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

APPELLEE'S ANSWER BRIEF

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases

New Mexico Statutes

STATEMENT OF COMPLIANCE

This brief was prepared using a proportionally-spaced type style or typeface, Times New Roman, and the body of the brief contains 5,841 words, as indicated by Microsoft Office Word Version 2007.

INTRODUCTION

This appeal concerns the question of whether the Water Authority's Labor Management Relations Ordinance (LMRO) or the Public Employees Bargaining Act, NMSA 1978 § 10-7E-1 *et seq.* (PEBA) applied when the parties reached an impasse during their negotiations with respect to new collective bargaining agreements.

Appellants American Federation of State County and Municipal employees, Council 18, AFL-CIO Local 3022, 2962, and 624 (collectively, "AFSCME") complain that PEBA's "evergreen" clause should have applied to keep the expired collective bargaining agreements in effect until the parties were able to execute new agreements; and that the Water Authority should have been required to follow PEBA's impasse-resolution procedures.

The district court properly concluded, however, that PEBA's grandfather provision applied, allowing the Water Authority to follow its LMRO rather than PEBA when the parties reached an impasse and the collective bargaining agreements expired. Furthermore, once the parties negotiated and executed new collective bargaining agreements, the district court properly dismissed AFSCME's claims as moot.

SUMMARY OF PROCEEDINGS

In the summer of 2010, AFSCME and the Water Authority reached an impasse in negotiations with respect to new collective bargaining agreements. That impasse was not resolved before the collective bargaining agreements expired. Following expiration of the agreements, AFSCME filed a Verified Petition for Temporary Restraining Order and Preliminary Injunction in the district court, in which it argued that the Water Authority was required by PEBA to abide by the terms of the expired collective bargaining agreements until new agreements were executed. RP 1-10. In particular, AFSCME argued that the "evergreen clause" of PEBA, NMSA 1978 § 10-7E-18 applied to keep the expired collective bargaining agreements in effect until execution of new collective bargaining agreements. *See* RP 2-3. AFSCME also asserted that PEBA requires impasse arbitration when the parties are unable to reach an agreement. RP 4.

The Honorable C. Shannon Bacon granted the requested Temporary Restraining Order on an *ex parte* basis on the same day the Petition was filed. The Honorable Alan M. Malott subsequently set the Petition for Preliminary Injunction for hearing. RP 19. At the hearing, the Water Authority opposed AFSCME's request for preliminary injunction on the ground that the Water Authority was entitled under PEBA to rely on the impasse procedures set forth in its own local Labor Management Relations Ordinance (LMRO). The LMRO impasse procedure does

not contain an evergreen clause and does not mandate arbitration in the event of an impasse. The Water Authority's reliance on the local ordinance is amply supported by PEBA's grandfather provision, which allows public employers like the Water Authority to continue to apply labor-management provisions that were in effect at the time PEBA was enacted. *See* NMSA 1978 § 10-7E-26; RP 28-32.

At the first hearing, the district court entered the preliminary injunction requested by AFSCME. *See* RP 117. Upon reconsideration requested by the Water Authority, however, the district court dissolved the preliminary injunction. RP 121-122. In its Order Dissolving Preliminary Injunction and Certification for Interlocutory Appeal, the district court found that the Water Authority's LMRO is entitled to grandfather status under PEBA. RP 121-122. In support of this determination, the district court concluded "[t]here has been no substantial change to [the Water Authority's] Labor Management Relations Ordinance (LMRO) after 2003." RP 121. The district court additionally found that "[t]he LMRO contains an impasse resolution process," and that "*City of Deming v. Deming Firefighters Local 4521*. . . does not allow the court to assess the quality or effectiveness of the impasse resolution process established in this LMRO." RP 121.

Disappointed with the district court's decision, AFSCME filed an Expedited Motion to Reconsider the Court's Order Dissolving Preliminary Injunction. RP

124. The district court denied that motion, and AFSCME then unsuccessfully sought interlocutory review in this Court. RP 139, 154, 235-36.

The parties were eventually able to negotiate new collective bargaining agreements. *See* RP 267-273. After execution of those successor agreements, the Water Authority filed a motion for summary judgment asserting that the execution of new agreements mooted AFSCME's claims. In support of this motion, the Water Authority observed that all the questions raised by the Complaint concerned whether the terms of the Water Authority's LMRO impasse procedures applied when no collective bargaining agreements were in effect. RP 247-253. The district court granted the Water Authority's motion, finding no actual controversy existed following execution of the new collective bargaining agreements, and dismissed the matter with prejudice on May 10, 2011. RP 279.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE WATER AUTHORITY'S LMRO IS ENTITLED TO GRANDFATHER STATUS UNDER PEBA.

A. Standard of Review

This Court reviews the question of whether a grandfather provision applies *de novo*. *Montoya v. City of Albuquerque*, 2012-NMSC-007, ¶ 12; *Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236.

B. Preservation

AFSCME preserved its arguments concerning this issue, and the Water Authority argued throughout the district court proceedings that its LMRO is entitled to grandfather status. *See, e.g. See* RP 28-32.

C. Argument

AFSCME argues that it was error for the district court to apply the grandfather provision in PEBA to conclude that the Water Authority was entitled to rely on the impasse procedure in the LMRO instead of the impasse provisions of PEBA. Specifically, AFSCME argues that PEBA's "evergreen" provision should have applied to keep expired collective bargaining agreements in effect until new collective bargaining agreements were executed, and that PEBA's impasse-resolution procedures should have applied once the impasse occurred.

It is important to note that the district court carefully applied PEBA's grandfather provision, which expressly allows local entities to continue to follow their existing labor-relations ordinances in lieu of PEBA. *See Montoya v. City of Albuquerque*, 2012-NMSC-007, ¶ 9. ("Some public employers had existing systems in place for collective bargaining. Therefore, the Act included a grandfather clause which permitted a public employer to preserve its collective bargaining system under certain circumstances.").

The grandfather clause of PEBA provides:

> A public employer other than the state that prior to October 1, 1991 adopted by ordinance, resolution or charter amendment a system of provisions and procedures permitting employees to form, join or assist a labor organization for the purpose of bargaining collectively through exclusive representatives **may continue to operate under those provisions and procedures. . . .**

NMSA §10-7E-26(A) (emphasis added).

Accordingly, under PEBA's grandfather clause, the Water Authority may rely on its LMRO—rather than otherwise applicable provisions of PEBA—as long as (1) the ordinance sets forth "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;" and (2) the ordinance was adopted before October 1, 1991. *See City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069, ¶ 9, 141 NM 686, 689, 160 P.3d 595, 598; *Montoya*, 2012-NMSC-007, ¶ 10 (same).

The Water Authority's Labor Management Relations Ordinance satisfies both of these requirements.

a. The Water Authority's LMRO was adopted before October 1, 1991.

Although the Water Authority did not exist in 1991, PEBA expressly provides that "[a] new entity, created by or pursuant to statute, that encompasses the same powers and duties as a previous public employer and uses essentially the same employees as the previous public employer shall be treated as if it were that previous public employer for purposes of the Public Employee Bargaining Act . .

.including the continued applicability of existing ordinances or resolutions pursuant to Section 10-7E-26 NMSA 1978 and of existing collective bargaining units pursuant to Section 10-7E-24 NMSA 1978." NMSA 1978 §10-7E-24.1.

The Water Authority is a new entity created by statute. *See* NMSA 1978 § 72-1-10. Furthermore, pursuant to § 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. *See* Affidavit of Mark Sanchez, ¶¶ 7-10, RP 38-39. In fact, §10-7E-24.1 was enacted to address "the unprecedented scenario presented by creation of the Albuquerque Bernalillo County Water Utility Authority." *See id.* ¶ 6, RP 38. And AFSCME apparently does not contest that the Water Authority should be treated as the City under NMSA 1978 §10-7E-24.1. *See* BIC 12 ("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.").

Following its creation, the Water Authority adopted ordinances to organize the operation of the utility including, in particular, the LMRO. *See* Affidavit of Mark Sanchez, ¶ 11, RP 39. The LMRO is virtually identical to the City of Albuquerque's Labor Management Relations Ordinance, which was enacted 1974. *See id.* ¶ 12; AFSCME's Verified Petition for Temporary Restraining Order and

Preliminary Injunction, RP 3 ("the City of Albuquerque Labor Management Relations Ordinance . . . contains identical language to the Authority's LMRO"); *compare* RP 48-58 (City of Albuquerque LMRO), *with* RP 176-195 (Water Authority LMRO). Accordingly, the Water Authority's adoption of the LMRO effectively continued the operation of the City of Albuquerque's Labor Management Relations Ordinance, and the Water Authority must be deemed to have adopted an ordinance containing a collective bargaining system prior to October 1, 1991. *See* NMSA 1978 §10-7E-26(A); *City Of Deming*, 2007-NMCA-069, ¶ 9.

AFSCME's arguments to the contrary are unavailing. AFSCME initially admitted that the Water Authority's LMRO is "identical" to the City's LMRO in its Petition for Temporary Restraining Order, but subsequently has attempted to establish otherwise. *See* RP 3 ("the City of Albuquerque Labor Management Relations Ordinance . . . contains identical language to the Authority's LMRO").

In any event, AFSCME's claim that the Water Authority's LMRO is substantially different than the City's LMRO relates to a provision not relevant to the dispute between the parties. *See* BIC 25-26. In particular, AFSCME argues that the Water Authority's LMRO does not contain a provision entitled "Guidelines Committee," which is included in the City's LMRO. *See id.* at 26. AFSCME does not attempt to argue that the absence of the Guidelines-Committee

provision is material to this matter, or to the impasse that occurred during the parties' negotiations. *See Montoya*, 2012-NMSC-007 (evaluating whether specific provision of the City of Albuquerque's LMRO was entitled to grandfather status). Nor could AFSCME tie the Guidelines-Committee provision to this matter. The Guidelines-Committee provision of the City's LMRO is not even part of the impasse procedures set forth in the City's LMRO, and is clearly not relevant to the question of whether the Water Authority should have abided by expired collective bargaining agreements until new agreements were executed.

Should the Court nonetheless conclude that the absence of Guidelines-Committee provision relevant, this small difference between the Water Authority's LMRO and the City's LMRO does not qualify as a "substantial change" to the ordinance within the meaning of § §10-7E-26(A). This is especially true given that the Water Authority could not have adopted the Guidelines-Committee provision of the City's LMRO given that it lacks the organizational structure contemplated by that provision. *See* City's LMRO, § 3-2-17, RP 58 (Guidelines Committee is designed "to facilitate communication between the Mayor and the City Council").

Because the pertinent provisions of the Water Authority's LMRO do not differ from those provisions of the City's pre-1991 LMRO, which the Water Authority adopted when it was created by statute in 2003, the Water Authority's LMRO qualifies as a labor management relations ordinance adopted before

October 1, 1991. *See City of Deming*, 2007-NMCA-069, ¶ 9; NMSA 1978 §10-7E-26(A).

b. The LMRO Sets Forth a System of Procedures Permitting Employees to Form Labor Organizations, and to Collectively Bargain.

The LMRO similarly sets forth a system of procedures permitting employees to form labor organizations, and to collectively bargain. *See City of Deming*, 2007-NMCA-069, ¶ 9; NMSA 1978 §10-7E-26(A). This can be seen through even a cursory review of the Water Authority's LMRO. *See, e.g.* Water Authority LMRO § 10-2-4(A), RP 178 ("Authority employees have the right to form, join and otherwise participate in the activities of an employee organization of their own choosing for the purpose of bargaining collectively with the Authority government, and for other lawful reasons."); *id.* § 10-2-7 (Duty to Bargain), RP 184; *id.* § 10-2-9 (Prohibited Practices), RP 185-86; *id.* § 10-2-13 (Negotiating Procedures), RP 188-190; *id.* § 10-2-14 (Impasse Procedures), RP 190-93.

Moreover, the New Mexico Supreme Court recently concluded that the City of Albuquerque's LMRO—which, as discussed above, is virtually identical to the Water Authority's LMRO—qualifies as a system of procedures permitting employees to form labor organizations and to collectively bargain. *See Montoya v. City of Albuquerque*, 2012-NMSC-007, ¶ 21 ("The City Ordinance in this case

aligns with Subsection A of the Act's grandfather clause requirement that a local ordinance create a system of collective bargaining.").

Accordingly, both requirements for grandfather status are satisfied here. The district court therefore correctly concluded that the Water Authority was entitled to follow its LMRO. *See* RP 121-122; NMSA 1978 §10-7E-26(A); *City Of Deming*, 2007-NMCA-069, ¶ 9. And, contrary to AFSCME's contentions, the district court properly so concluded even though the Water Authority's LMRO lacks an evergreen provision, and does not contain a mandatory arbitration provision.

i. **The District Court Property Concluded That The Water Authority May Apply Its LMRO Even Though It Lacks An Evergreen Provision.**

PEBA contains an "evergreen" provision allowing collective bargaining agreements to remain in effect until new agreements are executed, *see* NMSA 1978 § 10-7E-18(D). In the district court and on appeal, AFSCME has made much of the fact that the Water Authority's LMRO lacks a comparable provision. As detailed above, however, the Water Authority is entitled to apply its LMRO rather than PEBA. Thus, the district court properly dissolved the injunction requiring the Water Authority to follow expired collective bargaining agreements. *See* RP 121-122.

Insofar as AFSCME contends that the evergreen provision should apply despite the Water Authority's grandfathered ordinance[1], § 10-7E-26 directly refutes that notion. Section 10-7E-26 qualifies the grandfather status it creates by indicating that "[a]ny 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 [10-7E-26 NMSA 1978] of the Public Employee Bargaining Act." NMSA 1978 § 10-7E-26. Of significance here, Subsection B of Section 26 requires an ordinance, resolution, or charter amendment to include an "impasse resolution procedures equivalent to those set forth in Section 18 [10-7E-18 NMSA 1978] of the Public Employee Bargaining Act." Those impasse procedures include the evergreen clause. *See* NMSA 1978 § 10-7E-18(D).

A provision of PEBA located in the same statutory section as the grandfather clause addresses the applicability of labor-management ordinances adopted by

[1] AFSCME argues that an evergreen provision is a fundamental element necessary for collective bargaining. *See* BIC 9. But AFSCME greatly overstates the significance of a lapse in collective bargaining agreements by arguing that the collective bargaining agreements address issues such as salary, sick leave, retirement benefits, discipline, and occupational health and safety. *See* BIC 3, 10. Such issues are in large part governed by statute or the Water Authority's Merit System Ordinance—not collective bargaining agreements. *See, e.g.* Albuquerque Bernalillo County Water Utility Authority Merit System Ordinance, *available at* http://www.abcwua.org/pdfs/section10.pdf; NMSA 1978 § 10-11-1 *et seq.* (Public Employees Retirement Act); NMSA 1978 §§ 50-9-1 *et seq.* (Occupational Health and Safety Act). AFSCME's argument that expiration of the collective bargaining agreements would cause employees to be subject to employment at-will, *see* BIC 3, is similarly unfounded. Under the Water Authority's Merit System Ordinance, virtually all Water Authority employees are for-cause employees. *See* Merit System Ordinance at 1-4.

local public employers ***after*** the grandfathering date of October 1, 1991. *See,* NMSA 1978, §10-7E-26(B) (2003) (emphasis added). Such ordinances may be applied in lieu of PEBA, just as if they had grandfather status, provided they contain certain terms and provided that the local public employer "shall comply" with specified requirements, including impasse procedures equivalent to those set forth in PEBA. *Id.*

The Legislature could have similarly required ordinances adopted prior to 1991 to have impasse procedures equivalent to PEBA's impasse procedures to qualify for grandfathering, but elected not to do so. The absence of such a requirement reflects a legislative intent to allow ordinance adopted prior to 1991 to be grandfathered even if they do not contain impasse procedures similar or equivalent to PEBA's impasse procedures. *Wilson v. Denver*, 1998-NMSC-016, ¶ 38, 125 N.M. 308, 961 P.2d 153 (legislature was capable of specifying particular interests in ditch system, such as ownership interests, to which statute applied; unqualified reference to ditch interests in statute in question "signal[ed] a legislative intent" not to limit reference to particular interests); *Ashlock v. Sunwest Bank of Roswell, N.A.*, 107 N.M. 100, 101, 753 P.2d 346, 347 (1988) (had legislature intended elements of statutory offense to include alleged factor, "it would have so specified"), *overruled on other grounds by Gonzales v. Surgidev Corp.*, 120 N.M. 133, 899 P.2d 576 (1995).

Having met the requirements for grandfather status on § 10-7E-26(A), the Water Authority is entitled under the law to apply the provisions of its LMRO, and need not include the impasse procedures of § 10-7E-18—including the evergreen clause—until and unless it makes a substantial change to its LMRO. *See* NMSA 1978 § 10-7E-26; NMSA 1978 § 10-7E-18.

ii. The District Court Properly Concluded That The LMRO Is Not Required To Provide For Mandatory Impasse Arbitration.

AFSCME erroneously argues that the Water Authority's LMRO "is not a qualifying 'system of provisions and procedures permitting employees to form, join or assist any labor organization for purposes of collective bargaining.'" BIC 13. AFSCME supports this argument with a false claim that the LMRO does not require the Water Authority to negotiate in good faith, and "provides no device whereby parties can take their disputes to a neutral tribunal for dispute resolution." *See* BIC 11-13. AFSCME has apparently not read the LMRO.

The LMRO expressly requires good-faith negotiation, and contains an arbitration provision allowing the parties to take their disputes to a neutral tribunal for dispute resolution. *See* LMRO § 10-2-9-(A)(4) (classifying "refusing to negotiate in good faith" as a prohibited practice); § 10-2-14(B) (Voluntary Binding Total Package Final Offer Arbitration), RP 186, 190-193.

To the extent AFSCME contends that mandatory arbitration is necessary for grandfathering, as detailed above, § 10-7E-26 makes it clear that PEBA's impasse-resolution procedures do not apply in the case of a grandfathered ordinance.

Moreover, the Court cannot evaluate the quality of the impasse-resolution procedures when considering whether the LMRO is entitled to grandfather status. Quite the contrary, in *City of Deming v. Deming Firefighters Local 4521*, the Court explained:

> The grandfather clause requires only that a public employer have in place "a system of provisions and procedures permitting employees to form, join or assist a labor organization for the purpose of bargaining collectively through exclusive representatives." *Section 10-7E-26(A).* **It does not provide any minimal requirement with respect to the quality of the system or provide any qualitative measure as to the effectiveness of the collective bargaining.**

2007-NMCA-069, ¶¶ 20-21, 141 N.M. 686, 690, 160 P.3d 595, 600 (emphasis added).

Thus, *City of Deming* leaves no doubt that the Court should consider neither the quality of the LMRO's impasse-resolution procedures, nor AFSCME's opinion that the LMRO's impasse-resolution procedures are inferior to those set forth in PEBA.[2] *See id.* ¶ 21 ("PEBA defines 'collective bargaining' as 'the act of negotiating between a public employer and an exclusive representative for the

[2] *City of Deming* consequently forecloses AFSCME's arguments that the Water Authority's impasse-resolution process ultimately allows the Water Authority to have unilateral control. *See* BIC 14-18.

purpose of entering into a written agreement regarding wages, hours and other terms and conditions of employment.' Again, this definition does not contain any qualitative requirement or measure of effectiveness. Nor does it require any specific impasse provision or binding procedure.") (internal citation omitted).

Nonetheless, in contravention of the *City of Deming* Court's clear holding that "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," *see id.* AFSCME asks the Court to find the impasse-resolution procedures set forth in the Water Authority's LMRO insufficient for grandfather status. In support of this improper attempt, AFSCME argues that "the actual holding in *City of Deming* is not so broad" and contends that the Court in *City of Deming* evaluated the quality of the impasse resolution procedure, finding the provision for advisory arbitration in the ordinance at issue in that case sufficient. BIC 19-20.

AFSCME misinterprets *City of Deming*. Although the Court in that case did mention that "advisory arbitration was originally considered appropriate impasse resolution procedure for all purposes," this statement does not modify the Court's clear holding that the Court should not evaluate the quality of the employer's collective bargaining system when assessing applicability of the grandfather clause. *See City of Deming*, 2007-NMCA-069, ¶¶ 21-22, 141 N.M. 686, 692-93, 160 P.3d 595, 600-01. And insofar as the existence of mandatory advisory

arbitration was relevant to the Court's decision in *City of Deming*, the Water Authority notes that its LMRO contains a provision for voluntary **binding** arbitration which is at least equivalent to (if not stronger than) the mandatory **advisory** arbitration provision at issue in *City of Deming*. *See* RP 190-193.

AFSCME's argument that the Water Authority's LMRO does not even contain an impasse-resolution procedure is equally invalid. *See* BIC 20-21 ("The LMRO, under consideration by this Court, contains no impasse resolution procedure, *whatsoever*."). This contention is dependent on AFSCME's own unsupported "simple and intuitive" definition of "impasse resolution procedure." *See* BIC 21. Without citation to any authority, AFSCME claims that an "impasse resolution procedure" requires the following: "a fact finder must compare parties' contract positions[3] and issue a decision identifying the superior or appropriate final offer." BIC 21. This argument is merely another effort to ask the Court to consider and accept AFSCME's evaluation of the quality of the Water Authority's impasse-resolution procedure in violation of the clear holding of *City of Deming*. AFSCME cannot circumvent *City of Deming* by claiming the Water Authority's

[3] The authority cited by AFSCME in support of its claim that "an impasse resolution procedure must incorporate some form of fact finding necessary to resolve the dispute after negotiations have failed," does not stand for the proposition that impasse resolution requires fact finding. *See* BIC 21. Instead, AFSCME merely establishes that the negotiation and arbitration processes set forth in PEBA are different. *See id.* at 21-22; NMSA 1978 § 10-7E-18 (outlining PEBA's impasse procedure); *National Union of Hospital & Healthcare Employees v. AFL-CIO*, 2010-NMCA-102, ¶ 27, 149 N.M. 107, 245 P.3d 51 (Legislature intended the negotiation and arbitration processes set forth in PEBA to be different).

impasse-resolution procedure is so insufficient that it does not even qualify as an impasse-resolution procedure.

Finally, AFSCME argues that "[m]ediation is not designed as an impasse resolution procedure and cannot be considered an impasse procedure because it is explicitly and statutorily designated as part of the negotiation process." BIC 21. How mediation is classified in PEBA is not, however, pertinent to the question of whether the Water Authority may rely upon the particular impasse procedures set forth in its grandfathered LMRO. Mediation is part of the Water Authority's impasse-resolution procedure, and again, the Court should not consider AFSCME's opinion concerning the relative "quality" of such procedures when considering whether the Water Authority may apply its LMRO.

Accordingly, having failed to undermine or call into question *City of Deming*, AFSCME's arguments concerning the alleged insufficiency of the impasse-resolution procedures set forth in the Water Authority's LMRO have no bearing on the question of whether the Water Authority may apply its LMRO under PEBA's grandfather provision.

The Water Authority's LMRO was enacted prior to 1991 and contains collective-bargaining provisions, the relative quality of which this Court is not required to evaluate. *See City of Deming*, 2007-NMCA-069, ¶¶ 9, 20-21. The

district court consequently properly held that the Water Authority could apply its LMRO under PEBA's grandfather provision.

II. THE DISTRICT COURT CORRECTLY DISMISSED THIS MATTER AS MOOT.

A. Standard of Review

This Court reviews the district court's decision that AFSCME's claims became moot *de novo*. *Baber v. Desert Sun Motors*, 2007-NMCA-098, ¶ 9, 142 N.M. 319, 322, 164 P.3d 1018, 1021.

B. Preservation

The Water Authority preserved this issue by moving for summary judgment on the ground of mootness. *See* RP 247-257. Because the Court dismissed the matter as moot before AFSCME responded, the record does not support a position that AFSCME failed to preserve its arguments concerning mootness.

C. Argument

AFSCME sought in the district court only relief concerning the Water Authority's obligations during the pendency of contract negotiations. In particular, AFSCME sought a temporary restraining order and preliminary injunction requiring the Water Authority to abide by expired CBAs during negotiations for new CBAs; and a declaration that the Water Authority could not follow its LMRO because the LMRO is not entitled to grandfather status. *See* RP 9, 152. These

issues became moot once the parties executed new collective bargaining agreements.

"A case is moot when no actual controversy exists, and the court cannot grant actual relief." *Gunaji v. Macias*, 2001-NMSC-028, ¶ 9, 130 N.M. 734, 737, 31 P.3d 1008, 1011 (internal quotation marks and citation omitted); *City of Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, 124 N.M. 640, 954 P.2d 72 ("A case will be dismissed for mootness if no actual controversy exists.").

The request for injunctive relief during the pendency of negotiations obviously became moot once those negotiations concluded in the execution of new collective bargaining agreements. Once the agreements were executed, the Court lacked the ability to grant AFSCME actual relief in the form of a temporary restraining order or preliminary injunction.

AFSCME's claim for declaratory judgment was similarly mooted when the parties executed new collective bargaining agreements, because the execution of those agreements eliminated the "actual controversy" necessary for the Court to issue a declaratory judgment. *See New Energy Econ, Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 17, 243 P.3d 746, 752 ("In the absence of any actual case or controversy, it is improper to issue a declaratory judgment.").

> 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.

City of Las Cruces, 1998-NMSC-006, ¶ 16; *see also OS Farms, Inc. v. New Mexico American Water Co.*, 2009-NMCA-113, ¶ 39, 147 N.M. 221, 231, 218 P.3d 1269, 1279 ("A case presents an actual controversy if the question posed to the court is real and not theoretical, the person raising it has a real interest in the question, and there is another person having a real interest in the question who may oppose the declaration sought.") (internal quotation marks omitted).

Once new collective bargaining agreements were executed, the legal relations of the parties were no longer implicated by AFSCME's claim for declaratory judgment. Contrary to AFSCME's contention, the mere fact that "the unions are recognized exclusive representatives of several bargaining units made up of Water Authority employees covered by the Water Authority's Labor Management Relations Ordinance" is not "enough to establish an actual controversy." *See* BIC 28. No real or adverse interest remained at stake after the collective bargaining agreements were executed. There was no longer a question of what action the Water Authority was required to take during the period between expiration of the collective bargaining agreements and execution of new agreements, or whether the Water Authority's LMRO applied during that time period. And because AFSCME was not seeking damages for what the Water Authority did during that period of time, the Court could not have remedied any alleged wrong. Rather, any decision

by the Court would have been entirely in the abstract. Indeed, even the possibility that this issue could arise upon expiration of the new agreements in 2013 does not cure the absence of an actual controversy. *See Shoobridge*, 2010-NMSC-049, ¶ 18 ("[t]he mere possibility or even probability that a person may be adversely affected in the future by official acts fails to satisfy the actual controversy requirement.").

Perhaps recognizing the futility of its argument that the controversy is not moot, relying on *Bradbury & Stamm Constr. v. Bd. of County Commissioners of Bernalillo County*, 2001-NMCA-106, 131 N.M. 293, 35 P.3d 298, AFSCME primarily argues that this case presents an issue of substantial public importance that should have been decided even if it is moot.

In *Bradbury & Stamm*, however, the Court recognized that the matter was "not unique to the County" but instead "involve[d] all governmental entities and their competing legal obligations to resident New Mexico contractors and to the public at large." 2001-NMCA-106, ¶ 11, 131 N.M. at 295, 35 P.3d at 300. The Court in that case was presented with an issue concerning how public works contracts are to be awarded, which caused the dispute to have "a far-ranging impact on public finance and public administration." 2001-NMCA-106, ¶ 11, 131 N.M. at 295, 35 P.3d at 300. For that reason, the Court concluded that a matter of substantial public importance was involved, and elected to decide the moot case. 2001-NMCA-106, ¶ 12, 131 N.M. at 296, 35 P.3d at 301.

This case is not at all like *Bradbury & Stamm.* The issue raised in this case is unique to the Water Authority—AFSCME asks the Court to decide whether the Water Authority's LMRO is entitled to grandfather status. Because this inquiry is specific to the Water Authority's LMRO, it lacks the far-ranging impact of the issue in *Bradbury & Stamm.* Furthermore, to the extent there are any legal issues that could have a broader influence, those issues have already been decided in *City of Deming* and *Montoya.* There is no new legal issue of substantial public importance that should be decided in the abstract.

Accordingly, the district court correctly declined to issue an advisory opinion, and this Court should do the same. The execution of new collective bargaining agreements during the course of this proceeding mooted AFSCME's claims for injunctive and declaratory relief premised on the absence of such agreements.

III. COMPELLING THE WATER AUTHORITY TO HONOR EXPIRED COLLECTIVE BARGAINING AGREEMENTS WOULD VIOLATE THE BATEMAN ACT.

A. Standard of Review

As discussed below, the district court did not base any of its rulings on the Bateman Act. To the extent the Court nonetheless considers this issue, this would be a matter of statutory construction, which the Court should review *de novo. Gomez v. Chaverria*, 2009-NMCA-035, ¶ 6, 146 N.M. 46, 49, 206 P.3d 157, 160

B. Preservation

The Water Authority made its arguments concerning the Bateman Act by way of its Motion to Reconsider and/or Modify Preliminary Injunction. *See* RP 68-74. AFSCME preserved its arguments to the contrary in its response to that motion. *See* RP 97-104.

C. Argument

AFSCME notes in its brief that "[i]n 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." BIC 22. While the Water Authority did in fact seek a modification of the preliminary injunction initially entered by the Court based on the Bateman Act, the district court did not apply the Bateman Act or decide whether the Bateman Act could apply here. Instead, the district court ruled in the July 29, 2010 hearing dissolving the preliminary injunction that the dissolution of the preliminary injunction, and the underlying conclusion that the Water Authority's LMRO was entitled to grandfather status, mooted the Water Authority's argument concerning modification of the preliminary injunction to reflect budgetary concerns. *See* July 29, 2010 Transcript at 39. It is therefore unclear why AFSCME makes argument concerning the Bateman Act on appeal.

Furthermore, this issue is moot now that the parties have entered into collective bargaining agreements. As discussed above, the issue of what the Water Authority was required to do during the brief lapse in collective bargaining agreements became moot once new collective bargaining agreements were executed. And this is not an issue that could be considered in the abstract. Any future issue concerning the Bateman Act, budgetary constraints, and expired collective bargaining agreements would instead have to be considered in the context of a particular agreement and budget.

Should the Court nonetheless entertain argument concerning the Bateman Act, the Court's ability to require the Water Authority to abide by expired collective bargaining agreements is limited by the Bateman Act.

The Bateman Act states that local governments shall not:

> become indebted or contract any debts of any kind or nature whatsoever during any current year which, at the end of such current year, is not and cannot then be paid out of the money actually collected and belonging to that current year.

NMSA 1978, § 6-6-11 (1968); *see also* N.M. Const. art. 9, § 12; *Varney v. City of Albuquerque*, 40 N.M. 90, 96, 55 P.2d 40, 46 (1936) (City cannot contract debt that cannot be paid in one year without an enabling ordinance or the consent of the majority of the taxpayers through election).

Any provisions of PEBA in conflict with the Bateman Act are expressly superseded. *See* NMSA 1978 § 10-7E-3; *International Assoc. of Firefighters v.*

City of Carlsbad, 2009-NMCA-097, ¶¶ 20-21, 157 N.M. 6, 216 P.3d 256, 261, 258, 263 (Ct. App. 2009). The Water Authority's LMRO similarly subordinates collective bargaining agreements to the Bateman Act's budgetary requirements. *See* LMRO § 10-2-17, RP 195 ("Any contract between the Authority and an employee organization, which contains provisions that result in expenditures greater than the amount appropriated for wages and benefits in an adopted Authority budget for the initial fiscal year of the contract or which contains a multi-year commitment shall require the review and approval of by the Authority Board. All such contracts shall contain re-opening language for economic items.").

Thus, the court cannot impose an evergreen provision on the Water Authority without, at a minimum, making it contingent upon budget constraints. The Water Authority cannot be required through an evergreen provision to pay any costs exceeding its budget or to reappropriate funds to cover additional costs associated with an extension of expired collective bargaining agreements.

CONCLUSION

The district court correctly concluded that PEBA's grandfather provision allows the Water Authority to apply its LMRO in lieu of PEBA. The Water Authority was therefore not required to abide by the terms of expired collective bargaining agreements, or comply with PEBA's impasse-resolution procedures. The district

court likewise properly dismissed this matter once the execution of new collective bargaining agreements mooted AFSCME's claims. The Court should therefore affirm the decisions of the district court.

Dated May 24, 2012

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was mailed, via U.S. Mail, to the following:

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this 24th day of May, 2012.

for Nann M. Winter

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