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,

Petitioners-Appellants,

v.

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY,

Respondent-Appellee.

No. 31,365

APPELLANTS' REPLY BRIEF

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

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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 Reply Brief.

I.
ARGUMENT

A. The trial court was required to determine whether the impasse provision and the lack of a Guidelines Committee in the Water Authority's LMRO deprived it of grandfather status under the Public Employees' Bargaining Act.

The Water Authority relies on the recent New Mexico Supreme Court decision in *City of Albuquerque v. Montoya,* 2012-NMSC-007, 274 P.3d 108, to argue that its LMRO is entitled to grandfather status. (AB, pp. 10-11). The Supreme Court's decision in *Montoya*, however, was limited to the issue of whether PEBA's grandfather clause applied to a provision in the City of Albuquerque's Labor Management Relations Ordinance which allowed the president of the city council to appoint an interim member to the City's Labor Management Relations Board. *City of Albuquerque v. Montoya,* 2012-NMSC-007, ¶¶ 1-2, 274 P.3d 108. As required by *Regents,* the court was reviewing a specific provision in the City's Ordinance to determine whether it qualified for grandfather status. The Water Authority cannot rely on this narrow holding to

claim that its ordinance is grandfathered for all purposes. Such an argument is directly contrary to the holding in *Regents* that requires the two part test for grandfather status to be applied to each part of the ordinance separately: "We will construe this two-part test narrowly, holding that it applies to specific provisions of a public employer's policy rather than the policy as a whole. In other words, portions of an employer's collective-bargaining system may fail this two-part test while the remainder may qualify for grandfather status." *Regents of Univ. of New Mexico v. New Mexico Fed'n of Teachers*, 1998-NMSC-020, 125 N.M. 401, 412, 962 P.2d 1236, 1247.

The courts have the duty and authority to review local ordinances to determine whether they are in compliance with the PEBA. This *de novo* review requires to courts to analyze a public employer's system adopted prior to October 1, 1991, by reviewing its relevant parts rather than the system as a whole. Where a local ordinance provision, though enacted prior to 1991, directly conflicts with the PEBA, it is not encompassed by the Act's grandfather clause. *Regents*, 1998-NMSC-020, ¶ 45 (UNM's *Policy* included a definition of "appropriate bargaining unit" which is in direct conflict with PEBA's definition . . ."); *City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069, ¶ 14, 141 N.M. 686, 160 P.3d 595("Even though the City developed its exclusions by definition in its ordinance,

there is no indication that the definition and resultant exclusion comports with the exceptions of the PEBA.").

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 (1998). 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. As the *Regents* Court determined: "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.

A *de novo* review of the impasse procedures and lack of Guidelines Committee of the Water Authority LMRO is required notwithstanding the Supreme Court's decision in *City of Albuquerque v. Montoya,* 2012-NMSC-007, 274 P.3d 108.

B. Whether the Water Authority LMRO was substantially changed from the City of Albuquerque LMRO is a question of law for the court to decide.

The Water Authority argues that the elimination of the Guidelines Committee in its ordinance is not substantial because it "relates to a provision not relevant to the dispute between the parties." (AB, p. 8). This argument overlooks the fact that it is for the court, not the parties, to make the legal determination of whether the LMRO is entitled to grandfather status. 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,* 2012-NMSC-007, ¶ 12, 274 P.3d 111. The issue was raised below and ruled upon by the trial court. Therefore, this court should apply a *de novo* review of the ruling.

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). This ruling is entitled to *de novo*

review.

The City of Albuquerque LMRO, which was adopted by the Water Utility Authority, 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 was 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. 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.

The Water Authority LMRO was substantially changed when it was adopted without this important feature. The Water Authority argues that this change relates to a provision that is not relevant to the dispute between the parties. (AB, p. 8). The Authority claims it could not have adopted the Guidelines Committee provision because the Authority "lacks the organizational structure contemplated by that provision." (AB, p. 9). What the Water Authority fails to address is that, while not governed by a Mayor and City Council, it is governed by elected officials consisting of 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.

Under the Water Authority's LMRO, labor relations decisions are not placed in the hands of its governing Board of Directors. Instead, even though the Water Authority LMRO discusses the right of employees to bargain collectively with the "Authority Government," the LMRO vests significant authority in labor relations matters in an individual identified as the "Executive Director," who is not an elected official. Under the Water Authority LMRO, the Executive Director is the functional equivalent of the Mayor of the City of Albuquerque for purposes of labor relations between the Water Authority and the employees. *Compare* Water

Authority LMRO § 10-2-5("[T]he Executive Director and his/her administrative staff shall have the following rights: (A) To direct the work of its employees *etc.*") to City LMRO§ 3-2-5 ("[T]he Mayor and his administrative staff shall have the following rights: (A) To direct the work of its employees *etc.*").

Significantly, the Executive Director carries out the same functions carried out by the Mayor for the City of Albuquerque, but without any input by any elected official, something that the Guidelines Committee would have addressed. The failure of the Water Authority LMRO to address this deficiency, *i.e.* the lack of direction from any elected official for purposes of labor relations within the Water Authority, renders the Water Authority LMRO substantially changed from the City's LMRO. This, in turn, deprives the Water Authority LMRO of its grandfather status under the PEBA.

C. The Water Authority's attempt to glean legislative intent from what is missing in PEBA is not persuasive.

The Water Authority argues that the Legislature in enacting PEBA could have required an ordinance adopted prior to 1991 to have impasse procedures equivalent to PEBA's impasse procedures to qualify for grandfathering but elected not to do so. (AB, p. 13). According to the Water Authority, the absence of such a requirement reflects a legislative intent to allow ordinances adopted prior to 1991

to be grandfathered even if they do not contain impasse procedures similar or equivalent to PEBA's impasse procedures. *Id.*

Legislative silence, however, is at best a tenuous guide to determining legislative intent. *Swink v. Fingado*, 115 N.M. 275, 283-84, 850 P.2d 978, 986-87 (1993) *citing Torrance County Mental Health Program, Inc. v. New Mexico Health & Env't Dep't,* 113 N.M. 593, 598, 830 P.2d 145, 150 (1992). In this case, PEBA is silent on whether an ordinance adopted prior to 1991 must contain impasse procedures equivalent to PEBA's impasse procedures. This legislative silence, however, does not mean that ordinances adopted prior to 1991 do *not* have to have equivalent impasse procedures. Therefore, this argument based on legislative silence is not persuasive.

D. The Water Authority's argument that mandatory impasse resolution is not required overlooks the reality that without a mandatory procedure, as opposed to a voluntary procedure, the employer can always impose its last best final offer, no matter how extreme or one-sided.

The Water Authority argues that its voluntary arbitration provision is all that is needed in the event of impasse. (AB, p. 14). This notion overlooks the reality of negotiation. The Water Authority LMRO 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 no matter how extreme or one-sided. This creates a system

where bargaining is, without question, illusory.

For example, the Water Authority could take the extreme position in bargaining that they will reduce the pay of every bargaining unit member to minimum wage no matter what job they perform. Without some type of mandatory impasse dispute resolution, this extreme position could simply be imposed on the employees. In other words, the Water Authority 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.

E. The Water Authority's reading of the *City of Deming* is too narrow and conflicts with the holding of *Regents.*

The Water Authority claims that the court is not allowed to evaluate the quality of the impasse procedures under *City of Deming*. (AB, p. 15). This position is too narrow and should not be adopted. According to the reasoning of the Water Authority, any blank piece of paper entitled "Impasse Procedure" would qualify for grandfather status because the quality of the procedure is not to be evaluated. This reasoning is absurd and is directly refuted by *Regents:* "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.

Obviously, an impasse procedure that results in nothing cannot be deemed to be within the purpose of the grandfather clause which is to 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 (1998). 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.

As argued in the Brief in Chief, 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.

Without the existence of an impasse procedure that allows the parties to 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. Such a system completely and totally eliminates any real notion of collective bargaining and, therefore, does not qualify for grandfather status.

By arguing that the quality of the impasse procedure cannot be questioned by the courts, the Water Authority has taken an extreme position that is not supported by the law. This Court has a duty under *Regents* to assess whether the impasse procedure results in system of provisions and procedures permitting employees to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives. If not, the impasse procedure cannot be allowed to stand.

F. The validity of the City of Albuquerque LMRO's impasse procedure, which is the same as the Water Authority's impasse procedure, is currently being challenged and this establishes that this issue is of substantial public interest and is not unique to the Water Authority.

The validity of the same impasse provision in the City of Albuquerque's LMRO is currently being challenged in this court.[1] In the trial court below, AFSCME sought a stay pending the outcome of the appeal in the *AFSCME v. City*

1 *AFSCME v. City of Albuquerque,* Court of Appeals No. 30,927.

of Albuquerque case and the Water Authority did not object to a stay. (See Case Docket entry for 2/21/2011: "Parties agree to stipulated stay; order to be submitted"). AFSCME requested a Presentment Hearing for the Order Staying Action Pending Appellate Decisions but rather than present its own form of order staying the action, the Water Authority filed a Motion to Dismiss as Moot and provided the trial court with a form of order dismissing the action. The trial court entered the Water Authority's order before AFSCME was given a chance to oppose the Motion to Dismiss.

The Water Authority now argues that the issues raised in this appeal are unique to the Water Authority and not of substantial interest to the public. (AB, p. 23). In making this argument, the Water Authority completely overlooks the fact that the same issues are currently being litigated against the City of Albuquerque and that the Water Authority initially agreed to stay this action pending the outcome of the City of Albuquerque case. The issues cannot be described as unique as they have arisen in other litigation and clearly are of substantial interest to the public as they involve two large governmental agencies: the City of Albuquerque and the Albuquerque Bernalillo County Water Utility Authority. Furthermore, the issues relate to interpretation of the Public Employees Bargaining

Act which covers public employees statewide. Therefore, the issues are not unique and do implicate the public interest.

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. The court should decide whether the Water Authorities LMRO is valid. Even if no actual controversy exists, the issues are likely to reappear before the court. An exception should be made and the question decided.

G. The Water Authority concedes that the Bateman Act is not relevant to any issues currently on appeal and, therefore, should not be considered by the Court.

AFSMCE argued in its Brief in Chief that the Bateman Act, NMSA 1978, § 6-6-11, does not allow the Water Authority to impose upon the employees whatever terms and conditions of employment it desires. (BIC 22). In its Answer Brief, the Water Authority states that it is unclear as to why AFSCME raised the Bateman Act in its Brief in Chief because the district court did not apply the Bateman Act or decide whether the Bateman Act should apply. (AB 24). The Water Authority, therefore, concedes that the Bateman Act should not be considered by this Court.

II.
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.

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.

Dated: June 13, 2012

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this13th day of June, 2012, I caused a true and correct copy of the foregoing Reply Brief, to be mailed, via regular U.S. mail, postage pre-paid and affixed thereto, to the following:

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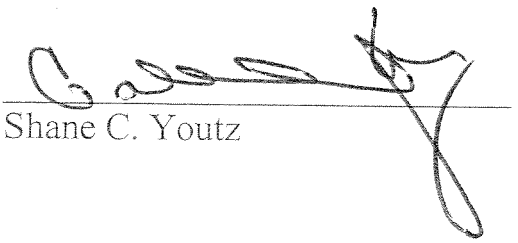

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