IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 18, AFL-CIO, LOCAL 3022, 2962 and 624,

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
MAR 26 2012
Wendy F Jones

Petitioners-Appellants,

v. **No. 31,365**

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY,

Respondent-Appellee.

APPELLANTS' BRIEF IN CHIEF

Appeal from the Second Judicial District
County of Bernalillo
Honorable Alan Malott
Cause No. D-202-CV-2010-08547

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 Petitioners-Appellants

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
I. SUMMARY OF PROCEEDINGS	1
II. ARGUMENT	8
A. The trial court erred when it ruled that the Water Authority's LMRO is entitled to grandfather status under the Public Employees' Bargaining Act.	8
1. Standard of review for District Court's decision to dissolve the preliminary injunction.	8
2. The evergreen clause is an integral part of public sector bargaining because it requires employers to honor the expired collective bargaining agreement until a successor agreement is in place. Without it, the Water Authority's LMRO violates the Public Employees' Bargaining Act.	9
B. The trial court erred when it ruled that the "impasse procedure" in the Water Authority's LMRO does not violate the Public Employees' Bargaining Act.	11
1. The LMRO does not require the employer to negotiate in good faith.	11
2. The District Court's reliance on *City of Deming* is misplaced.	18
3. The Bateman Act does not allow the Water Authority to to impose upon the employees whatever terms and conditions of employment it desires.	22
4. The LMRO was substantially changed from the City of Albuquerque's LMRO when it was adopted by the Water	25

Authority in 2007.

C. The trial court erred when it ruled that the matter was subject to dismissal under the doctrine of mootness. 27

1. Standard of Review for District Court's decision on Water Authority's Motion to Dismiss. 27

2. This case is not moot because an actual controversy between all parties exists and the case presents an issue of substantial public interest that is likely to reappear before the Court. 27

III. CONCLUSION 30

IV. ORAL ARGUMENT REQUESTED 31

CERTIFICATE OF SERVICE 33

TABLE OF AUTHORITIES

New Mexico Cases **Page**

Baber v. Desert Sun Motors
2007-NMCA-098, 142 N.M. 319, 164 P.3d 1018 — 27

Bradbury & Stamm Const. v. Board of County Comm'r of Bernalillo County
2001-NMCA-106, 131 N.M. 293, 35 P.3d 298 — 29

City of Albuquerque v. Montoya,
No. 32,570, Slip op., N.M. Sup. Ct., March 12, 2012 — 9

City of Deming v. Deming Firefighters Local 4521
2007-NMSC-069, 141 N.M. 686, 160 P.3d 595 — 9, 13-14, 18-20, 22

City of Hobbs v. State ex rel. Reynolds
82 N.M. 102, 476 P.2d 500 (1970) — 23

City of Las Cruces v. El Pas Elec. Co.
1998-NMSC-006, 124 N.M. 640, 954 P.2d 72 — 28

Gomez v. Chavarria
2009-NMCA-035, 146 N.M. 46, 206 P.3d 157 — 9

Las Cruces Professional Fire Fighters and International Association of Fire Fighters Local No. 2362 v. City of Las Cruces
1997-NMCA-031, 123 N.M. 239, 938 P.2d 1384 — 15-16

McMurtry v. City of Raton
64 N.M. 117, 325 P.2d 707 (1958) — 23

Mowrer v. Rusk
95 N.M. 48, 618 P.2d 886 (1980) — 29

National Union of Hospital and Healthcare Employees, District No. 1199 New Mexico, AFL-CIO, CLC v. The Board of Regents of the University of New Mexico 21-22, 24
2010-NMCA-102, 149 N.M. 107, 245 P.3d 51,
cert. den. 149 N.M. 64, 243 P.3d 1146, 2010-NMCERT-10

Regents of the University of New Mexico v. New Mexico Federation of Teachers 12-14, 16
1998-NMSC-020, 125 N.M. 401, 962 P.2d 1236

San Juan Water Com'n v. Taxpayers 23
116 N.M. 106, 860 P.2d 748 (1993)

Smith v. City of Santa Fe 9
2007-NMSC-055, 142 N.M. 786, 171 P.3d 300

Stennis v. City of Santa Fe 9
2008-NMSC-008, 143 N.M. 320, 176 P.3d 309

Federal Cases **Page**

Amalgamated Transit Union International (ATU) v. Donavon 16-18
767 F.2d 939 (D.C. Cir. 1985)

Millwrights & Machinery Erectors Local Union 729 v. *Gulf Engineering Co., LLC* 10
2011 WL 162071 (E.D.La.)

NLRB v. Montgomery Ward & Co. 15
133 F.2d 676 (9th Cir. 1943)

People v. Labrenz 29
411 Ill. 618, 104 N.E.2d 769 (1952)

New Mexico Statutes & Rules	Page
NMSA 1978, § 6-6-11, "Bateman Act"	23
NMSA 1978, § 10-7D-18 (1992)(repealed 1999), PEBA I	20
NMSA 1978, § 10-7E-1 *et seq.* "Public Employees Bargaining Act"	4-5, 10-12, 20-26
NMSA 1978, § 44-6-1 *et. seq.*, "Declaratory Judgment Act"	8
NMSA 1978, § 72-1-10	12

Other Authorities	Page
Black's Law Dictionary, 369 (9th Ed. 2009)	10
Cox, *The Duty to Bargain in Good Faith* 71 HARV.L.REV. 1401 (1958)	15

COMES NOW Appellants, American Federation of State, County and Municipal Employees Council 18, AFL-CIO, Local 3022, 2962 and 624 (collectively "AFSCME" or the "Union"), by and through counsel of record Youtz & Valdez, P.C. (Shane C. Youtz and Marianne Bowers), and hereby submits its Brief in Chief.

I.
SUMMARY OF PROCEEDINGS

AFSCME filed a petition for preliminary injunction (RP 1-13) and a complaint for declaratory judgment (RP 222-233) in the Second Judicial District Court seeking a determination that the Albuquerque Bernalillo County Water Utility Authority Labor Management Relations Ordinance (LMRO) is not entitled to grandfather status under the Public Employee Bargaining Act (PEBA), NMSA 1978, § 10-7E-1 to -26, on the grounds that it violates PEBA due to its lack of an evergreen clause (RP 225), due to its lack of binding arbitration procedures in the event of negotiation impasse (RP 225), and due to the fact that the LMRO, adopted after 2003, was substantially changed from the LMRO that was in effect for the previous public employer. (TR., 7-29-10, 21-25).

Appellants are labor unions and are the exclusive bargaining representatives for member employees working for the Albuquerque Bernalillo County Water Utility Authority ("Water Authority"). (RP 222). The relationship between the

Water Authority and the Unions is governed by the LMRO, WUA Ord. §§ 10-2-1 to 10-2-17[1], and the Public Employees Bargaining Act ("PEBA"), NMSA 1978, § 10-7E-1 to -26. (RP 224).

The Water Authority LMRO does not contain a provision (commonly referred to as an "evergreen provision") that would allow extension of existing collective bargaining agreements during negotiations of successor agreements. (RP 223). At the time the initial Petition for Temporary Restraining Order and Preliminary Injunction was filed, AFSCME Locals 3022, 2962, 624 and the Water Authority were engaged in negotiations to replace the collective bargaining agreements which were set to expire on July 13, 2010 following a short extension granted by the Employer from the previous expiration date of June 30, 2010. (RP 3). At the time the Petition was filed, the parties had not completed negotiations for successor agreements. (RP 3).

While the parties were engaged in negotiations, AFSCME proposed an additional contract extension which would have extended the then current collective bargaining agreement in order that the parties could complete negotiations on the successor agreement. (RP 3). The Water Authority refused to agree to the AFSCME's proposal for an additional extension after the initial short

1 The Water Utility Authority Labor Management Relations Ordinance is included in the Record Proper at R.P. 176-195.

extension expired. (RP 3). Therefore, as of July 14, 2010, the employees were working without a collective bargaining agreement. (RP 3).

The collective bargaining agreements contained protections that were of vital importance to every single bargaining unit member. (RP 5). Without those protections, the Union argued, members of the bargaining units would have been irreparably damaged. (RP 5). Specifically, the contracts provided specific salary requirements, insurance programs, retirement benefits, vacation and sick leave, seniority protection of positions, occupational health and safety, furlough and layoff protection, and disciplinary protection. (RP 5). In addition, the Water Authority had agreed under the collective bargaining agreements to provide for payroll dues deduction. (RP 6). The expiration of the agreements would have relieved the Water Authority of this obligation and the Water Authority could have effectively eliminated the funding necessary for the Union to continue operation. (RP 6).

In addition, the Union argued that the power in negotiations acquired by the Water Authority would be overwhelming if the contracts were allowed to expire. (RP 6). The Union would be forced to negotiate from a very difficult position, given that its bargaining unit employees were exposed to employee-at-will conditions and the Union faced a potential inability to continue operations. (RP 6).

The Union's concerns that the Employer would impose unilateral changes on the Union during negotiations if the status quo was not maintained were realized when the Water Authority argued in Court that it had the prerogative to impose a shift in insurance costs, from an 87/13 split (87% paid by the employer and 13% paid by the employees) to a 80/20 split whereby employees would be required to pay an increased amount, 20%, of their insurance premiums. (Tr., 7-29-10, 12:1-7).

The legal questions presented to the district court related to collective bargaining negotiations between AFSCME and the Water Authority at the point when the parties reached impasse in negotiations. (RP 3). As this Court is well aware, PEBA provides a clear path to resolution of impasse in public sector bargaining – maintenance of the status quo (evergreen clause), pending final resolution by binding arbitration. NMSA 1978, § 10-7E-18 (B & D). (RP 4). The Water Authority's LMRO contains "Impasse Procedures" at § 10-2-14 which provide for mediation but do not require any type of binding arbitration in the event of impasse during negotiations. (LMRO § 10-2-14)(RP 8). The Water Authority's LMRO does not contain the procedural safeguards of an evergreen clause and binding arbitration at impasse and, therefore, runs afoul of the PEBA. (RP 4).

The Union also argued that the Water Authority's LMRO is disqualified for grandfather status because it was substantially changed from the City of Albuquerque's LMRO when it was adopted in 2007. *See* PEBA, NMSA 1978, § 10-7E-26(A)("Any substantial change after January 1, 2003 to any ordinance, resolution or charter amendment, shall subject the public employer to full compliance with the provisions of subsection B of Section 26 of the Public Employee Bargaining Act."). The substantial change was the elimination of the Guidelines Committee which had been a part of the City of Albuquerque Ordinance but was eliminated when the Water Authority adopted its Ordinance. (Tr., 7-29-10, at 21-25; compare Water Utility Authority LMRO, RP 195, to City of Albuquerque LMRO, RP 215).

The Guidelines Committee is tasked with facilitating "communication and coordination between the Mayor and the City Council concerning collective bargaining strategy." (RP 215). The Guidelines Committee is "composed of three City Councillors appointed by the Council President and three members of the Mayor's staff, one of whom shall be the Chief Administrative Officer." (RP 215). Significantly, when negotiations with labor unions are opened, the Guidelines Committee "shall entertain a presentation from the employee organization involved in the subject collective bargaining negotiations summarizing its positions and

proposals in the upcoming negotiations so the Guidelines Committee may be fully informed." (RP 215). The Guidelines Committee allows the City's governing body, the City Council, to be involved in the collective bargaining process. This provision that allows involvement by the governing body was completely eliminated when the Water Authority adopted the ordinance.

Upon the filing of the Petition, the District Court initially extended the expiration dates of the collective bargaining agreements in its Order Granting Preliminary Injunction. (RP 117-119). Shortly thereafter, however, on August 12, 2010, the preliminary injunction was dissolved by the court. (RP 121-123). In its Order Dissolving Preliminary Injunction and Certifying Interlocutory Appeal the District Court ruled that the Water Authority LMRO was not substantially changed and is entitled to grandfather status under the Public Employee Bargaining Act. (RP 121-123).[2]

In its Order Dissolving Preliminary Injunction, the District Court found:

> There is no substantial change to the Respondent's Labor Management Relations Ordinance (LMRO) after 2003.
>
> The LMRO contains an impasse resolution process that provides for mandatory mediation in the event of impasse during negotiations between

---

2 This Court denied the Application for Interlocutory Appeal. (R.P. 235-236).

the employer and the union to establish new collective bargaining agreements following the expiration of existing collective bargaining agreements, but provides no binding form of impasse resolution.

> *City of Deming v. Deming Firefighters Local 4521,*141 N.M 686 (2007), does not allow the court to assess the quality or effectiveness of the impasse resolution process established in the LMRO.
>
> The absence of a mandatory impasse procedure may have impact on the effectiveness of the collective bargaining system established by the LMRO.
>
> The LMRO is, however, entitled to "grandfather" status under these circumstances.

(*Order Dissolving Preliminary Injunction and Certifying Interlocutory Appeal* filed August 12, 2010, RP 121-123).

At a status conference held on February 21, 2011, AFSCME asked the court to stay the proceedings pending a decision in *AFSCME v. City of Albuquerque,* filed in the Second Judicial District Court, Cause No. D-202-CV-2010-07003, currently on appeal to the New Mexico Court of Appeals (COA No. 30,927). Respondent did not object to a stay but the Order was not entered. (See Case Docket entry for 2/21/2011: "Parties agree to stipulated stay; order to be submitted").

On April 29, 2011 Petitioners requested a Presentment Hearing for Petitioners' Order Staying Action Pending Appellate Decisions. (RP 244). Five days later, on May 4, 2011, Respondent filed its Motion to Dismiss Claims as

Moot, or in the Alternative, for Summary Judgment and requested a hearing. (RP 247, 274). Two days later, on May 6, 2011, Respondent filed its Response to Request for Presentment Hearing wherein it argued that dismissal of the case was the "procedurally correct way to close this case." (RP 276). Without seeking approval from Petitioners, Respondent submitted an Order Dismissing With Prejudice to the Court which was signed by Judge Malott and filed just four days after its submission, on May 10, 2011. (RP 279). The case was dismissed without a hearing and before AFSCME was given the opportunity to respond to the Motion to Dismiss. In its final Order Dismissing with Prejudice, the district court reiterated its previous holding that the LMRO is entitled to grandfather status and dismissed the complaint with prejudice on the grounds of mootness.

II.
ARGUMENT

A. The trial court erred when it ruled that the Water Authority's LMRO is entitled to grandfather status under the Public Employees' Bargaining Act.

1. Standard of review for District Court's decision to dissolve the preliminary injunction.

This action began as a petition for preliminary injunction and then was amended to state a claim under the Declaratory Judgment Act. NMSA 1978, § 44-6-1 to -16. (RP 222-231). Declaratory judgment action is appropriate method for

challenging the validity of local laws or ordinances. *Smith v. City of Santa Fe,* 2007-NMSC-055, ¶ 14, 142 N.M. 786, 171 P.3d 300.

Interpretation of the Public Employee Bargaining Act is a question of law subject to *de novo* review. *City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069, ¶ 6, 141 N.M. 686, 160 P.3d 595. Issues of statutory construction are reviewed *de novo. Gomez v. Chavarria*, 2009-NMCA-035, ¶ 6, 146 N.M. 46, 49, 206 P.3d 157, 160. Determining the applicability of the grandfather clause in PEBA is a question of statutory construction which the courts review *de novo. City of Albuquerque v. Montoya,* No. 32,570, slip op. at ¶ 12, (N.M. Sup. Ct. March 12, 2012). Interpretation of municipal ordinances and statutes is a question of law that the court reviews de novo. *Stennis v. City of Santa Fe,* 2008-NMSC-008, ¶ 13, 143 N.M. 320, 324, 176 P.3d 309.

2. The evergreen clause is an integral part of public sector bargaining because it requires employers to honor the expired collective bargaining agreement until a successor agreement is in place. Without it, the Water Authority's LMRO violates the Public Employees' Bargaining Act.

One of the fundamental elements necessary for collective bargaining in the public sector is what is commonly known as an "evergreen clause." An evergreen clause requires employers to honor the expired collective bargaining agreement until parties have negotiated a successor agreement, or until an arbitrator issues an

order identifying the successor agreement in the process of impasse arbitration. NMSA 1978, § 10-7E-18(D); *cf. Millwrights & Machinery Erectors Local Union 729 v. Gulf Engineering Co., LLC,* 2011 WL 162071 (E.D.La.), 160 Lab.Cas. P 10, 338 n. 10 *citing Black's Law Dictionary* 369 (9th Ed. 2009)(An evergreen clause allows a contract to renew itself from one term to the next in the absence of a contrary notice by one of the parties.) The Union raised the issue of validity of the ordinance based on a lack of an evergreen provision in the petition for preliminary injunction and in the complaint for declaratory judgment.

The Public Employee Bargaining Act (PEBA), NMSA 1978, § 10-7E-1 to -26, requires that all public sector negotiations be conducted pursuant to an evergreen clause: "In the event that an impasse continues after the expiration of a contract, the existing contract will continue in full force and effect until it is replaced by a subsequent written agreement." NMSA 1978, § 10-7E-18(D).

Without the existence of an evergreen clause, employers may compel employees to work without a contract in force while negotiations are completed. This threat creates a coercive environment which allows the employer to force the Union to capitulate in negotiations to avoid the potentially disastrous consequence of working without insurance benefits, vacation provisions, protection from termination and other vital contract protections.

Unfortunately this worst-case scenario occurred at the Albuquerque Bernalillo County Water Utility Authority: the Water Authority and AFSCME were not able to complete the negotiation process prior to the expiration of the current agreements. Because the WUA Labor Management Relations Ordinance (LMRO) contains no evergreen clause and the Water Authority refused to sign an extension to the current agreement, the Water Authority could have forced its employees to work without a contract beginning on July 13, 2010 had the court not intervened and issued an order temporarily extending the agreements. When the court dissolved the preliminary injunction on July 29, 2010, the threat became a reality and the employees were forced to work without a contract while new contracts were negotiated.

B. The trial court erred when it ruled that the "impasse procedure" in the Water Authority's LMRO does not violate the Public Employees' Bargaining Act.

1. The LMRO does not require the employer to negotiate in good faith.

PEBA provides the Public Employee Labor Relations Board (PELRB) with the authority to create local boards and delegate to those boards the duties and responsibilities of the PELRB. NMSA 1978, § 10-7E-10(A). Those local boards must be created in a manner consistent with PEBA. PEBA does, however, provide that boards which are not strictly in compliance may be grandfathered under

NMSA 1978, § 10-7E-26(A). PEBA provides grandfather status to new entities created by statute that encompass the same powers and duties as a previous public employer and uses essentially the same employees as the previous public employer. NMSA 1978 §10-7E-24.1.

The Water Authority was created by statute as a separate political subdivision of the state governed by a board of directors which is comprised of elected City and County Officials. *See* NMSA 1978, § 72-1-10. Pursuant to Section 72-1-10, the Water Authority took over the water and wastewater powers and duties previously handled by the City of Albuquerque and used essentially the same employees as the City had previously employed. (RP 38-39). PEBA was amended to allow an entity such as the Water Authority to claim grandfather status if it took over for a previous public employer such as the City of Albuquerque using its previously adopted local labor ordinance. NMSA 1978, § 10-7E-24.1; NMSA 1978, § 10-7E-26.

The Water Authority claims that it is lawfully operating under "grandfather status." The grandfather exception is subject to severe limitations and must be a system of provisions and procedures permitting employees to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives. *Regents of the University of New Mexico v. New Mexico*

Federation of Teachers, 1998-NMSC-020, ¶ 34, 125 N.M. 401, 411-412, 962 P.2d 1236. A failure of the grandfathered ordinance to comply with these basic protections subjects the public entity to full compliance with PEBA. *Regents of the University of New Mexico,* 1998-NMSC-020 at ¶ 36.

The Water Authority's LMRO violates PEBA, because it is not a qualifying "system of provisions and procedures permitting employees to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives." The analysis to be undertaken by this Court, as informed by the Supreme Court in *Regents of the University of New Mexico*, *supra,* and the Court of Appeals in *City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069, ¶ 20, 141 N.M. 686, 160 P.3d 595, requires a finding that a system is in place which provides the basic rights guaranteed by the legislature in PEBA. The LMRO does not allow Water Authority employees to negotiate all of the terms of conditions of employment, it does not provide any vehicle for dispute resolution and it provides no protection for employees in instances where parties do not complete negotiations prior to the expiration of an agreement. It cannot be the source for lawful rules in labor relations between the Employer and the Union and should be declared invalid. The Union raised the issue of validity of the ordinance

based on a lack of impasse resolution provision in the petition for preliminary injunction and in the complaint for declaratory judgment.

As the *Regents* Court determined, the ability of an entity to qualify for grandfathering is severely limited under New Mexico law: "A grandfather clause will be construed to include no case not clearly within the purpose, letter, or express terms, of the clause. . . (a grandfather clause) is to be construed strictly and held to apply only to cases shown to be clearly within its purpose." *Regents of the University of New Mexico,* 1998-NMSC-020 at ¶ 27.

The Deming Court, when faced with the issues raised herein, determined that an ordinance must be viewed in light of the role of collective bargaining within PEBA:

> . . . In fulfilling this obligation, we look to the requirements of 'collective bargaining' within the PEBA. The PEBA defines 'collective bargaining' as 'the act of negotiating between a public employer and an exclusive representative for the purpose of entering into a written agreement regarding wages, hours and other terms and conditions of employment.

City of Deming, 2007-NMCA-069, ¶ 21.

The Water Authority provides no device whereby parties can take their disputes to a neutral tribunal for dispute resolution. The resolution of a contract dispute is always in favor of the Employer – it simply imposes its last, best and final offer. This creates a system where bargaining is, without question, illusory.

The Water Authority suffers no consequences for the positions it takes in collective bargaining. It can assure, without oversight, that the positions it takes in collective bargaining will eventually be the provisions which are enforceable against bargaining unit employees. This system completely and totally eliminates any real notion of collective bargaining. Without some sort of mechanism allowing for resolution of collective bargaining disputes – the LMRO cannot qualify for grandfathering because resolution is inherent and implied in the notion of collective bargaining.

Simply put, where an employer exercises unfettered power to set the contract unilaterally, it has not engaged in collective bargaining; rather, implementation constitutes the antithesis of collective bargaining. The duty to bargain in good faith is a legal concept about which much has been written over the last seventy years. It may be best summarized as follows:

> [T]he duty to bargain in good faith is an "obligation ... to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement...." Not only must the employer have "an open mind and a sincere desire to reach an agreement" but "a sincere effort must be made to reach a common ground."

Cox, *The Duty to Bargain in Good Faith,* 71 HARV.L.REV. 1401, 1415 (1958) (quoting *NLRB v. Montgomery Ward & Co.,* 133 F.2d 676, 686 (9th Cir. 1943).[3]

---

3 NLRB and Federal Court precedent are appropriate sources of law for interpretation of the New Mexico Public Employee Bargaining Act (PEBA). *Las Cruces Professional Fire Fighters and International Association of Fire Fighters,*

These principles "have provided the common denominator of the public sector collective bargaining schemes enacted by the states." *Amalgamated Transit Union International (ATU) v. Donavon,* 767 F.2d 939, 949 (DC Cir. 1985). In an opinion authored by Harry T. Edwards, a noted labor law jurist, the D.C. Circuit Court of Appeals addressed a Georgia statute which, unlike the Water Authority Ordinance, actually allowed the Employer to unilaterally implement and did not require a "subsequent agreement." *Amalgamated Transit Union International v. Donavon*, 767 F.2d 939 (D.C. Cir. 1985). Employing these common principles, Justice Edwards rejected the notion that unilateral imposition by a public employer could co-exist with a finding that the employer bargained in good faith.

The *ATU* decision involved the interpretation of Section 13(c) of the Urban Mass Transportation Act, which requires that transit employees be provided with collective bargaining rights. Section 13(c), in that regard, guarantees the same collective bargaining rights as PEBA. The precise legal question in *ATU*, was whether the right to bargain collectively was fairly guaranteed (as required by Section 13(c)) where the Georgia state collective bargaining law allowed

---

Local No. 2362 v. City of Las Cruces, 1997-NMCA-031, 123 N.M. 239, 938 P.2d 1384; *The Regents of the University of New Mexico v. New Mexico Federation of Teachers,* 1998-NMSAC-020, 125 N.M. 401, 408, 962 P.2d 1236 (applying federal labor law to lacunae in decisional state labor law).

employers to impose contracts at impasse, without entering into some form of arbitration to resolve the impasse. The legal question analyzed in *ATU*, is precisely the same legal question raised by the instant appeal: Can an employer's bargaining be viewed as having been conducted in good faith, if it unilaterally implements its choice of a collective bargaining agreement? The Water Authority, by its unilateral imposition, contends that it may be viewed as having bargained in good faith even as it ends bargaining by taking ultimate control over the terms and conditions of employment.

In *ATU*, the Union argued what the Union argues herein:

> ATU advances an additional ground for invalidating the Secretary's certification: because Georgia law prohibits strikes by public employees, and because Act 1506 provides for binding arbitration over wage disputes only if MARTA (the employer) consents, MARTA may unilaterally set wages. Thus, ATU argues, Act 1506 further deprives bargaining unit employees of the continuation of collective bargaining rights by giving them no real voice on a subject that is universally acknowledged to lie at the heart of collective bargaining. In the private sector, collective bargaining is thought to work because each side has economic weapons at its disposal-in the case of a union, that weapon is the right to strike. While Congress made it clear that section 13(c) would not protect the right of unionized workers to strike, *see, e.g.*, 109 Cong.Rec. 5672 (1963), ATU contends that loss of this weapon must be recompensed with some compulsory mechanism for resolving bargaining disputes over wages. Otherwise, it is claimed, the employer will have unfettered power to set wages unilaterally, which is the antithesis of collective bargaining.

ATU, 767 F.2d at 954.

Justice Edwards adopted the Union's position, finding that in order to

guarantee the Union's right to expect the employer to bargain in good faith, the resolution of impasse may not include unilateral control by the employer – no imposition:

> We hold that while section 13(c) does not entitle transit workers to any particular form of binding arbitration, it does require some process that avoids unilateral control by an employer over mandatory subjects of collective bargaining.

Id.

The Water Authority exercised unilateral control over the negotiations when it imposed a less favorable insurance split on the employees, thereby ending any fiction that it completed these negotiations in good faith. The imposition established bad faith bargaining as a matter of law. A system that allows such conduct should not be allowed to hide behind grandfather status under PEBA.

2. The District Court's reliance on *City of Deming* is misplaced.

The District Court relied on *City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069, 141 N.M. 686, 160 P.3d 595, to determine that the LMRO's impasse resolution process provides an adequate "system of provisions and procedures," for collective bargaining. This position derives from the following language in the *City of Deming*: "the legislature did not intend for the PELRB or a court to ascertain the quality of collective bargaining provisions or procedures in order to apply the grandfather clause." *City of Deming*, 2007-

NMCA-069, ¶ 21.

While this language appears to sanction any type of "impasse procedure" contained in the local ordinance, it is AFSCME's contention that the actual holding in *City of Deming* is not so broad and a careful reading of that decision shows that it actually requires some sort of fact finding mechanism, which does not exist in the LMRO. While this Court has specifically directed that PEBA does not require "any specific impasse provision or binding procedure," the holding in *City of Deming* does require grandfathered ordinances to have some sort of impasse provision which provides evaluation of parties' competing offers by some neutral fact finder. The fact that Respondent's ordinance provides no evaluation of competing offers by a neutral fact finder is inconsistent with PEBA I, PEBA II and with this Court's decision in *City of Deming*, as explained below. As a practical matter, parties in the instant negotiations were unable to reach agreement and had no procedure providing for resolution of the dispute. This lack of a procedure doesn't implicate the qualitative requirement of the ordinance or measure its effectiveness – it creates a vacuum in the process which makes it wholly incomplete and renders it violative of PEBA under *City of Deming*.

Both versions of PEBA contain, as the primary element of impasse resolution, mandatory arbitration. PEBA I made the process non-binding:

> If the impasse continues after a sixty-day mediation period, either party may request from the board or local board that a fact finder be assigned to the negotiations. The fact finder shall conduct hearings and submit written findings and recommendations to the parties and the board or local board. If the parties have not reached agreement within ten days after receipt of the fact finder's report, the board or local board shall publish the report.

PEBA I, NMSA 1978, §10-7D-18(B)(1992)(repealed 1999).

PEBA II made the impasse arbitration mandatory and binding. NMSA 1978, § 10-7E-18(B)(2)("The arbitrator shall render a final, binding, written decision . . .."). The City of Deming ordinance also contained mandatory advisory arbitration, similar to PEBA I. *City of Deming,* 2007-NMCA-069, ¶ 3. It was the existence of the City of Deming's mandatory advisory arbitration, which allowed the Court of Appeals to grandfather the ordinance: "Because advisory arbitration was originally considered appropriate impasse resolution procedure for all purposes, it was clearly acceptable for grandfather status." *City of Deming,* 2007-NMCA-069, ¶ 22. It is clear then, that an "impasse resolution procedure," is what this Court explicitly required in its *City of Deming* decision. The Court indicated that neither the PELRB nor a court should evaluate the quality of the procedure, but it also made clear that an impasse procedure must be in place. In that regard, the Court noted that mandatory advisory arbitration was good enough.

This is where the LMRO diverges from this Court's analysis in *City of Deming*. The LMRO, under consideration by this Court, contains no impasse

resolution procedure, *whatsoever*. If this Court grandfathers the LMRO, it will have grandfathered an ordinance that leaves parties without any method to resolve their impasse. The elements necessary for an impasse resolution procedure are simple and intuitive: a fact finder must compare parties' contract positions and issue a decision identifying the superior or appropriate final offer. This is what was required in PEBA I, it is what is required in PEBA II and it is the essential element of the City of Deming's ordinance that allowed it to survive this Court's scrutiny. This element is necessary because it is the only element which provides some measure of "resolution."

Mediation is not designed as an impasse resolution procedure and cannot be considered as a method of impasse resolution procedure because it is explicitly and statutorily designated as part of the negotiation process, as distinguished from the impasse resolution procedure. Mediation is statutorily identified as a device to "assist in negotiations." NMSA 1978, § 10-7E-18(A)(3). In contrast, an impasse resolution procedure must incorporate some form of fact finding necessary to resolve the dispute after negotiations have failed. NMSA 1978, § 10-7E-18; *see also, National Union of Hospital and Healthcare Employees District No. 1199 New Mexico, AFL-CIO, CLC v. The Board of Regents of the University of New Mexico,* 2010-NMCA-102, ¶ 28, 149 N.M. 107, 245 P.3d 51 *cert. den.* 149 N.M.

64, 243 P.3d 1146, 2010 -NMCERT- 10 (N.M. Oct 07, 2010) (Table, NO. 32,593). (In enacting PEBA, the legislature intended the process of negotiation and mediation, and the process of arbitration to be different.). The basic nature of the legislature's impasse dispute resolution system functions on the notion that parties' final offers be reviewed by a neutral fact finder, who issues an evaluation of the respective offers. NMSA 1978, § 10-7E-18. It is only this process which checks the authority of the employer and prevents it from implementing coercive contract provisions.

The necessity of some form of neutral evaluation also incorporates the necessity of an evergreen clause – as is required in PEBA. Since PEBA and *City of Deming* require some form of neutral fact finding, the ability of parties to remain in the status quo pending that resolution is absolutely essential. Without an effective impasse resolution procedure and without an evergreen provision, the LMRO violates PEBA and should not be allowed to stand.

3. The Bateman Act does not allow the Water Authority to impose upon the employees whatever terms and conditions of employment it desires.

In the proceedings below, the Water Authority relied on the Bateman Act, NMSA 1978, § 6-6-11, to argue that it was required to impose economic provisions upon the Union when the collective bargaining agreements expired.

(RP 72). Contrary to the position taken by the Water Authority, the Bateman Act is not so far reaching. The purpose of the Bateman Act is to require counties, cities, towns and school districts to live within the annual income provided for such municipal corporations. *San Juan Water Com'n v. Taxpayers*, 116 N.M. 106, 111, 860 P.2d 748 (1993). In order to achieve its purpose, the Bateman Act provides that each year the county or municipal corporation should pay its own debts out of the taxes collected for that year. *McMurtry v. City of Raton*, 64 N.M. 117, 120, 325 P.2d 707 (1958); NMSA 1978, § 6-6-11.

These authorities establish that the Bateman Act would not apply to the situation created when a local public entity and a union reach impasse in contract negotiations. First, maintaining the status quo during contract negotiations does not mean that the City is violating the Bateman Act or creating debts that it cannot pay. This is because it cannot be determined until the *end of the year* whether the City is unable to pay its debts. See *City of Hobbs v. State ex rel. Reynolds*, 82 N.M. 102, 105, 476 P.2d 500 (1970)(Court finds that it is premature to say whether Bateman Act has been violated where amount of obligation has not yet been ascertained and no determination has been made about whether obligation can be satisfied).

The Water Authority argues that conflicting provisions in PEBA are

superseded by the Bateman Act and that, therefore, the Authority should have unfettered discretion to impose its economic terms on the unions. (RP 69). While it is true that PEBA does not supersede the Bateman Act, this does not mean that the LMRO cannot be read together harmoniously with the Bateman Act. If the LMRO provided an impasse resolution provision that results in the timely adoption of new collective bargaining agreements, no conflict appears.

Such a system is clearly set out in the PEBA. NMSA 1978, § 10-7E-18(B) & (D). Under PEBA, if the parties are at impasse, they can proceed to mediation for 30 days and if mediation is unsuccessful, they can proceed to selection of an arbitrator who renders his final decision within 30 days. NMSA 1978, § 10-7E-18(B). This Court has recently recognized the importance of the sixty-day time restraint established by PEBA: "Presumably, this restraint is considered purposeful and important in public sector collective bargaining and constitutes an attempt to assure that expiring collective bargaining agreements are quickly replaced with new ones." *National Union of Hospital and Healthcare Employees District No. 1199 New Mexico, AFL-CIO, CLC v. The Board of Regents of the University of New Mexico,* 2010-NMCA-102, ¶ 28, 149 N.M. 107, 245 P.3d 51.

Of course, PEBA recognizes that an impasse resolution is contingent upon "the specific appropriation of funds by the appropriate governing body and the

availability of funds." NMSA 1978, § 10-7E-17(E). This simple, yet complete system is designed to allow PEBA to coexist harmoniously with other laws, including the Bateman Act, by setting out an efficient procedure to reach an agreement following impasse without invading the power of appropriation reserved for the legislative branch of the government.

4. The LMRO was substantially changed from the City of Albuquerque's LMRO when it was adopted by the Water Authority in 2007.

The Public Employee Bargaining Act contains the following provision: "Any substantial change after January 1, 2003 to any ordinance, resolution or charter amendment, shall subject the public employer to full compliance with the provisions of subsection B of Section 26 of the Public Employee Bargaining Act."). NMSA 1978, § 10-7E-26(A). The issue of whether there was substantial change to the ordinance when it was adopted was raised during the July 29, 2010 hearing and ruled on by Judge Malott in his Order Dissolving Preliminary Injunction and Certifying Interlocutory Appeal. (R.P.121).

The Water Authority adopted the City of Albuquerque's LMRO when it took over as the governing authority. The Water Authority LMRO was substantially changed, however, when it was adopted and therefore does not qualify for grandfather status. The City of Albuquerque LMRO contained a

provision for creation of a Guidelines Committee to facilitate communication and coordination between the Mayor and the City Council concerning collective bargaining strategy. *See* City of Albuquerque LMRO, § 3-2-17 (RP 215). The Guideline Committee is also required to entertain a presentation from the employee organization at the time negotiations are opened wherein the union summarizes its positions and proposals in the upcoming negotiations so the Guideline Committee may be fully informed. City of Albuquerque LMRO, § 3-2-17(C).

The LMRO adopted by the Water Authority in 2007 did not contain the provision for a Guideline Committee. The Guideline Committee represents an important procedure that allowed the democratically elected members of the City Council to have input into collective bargaining.[4] This feature is crucial for the purpose of the PEBA which is "to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions." NMSA 1978, § 10-7E-2. Negotiations required to be carried out without the participation of the elected officials has the potential to promote secret and acrimonious relations not in the public interest.

4 The Water Authority is governed by a seven member Board of Directors made up of three city councilors plus the mayor and three county commissioners appointed by the Bernalillo county board of county commissioners). NMSA 1978, § 72-1-10.

The Water Authority LMRO was substantially changed when it was adopted without this important feature. Therefore, the Water Authority is not entitled to grandfather status under the PEBA.

C. The trial court erred when it ruled that the matter was subject to dismissal under the doctrine of mootness.

1. Standard of Review for District Court's decision on the Water Authority's Motion to Dismiss.

Whether a lower court properly dismissed a case as moot presents a question of law, which this Court should review *de novo*. *Baber v. Desert Sun Motors,* 2007-NMCA-098, ¶ 9, 142 N.M. 319, 322, 164 P.3d 1018.

2. This case is not moot because an actual controversy between all parties exists and the case presents an issue of substantial public interest that is likely to reappear before the Court.

The Water Authority argued below that it had negotiated collective bargaining agreements with the Petitioners and that, therefore, the case should be dismissed on the grounds of mootness. (RP 247-257). The District Court agreed and dismissed the entire action with prejudice without giving the Union a chance to respond to the motion. (RP 279). The issue was preserved below when the Union sought a stay while awaiting a decision in *AFSCME v. City of Albuquerque,* filed in the Second Judicial District Court, Cause No. D-202-CV-2010-07003, currently on appeal to the New Mexico Court of Appeals (COA No. 30,927).

The New Mexico Supreme Court has set out the following test for determining whether a request for declaratory judgment presents an actual controversy and whether the request falls within the exception to the mootness doctrine:

> A case will be dismissed for mootness if no actual controversy exists. . . . The prerequisites of "actual controversy" warranting consideration in a declaratory judgment action are: a controversy involving rights or other legal relations of the parties seeking declaratory relief; a claim of right or other legal interest asserted against one who has an interest in contesting the claim; interests of the parties must be real and adverse; and the issue involved must be ripe for judicial determination.
>
> If no actual controversy exists, a case may not be heard unless the issue is of substantial public interest and is likely to reappear before the court. In such a situation, an exception may be made by a court and the question decided.

City of Las Cruces v. El Paso Elec. Co.,1998-NMSC-006, ¶ 16, 124 N.M. 640, 645, 954 P.2d 72. (citation omitted).

Applying this test to the case at hand, it is clear that an actual controversy exists between the local unions and the Water Authority. The fact that the unions are the recognized exclusive representatives of several bargaining units made up of Water Authority employees covered by the Water Authority's Labor Management Relations Ordinance (LMRO) is enough to establish an actual controversy because the legal interests of the local unions are directly adverse to the interests of the Water Authority on the issue of interpretation of the LMRO and whether it is valid under PEBA. Whether the Unions were able to reach agreement and sign off on

collective bargaining agreements that will expire in the next two years does not end the legal controversy over whether the LMRO is valid.

This Court reached a similar conclusion in *Bradbury & Stamm Const. v. Board of County Comm'r of Bernalillo County*, 2001-NMCA-106, ¶¶ 10-11, 131 N.M. 293, 295, 35 P.3d 298, when it concluded that the issue of statutory interpretation regarding residential preference in public work contracts was not moot on appeal despite the fact that the County subsequently awarded the disputed contract to the contractor that had initially challenged the award of a jail contract to an out-of- state bidder. The Court reasoned:

> We note that this dispute is not unique to the County. It involves all governmental entities and their competing legal obligations to resident New Mexico contractors and to the public at large. Thus, this dispute potentially has a far-ranging impact on public finance and public administration.
>
> For these reasons, we find the County's argument persuasive. The issue on appeal is of substantial importance to the public. If the County is correct that it has discretionary authority to protect its taxpayers from unnecessary expenditure, then the County and other governmental entities similarly situated could effectively eliminate the resident preference whenever it might be economically desirable to do so. Because this issue may well reoccur, it invites " 'authoritative determination for the future guidance of public officers.' " . . . . As our precedent guides us to "continue a cause" when these conditions are fulfilled, . . . we deny all motions to dismiss and proceed to decide the appeal.

Bradbury & Stamm Const., 2001-NMCA-106, ¶-11, 131 N.M. 293, 295-96, 35 P.3d 298 quoting *Mowrer v. Rusk*, 95 N.M. 48, 51, 618 P.2d 886, 889 (1980) and *People v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, 772(1952).

Furthermore, the exception to the mootness doctrine clearly applies because this case presents an issue of public interest that is likely to reappear year after year. The dispute has a far-ranging impact on public finance and public administration. This case presents classic facts that would allow it to be heard pursuant to the exception to the mootness doctrine. Therefore, the District Court erred when it dismissed the action on grounds of mootness.

III. CONCLUSION

The Albuquerque Bernalillo County Water Utility Authority Labor Management Relations Ordinance (LMRO) is not entitled to grandfather status under the Public Employee Bargaining Act (PEBA), NMSA 1978, § 10-7E-1 to -26. The Ordinance does not have an evergreen clause, it does not have binding arbitration procedures in the event of negotiation impasse and it was substantially changed when it was adopted in 2007. The Bateman Act does not allow a local public entity to impose whatever economic provisions it wants on its employees at the expiration of collective bargaining agreements as urged by the Water Authority. The Bateman Act can be read harmoniously with PEBA if PEBA and the Authority's LMRO required an evergreen provision that keeps existing collective bargaining provisions in place while new ones are negotiated followed by an impasse resolution provision that actually results in the timely adoption of

new agreements.

Given the uncertainty that would be created by grandfathering the LMRO as contrasted with the purpose of PEBA -- which creates as its primary goal to ensure, "at all times, the orderly operation and functioning of the state and its political subdivisions" –the Union respectfully submits that this court determine that the LMRO should not be grandfathered and that it violates PEBA.

Appellant asks that the Court of Appeals reverse the order of the District Court that the Water Authority Ordinance is entitled to grandfather status. Appellant seeks a ruling that in order to be compliant with PEBA, the Ordinance must contain an evergreen provision and an impasse resolution provision similar to those set forth in PEBA. In addition, the Court should reverse the District Court's ruling on the Water Authority's Motion to Dismiss on the grounds of mootness.

IV.
ORAL ARGUMENT REQUESTED

AFSCME respectfully requests oral argument before the Court. Oral argument will assist the court in deciding the issues presented due to the importance of public sector bargaining and the complexity of deciding whether a local ordinance should be granted grandfather status under the Public Employees Bargaining Act.

Dated: March 26, 2012

Respectfully Submitted,

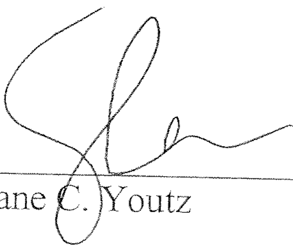
YOUTZ & VALDEZ, P.C.

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

CERTIFICATE OF SERVICE

I hereby certify that on this26th day of March, 2012, I caused a true and correct copy of the foregoing Brief in Chief, to be mailed, via regular U.S. mail, postage pre-paid and affixed thereto, to the following:

Juan L. Flores
Nann M. Winter
Stelzner, Winter, Warburton, Flores, Sanchez & Dawes, P.A.
302 8th St. N.W., Suite 200
PO Box 528
Albuquerque, NM 87103



Shane C. Youtz