IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
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Wendy F Jones

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

Plaintiffs/Appellants/Cross-Appellees,

v.

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

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

Defendants/Appellees/Cross-Appellants.

DEFENDANTS/CROSS-APPELLANTS' REPLY BRIEF

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

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I. TO BE GRANDFATHERED, THE CITY'S ORDINANCE NEED PROVIDE ONLY A SYSTEM PERMITTING COLLECTIVE BARGAINING – AND NOTHING MORE

A. Qualitative Differences Cannot Form The Basis For Denying Grandfathered Status For The City's Impasse Ordinance

The City's impasse resolution ordinance provides that either party may call for mandatory mediation if an impasse occurs, and allows for voluntary binding final-offer arbitration if mediation fails. Albuquerque, N.M., Revised Ordinances 1994 ("ROA"), § 3-2-14 (2001). The ordinance does not contain a clause that "evergreens" a CBA which expires before impasse resolution procedures have concluded. APOA argues that, because the City's impasse ordinance does not "evergreen" expired CBAs until new contracts are in place, it does not provide the same quality of collective bargaining protections as provided by the PEBA. [Cross-Appeal Answer Brief, pp. 2-7] APOA reasons that this difference in quality creates an uneven playing field and disqualifies the City's ordinance from grandfathered status. Id. However, differences in quality or effectiveness between a public employer's collective bargaining system and that created by the PEBA are inapposite to grandfathering analysis.

In City of Deming v. Deming Firefighters Local 4521, the Court of Appeals reversed the district court in holding that the city's impasse resolution ordinance was grandfathered. 2007-NMCA-069, ¶ 1, 141 N.M. 686, 160 P.3d 595. The ordinance provided for advisory arbitration as compared to the PEBA's binding

final-offer arbitration procedure. Id. at ¶ 3. The district court reasoned that the legislature had provided for binding final-offer arbitration for impasse resolution as a substitute for the leverage obtainable through the prohibited tactics of strikes. Id. at ¶19. For this reason, the district court concluded that the city's ordinance was not grandfathered because it provided nothing more than the right to petition the government and thus was not "a meaningful opportunity to engage in collective bargaining." Id. (quotations in original).

The Court of Appeals rejected outright the district court's qualitative analytical approach, stating, "We do not agree with the district court analysis because it differs from the requirements of the [grandfather] statute." Id. at ¶ 20. The Court of Appeals noted that the PEBA imposes no minimal standards of quality or effectiveness for grandfathered status:

> 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-E-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. *Id.* As a matter of statutory construction, we do not read language that is not present into a statute. (Cited authority omitted).

Id. (italics in original); see also City of Albuquerque v. Montoya, 2012-NMSC-007, ¶ 10, 274 P.3d 108. The Court reasoned that its conclusion was also supported by the PEBA's definition of "collective bargaining" – which similarly

contains no qualitative requirements or measure of effectiveness, nor any specific impasse provision or binding procedure. City of Deming, at ¶ 21 (citing NMSA 1978, § 10-7E-4(F)). City of Deming determined that the PEBA's language meant the legislature did not intend for courts "to ascertain the quality of collective bargaining provisions or procedures in order to apply the grandfather clause." Id.

City of Deming's holding rejecting qualitative rationale as applied to the PEBA's grandfathering analysis is further supported by the legislature's removal of "productivity" considerations from the re-enacted grandfather statute. PEBA I required that a public employer's collective bargaining system also had to have "resulted in the designation of appropriate bargaining units, the certification of exclusive bargaining agents and the negotiation of existing collective bargaining agreements." NMSA 1978, 10-7D-26 (B) (1992) (repealed by sunset provision in 1999). When PEBA II was enacted in 2003, the legislature removed PEBA I's productivity requirements from the statute. Thus, an ordinance's quality or effectiveness vis-à-vis the collective bargaining process are not proper areas of inquiry when analyzing grandfathered status. See City of Deming, 2007-NMCA-069, ¶¶ 19-21; see also Montoya, 2012-NMSC-007, ¶¶ 9-10.

APOA's contentions that the absence of an "evergreen" provision in the City's impasse ordinance disqualifies it from being grandfathered are fallacious. Had the legislature intended that every public employer operate under a uniform or

similar system of provisions and procedures for collective bargaining with its employees, it would not have included a grandfathering provision in the PEBA. Had the legislature intended that a public employer's pre-existing system ensure a certain quality of collective bargaining rights or procedures as compared to the PEBA, it would have included such requirements – it did not.

Instead, the legislature recognized that some public employers would have pre-existing collective bargaining systems different from the PEBA, and manifested its intent to afford protection to such systems despite such differences. The grandfather statute's plain language makes clear that public employers having "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 1978, § 10-7E-26(A) (2003) (emphasis added). Injecting the PEBA's "evergreen" provision into the City's Labor Management Relations Ordinance ["LMRO"] contradicts § 10-7E-26(A)'s express mandate.

APOA contends that the City will be empowered to improperly "delay negotiations or refuse to bargain in good faith until a CBA expires to secure the ability to dictate working conditions" unless the City is required to "evergreen" non-economic terms of expired CBAs until new ones are in place. APOA is wrong.

The City's LMRO already imposes a duty on the City to act in good faith. If the City fails to do so, it is subject to a prohibited practices complaint and oversight by the Labor Management Relations Board. ROA, § 3-2-9(D) (2001); see also ROA, § 3-2-14(E) (recognizing that impasse procedures are voluntary and do not constitute a condition precedent to a party's right to seek actions for relief in an appropriate tribunal). The City does not have power to act in bad faith as APOA claims. See ROA, § 3-2-2(A) (1977); ROA, § 3-2-3 (1977) (defining collective bargaining to include good faith negotiation); ROA, § 3-2-9(A)(4) (prohibiting the City from refusing to negotiate in good faith with a certified exclusive bargaining representative). APOA's argument also rests on the improper assumption that the City's officials will fail to appropriately perform their good faith collective bargaining and impasse resolution responsibilities. That assumption is contrary to law establishing that "a public official is presumed to properly perform his or her duty." Montoya, 2012-NMSC-007, ¶ 20 (quoted authority omitted).

APOA similarly overstates the City's purported power and role in the parties' CBA expiring. The City's LMRO provides that, not less than 60 days before a contract ending date, either side can request the opening of negotiations. ROA, § 3-2-13(B)(2) (2001). This provision encourages that collective bargaining negotiations begin well in advance of a CBA's expiration date. The City began

negotiating with the union beginning in February – many months before the CBA was to expire on June 30, 2011. [Cross-Appeal Answer Brief, p. 2]

If APOA was dissatisfied with the progress of negotiations, it could have invoked impasse procedures toward a final new agreement well before the CBA expired – but it chose not to do so. See ROA, § 3-2-14 (providing that either party may declare impasse and call for mediation, and allowing for voluntary binding final-offer arbitration if impasse persists more than 15 days after mediation). The City did not unilaterally orchestrate the CBA's expiration to the City's purported benefit and APOA's purported detriment as the union contends. APOA let its CBA expire rather than declare impasse and use the procedures available to it.

Neither did the City treat the CBA's expiration as "the end of [APOA's] collective bargaining rights." [Cross-Appeal Answer Brief, p. 2] Once the CBA expired, the City was no longer contractually bound to its terms. Nonetheless, the City continued collective bargaining negotiations with APOA in working towards a new agreement. The PEBA and the City's LMRO similarly define "collective bargaining" as negotiations in effort to reach agreement regarding wages, hour, and other terms and condition of employment. See NMSA 1978, § 10-7E-4(F) (2003); ROA, § 3-2-3. Given that the parties continued collective bargaining negotiations after the CBA expired, APOA's claim that the City treated the CBA's expiration as an end to APOA's collective bargaining rights is simply unfounded.

In fact, the parties were still negotiating when APOA used the PEBA's "evergreen" clause to obtain injunctive relief. [TR-III, 25:11-20] APOA had not invoked any impasse resolution procedures. The PEBA's "evergreen" clause, however, triggers only upon a CBA expiring during impasse resolution efforts. See NMSA § 10-7E-18(D) (2003) ("[I]n the event that an impasse continues after expiration of a contract, the existing contract will continue in full force and effect until it is replaced by a subsequent written agreement"); NMSA § 10-7E-4(K) (defining "impasse" as the failure "after good-faith bargaining, to reach agreement in the course of negotiating a collective bargaining agreement"). The district court gave APOA greater "evergreen" relief than provided by the PEBA.

APOA's arguments rest improperly on qualitative differences between the collective bargaining system provided under the City's LMRO and that provided by the PEBA. By definition, qualitative differences will always exist between grandfathered systems and the PEBA. See City of Deming, 2007-NMCA-069, ¶ 21 (determining that the legislature did not intend for courts "to ascertain the quality of collective bargaining provisions or procedures in order to apply the [PEBA's] grandfather clause").

The district court erred by injecting into the City's impasse resolution ordinance a clause and process that was not there before, and improperly re-wrote the ordinance to be more like the PEBA. See id. at ¶ 23 (stating that construing the

PEBA's grandfather statute to apply only to ordinances that adopt the same system of provisions and procedures as those currently in the PEBA would render the grandfather statute meaningless). Differences in kind and quality of the collective bargaining system under the City's LMRO as compared to the PEBA are actually protected by the grandfather statute. See Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers, 1998-NMSC-020, ¶ 25, 125 N.M. 401, 962 P.2d 1236 (noting that the intent of a grandfather statute is to save something that would otherwise be lost). The district court erred in granting injunctive relief and its order should be reversed.

B. APOA's Fiduciary Duties To Its Members Are Inapposite To The Grandfathering Analysis

APOA's argument that "evergreening" Section 1.3.1 of the expired CBA is necessary for APOA to adequately represent its members' interests while bargaining collectively fails because it rests on purported differences in the quality of the City's and the PEBA's collective bargaining systems. See City of Deming, 2007-NMCA-069, ¶ 21; see also Section I(A) discussion *supra*. APOA's assertion that an ordinance should protect a union against potential liability for not meeting its fiduciary duties to its members fails because that condition is simply not one of the two requirements for grandfathered status. See NMSA 1978, § 10-7E-26(A); Montoya, 2012-NMSC-007, ¶ 10. APOA's claim that the City enjoys numerous protections against suit "for a wide variety of employment issues" under the

expired CBA is irrelevant, unsupported by record evidence, and inaccurate. [Cross-Appeal Answer Brief, p. 8][1]

The City's impasse ordinance is grandfathered despite the absence of an "evergreen" provision because it meets the two requirements for grandfathered status. APOA's arguments regarding the union's various fiduciary duties to its members, purported protections for the City under the CBA, and whether "evergreening" could theoretically benefit the City in some way are irrelevant to grandfathering under § 10-7E-26(A).

C. The PEBA's Grandfather Clause Reflects Legislative Recognition Of The City's Home Rule Authority To Implement Its Own Labor Management Relations Ordinances

The City's LMRO was enacted pursuant to its home rule municipality powers many years before the PEBA existed. Although home rule authority may be prescribed by general law, the legislature's inclusion of a grandfather clause in the PEBA for pre-existing collective bargaining systems refutes APOA's claim that the PEBA generally trumps the City's home rule powers and LMRO. The legislature would not have included a grandfather clause had it intended the PEBA to operate as a general law preempting the City's LMRO. The PEBA's

[1] Because the CBA is not of record, the City can only represent that the CBA contains just two provisions indemnifying and protecting it against suit by union members. Those provisions address suits arising from payroll deductions for collecting union member dues or agency fee/"fair share" amounts from non-members. The grievance procedures contain no protections against a City employee filing suit on employment issues.

grandfather statute actually protects the City's home rule interests in conducting and controlling its labor-management relations business and affairs to the fullest extent possible in its own way. See State ex rel. Haynes v. Bonem, 114 N.M. 627, 631, 845 P.2d 150, 154 (1992) (home rule municipalities only look to statutes to determine if express limitations have been placed on their power); see also Regents of the Univ. of N.M., 1998-NMSC-020, ¶ 26 (noting that, by including grandfather provisions in new law, the legislature recognizes that classes of entities exist who could be damaged by the blanket and unrestricted application of new rules).

Moreover, no provision in the City's LMRO requires that the City pay union officials their regular City wages while performing union business on City time. City ordinance provides that City employees will be released from their duties *without* pay to participate in negotiations. ROA, § 3-2-13(C)(7). The PEBA also does not require that public employers pay employees their regular wages while performing union business on employer time. Even if the PEBA applied as a general law expressly limiting the City's home rule authority to legislate ordinances governing labor relations (which it does not), nothing in the PEBA mandates that the City pay APOA officials their City wages while performing union business on City time. The district court's order compels the City to do what no law requires, and infringes on the City's home rule municipality and appropriation powers.

II. A TERM THAT REQUIRES THE EXPENDITURE OF FUNDS IS ECONOMIC, INVOLVES APPROPRIATION AUTHORITY, AND DOES NOT "EVERGREEN" UNDER THE PEBA

Assuming, *arguendo*, that the PEBA "evergreens" APOA's expired CBA (which is denied), interpreting the clause to "evergreen" economic terms would violate the Bateman Act and the state Constitution's restriction on municipal debt. [Cross-Appeal Brief-in-Chief, pp. 17-26] APOA does not dispute the City's showing in this regard. Instead, APOA simply argues that "evergreening" Section 1.3.1 of its expired CBA raises no Bateman Act or unconstitutional debt concerns because Section 1.3.1 is a non-economic term that does not affect appropriation authority. [Cross-Appeal Answer Brief, pp. 9-10] The PEBA's language, the record evidence, and common sense establish otherwise.

The PEBA makes implementation of any CBA term that requires the "expenditure of funds" contingent on the governing body's exercise of its appropriative discretion. NMSA 1978, § 10-7E-17(E) (2003). This language in the PEBA recognizes that a governing body's appropriation prerogative is necessarily impacted by any term in a CBA that requires the expenditure of money to be implemented. Labor costs constituted approximately 76% of the money appropriated for the City's general fund budget for Fiscal Year 2011. [RP 100] Wages are clearly an economic item.

Section 1.3.1 impacts the City's appropriation authority because the monies needed to pay APOA's union officials their police officer wages while engaged in union business on City time must be set aside for that purpose by formal budget resolution. APOA's President and Vice President spend their entire work weeks conducting business for the union while being assigned to administrative positions in the City's police department. [RP 369] Thus, neither is performing any City administrative services in exchange for their wages. As a result, their "administrative positions" within the City police department are fictional jobs on the City payroll. The arrangement under Section 1.3.1 of APOA's expired CBA directly *costs* the City money it would not need to spend if the arrangement did not exist. Because it costs money, funds must be appropriated to cover the expense.

APOA acknowledged the economic nature of Section 1.3.1 when it argued at hearing that funding Section 1.3.1 costs approximately $288,000, and that it would take time for the union to modify its dues structure to take on the financial responsibility. [TR-III, 16:22-24; 22:15-23] The district court similarly recognized Section 1.3.1's economic value in ordering the City to reimburse affected employees by reconstituting leave or "with pay." [RP 438-39]

Section 1.3.1's pay arrangement is distinguishable from non-economic CBA terms that establish processes for filing grievances, instituting discipline or termination. The fact that APOA's union officials may assist union members

during grievance and disciplinary processes does not convert the payment of City wages to union officials under Section 1.3.1 into a non-economic term. The PEBA makes clear that a term requiring the expenditure of funds to be implemented is economic in nature and contingent upon the governing body's exercise of its appropriation authority. NMSA 1978, § 10-7E-17(E). Section 1.3.1 is an economic term under the record facts and the PEBA, and was improperly "evergreened" by the district court's injunctive relief order.

III. THE DISTRICT COURT'S ORDER IMPROPERLY COMPELS THE CITY TO SUBSIDIZE APOA'S PRIVATE INTERESTS WITH PUBLIC FUNDS

APOA's argument that "evergreening" Section 1.3.1 is necessary for it to fulfill its fiduciary responsibilities to its members underscores the City's showing that Section 1.3.1 is an improper subsidy to the union. Using public funds to cover the expense of this resource serves the private interests of APOA and its members, who are in an adversarial relationship with the City. See Akins v. United Steel Workers of Am., 2010-NMSC-031, ¶¶ 1, 11, 148 N.M. 442, 237 P.3d 744. Even though he was a City employee in the police department, APOA President Joey Sigala described his full-time activities furthering the interests of APOA and its members as "my job." [RP 370]

APOA argues that it facilitates productive relationships between the City and its employees, and that such purported facilitation constitutes adequate

consideration for the subsidy under Section 1.3.1. The City provided multiple case law authorities establishing that incidental benefit received by a public entity from contributing to private interests will not save such contributions from violating the anti-donation clause. [Cross-Appeal Brief-in-Chief, pp. 27-30] APOA's only response to those authorities is vague reference to a non-binding decision by the PELRB – a board having no jurisdiction over the City. Moreover, whether adequate legal consideration exists to avoid violating the anti-donation clause rests on resolving questions of constitutional and common law to which the PELRB is entitled to no deference by this Court. See City of Deming, 2007-NMCA-069, ¶ 6 (although an appellate court may afford some deference to an agency's interpretation of statutes within its field of expertise, courts have the ultimate responsibility to interpret the law).

APOA's President and Vice President are not akin to City human resources staff or other City personnel whose positions specifically include addressing employee grievances, disputes, or relations on the City's behalf. APOA's President and Vice President spend their work weeks addressing these same issues from the opposite side of the table on the union's behalf. No police department administrative needs are being performed for the City when these union officials are advocating for APOA and its members in their relations with the City.

Finally, whatever consideration theoretically could have supported Section 1.3.1 when it was originally executed ended when the CBA expired. Past consideration provides no basis for compelling the City to continue a term to which it previously agreed, and which it now believes violates law, its own ordinances, and establishes poor policy. Even the PEBA recognizes that parties cannot be forced to concede or agree to terms during collective bargaining, NMSA 1978, § 10-7E-17(A)(1), and no law requires the City to cover the cost of this resource for APOA. Compelling the City to financially support this union resource infringes on the City's home rule policymaking authority and violates the state Constitution's anti-donation clause.

IV. CONCLUSION

For all the foregoing reasons, the City requests that this Court reverse the district court's order granting preliminary and permanent injunction, and provide such other and further relief as this Court deems just and proper.

Respectfully submitted,

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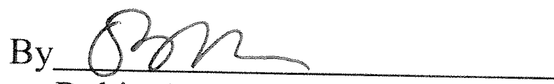

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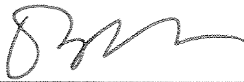

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