IN THE NEW MEXICO COURT OF APPEALS

ALBUQUERQUE POLICE OFFICERS' ASSOCIATION, JOEY SIGALA, FELIPE GARCIA, TOM NOVICKI and MATT FISHER,

Appellants/Plaintiffs,

v.

CITY OF ALBUQUERQUE, ALBUQUERQUE POLICE DEPARTMENT, and MAYOR RICHARD BERRY,

Appellees/Defendants.

Ct. App. No. 31,632
[Consolidated 31,606 & 31,632]
Second Judicial District Court
No. CV-2010-08640

APPELLANT/PLAINTIFFS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G), counsel for Plaintiff/Appellant certifies that this brief complies with the type-volume limitation of Rule 12-213(F)(3). According to Microsoft Word 2007, the body of the Reply Brief, as defined by Rule 12-213(F)(1), contains 2,112 words.

SUMMARY OF REPLY ARGUMENT

The City asserts that mandatory bargaining terms within multi-year collective bargaining agreements with public employees are, by necessity, mere "aspirations" that a public employer may unilaterally change without reliance on the negotiation or impasse procedures of either its own LMRO or the PEBA. However, none of the restrictions on municipal spending cited by the City, whether statutory or Constitutional, prevent it from committing tax revenues collected in one fiscal year to multi-year commitments. In fact, the precedent cited by the City prohibits a City Council from reaching back in time and changing the decisions that previous legislative bodies made regarding the appropriation of the tax revenues available in that past fiscal year.

APOA presented legal arguments regarding the City's appropriation process based on the City's own ordinances and cited evidence that the Mayor and City Council took each and every step necessary to approve and appropriate funds for the CBA. The City argues that budgets are created each year and makes conclusory statements that APOA has failed to present evidence of an appropriation but has not offered an alternative theory regarding how the appropriations process itself works. Instead, the City would have this Court rule that the entire Public Employees' Bargaining Act is either unconstitutional,

superfluous, or merely an optional suggestion rather than a presentation of minimal collective bargaining rights for public employees.

The City makes passing reference to the re-opening language found in Section 3-2-18 of the LMRO without acknowledging that this language was not utilized by the City. This re-opening language merely gives the City the ability to call APOA back to the table to attempt to negotiate a change in an existing CBA pursuant to negotiation and impasse procedures – an option available to both parties even in the absence of this language. If, in the alternative, the Court adopts the City's implicit definition of the LMRO's re-opening sentence as granting the City the ability to unilaterally change work conditions that PEBA defines as manadatory bargaining terms without relying upon the negotiation or impasse procedures of either PEBA or the City's LMRO, then this provision cannot pass the grandfathering analysis.

ARGUMENT

I. A CBA CONTAINING A FIXED AND DEFINITE MULTI-YEAR MUNICIPAL EXPENDITURE DOES NOT CONSTITUTE CONSTITUTIONAL DEBT AND DOES NOT VIOLATE THE BATEMAN ACT IF THE LEGISLATIVE BODY APPROPRIATES SUFFICIENT FUNDS TO COVER THE ENTIRE FINANCIAL OBLIGATION AT THE TIME THAT AN AGREEMENT IS ENTERED INTO AND THE FUNDS WERE AVAILABLE AT THE TIME THE EXPENDITURE WAS APPROVED.

A. Standard of Review on Summary Judgment

Appeals from summary judgment are reviewed *de novo*. Sonic Industries, Inc. v. State, 2000-NMCA-87, ¶ 5, 129 N.M. 657, 660, 11 P.3d 1219, 1222. Summary judgment is only proper where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Roth v. Thompson, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (S. Ct. 1992). The reviewing court will consider the whole record for evidence that puts a material fact at issue. Id. at 335, 825 P.2d at 1245. If the facts are not in dispute and only their legal effects remain to be determined, summary judgment is proper. *Id.* A substantial dispute as to any material fact forecloses summary judgment. Pharmaseal Laboratories, Inc. v. Goffe, 90 N.M. 753, 756, 568 P.2d 589, 592 (S. Ct. 1977).

B. The CBA does not create a debt in the Constitutional sense and so is not void under Art. IX, § 12 of the New Mexico Constitution and does not violate the Bateman Act because the wage increases are fixed and definite, the City appropriated funds to cover the wage increases, and the funds needed to satisfy the future wage increases were available at the time the City entered into the CBA in 2008.

The City fails to differentiate between different types of debt when it argues that the CBA is a "debt" that violates the New Mexico Constitution. [AB 22-23]. The N.M. State Constitution does not prevent a municipality from entering into an agreement containing a multi-year expenditure as long as: 1) the expenditure is fixed, definite and certain; 2) the municipality appropriates funds to cover the

entirety of the multi-year expenditure; and 3) the municipality has current revenue available to satisfy the entirety of the multi-year expenditure when entering the agreement. Article IX, Section 12 of the N.M State Constitution contains a restriction upon municipal indebtedness designed to avoid burdening future taxpayers without the prior approval of the municipality's voters. However, not all contracts requiring multi-year municipal expenditures are prohibited as "debts" in the constitutional sense. The purpose of this constitutional restriction on municipal spending is to reduce the likelihood of bankruptcy of local governments and "the ruin of the property owners" while still allowing a municipality "reasonable leeway, so that it will not be unduly hampered in providing for the needs of the community." State Highway Commission v. City of Aztec, 77 N.M. 524, 527, 424 P.2d 801, 803 (1967) (quoting Lanigan v. Town of Gallup, 17 N.M. 627, 131 P.997 (1913)).

APOA agrees that one local governing body may not bind their successors in office. However, the City's argument misses the difference between committing to spend existing tax revenues in the future versus committing to spend future tax revenues. An expenditure falls within the terms of the constitutional debt restriction when a municipality enters any agreement where it "obligates itself to pay out of tax revenues, and commits itself beyond revenues for the current fiscal year." Hamilton Test Systems, Inc. v. City of Albuquerque, 103 N.M. 226, 228,

704 P.2d 1102, 1104 (1985). Therefore, a municipality has not created debt in the constitutional sense when it appropriates the entire amount needed to satisfy an agreement and has the revenue available to do so at the time the municipality enters into it.[1] But an agreement cannot meet these two conditions unless a municipality first knows the amount of the total future expenditure. Hence, the N.M. Supreme Court has also held that a multi-year municipal expenditure must be fixed, definite, and certain at the time it is incurred. Henning v. Town of Hot Springs, 44 N.M. 321, 102 P.2d 25, 30 (1939)(" We are satisfied that said Sec. 12 of Art. 9 inhibits cities, towns and villages from entering into contracts which would, or might, create obligations resting upon future contingencies, and the amount of which is not fixed, definite and certain at the time the contract is made;").

The economic terms in the CBA are fixed and definite as they were laid out as specific amounts rather than contingent upon future circumstances. The Executive Communication from the Mayor to the City Council describes the wage increases in detail. [RP 11].

As a result, there are two questions of fact left for the District Court to answer on remand: 1) whether the City appropriated funds to cover all three years of the economic terms of the CBA in 2008, and 2) whether the funds appropriated

[1] Alternatively but not applicable here, an agreement that sets out and specifies sources other than general revenues for payment of the obligations does not violate the prohibition on constitutional debt either. State Office Bldg. Comm'n v. Trujillo, 46 N.M. 29, 120 P.2d 434 (1941) (explaining the "special fund doctrine.").

by the City in 2008 were actually available. As described in APOA's Brief in Chief, the City's LMRO already lays out the specific steps required for the City Council and Mayor to approve a multi-year CBA. [BIC 7-8]. APOA alleges in its complaint that the City appropriated revenue to cover the entirety of the expenditures found in the CBA in 2008 when they approved the contract in the manner described in ROA 1994, §3-2-18.

APOA does not dispute that expenditures of public funds are accomplished through the operation of the annual budget and appropriation process. An elected legislative body serving in a particular year, cannot create budgets for future years and cannot appropriate future tax revenues that they expect future elected legislative bodies to collect. However, this assertion and the authority cited by the City do not support the conclusion that a legislative body may not, through the annual budget and appropriation processes, commit *existing* revenues to future expenditures through the annual budget and appropriations processes. By logical extension, the current City Council may not reach back in time to re-appropriate past tax revenues that were already committed to future purposes. The City's failure to draw a line or limit their argument leads to the implication that municipalities are prohibited from ever committing to multi-year expenditures. This does not comport with reality. Again, as described in APOA's Brief in Chief [BIC 10], Section 3-2-18 of the City's Labor-Management Relations Ordinance

describes the steps the executive and legislative arms of the City must take to approve a CBA that includes multi-year expenditures. The City offers no alternative analysis for how an appropriation occurs.

Therefore, the issue of constitutionality of the CBA, like the issues of whether the CBA can be enforced under PEBA and whether the CBA violates the Bateman Act, should be sent back for fact finding with APOA bearing the burden of proving that an appropriation occurred and the City then bearing the burden of proving that the funds appropriated by the City Council in 2008 were not available. The record below reveals that the City has not even attempted to show that the funds were unavailable in 2008. Since APOA has presented prima facie evidence to meet the steps required for an appropriation, the availability of the funds in 2008 is still in dispute and so summary judgment is improper and the district court's grant of the City's Motion for Summary Judgment should be reversed.

II. UNLESS THE RE-OPENING LANGUAGE FOUND IN SECTION 3-2-18 OF THE LMRO REQUIRES THE PARTIES TO RELY UPON NEGOTIATION AND IMPASSE PROCEDURES WHEN PROPOSING CHANGES TO A CBA, THIS SECTION OF THE LMRO CANNOT QUALIFY FOR GRANDFATHER STATUS.

The City, not APOA, bears the burden of proving that a particular provision of its local ordinance should be grandfathered in place of PEBA. PEBA's grandfather clause applies to specific provisions of a local ordinance "rather than the policy as a whole." City of Deming v. Deming Firefighters Local 4521, 2007-

NMCA-069, ¶ 9, 141 N.M. 686, 160 P.3d 595 (citing Regents v. NM Federation of Teachers, 1998-NMSC-020, ¶ 35, 125 N.M. 401, 926 P.2d 1236). Even then, a provision will be grandfathered in place of a section of PEBA only if the local policy or ordinance protected employees collective bargaining rights. Id.

Section 3-2-18 of the LMRO requires that multi-year CBAs "shall contain re-opening language for the economic terms." ROA §3-2-18 (2002). Without expressly saying so, the City's conduct and arguments reveal that the City is under the impression that this ordinance language gives the City the power to unilaterally change mandatory bargaining terms, in this case, wages, at will without relying upon the negotiation and impasse procedures outlined in either PEBA or its own LMRO. Such a construction of this re-opening provision would disqualify this section of the LMRO from grandfather status as it would disregard the bargaining unit's basic collective bargaining rights under PEBA. An ordinance that converts mandatory bargaining terms into mere aspirations flies in the face of the entire purpose of PEBA.

Even under the LMRO, the City may only terminate an existing CBA if the local board determines that a "strike" has occurred. Specifically, Section 3-2-11(A) allows the Mayor to terminate the CBA, order decertification of the organization, inform the organization that it no longer represents the employees of that bargaining unit, and advise the employees that they will not be privileged to

bargain with the city government through a collective bargaining agent for at least 12 months. ROA, §3-2-11(A)(2001). Ultimately, the City advocates for a world where a public employer may abide by the terms of a negotiated CBA or not, from year to year, completely at the employers discretion while employees are required to continue to meet the negotiated terms or risk being found to have gone on "strike" thereby losing all of their collective bargaining rights for a year. Surely the N.M. Legislature did not enact PEBA or its grandfather clause as a thinly disguised set of handcuffs designed to trick public employees into bargaining away and offering concessions on work conditions with no consideration required in return from their employers.

CONCLUSION

As a matter of law, APOA has presented evidence that the City met all the steps necessary to appropriate funds to cover the entire three-year CBA the year it was entered into and approved. Whether the City had funds available to cover the entire three years of wage increases and benefits found in the CBA at the time it was entered into in 2008 remains a disputed questions of fact that the City bears the burden of proving. Therefore, APOA respectfully requests that this Court reverse the lower Court's decision to grant the City's Motion for Summary Judgment and remand for further proceedings.

Respectfully submitted,

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