IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

Plaintiffs/Appellants/Cross-Appellees,

v.

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

Defendant/Appellees/Cross-Appellants.

Ct. App. No. 31,632
(Consolidated with No. 31,606)

DEFENDANTS/CROSS-APPELLANTS' BRIEF-IN-CHIEF

On appeal from Second Judicial District Court, Bernalillo County
The Honorable Clay Campbell presiding
No. CV- 2010-08640

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I. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

This appeal arises from the district court's order granting injunctive relief against Defendants/Cross-Appellants City of Albuquerque, Albuquerque Police Department, and Mayor Richard Berry (collectively the "City") on Plaintiffs/Cross-Appellees Albuquerque Police Officers' Association, Joey Sigala, Felipe Garcia, Tom Novicki, and Matt Fisher's (collectively "APOA") Verified Petition for Preliminary Injunction. [RP 362-83, 436-39] APOA sought an injunction requiring the City, pursuant to provisions in the parties' multi-year Collective Bargaining Agreement ("CBA") executed in 2008, to continue providing paid leave for police department personnel to conduct APOA business and negotiations during the 40-hour work week on City time after the CBA expired on June 30, 2011. [RP 362-65][1]

APOA claimed that NMSA 1978, § 10-7E-18(D) (2003), the "evergreen" clause of the Public Employee Bargaining Act ("PEBA"), governed its CBA with

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[1] APOA originally initiated its action by filing a complaint against the City claiming that it breached the 2008 CBA when the City Council chose not to appropriate the funds needed to implement the CBA's proposed wage increases for FY 2011. [RP 1-13] The district court granted summary judgment in the City's favor and dismissed the original complaint with prejudice. [TR-II, 43:15-21; RP 434-35] The summary judgment decision is the subject of Ct. App. No. 31,606, which is consolidated with this cross-appeal. APOA filed the Verified Petition for Preliminary Injunction in that same district court case before the summary judgment dismissal order was entered. [RP 362, 434] Because APOA's original action had not yet been dismissed, the district court treated APOA's petition as an amendment to APOA's complaint so the court could address the petition on its merits. [TR-III, 6:23-7:10]

the City and required that contract terms remain in force and effect after June 30, 2011, until a new CBA was executed. [RP 364] APOA further alleged the City's actions, expressed by a notice that, once the existing CBA expired, it would discontinue paying City wages to police department personnel while conducting APOA business and negotiations on City time, constitute a prohibited practice under the City's Labor Management Relations Ordinance ("LMRO") and should be enjoined. Id.

The City opposed APOA's petition for injunctive relief, arguing that APOA had failed to make the necessary showing to justify granting the equitable relief requested. [RP 388-414] The City further demonstrated that an injunction was improper because the City's LMRO provisions regarding impasse procedures are "grandfathered" under the PEBA, § 10-7E-26(A) (2003), and do not provide for CBAs to be "evergreened" once they expire. Id. Finally, the City contended that, compelling the City to economically subsidize APOA violated City ordinance, state law, and was unconstitutional. Id. Consequently, applying the PEBA's "evergreen" clause to compel the City to continue the arrangement of economically subsidizing APOA past the expiration of the 2008 CBA forces the City to violate law. Id.

After reviewing all the parties' submissions and receiving oral argument,[2] the district court determined that APOA had established all the elements necessary to justify granting its petition for injunctive relief. [TP-III, 41:2-17; 43:16-21] The district court rejected the City's arguments that granting such relief violated various laws. An order granting a preliminary and permanent injunction against the City was entered on August 26, 2011, and the City filed a timely notice of appeal. [RP 436-39, 478-83]

II. SUMMARY OF RELEVANT FACTS AND PROCEEDINGS

In 2008, the City and APOA executed a CBA running from July 1, 2008 through June 30, 2011, for Fiscal Years ("FY") 2009, 2010, and 2011. [RP 5-6] The CBA contained two provisions addressing leave and pay for APOA's President and Vice President while performing APOA business on City time:

> 1.3.1 Association Representation
>
> > 1.3.1.1 The Association's President and Vice-President will be assigned to a day shift administrative position as determined by the Chief of Police on the basis of the education and expertise. The Association Representative will be allowed reasonable time during working hours to handle grievances and application of this Agreement except any political activity or civil proceeding beyond the Personnel Board, Labor Board or the internal department grievance process.

[2] The district court also consolidated the hearing on APOA's petition with a similar petition for injunctive relief filed by AFSCME, another union seeking to "evergreen" its expired CBA with the City. [TR-III, 4:3-5:1] APOA raised its own arguments at hearing and joined in those made by AFSCME's counsel. [TR-III, 24:25-32:3]

> 1.3.1.2 The Association's President and Vice-President will be allowed leave with pay to assist with the resolution of Labor/Management issues. ...

[RP 367]

APOA's CBA with the City expired on June 30, 2011. [RP 5] On July 1, 2011, the City advised APOA that, effective immediately, the City was discontinuing the practice of paying City employees for conducting APOA business on City time, as previously provided under the CBA. [RP 368] The City considered the practice to be illegal under the City's LMRO, state law, and the state constitution, as well as poor public policy. Id. The City advised that it would release APOA's bargaining team members on leave without pay to attend negotiations and impasse procedures pursuant to § 3-2-13 of the LMRO, and/or offer other arrangements to accommodate efficient management/labor relations. Id.

On July 14, 2011, APOA filed a Verified Petition for Preliminary Injunction seeking to enjoin the City from discontinuing the practice of paying APOA's President and Vice President City wages while engaged in APOA business on City time. [RP 362-66] APOA contended that the PEBA's "evergreen" clause mandated that existing working conditions under Section 1.3.1 of the expired CBA remain in effect during negotiations until a new CBA is executed. [RP 364-65] APOA also asserted that the City's unilateral action of discontinuing the paid leave

for APOA officials as provided by Section 1.3.1 of the 2008 CBA was a prohibited practice under the City's LMRO. [RP 364]

APOA supported its petition with the Affidavit of Petitioner Joey Sigala. [RP 369-70] Mr. Sigala is APOA's President. [RP 369] He attested that, since his election as APOA's President, he has worked "more than forty (40) hours a week on behalf of the APOA, without restriction," as permitted under Section 1.3.1 of APOA's CBA with the City. Id. Mr. Sigala stated his belief that APOA's Vice President has also enjoyed a similar work schedule on APOA's behalf for nearly four years. Id. According to Mr. Sigala, the City's decision to discontinue paying City wages for time spent on APOA business after July 1, 2011, would "prohibit [him] from doing [his] job as provided for under the CBA and past practice." [RP 370][3] At hearing, the APOA also argued that requiring it to pay the estimated costs for paying its representatives while conducting APOA business on City time would be a hardship. [TR-III, 16:22-24; 22:15-23]

The City defended against APOA's petition by showing that its decision to discontinue subsidizing APOA by paying union representatives their regular City

[3] APOA also attached to its petition copies of two prior district court orders from similar cases between other unions and the City. [RP 371-83] Both involved "evergreen" issues like that being argued by APOA. Id. The summary judgment entered in the City's favor in one of those matters is presently on appeal in Ct. App. No. 30,927. The order granting injunctive relief against the City from the other matter is not on appeal.

employee wages while performing APOA business on City time was supported by City ordinances and the City's powers as a "home rule municipality." [RP 388-414; TR-III, 32:5-51:17] The City further showed that, because § 3-2-14 of its LMRO regarding impasse procedures was entitled to "grandfather" status under the PEBA, the City was not required to "evergreen" expired CBAs as mandated by § 10-7E-18(D) of the PEBA. Id. The City's argument and authorities also demonstrated that "evergreening" the expired CBA's economic provision, and requiring the City to pay the costs associated with APOA representatives performing their services for the union on City time, violated statutory and constitutional restraints regarding municipal debt and the City's appropriation authorities, as well as the New Mexico Constitution's anti-donation clause. Id.

The district court rejected the City's legal defenses. [RP 437-38] The district court also reasoned that applying § 10-7E-18(D), the PEBA's "evergreen" clause, to the City's expired CBA with APOA did not disturb the grandfather status of the City's LMRO because the district court construed the LMRO's general purposes, as stated in ROA § 3-2-2, to require the City to comply with § 10-7E-18(D) of the PEBA. [RP 437] The district court enjoined the City from discontinuing pay with leave for City employees conducting APOA business on City time, and further ordered the City to reimburse employees affected by its July 1, 2011, policy by reconstituting leave or pay. [RP 438-39]

III. ARGUMENT

A. The District Court Misapprehended And Misapplied Governing Law In Granting APOA's Request For Injunctive Relief

1. Standards governing review.

A district court's grant of injunctive relief is reviewed for abuse of discretion. Aragon v. Brown, 2003-NMCA-126, ¶ 9, 134 N.M. 459, 78 P.3d 913. However, the district court abuses its discretion "when it applies an incorrect standard, incorrect substantive law, or its discretionary decision is premised on a misapprehension of the law." Id. When the injunctive relief rests on resolving a question of law, the question of law is reviewed de novo. Id.

2. The City was relieved of its contractual obligations to pay City employees for conducting APOA business on City time after the CBA expired, and was authorized to do so by City ordinances and the City's "home rule" powers.

These issues were preserved in the City of Albuquerque's Memorandum of Law in opposition to APOA's Verified Petition for Preliminary Injunction and at the July 29, 2011 hearing before the district court. [RP 393-400, 408-09, 413; TR-III, 41:19-42:9]

APOA's CBA with the City expired under its own terms on June 30, 2011. [RP 5] As of July 1, 2011, the City was simply no longer contractually obligated to abide by the expired CBA's terms – including Section 1.3.1, under which the

City previously paid City wages to police department personnel while performing APOA business on City time. [RP 368]

The City's decision not to continue subsidizing APOA in this manner after the CBA expired was further supported by the City's LMRO, which provided that "[m]embers of the employee organization negotiation team will be released from their normal duties *without pay* to participate in negotiations." Albuquerque, N.M., Revised Ordinances 1994 ("ROA"), § 3-2-13(C)(7) (2001) (emphasis added).[4] In addition, although the City's LMRO provides for mediation and voluntary final offer arbitration impasse procedures in negotiating a CBA, the LMRO does not require that the terms of an expired CBA "evergreen" until a new CBA is executed. See ROA, § 3-2-14 (2001). Thus, "evergreening" Section 1.3.1 of APOA's expired CBA not only causes the City to violate its own ordinance, but also imposes a condition on the City that is not required by the express terms of its LMRO impasse provision.

Enjoining the City against complying with its own LMRO also improperly infringes on its powers as a home rule municipality. See Apodaca v. Wilson, 86 N.M. 516, 519-20, 525 P.2d 876, 879-80 (1974), modified on other grounds by State ex rel. Haynes v. Bonem, 114 N.M. 627, 845 P.2d 150 (1992) (recognizing Albuquerque's status as a home rule municipality). Under the state Constitution,

[4] ROAs are available in full online at http://www.amlegal.com/albuquerque_nm/. The City's LMRO is found in its entirety at ROA, §§ 3-2-1 through 3-2-18.

the City enjoys a degree of governmental autonomy that is not available to other political subdivisions. A municipality that adopts a home rule charter "may exercise all legislative powers and perform all functions not expressly denied by general law or charter." N.M. Const., art. X, § 6(D). "[H]ome rule municipalities do not look to the legislature for a grant of power to legislate, but only look to statutes to determine if any express limitations have been placed on that power." State ex rel. Haynes v. Bonem, 114 N.M. 627, 631, 845 P.2d 150, 154 (1992).

Under New Mexico's home rule amendment, "[a] liberal construction shall be given to the powers of municipalities." Id. (quoting N.M. Const., art. X, § 6(E)). This is because "[t]he purpose of municipal home rule is to enable municipalities to conduct their own business and control their own affairs, to the fullest possible extent, in their own way." Id. (internal quotation marks & citations omitted).

Years before the advent of the PEBA, the City, acting under its home rule authority, empowered its employees to organize and bargain collectively pursuant to the LMRO. Within that framework, it adopted an ordinance releasing members of an employee organization negotiation team from their normal duties to participate in collective bargaining negotiations. ROA, § 3-2-13(C)(7). No statute requires that the City also pay such employees their regular City wages while engaged in negotiating activities on behalf of the union that they represent. The

district court's injunction order contravened the express terms of § 3-2-13(C)(7) of the City's LMRO.

The district court also improperly expanded the impasse procedures under the City's LMRO by injecting into that system the requirement that expired CBAs automatically "evergreen" until new CBAs are executed. In doing so, the district court not only gave no deference to the City's home rule powers, but also undermined the protections afforded the LMRO by virtue of its "grandfathered" status under the PEBA.

B. The District Court Erred In Concluding That The City's LMRO Requires The City To Abide By The PEBA's "Evergreen" Provision And, By Doing So, Vitiated The Protections Afforded The City's LMRO Under The PEBA's Grandfather Statute

The City opposed APOA's petition on these grounds in the City of Albuquerque's Memorandum of Law in opposition to APOA's Verified Petition for Preliminary Injunction and at the hearing on APOA's petition. [RP 393-400; TR-III, 34:14-21; 41:5-42:9]

The district court cited § 3-2-2 of the City's LMRO to support the court's conclusion that the LMRO, itself, requires the City to comply with the PEBA's "evergreen" provision. [TR-III, 61:3-22] Section 3-2-2 describes the purposes of the LMRO to include: (1) allowing city employees to organize and bargain collectively with the city government; (2) promoting harmonious and cooperative relationships between the parties; and (3) to protect the public interest by assuring

the orderly and uninterrupted operations and functions of the city government. ROA, § 3-2-2 (1977).

The PEBA's stated purposes mirror those of the City's LMRO. See NMSA 1978, § 10-7E-2 (2003) (the PEBA's purpose is to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employees and their employers, and to protect the public interest by ensuring the orderly operation and functioning of the state and its political subdivisions). The district court reasoned that, because the LMRO's stated purposes are virtually identical to the PEBA's, the LMRO's purposes would be served, and its grandfathered status not harmed, by requiring the City to comply with the PEBA's "evergreen" clause. [TR-61:3-22; RP 437] The district court's analysis applied the wrong test and led to a result which conflicts with well-established law.

Because some public employers had collective bargaining systems in place before the PEBA was enacted, the PEBA includes a grandfather clause which permits a public employer to preserve its collective bargaining system under certain circumstances. City of Albuquerque v. Montoya, 2012-NMSC-007, ¶ 9, 274 P.3d 108. For systems created before 1991 – like the City's LMRO – the PEBA's grandfather clause preserves an existing collective bargaining system as long as the "system of provisions and procedures permit[s] employees to form, join

or assist a labor organization for the purpose of bargaining collectively through exclusive representatives." Id. ¶ 10 (citing NMSA 1978, § 10-7E-26(A)); see also ROA, § 3-2-2 (reflecting that the City's LMRO was adopted in 1974).

This test 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" for an ordinance to enjoy grandfathered status. City of Deming v. Deming Firefighters Local 4521, 2007-NMCA-069, ¶ 20, 141 N.M. 686, 160 P.3d 595. 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." Id. ¶ 21 (citing NMSA 1978, § 10-7E-4(F) (2003)). The PEBA's definition of "collective bargaining" also does not contain any qualitative requirement or measure of effectiveness, and does not require any specific impasse provision or procedure. Id.; see Montoya, 2012-NMSC-007, ¶¶ 13-15, 21-22 (holding that the City's LMRO provision, which provided a different process than the PEBA for addressing board vacancies due to a member's absence as opposed to an inability to complete their term, was entitled to grandfather status under § 10-7E-26(A) of the PEBA).

"Grandfather clauses are statutory provisions that 'delineate a special exception from the general requirements of a statute.'" Montoya, 2012-NMSC-

007, ¶ 11 (quoted authority omitted). "The effect of these provisions is to narrow, qualify, or otherwise restrain the scope of the statute. They remove from the statute's reach a class that would otherwise be encompassed by its language." Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers, 1998-NMSC-020, ¶ 34, 125 N.M. 401, 962 P.2d 1236.

A grandfather clause essentially "preserves something old, while the remainder of the law which it is a part institutes something new." Id. ¶ 25. Its intent is to save something that would otherwise be lost. Id. Grandfather clauses "do not usually create rights or requirements, but rather prevent an entity from being altered or imposed upon by a new statute." Id. As a result, "[a] grandfather clause may have the effect of relieving an entity from submitting to new restrictions, or the clause may have the reverse effect of permitting the entity to avoid broadening the scope of its activities." Id.

As noted by the New Mexico Supreme Court, grandfather clauses are considered necessary because they prevent harm:

> New statutory restrictions or requirements can, in many circumstances, impose hardships upon enterprises whose activities were well established prior to the law's enactment. By including grandfather provisions into a new law, the Legislature recognizes that there are classes of entities who could be damaged by the blanket and unrestricted application of new rules.

Regents of the Univ. of N.M., 1998-NMSC-020, ¶ 26.

Whether a grandfather clause applies is a question of statutory construction which is reviewed de novo. Montoya, 2012-NMSC-007, ¶ 12. In construing a statute, the court's charge is to determine and give effect to the intent of the Legislature. Id. Legislative intent is discerned by first looking to "the plain language of the statute, giving words their ordinary meaning, unless the Legislature indicates a different one was intended." Id. The court should not depart from the plain wording unless necessary "to resolve an ambiguity, correct a mistake or an absurdity that the Legislature could not have intended, or to deal with an irreconcilable conflict among statutory provisions." Regents of the Univ. of N.M., 1998-NMSC-020, ¶ 28. Neither should the court "read into a statute or ordinance language which is not there, particularly if it makes sense as written." Id. (quoted authority omitted). "[A] grandfather clause will be construed to include no case not clearly within the purpose, letter, or express terms, of the clause." Id. ¶ 27.

The district court clearly departed from these governing principles when it simply inserted the PEBA's "evergreen" clause into the City's LMRO because the statute and ordinance share similar aspirational goals. By doing so, the district court also erroneously deprived the LMRO impasse provision of the grandfathered status to which it is entitled – essentially rewriting ROA, § 3-2-14 to provide the same system as that provided by the PEBA contrary to the purposes served by grandfather statutes.

Under the district court's logic, whenever a provision in the PEBA provides something more or different in kind than a corresponding LMRO provision, the shared general purposes of both systems supports inserting language into the LMRO so that it matches the PEBA. However, as noted by this Court in City of Deming, construing § 10-7E-26(A) of the PEBA's grandfather clause to only protect ordinances that adopt the *same system* of provisions and procedures as those in the PEBA renders the grandfather clause meaningless. 2007-NMCA-069, ¶ 23 (emphasis added).

In City of Deming, an impasse ordinance providing for mediation and advisory arbitration was held to be grandfathered under § 10-7E-26(A) of the PEBA even though the PEBA provides for final, binding arbitration. 2007-NMCA-069, ¶¶ 3, 21-24. The court noted that, when the Legislature reenacted the PEBA with its new impasse resolution procedure in 2003, it did not change the grandfather clause to require any different impasse resolution procedure, or amend the definition of collective bargaining. Id. ¶ 22. The court concluded that, if the Legislature had intended to change the effect of those PEBA provisions, it would have amended them. Id. Under the circumstances, City of Deming found the city's impasse ordinance was entitled to grandfathered status, reasoning that the court would not be giving effect to, or embracing legislative intent, if it added language to a statute that the legislature did not adopt. Id. ¶ 23.

The reasoning and holding in City of Deming support grandfather status for the City's LMRO. ROA, § 3-2-14 provides for mediation and voluntary binding arbitration. The holding in City of Deming makes clear that § 3-2-14 of the LMRO need not provide the same procedures as § 10-7E-18 of the PEBA to be grandfathered. Even though the "evergreen" clause was not directly considered in City of Deming, the holding establishes that the LMRO's mediation and arbitration procedures meet the requirement of 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." See Montoya, 2012-NMSC-007, ¶ 10.

Albuquerque's LMRO "system" permits employees to form, join, and assist a union for the purpose of bargaining collectively through exclusive representatives. See ROA, § 3-2-2(A) (1977) (allowing city employees to organize and bargain collectively with the city government); ROA, § 3-2-13 (2001) (establishing negotiation procedures); ROA, § 3-2-14 (2001) (providing procedures for addressing an impasse in negotiations). Nothing more is required for grandfathered status under City of Deming and Montoya. The presence of an "evergreen" provision in the PEBA and the lack of one in the City's LMRO is an issue of *quality* that does not affect the LMRO's entitlement to grandfathered status. See City of Deming, 2007-NMCA-069, ¶ 20 (stating that the test for

grandfathered status does not set any minimal requirement regarding the quality of the system or any qualitative measure as to the effectiveness of the collective bargaining).

The PEBA does not "require any specific impasse provision" and the Legislature did not intend for a court to "ascertain the quality of collective bargaining provisions or procedures in order to apply the grandfather clause." Id. ¶¶ 20-21. The absence of an "evergreen" provision in the LMRO in no way prevents City employees from forming, joining, or assisting a labor organization for the purpose of collective bargaining under the PEBA, the LMRO, or the holdings in City of Deming and Montoya – and the district court erred in concluding otherwise.

C. "Evergreening" Section 1.3.1 Of APOA's CBA With The City Violates The PEBA, The Bateman Act, The State Constitution's Restriction On Municipal Debt, And The Constitution's Anti-Donation Clause

The City opposed APOA's petition on these grounds in the City of Albuquerque's Memorandum of Law in opposition to APOA's Verified Petition for Preliminary Injunction and at the hearing for injunctive relief. [RP 402-09; TR-III, 36:24-40:24, 43:18-46:10]

1. The PEBA's "evergreen" clause does not extend terms of an expired CBA that impact a municipality's appropriation authority.

The PEBA provides that an impasse resolution or an agreement provision in a CBA "that requires the expenditure of public funds shall be contingent upon the specific appropriation of funds by the appropriate governing body." NMSA 1978, § 10-7E-17(E) (2003); see also Int'l Ass'n of Firefighters v. City of Carlsbad, 2009-NMCA-097, ¶ 13, 147 N.M. 6, 216 P.3d 256 (relying on § 10-7E-17(E) in determining that, in enacting the PEBA, the Legislature "continued to leave to governmental entities the ability to manage and appropriate their public funds"). The PEBA's "evergreen" clause provides that, "[i]n 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) (2003). To construe these PEBA provisions harmoniously with each other, one must conclude that the PEBA's "evergreen" clause cannot be implemented in a manner that affects a governmental entity's ability to manage and appropriate its public funds. Thus, even if § 3-2-14 of the City's LMRO were not entitled to grandfather status under § 10-7E-26(A) of the PEBA, the PEBA's "evergreen" clause would not operate to extend the economic benefit conferred by Section 1.3.1 of APOA's expired CBA.

Any decision regarding economic costs of a CBA necessarily implicates the City Council's management powers, fiscal responsibilities, and appropriation authority. The City Council is statutorily vested with the power to "manage and control the finances . . . belonging to the municipality" and to "prescribe the compensation . . . to be paid municipal officers and employees." NMSA 1978, § 3-12-3(A)(3) (1967); see also Albuquerque Charter, Art. IV, Section 10 (providing that the City Council elected by the people will "[r]eview, approve or amend and approve all budgets of the city"). Related City ordinances, state statutes, and constitutional mandates require that the City Council exercise its fiscal duties responsibly while managing and appropriating the public funds in its care.

ROA § 2-11-12 prescribes that the City "shall not expend any public funds . . . unless the expenditure is authorized in the budget and is made or encumbered in the fiscal year covered by the budget." ROA, § 2-11-12 (1995). Should the City Council amend the budget during the fiscal year, such amendment may not result in total expenditures that exceed the resources available for the fiscal year to which the budget is applicable. ROA, § 2-11-15 (2001). The LMRO also recognizes that appropriations to cover the costs of a multi-year CBA are subject to appropriations by the City Council consistent with its annual budgeting procedures. ROA, § 3-2-18 (2002).

Section 1.3.1 of APOA's expired CBA is an economic term which, when "evergreened," necessarily impacts the City Council's appropriation powers. APOA's President, Joey Sigala, attested that he spends more than forty hours a week on APOA business on City time without restriction. [RP 369] Mr. Sigala believes that APOA's Vice President spends a similar amount of time on APOA business on City time. Id. Pursuant to Section 1.3.1 of the expired CBA, both individuals are assigned to administrative positions in the City police department. [RP 367]

The fact that two full-time City employees are conducting APOA business during the hours that they are paid to be performing duties for the City means they are not accomplishing the City's work for which they are responsible. Other resources must necessarily be allocated to hire individuals to perform the functions unattended to by Mr. Sigala and APOA's Vice President. Under the circumstances, it is reasonable to presume that the City must hire four police officers for these positions to do the work of two given that the individuals to whom they are assigned spend their entire 40-hour week working for APOA. See RP 370 (Sigala testimony describing the work he performs for the union, as permitted by Section 1.3.1 of the CBA, as "my job").

At hearing, the unions argued that it would be hardship for the unions to collect dues from their membership to cover the estimated hundreds of thousands

of dollars in costs to pay union officers for time spent conducting union business. [TR-III, 16:22-24; 22:15-23] The district court recognized the economic value enjoyed by APOA under Section 1.3.1 of the CBA in ordering the City to reimburse employees affected by its July 1, 2011, policy by either reconstituting leave or "with pay." [RP 438-39] Even if otherwise permissible – and it is not because the PEBA does not "evergreen" economic terms of an expired CBA – the district erred in relying on the "evergreen" clause in ordering the City to continue paying City employees to conduct APOA business on City time. The grandfathered status of the City's LMRO not only protects it against such conduct by the district court – the plain terms of the PEBA do as well.

2. "Evergreening" Section 1.3.1 of APOA's expired CBA commits future City funds in a manner that violates the Bateman Act and constitutional restrictions on municipal debt.

The PEBA acknowledges that it shall not supersede the provisions of the Bateman Act, including § 6-6-11. NMSA 1978, § 10-7E-3 (2003). The Bateman Act limits a local government's yearly expenditures to its annual income:

> It is unlawful for any . . . municipal governing body . . . for any purpose whatever to become indebted or contract 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, and any indebtedness for any current year which is not paid and cannot be paid, as above provided for, is void. Any officer of any . . . municipality . . . who shall issue any certificate or other form of approval of indebtedness separate from the account filed in the first place or who shall at any time use the fund belonging to any current year for any other purpose

> than paying the current expenses of that year, or who shall violate any of the provisions of this section, is guilty of a misdemeanor.

NMSA 1978, § 6-6-11 (1968). The Bateman Act requires municipalities to "live within their annual incomes." San Juan Water Comm'n v. Taxpayers and Water Users of San Juan Cnty., 116 N.M. 106, 111, 860 P.2d 748, 753 (1993) (cited authority omitted). The PEBA's deference to a municipality's annual appropriation powers is embodied not only in § 10-7E-3's express reference to the Bateman Act, but also in the PEBA's mandate that any economic items in a CBA are contingent on appropriations by the governing body. See NMSA 1978, § 10-7E-17(E).

Article IX, Section 12 of the New Mexico Constitution is another restriction on municipal indebtedness affected by "evergreening" a CBA term that impacts a city's appropriation powers. The provision prohibits a municipality from entering into an agreement that obligates it to pay out of tax revenues, and commits itself beyond revenues for the current fiscal year, unless the municipality obtains voter approval. Hamilton Test Sys., Inc. v. City of Albuquerque, 103 N.M. 226, 227-229, 704 P.2d 1102, 1103-1105 (1985). "[A] broad interpretation of the debt limitation has long been favored in New Mexico." Montano v. Gabaldon, 108 N.M. 94, 95, 766 P.2d 1328, 1329 (1989).

In State Office Bldg. Comm'n v. Trujillo, 46 N.M. 29, 120 P.2d 434 (1941), the New Mexico Supreme Court described the breadth of the constitutional debt limitation:

> *Only* where it can be clearly *demonstrated* beyond a reasonable doubt that a contemplated scheme of embarkation upon new capital ventures will *not immediately or mediately, presently or infuturo, directly or contingently*, operate to impose an added burden on the taxing power, or have the effect of impairing the public credit in future, will the consummation of such a debt incurring scheme be held authorized, absent the approving voice of the freeholders . . . .

Id. at 45, 120 P.2d at 444 (emphasis in original). "The idea of 'debt' in the constitutional sense is that an obligation has arisen out of contract, express or implied, which entitles the creditor unconditionally to receive from the debtor a sum of money, which the debtor is under a legal, equitable, or moral duty to pay without regard to any future contingency." Seward v. Bowers, 37 N.M. 385, 386, 24 P.2d 253 (1933); see also Montano, 108 N.M. at 95-96, 766 P.2d at 1329-30 ("[a]n agreement that commits the [governing body] to make payments out of general revenues in future fiscal years, without voter approval, violates the New Mexico Constitution even if that obligation is merely an 'equitable or moral'" or "contingent" duty) (cited authorities omitted).

In Hamilton Test Sys., Inc., the court rejected the plaintiff's argument that no unconstitutional "debt" arose from a five-year services contract to operate a motor vehicle inspections program because the city was obligated to pay each year

only for services the plaintiff had performed that year. The court reasoned that the plaintiff's proposed "service contract" exception was "essentially a device to evade constitutional debt restrictions, and it would allow just what our constitutional debt restriction is meant to prohibit: the burdening of future taxpayers, without the prior approval of the municipality's voters." 103 N.M. at 229, 704 P.2d at 1105.

State Office Bldg. Comm'n invalidated a twenty-five year lease agreement for office space as creating an unconstitutional debt. The lease was for a term of twenty-five years, and could be terminated by the state on showing that equally desirable space in a privately owned building was available on more favorable terms. 46 N.M. at 32-33, 120 P.2d at 435-36. State Office Bldg. Comm'n reasoned the lease could not be construed as relating only to current expense because it necessarily infringed on future appropriating authority:

> Subject only to the one condition set out in said section, the state would be *obliged* to continue payment of rentals until the indebtedness of the Commission was satisfied. This would mean, so long as the agencies did not recede from the lease agreements under the one specified condition, that future legislatures would be bound to provide appropriations for payment of rentals. Such would not be within the conception of expense under a lease as current expense; and a legislature cannot tie the hands of another legislature.

46 N.M. at 52, 120 P.2d at 448 (emphasis in original); see also Naranjo v. Cnty. of Rio Arriba, 862 F. Supp. 328, 331-32 (D.N.M. 1994) (multi-year lease that purported to bind future county commissions to appropriate funds created an unconstitutional debt) (citing N.M. Att'y Gen. Op. No. 88-67 at 5-6 (October 31,

1988) (noting majority common law rule that presently constituted local governing bodies cannot bind their successors; if a contract addresses legislative or governmental functions or individual discretionary matters, a governmental body cannot bind a future body unless a statute specifically authorizes it to do so)); Borde v. Bd. of Cnty. Comm'ns of Luna Cnty., Mem. Op. and Order, No. CIV 09-1185 WDS/GBW, at 8 (D.N.M. Sept. 13, 2011) (multi-year employment contract was unconstitutional even if monies were budgeted in one year for all three years because the effect was to obligate public monies to be paid in future years for future services).

Under circumstances similar to the present case, the Oklahoma Supreme Court found an "evergreen" clause unconstitutional in City of Del City v. Fraternal Order of Police, Lodge No. 114, 869 P.2d 309 (Okla. 1993). A provision in Oklahoma's constitution provided that no city "shall be allowed to become indebted, in any manner, or for any purpose to an amount exceeding, in any year the income and revenue provided for such year" without voter assent. Id. at 311. "The purpose behind [Oklahoma's] constitutional provision is to force cities and municipalities to operate on a cash basis, and to prevent indebtedness extending beyond one year." Id.

At issue in City of Del City was an "evergreen" clause in the Oklahoma Fire and Police Arbitration Act that would continue a collective bargaining agreement

with the city beyond its expiration date, and into the future until a new agreement was reached. Id. at 310. The court determined that the bargaining agreement was an obligation incurred by the city to pay police and fire personnel specific wages and benefits. Id. at 312. The "evergreen" statute was found to be unconstitutional for requiring municipalities to perpetrate contracts beyond the constitutionally-permitted one year. Id. at 318. In so holding, the court noted that "[a] legislative act cannot trump a constitutional provision and create municipal liability that necessarily requires unconstitutional funding practices," regardless of the merit of the policies the act was intended to serve. Id.

"Evergreening" Section 1.3.1 of APOA's expired CBA – or any other provision the implicates annual appropriations – unconstitutionally obliges how the City Council appropriates funds in the future, and perpetuates the City's CBA with APOA beyond its expiration date, contrary to fiscal budgeting and management practices mandated by the Bateman Act and Article IX, Section 12 of the state Constitution. Subjecting the City to the PEBA's "evergreen" clause also infringes on its discretion to appropriate funds as it deems best, and impairs its flexibility in responding to economic conditions as they occur as part of its annual budgeting and fiscal management responsibilities. Grandfathered status for the LMRO impasse provision preserves the City Council's appropriation powers and avoids Bateman Act and unconstitutional debt concerns.

3. Compelling the City to subsidize APOA by paying costs for representation that would otherwise be covered by the dues of its members violates the state Constitution's anti-donation clause.

The state Constitution's anti-donation clause prohibits municipalities from making a donation of any kind to an association or in aid of private enterprise: "Neither the state nor any . . . municipality . . . shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation . . . ." N.M. Const., art. IX, § 14. "Donation . . . is applied in its ordinary sense and meaning, as a 'gift,' an allocation or appropriation of something of value, without consideration to a 'person, association or public or private corporation.'" Village of Deming v. Hosdreg Co., Inc., 62 N.M. 18, 20-21, 303 P.2d 920, 926-27 (1956). "The constitution makes no distinction as between 'donations', whether they be for a good cause or a questionable one. It prohibits them all." State ex rel. Sena v. Trujillo, 46 N.M. 361, 368, 129 P.2d 329, 333 (1942).

The Supreme Court of New Mexico has stricken transactions under the anti-donation clause in circumstances involving a gift of money to a private entity with no exchange of adequate consideration. See Chronis v. State ex rel. Rodriguez, 100 N.M. 342, 348, 670 P.2d 953, 959 (1983) (holding that a tax credit to liquor licensees against taxes owed to the state was an unconstitutional subsidy of the liquor industry); State ex rel. Mechem v. Hannah, 63 N.M. 110, 118, 314 P.2d 714,

720 (1957) (holding that an appropriation to pay the state's share of emergency feed certificates issued to livestock owners for the purchase of hay was an unconstitutional subsidy of the livestock industry); see also N.M. Att'y Gen. Op. No. 90-13, at 1 (1990) (finding that the Department of Public Safety could not provide use of its dormitory and meals to a Boy Scouts of America troop at a substantially reduced cost because the proposed reduction would be a violation of the anti-donation clause that is applicable to both for-profit and non-profit corporations).

Simply put – paying a City employee to do APOA's work violates the Constitution because APOA's work is not the City's work. That reality is evidenced by Mr. Sigala's characterization of all the activities he performs on APOA's behalf during the work week as "my job." [RP 370] It is further evidenced by the union counsel's argument at hearing that the union's duty to represent, and provide resources to, its members would be irreparably harmed if the City discontinued paying City employees while conducting union business on City time. [TR-III, 22:9-23:2; 30:20-31:6] The work being done by Mr. Sigala and APOA's Vice President clearly serves APOA's duties to its members and not the City's interests in having the police department activities performed to which Mr. Sigala and APOA's Vice President are assigned. The district court's

injunction forces the City to maintain two full-time union officials on the City's police department payroll.

No adequate consideration supports the arrangement of the City paying APOA's officials to perform union work on City time because APOA is generally in an adversary relationship with the City. See Akin v. United Steel Workers of Am., 2010-NMSC-031, ¶¶ 1, 11, 148 N.M. 442, 237 P.3d 744. Given APOA's admitted loyalty and duties of representation to its members vis-à-vis the City [TR-III, 22:9-23:2; 30:20-31:6], APOA and the City necessarily approach the issues between themselves from opposite sides of the table. The parties who obviously benefit from the City subsidizing APOA's activities are APOA and its members who do not have to spend their dues money on this union expense if the City is ordered to pay it. [See TR-III, 22:15-23 (union counsel arguing that the City has attempted to shift a $300,000 responsibility to the union, and the union cannot assume that responsibility without sufficient notice and opportunity to prepare for it through its dues structure)]

While APOA's activities may provide a public benefit by "facilitat[ing] the collective bargaining process," id. ¶ 17, the anti-donation clause applies even to donations that are beneficial to the public. See e.g., State ex rel. Mechem, 63 N.M. 110, 314 P.2d 714 (1957). Paying City wages to a City employee for union work accrues to the employee's and union's benefit without a return to the City and

amounts to a subsidy to the union. See Chronis, 100 N.M. at 348, 670 P.2d at 959 (statute granting credit against gross receipts tax to certain liquor licensees was "an unconstitutional subsidy to the liquor industry"). Consequently, the practice is unconstitutional.

IV. CONCLUSION

For all the foregoing reasons, the City requests that the district court's order granting preliminary and permanent injunction be reversed.

V. STATEMENT REQUESTING ORAL ARGUMENT

The City requests oral argument because the issues on appeal involve matters of public importance having the potential to affect the operation of the largest city in the state, as well as public collective bargaining throughout the state.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of Defendants/Cross-Appellants' Brief-in-Chief were served by U.S. First Class Mail on the following counsel of record this 31st day of May, 2012:

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