not complied with the Temporary Restraining Order and Preliminary Injunction: "The City of Albuquerque has failed and refused to comply with this Court's Order in that it has announced its decision to shut down the Albuquerque Recovery Program without allowing the Union the opportunity to present argument and data to counter the City's action as required by Section 38.1.4 of the CBA [Privatization and Contracting Out]." (R.P. 66). In the Motion, AFSCME made no claims whatsoever regarding violation of Section 35 (Layoff/Reduction in Force and Recall). (R.P. 64-75).

In its Opposition and Objections to Petitioner's Motion for Order to Show Cause, the City acknowledged that the Motion for Order to Show Cause was limited to the Union's claim that the City had not complied with Section 38 of the CBA arguing that "[e]very provision of Paragraph 38 of the CBA, Privatization and Contracting Out, has been complied with." (R.P. 80). At the hearing on the Motion for Order to Show Cause, the Court did not consider the issue of compliance with Section 35 of the CBA (June 17, 2010 Transcript) and the Court's denial of the Motion for Order to Show Cause did not reference Section 35 of the

CBA. (R.P. 92-93). The Court's Order Denying Petitioner's Motion for Order to Show Cause also dissolved the TRO and Preliminary Injunction. (R.P. 93).

The Union subsequently filed a grievance and requested arbitration pursuant to the grievance and arbitration provision of the collective bargaining agreement. (Petitioner's Motion to Compel Arbitration, R.P. 95). The issue presented was the City's compliance with Section 35.1.2 of the CBA. (Petitioner's Motion to Compel Arbitration, R.P. 95). The City participated in selection of Arbitrator Oliver J. Butler, Jr., but then unilaterally informed Arbitrator Butler on July 23, 2010 that arbitration was "no longer appropriate." (Letter from Michael Garcia, Exhibit 2 to Petitioner's Motion to Compel Arbitration, R.P. 107). The City advised the arbitrator that the District Court had already resolved the issue and that he effectively was without jurisdiction to resolve the issue – in other words that the dispute was not arbitrable. (Letter from Michael Garcia, Exhibit 2 to Petitioner's Motion to Compel Arbitration, R.P. 107).

After the arbitrator notified the parties that he could take no action absent either agreement of the parties or an order of the Court, AFSCME filed a Motion to Compel Arbitration. (R.P. 94-107). In opposing the motion to compel arbitration, the City argued that AFSCME had waived its right to arbitrate because the Judge had already ruled on whether the City had complied with Section 35 of the CBA. (R.P. 112-117). The court rejected the City's position and ordered arbitration

issuing its Order granting the Motion to Compel Arbitration (R.P. 125-126) and Judgment on Order Granting Motion to Compel Arbitration. (R.P. 127-128).

The City appealed the Court's Order compelling arbitration on the grounds that AFSCME waived its right to arbitration by invoking the Court's ruling on compliance with Section 35. As will be shown below, (1) under the Uniform Arbitration Act, NMSA 1978, § 44-7A-1 to -32 (UAA), the question of arbitrability is for the arbitrator to decide in the first instance; (2) the Court's ruling on the Petition for Temporary Restraining Order and Preliminary Injunction was limited to finding that the Union was not entitled to a temporary restraining order or preliminary injunction under Section 35.1.2 of the collective bargaining agreement; (3) the Court's ruling on AFSCME's request for contempt sanctions was limited to whether the City had complied with Section 38 (Privatization and Contracting Out); (4) there was no prejudice to the City when the Court subsequently ordered arbitration on the issue of compliance with Section 35 because at the initial hearing on the Petition for Temporary Restraining Order and Preliminary Injunction the City represented to the Court that no employee had been laid off.

II.
ARGUMENT

Arbitration, as authorized under the Uniform Arbitration Act, is a device which eases judicial burdens; refusal to arbitrate is disfavored. The United States

Supreme Court has ruled time and again that Courts should err on the side of ordering parties to arbitrate: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Steelworkers v. Warrior & Gulf Navigation Co.*, 80 S.Ct. 1347, 1353 (1960).

In this instance, as argued below, the predicate question raised by the City is one which is presumptively one for the arbitrator: is the dispute arbitrable? The question raised by the grievance which triggered arbitration is, without question, one for an arbitrator: Did the City violate Section 35 of parties' collective bargaining agreement? While Respondent sought judicial intervention in this matter initially to prevent irreparable harm, it did so sparingly and reverted to its standard remedy – arbitration – to obtain resolution of contractual disputes, thereby relieving the judicial system of the necessity of resolving issues which were not immediate.

Respondent carefully limited its recourse in the State's judicial system and did not obtain a legal finding on disputes relating to Section 35 of parties' collective bargaining agreement. An Order by this Court directing parties to arbitration is consistent with settled issues of law and most efficiently serves the needs of judicial economy.

A. The trial court correctly ordered the parties to arbitrate their dispute because the issue of arbitrability is for the arbitrator to decide.

1. Standard of Review.

Whether the parties have agreed to arbitrate is a question of law; the appellate court will review the applicability and construction of a provision requiring arbitration de novo. *Santa Fe Technologies, Inc. v. Argus Networks, Inc.*, 2002-NMCA-030, ¶ 51, 131 N.M. 772, 788, 42 P.3d 1221, 1237.

2. The issue of arbitrability is for the arbitrator to decide.

This action arises under the Uniform Arbitration Act, NMSA 1978, Section 44-7A-1 to -32 (2001) (UAA). The American Federation of State, County and Municipal Employees, Council 18, AFL-CIO and Local 3022 (the Union) are the exclusive bargaining representative with respect to wages, hours, and other conditions of employment for certain City employees. The parties entered into a Collective Bargaining Agreement (CBA) by which the City is obligated to comply. The Union requested arbitration on an issue covered by the CBA and the City refused to arbitrate, citing an issue of arbitrability. This issue (arbitrability) should be resolved by the arbitrator.

AFSCME and the City agreed in the CBA that parties may use the arbitration process for "any alleged violation of this agreement." (Section 25.1.2 of the CBA, Exhibit 1 to Petitioner's Motion to Compel Arbitration, R.P. 101). The parties acceded to the authority of the arbitrator by jointly selecting an

arbitrator: "Once an arbitrator is either selected by the parties or appointed by the FMCS, the arbitrator shall have full jurisdiction." (Section 25.2.6.3 of the CBA, Exhibit 1 to Petitioner's Motion to Compel Arbitration, R.P. 105) The parties also explicitly provided for the arbitrator to decide issues of arbitrability: "The arbitrator shall be authorized to decide issues of arbitrability." (Section 25.2.6.4 of the CBA, Exhibit 1 to Petitioner's Motion to Compel Arbitration, R.P. 105).

The Uniform Arbitration Act, NMSA Section 44-7A-8(a) holds that "[o]n motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

> (1) if the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitrate; and
>
> (2) if the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

Further, NMSA Section 44-7A-7(d) provides: "The Court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established." Article 25 is an enforceable agreement to arbitrate, and the City has refused to arbitrate.

The question of resolution of Article 35 violations is a condition precedent, and must be arbitrated under the New Mexico Uniform Arbitration Act. As stated, the Uniform Arbitration Act Section 44-7A-7(c) provides that "an arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether

a contract containing a valid agreement to arbitrate is enforceable." (emphasis added). The law of the State of New Mexico provides the definitive answer to the question raised by the City, and makes it clear that the issue of arbitrability should be decided by the arbitrator.

Under the circumstances presented by the parties' language, the requirement to arbitrate "arbitrability" is almost universally enforced. In the federal private-sector framework, the United States Supreme Court's 1960 decisions, known as *The Steelworkers Trilogy*, resolved questions of the appropriate venue for questions of arbitrability. As to compelling arbitration, in the context of arbitrability, the Supreme Court stated:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

Steelworkers v. American Manufacturing Co., 80 S.Ct. 1343, 1346 (1960).

More specifically, the Supreme Court indicated that it should err on the side of ordering parties to arbitrate: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

Doubts should be resolved in favor of coverage." *Steelworkers v. Warrior & Gulf Navigation Co.,* 80 S.Ct. 1347, 1353 (1960).

In *AT&T Technologies v. CWA,* 106 S.Ct. 1415, 1419 (1986), the Supreme Court affirmed the *Steelworkers Trilogy* and ordered that "where the (arbitration) clause is as broad as the one employed in this case, which provides for arbitration of 'any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder,'" then parties have agreed to arbitrate questions of arbitrability. The Supreme Court has effectively ruled that questions of procedural arbitrability are for arbitrators to decide and not for the courts. The parties' agreement to arbitrate is comprehensive and would obviously include reserving questions of arbitrability for an arbitrator.

3. The party asserting waiver of the right to arbitrate bears a heavy burden in proving waiver.

The City argues that AFSCME has waived its right to arbitrate. Cases which have considered the question of when to find waiver concur that the line is not easy to draw uniformly. *Bd. of Educ. Taos Mun. Sch. v. The Architects, Taos*, 103 N.M. 462, 463-64, 709 P.2d 184, 185-86 (1985). The inquiry depends on the facts of each case, from which the court must infer the original intent of the party now asking for arbitration. *Bd. of Educ. Taos Mun. Sch. v. The Architects, Taos*, 103 N.M. 462, 463-64, 709 P.2d 184, 185-86 (1985)

According to *Bd. of Educ. Taos Mun. Sch.,* there are three principles which

govern the court's review:

> 1. The first is a strong policy preference for arbitration as a more efficient mode of resolving disputes than litigation. Therefore "the courts hold that all doubts as to whether there is a waiver must be resolved in favor of arbitration." *United Nuclear Corp. v. General Atomic Co.,* 93 N.M. 105, 114, 597 P.2d 290, 299 (1979). (citations omitted). Consequently, "[t]he party asserting the default in pursuing arbitration bears a heavy burden of proving waiver." *Id.* at 115; 597 P.2d at 300 (citations omitted).
>
> 2. The second principle, following from the first, is that relief will only be granted upon a showing of prejudice to the party opposing arbitration. Dilatory conduct in itself does not constitute waiver. *Id.* at 115, 597 P.2d 290. This court in *United Nuclear* characterized the inquiry as going to the intent of the party claiming waiver, upon whose objective manifestation the other party has relied. Usually this reliance takes the form of preparation for trial in the belief that the other party intends to litigate rather than to demand arbitration. *Wood v. Millers National Insurance Co.,* 96 N.M. 525, 527, 632 P.2d 1163, 1165 (1981).
>
> 3. The best measure of such reliance involves the third principle, namely the extent to which the party now urging arbitration has previously invoked the machinery of the judicial system. A concern for preserving scarce judicial resources lies at the heart of the preference for arbitration in the first place.

Bd. of Educ. Taos Mun. Sch. v. The Architects, Taos, 103 N.M. 462, 463-64, 709 P.2d 184, 185-86 (1985).

Applying these principles to the circumstances presented here, it is beyond question that AFSCME did not waive arbitration on the issue of compliance with Section 35 of the CBA. First, Petitioner never requested, and the District Court never determined, whether the City violated the contract as regards Section 35. The Court's holding was limited to a finding of whether it was likely that Petitioner would prevail on the merits. Furthermore, the City took the position

below that no layoffs had occurred, a position that necessarily presumes no violation of the layoff provision of the CBA. As a consequence of the limited question presented to the Court by AFSCME, combined with the position of the City that no layoffs had yet occurred, the court's discretionary power was not invoked on the issue of compliance with Section 35 of the CBA prior to demanding arbitration, as required for a waiver to be established under *Wood v. Millers*.

Secondly, and more importantly, AFSCME's request for contempt sanctions related exclusively to Section 38 issues and the request for contempt sanctions was not made as regards Section 35 issues. Therefore, to the extent that the City's argument relies upon the assumption that AFSCME invoked the Court's discretionary powers by asking for contempt sanctions, the argument fails.

Finally, the City suffers no prejudice because at the time of the initial hearing, it represented to the Court that no layoffs had occurred. If no layoffs had occurred, there would be no need for a ruling by the Court on whether the City complied Section 35 of the CBA when it made the layoffs. In fact, as argued above, there was no ruling because the court limited its decision to whether there was a likelihood that AFSCME would prevail on the merits. Therefore, applying the principles of waiver of arbitration, AFSCME did not waive its right to request arbitration under the CBA.

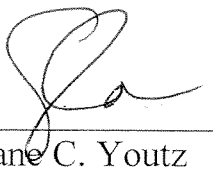
III.
CONCLUSION

AFSCME asks that the Court of Appeals uphold the Order of the District Court compelling arbitration.

Dated: February 6, 2012

Respectfully Submitted,

YOUTZ & VALDEZ, P.C.

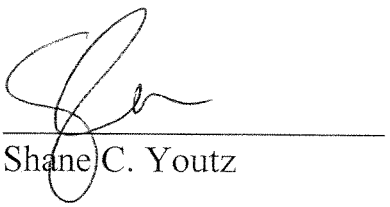


Shane C. Youtz
Marianne Bowers
900 Gold Ave. S.W.
Albuquerque, NM 87102
(505) 244-1200
(505) 244-9700 Fax
Attorneys for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was mailed via regular US mail, postage pre-paid and affixed thereto to the following parties this 6th day of February, 2012:

David Tourek
City Attorney
Michael I. Garcia
Assistant City Attorney
City of Albuquerque
PO Box 2248
Albuquerque, NM 87102



Shane C. Youtz