IN THE NEW MEXICO COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
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REGINALD ADOLPH,

Appellant/Petitioner,

vs. No. 31-816

CITY OF ALBUQUERQUE,

Appellee/Respondent.

APPELLEE/RESPONDENT CITY OF ALBUQUERQUE'S ANSWER BRIEF

Answer to Petitioner's Brief In Chief
Second Judicial District County of Bernalillo
Honorable Beatrice Brickhouse
Bernalillo County Courthouse No. D-202-CV-2011-05592

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES . . . . ii-iv

I. SUMMARY OF THE PROCEEDINGS 1

II. ARGUMENT 10

A. Standard of Review 10

B. Neither the PHO nor the Personnel Board had the authority to ignore the Substance Abuse Policy or the City's rule mandating termination for an employee who tested positive for drugs and had qualifying discipline in his personnel record. 13

C. The Personnel Board acted arbitrarily, capriciously or otherwise not in accordance with the law when it mandated that the City reinstate Adolph to a non-safety-sensitive position 21

D. Adolph's due process rights were not violated when the District Court upheld his termination from City employment; The City did not violate "industrial fair play" 26

III. CONCLUSION 32

STATEMENT REGARDING ORAL ARGUMENT 33

CERTIFICATION PURSUANT TO R. APP. PRO. 12-505 F. 33

CERTIFICATE OF SERVICE 34

TABLE OF AUTHORITIES

I. STATE CASES

New Mexico

Balboa Construction Co. V. Golden
97 N.M. 299, 538 P.2d 586 (Ct.App.1981) 8

Chavez v. City of Albuquerque
1998-NMCA-004, 124 N.M. 479, 952 P.2d 474 . . . . 17, 18

Clark v. N.M. Children, Yout & Families Dep't.
1999-NMCA-114, 128 N.M. 18, 988 P.2d 888 . . . . 11, 26

Ellis v. Parmer
76 N.M. 626, 417 P.2d 436(1966) 8

Fitzhugh v New Mexico Department of Labor
122 N.M. 173, 922 P.2d 555 (1996) 12

Hobbs Gas Co. V. New Mexico Pub. Serv. Comm'n.
115 N.M. 678, 858 P.2d 54 (1993) 25

Las Cruces Prof'l Firefighters v. Las Cruces
123 N.M. 329 (1997) 11

Lasley v. Baca
95 N.M. 791, 626 P2d 1288, (1981) 19

Matter of Termination of Boespflug
114 N.M. 771, 845 P.2d 865 (Ct. App. 1992) 27

Mirabal v. Robert E. McKee, General Contractor, Inc.
74 N.M. 455, 394 P.2d 851 (1964) 8

Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n
1995-NMSA-071, 120 N.M. 579, 904 P.2d 28 (1995) 11

Mutz v. Municipal Boundary Comm'n
101 N.M. 694, 688 P.2d 12, (1984) 12

New Mexico Transportation Union v. City of Albuquerque
No. CV 2008-09878 (2d Jud.Dist.Ct. 11-03-09) 2

Palermo at Lakeland, LLC v. City of Bonney Lake
147 Wash.App. 64, 193 P.3d 168 (App. Div 2008) 29

Perkins v. Dept. of Human Services
106 N.M. 651, 748 P.2d 24 (N.M. App. 1987) 13

Rex, Inc. v. Manufactured Housing Committee
119 N.M. 500, 892 P.2d 947 (1995) 10

Rio Grande Chapter of Sierra Club v. New Mexico Mining Commission
2003-NMCA-005, 133 N.M. 97, 61 P.3d 806 10

Selmeczki v. N.M. Dept. Of Corrections
2006-NMCA-024, 139 N.M. 122, 129 P.3d 158 (Ct. App.2006) 11, 15

Smyers v. City of Albuquerque
140 N.M. 198, 141 P.3d 542 (Ct. App. 2006) 13

Snyder Ranches, Inc. V. Oil Conservation Comm'n.
110 N.M. 637, 798 P.2d 587 (1990) 12

State ex rel. New Mexico State Highway Dept. v. Silva
98 N.M. 549, 650 P.2d 833 (Ct. App. 1982) 29

State v. Rondeau
89 N.M. 408, 533 P.2d 608 (1976) 28

Tallman v. AFB
108 N.M. 124, 767 P.2d 363 (N.M. App. 1988) 12

We the People of Nevada ex rel. Angle v. Miller
192 P.3d 1166 (Nev. 2008) 29

Zamora v. Village of Ruidoso Downs
120 N.M. 778, 907 P.3d 182, (1995) 13

II. OTHER CASES CITED

Board of Regents of State Colleges v. Roth
408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed2d 548 (1972) 27

Cleveland Bd. Of Educ. v. Loudermill
470 U.S. 532, 105 S.Ct. 1487 (1985) 27

In re Gage
137 Vt. 16, 298 A.2d 297 (Vt. 1979) 24

III. FEDERAL CASES

International Brotherhood of Teamsters v. Department of Transportation
932 F.2d 1292 (9th Cir. 1991) 32

Rutherford v. City of Albuquerque
77 F.3d 1258 (10th Cir. 1996) 31

IV. RULES AND STATUTES

Albuquerque N.M. Code of Ordinances §§ 3-1-1 to 27 (1974) 2, 17, 18
Labor Management Relations Ordinance, R.O. § 3-1-25(H) 2, 15, 22
N.M. Rule Civ. Pro. 1-074 (R) 11, 15, 24

THE CITY OF ALBUQUERQUE'S RESPONSE TO APPELLANT/PETITIONER'S BRIEF IN CHIEF

The City of Albuquerque, by and through its undersigned attorneys, hereby responds to Appellant/Petitioner Reginald Adolph's (hereinafter Adolph) Brief in Chief (hereinafter Brief). The decision of the District Court should be upheld because Adolph, a bus driver, tested positive for cocaine as a result of a reasonable suspicion drug test. Despite the clear mandates of the City's Substance Abuse Policy and the rules and regulations, the City's Personnel Board adopted the recommendation of the Personnel Hearing Officer (hereinafter PHO) to return Adolph to work as a bus driver, but modified that ruling by mandating that he be transferred to a non-safety-sensitive position. The Personnel Board lacks the authority to deny application of the mandated policy to terminate employees and also lacks authority to reinstate an employee to a position from which the employee was not terminated. The City requests that the Court affirm the District Court's decision upholding management's decision to terminate Adolph.

I. SUMMARY OF THE PROCEEDINGS

When Adolph, a bus driver for the City's Transit Department, was observed driving erratically on his route on February 9, 2009, failing to pick up passengers from a designated bus stop and crossing the center line, his supervisor sent him for a reasonable suspicion drug test; he tested positive for cocaine. He was initially

placed on administrative leave with pay, given a pre-determination hearing and on February 18, 2009, he was terminated under the Substance Abuse Policy adopted in 2006, referred to as the "zero tolerance" policy, which mandated termination after one positive drug test. He appealed that termination pursuant to the Merit System Ordinance, R.O. §§ 3-1-1 to 27 (1974).

In November, 2009, in an appeal filed by another union, Judge Valerie Huling determined that the City had failed to negotiate with the City's unions the zero tolerance penalties in the 2006 policy. Judge Huling remanded the case to the City Labor Board "to make appropriate findings and conclusions and to provide appropriate relief." New Mexico Transportation Union v. City of Albuquerque, No. CV 2008-09878 (2d Jud.Dist.Ct. 11-03-09). RP 130. On remand, the Labor Board did not reduce its discussion to a written order as required by City ordinances. Labor Management Relations Ordinance, R.O. § 3-2-10 (B)(2001).

Despite the lack of an order from the Labor Board or the District Court holding the 2006 policy invalid, on June 29, 2010, the City voluntarily reverted to the 1999 Substance Abuse Policy, referred to as the "second chance" policy, which mandated termination after the first positive drug test, only if an employee had specific discipline in his or her personnel record. ROA 139. Adolph was given notice of reinstatement and notice of pre-determination hearing. ROA 210. He was paid full back pay and benefits, ROA 209, and after reinstatement, was placed

on administrative leave with pay pending the outcome of the pre-determination hearing. ROA 214. At the pre-determination hearing held on July 8, 2010 Adolph, represented by AFSCME, argued that the discipline in the 1999 Substance Abuse Policy should be applied and that Adolph did not have qualifying discipline in his personnel record. ROA 217 ("[T]hat the 1999] policy is still the applicable policy that the City should go by . . . ") and ("He had no suspension in his record . . .").[1]

The qualifying discipline under the 1999 policy require that an employee has "(a) a total of six days of suspension in the preceding two years; or (b) in the preceding year has received a notice of over utilization of sick leave as provided in the Personnel Rules and Regulations; or (c) in the preceding year has received a suspension for tardiness or absenteeism." ROA 139 – 40 (*emphasis added*). According to the 1999 policy, any one of the articulated disciplines constitutes qualifying discipline. The 1999 policy thus incorporated progressive discipline in mandating termination for the first positive drug test for an employee with such

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1 As part of his defense at the hearing Adolph argued that he was tired because of lack of sleep and that he was around a person who was smoking cocaine which accounted for his positive drug test. The Medical Review Officer testified that an individual cannot test positive for cocaine for being around people who smoked cocaine. *See* RP 65, ROA 295 ("Q Can you test positive for cocaine just being around people who smoke or ingest cocaine. A No"). Neither of these arguments is relevant because it is uncontested that he tested positive for use of cocaine.

qualifying discipline. Otherwise, for an employee without the qualifying discipline, the 1999 policy mandated:

> (6) Unless the employee has a prior record . . . for the first instance of a verified positive test from a sample submitted as the result of a random, reasonable suspicion drug/alcohol test, disciplinary action against the employee shall include:
>
> (a) A twenty (20) work day suspension without pay; and
>
> (b) Mandatory referral to the [Substance Abuse Program] for assessment formulation of a treatment plan, and execution of a return to work agreement . . . .

ROA 139 *(emphasis added).*

Contrary to Adolph's assertion at the pre-determination hearing, he had the specified qualifying discipline in his personnel record, consisting of: (1) a two day suspension for violation of safety rules which he served on August 12 and August 14, 2008. ROA 174, 278; (2) a three day suspension for being tardy for work which he served on August 15, August 16 and August 18, 2008. ROA 34, ¶7; 278; and, (3) a five day suspension for violation of safety rules which he served on December 3, December 4, December 8 through 10, 2008. ROA 198, 278. Under the 1999 policy, this was qualifying discipline: he had ten days of suspension in the previous two years, including a three day suspension for being tardy for work, within the year prior to his positive drug test. ROA 139. Adolph disputed one of those disciplines, RP 75, but the City demonstrated that he served the days of

suspension, RP 71, 76, and the PHO included that discipline in his findings. RP 209.

AFSCME, on behalf of Adolph, stipulated at the post-termination hearing that Adolph did not file a grievance or an appeal to contest these disciplines. RP 65 ("[A]pparently there were a two-day prior suspension and a five-day prior suspension in the employment record of Mr. Adolph and these were not appealed"). Pursuant to the 1999 substance abuse policy, "an employee who has in his/her employment record one of the following, the first instance of a verified positive test shall result in termination from City employment." ROA174, 198 and159 ¶ Q(9) *(emphasis added)*. Adolph had a total of more than six days of suspension in the two years preceding his testing positive for cocaine and in the year preceding his positive test, Adolph received a suspension for tardiness or absenteeism. RP 209. Adolph did not dispute that he incurred a verified positive drug test for cocaine. RP 209. Adolph was terminated under the 1999 substance abuse policy and the City's rules and regulations, taking into consideration his qualifying discipline as mandated under the 1999 policy. ROA 219, 222.[2]

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2 Adolph and the union argued that the City had violated the time frame for pursuing the termination for the positive result under the Collective Bargaining Agreement. RP 210. The City reinstated Adolph on June 29, 2010, thus making him whole. The City gave him a notice of investigation on June 29, 2010 and a pre-determination hearing on July 8, 2010. ROA 210. In his recommendations to the Personnel Board, the PHO determined that the City did not violate any part of the Collective Bargaining Agreement, including the timing for discipline; Adolph

The PHO found just cause for discipline to be imposed and recommended that Adolph should be reinstated to his former position as a Motor Coach Operator and given a 40-day suspension. ROA 35. The Personnel Board adopted the recommendations but modified those recommendations to provide that Adolph would not be returned to his prior safety-sensitive position as a bus driver. RP 13; ROA 6. The Personnel Board did not direct to what position Adolph should be transferred.

The City appealed the result reached by the Personnel Board to the district court pursuant to N.M.Civ.Pro. 1-074, and filed its statement of appellate issues. RP 99. AFSCME responded, RP 135, the City replied, RP 154, and on November 29, 2011, Judge Beatrice Brickhouse issued a Memorandum Opinion and Order, reversing the conclusion of the Personnel Board and the PHO and upholding the termination of Adolph by City management. RP 170. AFSCME, on behalf of Adolph, petitioned for certiorari which was granted by this Court.

In response to Adolph's summary of the proceedings, while the PHO stated in his recommendations that the City had "abandoned" the 2006 policy, RP 12, ROA 35, the PHO failed to recognized that the City had not changed or abandoned its personnel policies, rules and regulations: the City terminated Adolph on the

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did not appeal this finding to the court. ROA 35, RP 210. Adolph did not argue the lack of timeliness in the appeal filed by the City before the District Court.

basis of, among other violations of the rules and regulations, Section 311.1 which provides:

> 311.1 Alcohol/Drug Possession and Consumption
>
> "As a condition of employment, consumption, possession, sale, purchase and/or transfer of illegal drugs or drug paraphernalia by City employees are strictly prohibited. Consumption of alcohol by City employees is prohibited in any facility, vehicle or work site (owned, leased or rented) during assigned work hours including lunch periods and breaks."
>
> "C. No employee will report to work, perform work, visit a City work site, City office or City facility (owned, rented or leased) while under the influence of alcohol or the presence of illegal drugs in the their system. Employees suspected of being under the influence of alcohol or illegal drugs during assigned work hours shall be subject to a reasonable suspicion alcohol/drug test."

ROA 33. AFSCME and the PHO pointed out that "there was no direct reference to the 1999 policy." RP 208 and Brief at p. 5. There was, however, reference to Section 309.3 which specifically incorporated the substance abuse policy. ROA 221. After finding just cause for discipline, RP 210, the PHO also found that Adolph had qualifying discipline in his personnel record and applied the 1999 policy. Despite the mandate of the 1999 policy, requiring termination for an employee who tested positive and had qualifying discipline in his or her personnel record, the PHO recommended that Adolph be reinstated to the position from which he was terminated; the Personnel Board adopted the PHO's recommendation but reinstated him to an unspecified "non- safety-sensitive

position." RP 13. The union advocated for application of the 1999 policy during both the pre-determination and post-deprivation hearings and Adolph was fired under the regulations which incorporate the 1999 policy. ROA 221, RP 209-10.

Further, the comments of the Personnel Board members which are not incorporated into a final order cannot form the basis of error: "Oral statements of a judge in articulating his ruling at the close of trial do not constitute a 'decision' within the meaning of N.M.R.Civ.P. 52(B)(a)(1), N.M.S.A.1978, and error may not be predicated thereon." Balboa Construction Co. v. Golden, 97 N.M. 299, 304, 639 P.2d 586, 591 (Ct.App.1981) (*citing* Ellis v. Parmer, 76 N.M. 626, 417 P.2d 436 (1966); Mirabal v. Robert E. McKee, General Contractor, Inc., 74 N.M. 455, 394 P.2d 851 (1964)).

If the Court considers the statements before the Personnel Board, the statements of counsel for the City were appropriate. Brief, p. 6. The statement referenced by Adolph was that the City cannot simply revert to the 1999 policy in its entirety because federal regulations were updated between 1999 and 2006. Judge Huling only dealt with the penalty provisions of the 2006 policy, not any other portions of that policy. *See* RP 123 (the City "imposed a 'zero-tolerance' drug policy without first negotiating the policy's penalty provision." (*Footnote omitted*)). The City was clear about the application of the 1999 second chance policy for discipline. The Personnel Board actually applied the 1999 policy in

adopting the recommendations of the PHO finding Adolph had qualifying discipline; the Personnel Board simply decided that its judgment as to discipline was preferable to the discipline mandated by either of the policies.

Adolph characterizes the District Court opinion in this case as being concerned only with the discretion exercised by the Personnel Board in reinstating Adolph to a position from which he was not terminated. Brief, p. 7. Judge Brickhouse applied the articulated City policy of disciplining its employees for on-the-job drug use, whether from the application of the substance abuse policy or the City's rules and regulations. *E.g.*, RP 173 (with regard to the violation of Section 301.8 of the Personnel Rules, the "use of cocaine while driving a public bus is certainly a violation of this section") and RP 174. Judge Brickhouse appropriately was more concerned with the improper exercise of discretion by the PHO and the Personnel Board when such discretion did not exist in the City's ordinances, rules, and regulations and policies.

This Court should affirm Judge Brickhouse's result and uphold the termination of Adolph by the Transit Department. Adolph was aware that he could be terminated for driving a City bus while under the influence of cocaine. He was not sent for a random test, but was sent by his supervisor when Adolph was seen erratically driving the City bus. The second chance policy was applied and, because he had qualifying discipline, the policy mandated that he be terminated.

When the facts were established before the PHO and adopted by the Personnel Board, neither the PHO nor the Personnel Board could ignore the clear mandate of termination in the policy.

II. ARGUMENT

This Court should uphold the termination of Adolph by management and affirm the District Court's conclusion that the PHO's and Personnel Board's results were "arbitrary and capricious and exceed the Board's and the [PHO]'s authority." RP 177. The PHO and Personnel Board were obligated to apply the 1999 policy and the rules and regulations which mandated termination of employment for a bus driver who tested positive for cocaine on a reasonable suspicion drug test with qualifying discipline in his personnel record.

A. Standard of Review

The appellate court conducts the same review of an administrative decision as the district court. Rio Grande Chapter of Sierra Club v. New Mexico Mining Commission, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 61 P.3d 806, 812 (*citing* Rex, Inc v. Manufactured Housing Commission, 119 N.M. 500, 504, 892 P.2d 947, 951 (1995)). Thus, the appellate court can reverse the findings of the City Personnel Board when:

(1) The agency acted fraudulently, arbitrarily or capriciously;

(2) Based upon the whole record on appeal, the decision of the agency is not supported by substantial evidence;

(3) The action of the agency was outside the scope of authority of the agency; or

(4) The action of the agency was otherwise not in accordance with the law.

Rule 1-074(R). When reviewing administrative decisions under this standard, courts look to "the whole record to ascertain whether there has been unreasoned action without proper consideration or disregard of the facts and circumstances." Las Cruces Prof'l Fire Fighters v. Las Cruces, 123 N.M. 329 (1997); Selmeczki v. N.M. Dept. of Corrections, 2006-NMCA-024, ¶ 12, 139 N.M. 122, 129 P.3d 158. "We review *de novo* whether a ruling by an administrative agency is in accordance with the law." Clark v. N.M. Children, Youth & Families Dep't, 1999-NMCA-114, ¶ 7, 128 N.M. 18, 988 P.2d 888.

"When reviewing administrative agency decisions courts will begin by looking at two interconnected factors: whether the decision presents a question of law, a question of fact, or some combination of the two; and whether the matter is within the agency's specialized field of expertise." Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n, 1995–NMSC–071, 120 N.M. 579, 582, 904 P.2d 28, 31 (1995). "If an agency decision is based upon the interpretation of a

particular statute, the court will accord some deference to the agency's interpretation, especially if the legal question implicates agency expertise. However, the court may always substitute its interpretation of the law for that of the agency's 'because it is the function of the courts to interpret the law.' *Id.* at 583, 904 P.2d at 32. If the court is addressing a question of fact, the court will accord greater deference to the agency's determination, 'especially if the factual issues concern matters in which the agency has specialized expertise.'" *Id.*

An arbitrary and capricious action is an administrative ruling which, when viewed in light of the whole record, is unreasonable or does not have a rational basis. Snyder Ranches, Inc. v. Oil Conservation Comm'n., 110 N.M. 637, 639, 798 P.2d 587, 589 (1990). It is also action that is "without a rational basis and which is a product of an unconsidered, willful and irrational choice of conduct and not the result of a 'winnowing and sifting' process." Mutz v. Municipal Boundary Comm'n, 101 N.M. 694, 702, 688 P.2d 12, 17 (1984).

To find that an administrative decision is supported by substantial evidence in the whole record, "the court must be satisfied that the evidence demonstrates the reasonableness of the decision." Tallman v. ABF, 108 N.M. 124, 128, 767 P.2d 363, 367 (N.M. App. 1988). Substantial evidence is evidence that a reasonable mind would regard as adequate to support a conclusion. Fitzhugh v. New Mexico Department of Labor, 122 N.M. 173, 180, 922 P.2d 555, 562 (1996). The

reviewing court is expected to review the record to determine whether there has been unreasoned action without proper consideration of the facts and circumstances. Perkins v. Dept. of Human Services, 106 N.M. 651, 655, 748 P.2d 24, 28 (N.M. App. 1987); *see also* Zamora v. Village of Ruidoso Downs, 120 N.M. 778, 782, 907 P.3d 182, 186 (1995); Smyers v. City of Albuquerque, 140 N.M. 198, 141 P.3d 542, 544-45 (Ct.App. 2006). In this case, there is no specialized knowledge of the law at issue: the PHO and the Personnel Board did not have to interpret either of the policies. Both the PHO and the Personnel Board found facts supporting that Adolph tested positive for cocaine on a reasonable suspicion drug test, he had qualifying discipline in his personnel record, meaning that under the 1999 policy, his employment should be terminated. Nor were there any specialized facts that either the PHO or the Personnel Board was required to find. They found all of the facts necessary to dictate that Adolph should be terminated. Based on substantial evidence in the record and the undisputed findings of fact, this Court should affirm the holding of the District Court.

B. Neither the PHO nor the Personnel Board had the authority to ignore the Substance Abuse Policy or the City's rules mandating termination for an employee who tested positive for drugs and had qualifying discipline in his personnel record.

The PHO found the facts necessary to justify termination of Adolph: 1) he was validly referred for a reasonable suspicion drug test, he tested positive for cocaine and Transit management terminated him under the 2006 zero tolerance

drug policy; 2) he appealed that termination; 3) Judge Huling invalidated the 2006 policy but the Labor Board did not issue an order addressing her remand; 4) the City voluntarily reinstated Adolph, gave him back pay and benefits and provided him with another pre-determination hearing; 5) Adolph had qualifying discipline under the 1999 second chance drug policy which, under that policy, mandated termination; 6) he appealed that termination pursuant to the Merit System Ordinance; 6) he was provided a post-termination hearing at which he presented evidence, called and cross-examined witnesses, made arguments and submitted a post-hearing brief; 7) the PHO found that Adolph violated City Personnel Rules and Regulations as well as the Substance Abuse Policy; and 8) the PHO found just cause for disciplining Adolph. RP 209 – 10. Adolph does not dispute these factual findings. Despite finding all of the facts necessary to support his termination under the 2006 Policy, the 1999 Policy and the City's rules and regulations, the PHO thought that the discipline of termination was too harsh. RP 210. The PHO instead, held that Adolph should be disciplined for a period of 40 work days without pay and comply with all other aspects of the Substance Abuse Policy, failing to apply the mandated termination under both policies and the rules and regulations.

The PHO found that the City demonstrated just cause for Adolph's termination. Just cause is defined, under the State Personnel Act,[3]

> exists "when an employee engages in behavior inconsistent with the employee's position and can include, among other things, incompetency, misconduct, negligence, insubordination, or continuous unsatisfactory performance." The question of whether behavior "constituted misconduct so as to provide 'just cause' for the discipline of a state employee is a question of fact to be determined from all the attendant circumstances in each case."

Selmeczki v. N.M. Dept. of Corrections, 139 N.M. 122, 127, 129 P.3d 158, 163 (Ct.App. 2006) (*citations omitted*). The PHO determined that just cause existed for disciplining Adolph by finding facts supporting his termination under the 2006 policy and under the City's rules and regulations: Adolph tested positive for cocaine when he was sent for a reasonable suspicion drug test. The PHO also found the necessary facts for terminating Adolph under the 1999 policy by finding he had qualifying discipline in his personnel record which he did not appeal when that discipline was imposed. RP 209. The PHO further found that "[s]uch positive test is prohibited by the City Rules and Regulations and therefore constitutes just cause." RP 209 - 10. Once the PHO found just cause, he did not have discretion to deviate from the punishment mandated.

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[3] The City of Albuquerque is a home-rule municipality under state law, thus the State Personnel Act is not applicable to personnel actions imposed by the City of Albuquerque. The definition of just cause is generally accepted.

The City clearly mandated termination under both the 1999 and 2006 policies for a positive drug test. The only difference is that in the 1999 policy, employees without qualifying discipline in their personnel records receive a 20 day suspension and referral to the substance abuse program, thus making application of the 1999 policy more favorable to employees. Adolph, through AFSCME, advocated in his pre-determination hearing and before the PHO that the 1999 policy should be applied. Adolph, however, had qualifying discipline, having been suspended for over six days in the preceding two years before his positive drug test and having been disciplined for absenteeism within the prior year. RP 209. Under either policy, the discipline mandated was termination.

The powers of the PHO are described under the City's Merit System Ordinance: "The Personnel Hearing Officers have the power to administer oaths, subpoena witnesses and compel the production of documents pertinent to any hearing authorized by this article." R.O. §3-1-25(H). No other provision addresses the power of the hearing officer. No other provision allows the PHO to impose discipline not authorized in the City's ordinances. The District Court stated: "There is no provision for a [PHO]'s discretion in this matter. Not only did the [PHO] permit [Adolph] to retain his employment as a City bus driver but he also ordered a forty-day suspension without pay. This was outside his authority because (1) [Adolph] should have been terminated; and (2) if [Adolph] qualified

for retention (which he did not), he was subject only to a twenty day suspension without pay." RP 174 - 75. The District Court recognized the lack of discretion of the PHO in, in essence, making up the discipline the PHO recommended to be imposed.

The powers of the Personnel Board are also described in the Merit System Ordinance and include rendering decisions "upon the appeal of classified employees of the city who have been suspended without pay for more than five days, . . ." R.O. § 3-1-5(B). With regard to making policy, the Merit System Ordinance also provides for the Board to "advise and assist the Chief Administrative Officer . . . in adopting such Personnel Rules and Regulations as are considered necessary, appropriate or desirable to carry out the provisions of this article," to "advise and assist the Chief Administrative Officer . . . in the improvement of personnel standards in the classified service," to "advise the Chief Administrative Officer . . .upon problems concerning personnel administration and recommend corrective action," and to "inquire after consultation with the Chief Administrative Officer, into any matter which it may consider desirable concerning the administration of affairs of personnel." *Id.* at § 3-1-5(A)(1) – (4). The Merit System Ordinance does not allow the Personnel Board to set policy or establish the discipline for employees of the City of Albuquerque. In fact, the Ordinance is specific: It allows for the Board to advise and assist the Chief Administrative

Officer, not enact or establish.[4] Neither the PHO nor the Personnel Board can establish policy or determine discipline when such discipline is mandated by the City. Both can exercise only the powers granted under the enabling ordinance.

In Chavez v. City of Albuquerque, 124 N.M. 479, 952 P.2d 474 (Ct.App. 1997), the Court limited the powers of the City of Albuquerque's Personnel Board:

> The essential functions of a municipal personnel board are to establish rules and regulations governing the terms and conditions of municipal employment and to administer the merit system ordinance. . . . Among its duties, the personnel board renders a decision "upon the appeal of classified employees of the city concerning certain grievances as provided in § 3-1-23." MSO, § 3-1-5(B). . . .
>
> "Grievances" are limited to "those matters which fall exclusively within the purview of this article or the implementation of the Personnel Rules and Regulations." MSO, § 3-1-23(A)(1). The personnel board's exercise of authority is contingent upon (1) a management action (2) that falls within the scope of a Class I grievance (3) concerning a classified employee who is subject to the MSO. . . .

124 N.M. at 481 - 482 (*citations omitted*). The Chavez Court recognized, "[b]ecause of the personnel board's limited statutory authority to adopt regulations and to administer the merit system ordinance and because of the broader explicit state and federal authority of district courts to entertain the [Open Meetings Act]

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[4] The Merit System Ordinance also addresses the scope of review by the district court: the decision of the Board shall be affirmed unless the decision is found to be "in excess of the statutory authority or jurisdiction of the Board." Section 3-1-25(F)(3). The Board acted in excess of its authority by creating its own discipline.

and constitutional claims. . ." the Personnel Board was not empowered to consider the constitutional and statutory claims raised in that case. 124 N.M. at 483; *see also* Lasley v. Baca, 95 N.M. 791, 794, 626 P.2d 1288, 1291 (1981) (lack of subject matter jurisdiction means lack of authority to decide matters presented). Similarly, because there is no authorization in the MSO to permit either the PHO or the Personnel Board to deviate from the mandated discipline, both lack authority to reinstate an employee who tests positive for cocaine with qualifying discipline in his personnel file and to manufacture their own discipline.

As advocated by AFSCME on behalf of Adolph, the PHO applied the 1999 policy then failed to adhere to any part of that policy by reinstating Adolph when his termination was mandated by the policy and then by assessing him more discipline than specified in the policy.[5] The hearing officer, without any authority, determined that 40 days would solve the City's problem with an employee who chose to operate the City bus while under the influence of cocaine. The PHO also mandated that Adolph be referred to the substance abuse program.[6]

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[5] Adolph does not object to the 40 day suspension but advocates for application of the 1999 policy.

[6] The PHO ordered that Adolph comply with the City's Substance Abuse Program "that any returning employee to a safety sensitive position is held to including the SAP that is now in effect. . . ." RP 210. An employee serving in a safety sensitive position who tests positive for prohibited drugs must satisfactorily complete the employer's substance abuse program. *See* 49 C.F.R. Part 40.285 ("as an employee, when you have violated DOT drug and alcohol regulations, you

The Personnel Board adopted the PHO's recommendations but ordered the City to not reinstate Adolph to a safety sensitive position. The Personnel Board has no authority to adopt regulations. The Board has no authority to deviate from the mandated discipline by creating its own. The Board only has the authority given to it in the regulations: to find facts by adopting the recommendations of the hearing officer and applying the City's policies to those facts. In this case, applying the City's policy mandates that Adolph be terminated.

The District Court reached the correct result. Adolph argues that the District Court did not have the power to refuse to reinstate Adolph, given the PHO's recommendations and the Personnel Board's adoption of those recommendations with modification. Adolph relies on State ex rel. New Mexico State Highway Dept. v. Silva, 98 N.M. 549, 533, 650 P.2d 833, 837 (Ct.App. 1982), in which the State Personnel Board found that the dismissal of an employee was without just cause. "The plain wording of § 10–9–18(F), [ ] is that if agency action was without just cause the Board 'may modify the disciplinary action or order the agency to reinstate the appealing employee.' Our holding is that the Board may

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cannot again perform any safety-sensitive duties for any employer until and unless you complete the [Substance Abuse Professional]'s evaluation, referral, and education/treatment process set forth in this subpart and applicable DOT agency regulations. The first step of this process is a SAP evaluation"). By imposing the requirement that the City return Adolph to a non-safety sensitive position, the Personnel Board failed to address whether Adolph had to complete the SAP.

find employee misconduct and may also order reinstatement; such accords with the legislative language in § 10–9–18(F)." 650 P.2d. at 839. The PHO in this case found just cause for disciplining Adolph: he simply did not apply the mandated discipline.

Adolph argues that the PHO questioned the process by which the City terminated Adolph under the 2006 and 1999 policies. The PHO, however, found that Adolph had violated numerous City policies, including Sections 301.1, 301.2, 301.3, 301.8, 309.3 and 311.1. RP 209 – 10. There was no evidence that these policies had changed during the course of terminating Adolph's employment. Further, the City made Adolph whole by giving him back wages and benefits. Adolph and the PHO opine about whether Adolph's reinstatement with back wages furthers any justice. RP 210, Brief, p. 12. They do not question whether the concerns of citizens of the City of Albuquerque were furthered by mandating the return of a bus driver to employment, ignoring that he tested positive for cocaine after driving the bus erratically on City streets: he "can hardly be said to have been responsible to the public when he drove a City bus while obviously impaired by cocaine." RP 173.

C. The Personnel Board acted arbitrarily, capriciously or otherwise not in accordance with the law when it mandated that the City reinstate Adolph to a non-safety-sensitive position.

The Personnel Board sought to reinstate Adolph to a non-safety sensitive position, thereby obviating the need for him to enroll and complete the substance abuse program as required by the federal regulations to assign him to safety-sensitive duties. The Personnel Board does not have the power to mandate that an employee be placed in another City position other than the one from which he or she was terminated. There are obvious reasons why this power is withheld, including: i) the rate of pay: if the employee was transferred to another department, his pay rate would change; neither the Personnel Board nor the PHO Officer can establish salary;[7] ii) the authority to transfer: only the CAO can transfer between departments[8] and the CAO must consider departmental needs, budget, collective bargaining and a myriad of other concerns in making such decision: the Personnel Board is without power to adjust the budget;[9] iii) would

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7 *See* R.O. § 3-1-10 ("[c]ompensation of classified employees shall be based on a classification plan. The classification plan shall be based on duties, authority and responsibility of the positions in the city service").

8 *See* R.O. § 3-1-2(C) ("Chief Administrative Officer shall have the following rights: (2) To hire, promote, evaluate, transfer, and assign employees;").

9 The Personnel Board did not consider the disruption to the City budget in the Transit Department. Only bus drivers are paid according to the union scale for bus drivers. If Adolph is required to be reinstated to a non-safety sensitive position, depending on his qualifications, he may suffer a loss of pay. If the Personnel Board intended for Adolph to maintain the same amount of pay, he will be paid more for doing the same work as other City employees. This would mean that the City would be required to pay him more for the same work being performed by

grievant have "bump rights" to force an incumbent out of his or her position or would the City have to put him on administrative leave and pay him until a position for which he is qualified becomes vacant; and vii) will the employee have to give up his union membership or transfer to a different union? Simply put, the Personnel Board cannot avoid the requirements of the federal regulations by transferring an employee with a verified positive drug test result to another City position.

The District Court bluntly rejected the result reached by the Personnel Board in adopting the PHO's recommendations, but with the modification that Adolph would be reinstated to a non-safety-sensitive position: "The rules do not provide for this. . .The [Personnel] Board's adoption of the [PHO]'s recommendation that [Adolph] not be terminated but rather, be placed in another position is arbitrary and capricious and outside the scope of its authority." RP 175 -76. The District Court held that the City's reversion to the 1999 policy was warranted, RP 175, and rejected Adolph's argument that "it was unclear that [the City] had reverted to the 1999 [policy] after the Court found that the 2006 policy had not been negotiated in good faith." *Id.*[10]

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other laborers throughout the period of his employment which could last 25 years, creating dissension among the other workers.

[10] The District Court, in reaching this result, partly relied on AFSCME's argument that the 1999 policy should apply. RP 175.

In In re Gage, 137 Vt. 16, 398 A.2d 297 (Vt. 1979), the Court found that the administrative board went beyond its authority in ruling that progressive discipline "is an inherent element of discharge procedures, and that failure to resort to less severe measures than discharge is, in effect, a waiver of what might otherwise be good cause." In that case, the Court found that the Board could not establish policy for the State: "Thus, the Board still misconstrues its function. The Board's duty is to decide whether there was, in law, just cause for the action taken, not whether it agrees or disagrees with that action. It has power to police the exercise of discretion by the employer and to keep such actions within legal limits. But the Board is not given, by the statute or by the agreement, any authority to substitute its own judgment for that of the employer, exercised within the limits of law or contract."

In this case, however, the Board went beyond its authority and substituted its own judgment for that of the City and the Transit Department by: 1) reinstating Adolph and 2) transferring him to a non-safety sensitive position. The Board was in clear violation of the City policies, the Merit System Ordinance and the law, justifying reversal of the Order of the Board. The PHO and the Personnel Board are obligated to apply the discipline mandated under the 1999 policy. Because Adolph had qualifying discipline in his personnel file, termination was mandatory: the word "shall" is used in the policy regarding the discipline to be imposed which

mandates that he be terminated. ROA 139 ("(9) For an employee who has in his/her employment record one of the following, the first instance of a verified positive test shall result in termination. . . ." *(Emphasis added)*).

Adolph argues, Brief, p. 13, that the District Court has "no power to modify the order appealed from because amending or modifying administrative orders would be substitution of the Court's judgment for that of the agency . . . " relying on Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n., 115 N.M 678, 680, 858 P.2d 54, 56 (1993). Rule 1-074 of the Rules of Civil Procedure, defines the District Court's authority:

> The district court, in its appellate capacity, shall issue a written decision, which may include:
>
> (1) remanding the case to the administrative agency with specific instructions for further proceedings and determinations, . . ;
>
> (2) reversing the decision under review, with a statement of the basis for the reversal as provided under Paragraph R [standard of review] of this rule;
>
> (3) affirming the decision under review, with a statement of the basis for affirmance.

N.M.R.Ann. § 1-074T. The holding in Hobbs is inapplicable to appeals pursuant to Rule 1-074.

Adolph argues that the Personnel Board is not limited to being a "rubber stamp" for either the PHO's recommendations or the decision of management. Brief, p. 11. The Personnel Board, however, is bound by the clear dictates of City

policy in mandating punishment for an employee who violated the policies, rules and regulations. The Merit System Ordinance provides that the Personnel Board may "[a]ccept the recommendations of the Hearing Officer by accepting the Hearing Officer's Proposed Findings of Fact and entering conclusions of law consistent with those findings." Section 3-1-25(E)(1) (*emphasis added*). The Personnel Board adopted the PHO's findings of fact, RP 211, but then decided to reinstate Adolph to a non-safety sensitive position. Whether the Personnel Board applied the applicable law is a conclusion of law for the court to review de novo. *See* Clark v. N.M. Children, Youth & Families Dep't, 1999-NMCA-114, ¶ 7.

The District Court in this case applied Rule 1-074. The Court stated the reasons for reversing the conclusion of the Personnel Board. It did not question the findings of fact by the PHO or the Personnel Board. The District Court interpreted the law and found the conclusions of the Personnel Board to be "arbitrary, capricious and outside the scope of the [Board's] authority." RP 176. This Court should affirm the conclusion of the District Court.

D. Adolph's due process rights were not violated when the District Court upheld his termination from City employment; the City did not violate industrial fair play."

The City initially terminated Adolph under the 2006 policy. When Judge Huling remanded the discipline in the 2006 policy to the Labor Board, the City reverted to the discipline under the 1999 policy. Adolph was given back pay, was

reinstated and was made whole.[11] He was given a new pre-determination hearing and was legitimately terminated under the 1999 policy because he had the requisite qualifying discipline.

Adolph argues that a governmental employee with a legitimate expectation of continued employment cannot be terminated without just cause, notice and an opportunity to be heard. Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 541, 546, 105 S.Ct. 1487 (1985). In Matter of Termination of Boespflug, 114 N.M. 771, 772, 845 P.2d 865, 866 (Ct.App. 1992), the Court stated:

> As a permanent public employee of San Juan County, petitioner had a property right in continued employment and could be fired only for just cause. . . The county could not deprive petitioner of this property right without satisfying procedural due process, which requires some kind of pretermination hearing. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569–70, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972); Loudermill, 470 U.S. at 541–42, 105 S.Ct. at 1492–93. In fulfilling the essential due process requirements of notice and an opportunity to be heard, a "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546, 105 S.Ct. at 1495.

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[11] The City paid Adolph back wages and benefits when it might not been obligated to pay him back wages and benefts. *See* Boespflug: "Petitioner contends that the remedy for a procedural due process violation is reinstatement with back pay until the procedural defects have been cured at a new hearing." The Court rejected this argument: "It is unnecessary to determine what compensatory damages, reinstatement, or back pay petitioner may be entitled to until he shows that he was wrongfully terminated." 114 N.M. at 776, 845 P.2d T 877. In this case, there is no allegation that either of the pre-determination hearings violated Adolph's due process rights and it has not yet been determined whether Adolph will be reinstated.

The PHO found just cause for disciplining Adolph. It is also undisputed that Adolph received notice of the evidence against him and an opportunity to be heard both pre- and post-termination. Whether he was finally terminated under the 1999 policy is irrelevant and does not "raise legitimate due process concerns," Brief, p. 15:[12] the City's rules and regulations did not change between when Adolph tested positive for cocaine and when he was finally terminated. He had notice that it was a terminable offense for driving a City bus while under the influence of cocaine. *See* District Court opinion: "He was not blind-sided by his termination." RP 176. In fact, when the City reverted to the 1999 policy, it gave Adolph a second chance as opposed to the 2006 zero tolerance policy. Adolph never argues that he was not aware that he should not operate a City bus while under the influence of an illegal drug.

The PHO stated that the City did not provide "industrial fair play" by reverting to the 1999 policy. The PHO held: "the best that can be said is that an invalidated policy cannot be used to sustain a termination nor can another policy

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[12] Adolph argues, Brief, p. 16, that the PHO "might not have reached the correct conclusion because the second termination did not take place until August 5, 2010," meaning that he did not have the qualifying discipline within the relevant time period. Adolph ignores that he was disciplined for absenteeism in the year prior to his positive drug test, also one of the qualifying disciplines. *See* ROA 139. Further, Adolph did not raise this argument before the District Court and he did not appeal to the district court from this finding. *See* RP 135.

not in service at the time of the infraction be substituted to support a later effort to terminate an employee." ROA, p. 035. The PHO was incorrect in ignoring judicial decisions holding that when a law is invalidated, the prior version of that law becomes operative. *See* We the People of Nevada ex rel. Angle v. Miller, 192 P.3d 1166, 1176 (Nev. 2008) ("when a statute is declared unconstitutional, it has no effect and the prior governing statute is revived") *and* State v. Rondeau, 89 N.M. 408, 412, 553 P.2d 688 (1976) ("an unconstitutional act is inoperative as if it had never been passed, and the subsequent unconstitutional act cannot repeal the existing law"); Palermo at Lakeland, LLC v. City of Bonney Lake, 147 Wash.App. 64, 193 P.3d 168, 178 (App. Div 2008) ("[A]n invalidly enacted statute is a nullity. It is as inoperative as if it had never been passed. The natural effect of this rule ... is that once the invalidly enacted statute has been declared a nullity, it leaves the law as it stood prior to the enactment." (*Citations omitted*)). The District Court rejected the statement and the finding of the PHO.

The PHO found that the City was justified in disciplining Adolph, RP 210, ROA p. 035, and applied the 1999 policy, although with modifications.[13] Because the PHO applied the 1999 policy in disciplining Adolph, the PHO undermines his own decision that applying the 1999 policy violates "industrial fair play." In the

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[13] The 1999 policy provides for 20 days suspension and referral to the Program. The PHO raised the discipline to a 40 day suspension, again, with no authority.

words of the District Court, "[a]lthough the [PHO] applied the correct SAP in disciplining [Adolph], he did not apply the sanction that was required by the SAP. His discipline was arbitrary and capricious and not in accordance with the law." RP 175 (*emphasis in original*).

The PHO and the District Court found that the union, on behalf of Adolph, argued that the discipline in the 1999 policy should be applied. The union did not argue lack of "industrial fair play," before the PHO. Adolph was provided with fair play and fair notice. The City treated him fairly when he was reinstated with back pay and, in his words, "made whole." Brief, p. 3. The City gave fair notice that he was being terminated under both the 1999 policy and the rules and regulations, as a result of his testing positive for cocaine on a reasonable suspicion drug test and having qualifying discipline. ROA 219 – 23. Adolph appeared at the pre-determination hearing and had representation. The City continued to pay him until after the pre-determination hearing and the notice that he was terminated. The notice of final action specified what prior disciplines were being considered. ROA 222. Adolph did not argue before the District Court, the PHO or the Personnel Board that he was unable to determine "how the two years of prior discipline were calculated." Brief, p. 17. In the notice of final action, it was clear when the disciplines were imposed and the City only specified disciplines imposed within one year prior to his positive drug test. ROA 222.

Adolph's argument is that because it took so long for the City to terminate him the City should be prevented from imposing the discipline of termination mandated under the 1999 policy because, according to Adolph, he was "left in limbo." Brief, p. 15. Whether Adolph was terminated under the 2006 policy or the 1999 policy is irrelevant: both provide for automatic termination in his case. Adolph was terminated initially in 2009. He had an obligation to mitigate his damages by searching for another position. He did in fact earn outside wages. *See* ROA 209. Before the hearing was held on his grievance of the termination under the 2006 policy, the City gave him another notice of pre-determination hearing relying on the 1999 policy. He appeared at that hearing with his union representative. He had the opportunity to contest the discipline and he argued for application of the discipline in the1999 policy. This is the essence of fair play.

The PHO felt that the punishment of termination was "too harsh." RP 210.[14] This is not a determination for the PHO to make. The Personnel Board adopted that recommendation with modification. The City, through both the 1999 and

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[14] In Rutherford v. City of Albuquerque, 77 F.3d at 1264, the Tenth Circuit found no violation of the Constitution when the City equated a positive drug test to just cause for termination. The Court stated: The City's decision to treat a positive drug test as "'just cause' for immediate discharge of employees deemed safety sensitive, though harsh, is not irrational and cannot be held offensive to the Constitution." The Tenth Circuit upheld what it considered to be a harsh outcome of termination for an employee testing positive for drugs on the first test. In this case, Adolph was given a second chance under the 1999 policy. Only because he had qualifying discipline, was he terminated.

2006 policies has already made the decision that a safety-sensitive employee who tests positive on a reasonable suspicion test, who has qualifying discipline under the 1999 policy, must be terminated. Neither the PHO nor the Personnel Board can ignore the mandate that such an employee be terminated. Employees were aware that drug use on the job was not permitted whether the employees were disciplined under the 1999, 2006 policy or the City's Rules and Regulations. *See* Rutherford v. City of Albuquerque, 77 F.3d 1258, 1262 (10th Cir. 1996)("Drivers will be aware of the existence of a random drug-testing scheme, so while the precise time of the test will be unknown, the fact that they are subject to this search procedure will not come as a surprise." (*Citing* International Brotherhood of Teamsters v. Department of Transportation, 932 F.2d 1292, 1303 (9th Cir. 1991)) and RP 176 ("there were no surprises"). Adolph knew he would be terminated if he drove erratically endangering the public, used cocaine, had qualifying discipline and got caught. Whether he was terminated under the 2006 policy or the 1999 policy is irrelevant: he knew he could be terminated and he chose to engage in the behaviors that resulted in his termination. RP 176 ("He was not blind-sided by his termination").

III. CONCLUSION

In the words of the District Court, Adolph "was treated fairly – far more fairly than he treated his employer and the members of the public who rode his bus

while he was under the influence of cocaine." RP 177. Adolph was aware of the consequences of his actions. The City chose voluntarily to revert to the 1999 policy which mandated termination with qualifying discipline. The City reinstated Adolph with back wages after it made that determination. Neither the PHO nor the Personnel Board had the authority to ignore this policy which mandated termination. The City respectfully requests that this Court affirm the judgment of the District Court, upholding Adolph's termination by the Transit Department.

STATEMENT REGARDING ORAL ARGUMENT

The City believes that oral argument is not necessary. There are not facts in dispute and the Court's decision will be based on interpretation of the applicable law.

CERTIFICATION PURSUANT TO R.APP.PRO. 12-505F.

The City certifies, pursuant to the Rules of Appellate Procedure, 12-213 F and G, that this Answer Brief contains 8,548 words, in proportionally spaced Times New Roman, 14 pt. type using Microsoft Word.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the following counsel of record on this 8th day of October, 2012:

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