IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
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Wendy F. Jones

EMILY KANE,

Petitioner/Appellee,

v.

THE CITY OF ALBUQUERQUE,

Respondent/Appellant.

Ct. App. No. 32,383
No. D-202-CV-2012-05075

APPELLANT'S BRIEF-IN-CHIEF

Appeal from the Second Judicial District Court
The Honorable Beatrice Brickhouse, Presiding

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ORAL ARGUMENT IS REQUESTED

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

OTHER AUTHORITIES

I. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

Petitioner Emily Kane, a Captain in the Albuquerque Fire Department, filed an Application for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction and for Declaratory Judgment against her employer, the City of Albuquerque ["the City"]. RP:1-10. Kane sought protection against potential disciplinary action based on her candidacy for the state legislature. RP:1-3. Article X, Section 3 of the City of Albuquerque Charter ("Charter") and Section 311.3 of City Personnel Rules and Regulations ("Personnel Rules") prohibit City employees from running for or holding elective public office. RP:20-21.

Kane asserted that the City's prohibitions violate the First and Fourteenth Amendments of the United States Constitution, are preempted by NMSA 1978, § 10-7F-9 (2010) of the New Mexico Hazardous Duty Officers Employer-Employee Relations Act ["HDOA"], and breach the Collective Bargaining Agreement ["CBA"] between her firefighters union and the City. RP:2-3. Kane requested injunctive relief precluding the City from taking any action to require her to withdraw her candidacy, or to choose between taking office as a legislator and retaining her position with the City. RP:3. She further requested a declaratory judgment that the CBA prohibited the City from enforcing its Charter and personnel rule prohibitions against her running for or holding elective state office. RP:3, 10.

An order was entered temporarily enjoining the City from taking any disciplinary action against Kane based on her candidacy for elective state office. RP:44-45. The City thereafter moved for declaratory judgment in its favor, asking for a determination that provisions in its home rule municipality Charter and Personnel Rules forbidding City employees from seeking or holding elective public office are constitutional and otherwise lawful, and enforceable against Kane. RP:50-58.

The district court held an evidentiary hearing on Kane's application and the City's declaratory judgment motion. TR:4. The court granted Kane's application for injunctive relief and denied the City's motion. RP:132-34; TR:92-97. The district court permanently restrained the City from taking any action to discipline Kane for seeking or holding office as a Representative in the state House of Representatives. RP:132-34.

The Preliminary And Permanent Injunction And Final Judgment On Application For Injunctive Relief And Declaratory Judgment And On Motion For Declaratory Judgment was entered August 8, 2012. RP:132-35. The City timely appealed on August 10, 2012. RP:136.

On November 6, 2012, Kane won her election. In January 2013, she began serving in the New Mexico House of Representatives as Representative for District 15. See http://www.nmlegis.gov.

II. SUMMARY OF RELEVANT FACTS AND PROCEEDINGS

Facts and exhibits stipulated to by the parties before the evidentiary hearing, and attachments to the parties' dispositive filings, established as follows:

Kane is a Captain in the Albuquerque Fire Department, and has been employed with the department for approximately twenty years. RP:125. She is a firefighter paramedic and works in the emergency response division. RP:36. In March 2012, she formally advised several City officials that she intended to run for state public office as a Representative in the state legislature. Ex. 3. Discussions ensued between Kane and the City regarding potential legal barriers to her seeking or holding an elective state office while actively working for the City. Exs. 2, 3.

On March 26, 2012, the City informed Kane that it was not legally possible for her to run for or hold office in the state legislature while working for the City based on provisions in the City's home rule Charter and its Personnel Rules. Ex. 1. The Charter prohibits employees from holding elective public office:

> Effective January 1, 1993, employees of the city are prohibited from holding an elective office of the State of New Mexico or any of its political subdivisions, except employees of the city on October 3, 1989, who on that date hold elective office of the State of New Mexico or any of its political subdivisions may thereafter hold and be elected to the same elective office while serving as a city employee.

City of Albuquerque Charter, Article X, Section 3 (adopted at Regular Municipal Election, October 3, 1989, as Proposition #8; Article X amended at Regular Municipal Election, October 3, 1989, as part of Proposition #4). Ex. 1.

Personnel Rules similarly prohibit City employees from running for or holding elective office with the state or any of its political subdivisions while actively employed with the City:

> 311.3 Political Activities
>
> No person shall engage in political activity that diminishes the integrity, efficiency or discipline of the City service. No employee will participate in the following types of activity:
> . . .
> B. Be a candidate for or hold an elective office of the State of New Mexico or any of its political subdivisions. . . .
>
> 311.4 Hatch Act Provisions
>
> City employees whose principal employment is in connection with an activity financed in whole or in part by federal loans or grants made by the United States or a Federal agency are required to comply with the provisions of the Hatch Act.
>
> These employees may not:
> . . .
> C. Be a candidate for public elective office in a partisan election.

Ex. 1.

The City informed Kane that these prohibitions in its Charter, Personnel Rules, and the Hatch Act would apply as soon as she registered as a candidate for State Representative. Id. Accordingly, she could not legally remain an active employee and run for the state legislature as she intended. Exs. 1-4. Nonetheless, Kane persisted in her efforts to become elected to the state legislature. See Ex. 5.

During late March and into April 2012, Kane continued disputing and disregarding the City's stated legal impediments to her candidacy. RP:126; Exs. 1-3. On May 14, 2012, Fire Chief James Breen confirmed to Kane that her request for permission to run for an elective state office had been denied based on the Charter and Personnel Rule prohibitions against City employees running for or holding elective state office. RP:126; Ex. 4. Chief Breen instructed Kane to immediately surrender her candidacy or end her employment with the City. Ex. 4. If she chose to continue running for state office, Chief Breen advised that she would be entered into a disciplinary process and could face discipline, up to and including termination of her employment. Id.

When Kane did not comply with Chief Breen's directive, he informed her that she needed to appear for questioning in connection with an investigation stemming from alleged inappropriate on and or off duty conduct by her. Ex. 5. Possible violations of the Charter and Personnel Rules were identified as concerns to be addressed. Id. The investigation ensued and its results supported the allegation that Kane had initiated candidacy for an elective office in direct violation of the Charter and Personnel Rules, and had continued pursuing elective office despite having been counseled to discontinue her candidacy in lieu of possible disciplinary action. RP:126; Exs. 6, 7.

On May 30, 2012, Chief Breen issued notice of a pre-disciplinary hearing, informing Kane that she had engaged in prohibited behavior and was being charged with conduct unbecoming of a City official and Fire Department employee. Ex. 7. She was instructed to appear on June 1, 2012, to respond to the charges. Id. However, the pre-disciplinary hearing never occurred because, by this time, Kane had petitioned for injunctive and declaratory relief to prevent the City from pursuing disciplinary proceedings against her. RP:1. On May 31, 2012, she obtained a temporary restraining order prohibiting the City from proceeding with the pre-disciplinary hearing or taking any disciplinary action whatsoever connected with her candidacy for an elective state office. RP:44-45.

By the time of the July 2012 evidentiary hearing, Kane had prevailed in the Democratic primary election and was a candidate for election to the state House of Representatives. RP:125. Kane stated that she would not campaign or serve as a legislator while on duty. Id. She acknowledged that no authorized City official gave her permission to run for elective office. RP:126.

In the past, several other firefighters had run for elective offices outside of Albuquerque. RP:125. Eddie Torres was elected and served as a Bernalillo village councilor without objection by the City. RP:126. He was not disciplined for running for or serving in that office. Id. However, it was a non-partisan office. Id. Kane presented no evidence that Torres notified the City, in advance, of any

intentions to run for village councilor, or that Torres knew he was violating the Charter and Personnel Rules in running for and serving in that position.

Over the City's objection, the district court allowed Kane to call Diego Arencon, a previously unidentified witness attending the proceedings, to attempt to establish that the City knew about Torres's Bernalillo councilor service when it occurred.[1] TR:57-65; see also RP:92. Although Arencon claimed he had personal knowledge that Torres's direct supervisors knew Torres served on the Bernalillo Council, he speculated it was "common knowledge," and only assumed that Torres discussed his service with his supervisors. TR:61. Arencon testified he had no direct knowledge of any such discussions. Id.

Arencon stated that, at some point during some conversation with Chief Ortega, Torres's service as a Bernalillo Councilor had been referenced jokingly. TR:61-62. However, Arencon said, "This was obviously after the fact." TR:62. On cross-examination, Arencon admitted he had no specific knowledge of whether anyone spoke with Torres about his Bernalillo Councilor activities when they occurred. TR:64.

Torres also ran for Mayor of Bernalillo in 2010 and was advised by the City that his candidacy (a partisan elective office) was not permitted by City policy. RP:126; TR:20, 52. Torres was not disciplined in connection with his mayoral

[1] The parties had stipulated to Kane and Chief Breen as the only potential evidentiary hearing witnesses. TR:3-5; Ex. 8 (emails at the end).

candidacy. RP:126. Chief Breen did not know whether Torres surrendered or did not surrender his candidacy after being informed it was not permitted. Id. Torres was shown of record as having lost the mayoral election. Id. However, Kane presented no evidence establishing the City actually knew that Torres continued his candidacy after being informed it violated the Charter and Personnel Rules. Although Kane previously identified Torres as a witness, she did not call him to testify. RP:92; see also TR:5, 31 (Kane's counsel advising the district court the case was boiled down to legal argument based on the stipulations, and stating, "it was anticipated the stipulated exhibits and stipulated facts would be sufficient" in response to the district court directing Kane to present her witnesses and evidence).

Phillip Luna served as an Estancia Village Trustee for four years beginning in 2002. RP:127. Luna was not disciplined in connection with that service. Id. However, this too was a non-partisan office. Id. Kane presented no evidence that Luna notified the City, in advance, of any intentions to run for Trustee, or that Luna ever knew his candidacy and Trustee service violated the Charter and Personnel Rules. Kane also presented no evidence showing the City knew about Luna's service as a village Trustee when it occurred. Although Kane previously listed Luna as a witness, she did not to call him to testify. RP:92; TR:5, 31.

Lawrence Montoya was chosen by his pueblo to serve as Santa Ana Pueblo Governor. RP:126. Kane offered no evidence that it was a partisan and/or elective

office. The City allowed Montoya to serve pursuant to a "loaned executive" agreement under which the Pueblo reimbursed the City for Montoya's salary during his term. RP:126-27. Thus, Montoya was not on active firefighter service with the City while holding the non-City office. Although Kane previously listed Montoya as a witness, she did not call him to testify. RP:92; TR:5, 31.

No other evidence regarding firefighters seeking elective office in the past ten years was presented. TR:8-9. Regarding other City employees, it was stipulated that, in recent years, two assistant city attorneys resigned to seek elective office. RP:127.

Section 10.1.4 of the City's CBA with the firefighters union gave the City discretion to permit leave for union members to serve in elective public offices (similar to the arrangement made for Montoya to serve as Santa Anna Pueblo Governor). TR:33. The provision stated: "Sufficient leave of absence without pay may be granted to permanent employees to enable them to hold a non-City public office to which they have been elected." Id.

As to whether Kane's conduct raised Hatch Act concerns (TR:67-79), the parties acknowledged that none of Kane's firefighter salary is funded by federal tax dollars. RP:125. However, the Albuquerque Fire Department receives federal funding for, but not limited to, items such as breathing apparatus, and turn-out gear (personal protective equipment), all of which Kane uses as part of her employment.

RP:36. In the past five years, the Department received over $1 million from various federal grants that was used to purchase equipment. RP:125-26; Ex. 8. During the previous five-year period of time, the Department received over $1.5 million in federal grant aid. Ex. 8. Since 2002, federal funding used to purchase personal protection equipment and breathing apparatus that Kane uses in connection with her firefighter duties exceeded $1.26 million. RP:36; Ex. 8.

Kane asserted the City's concerns regarding the Hatch Act were unfounded. TR:67-83. Kane offered an advisory opinion letter addressing whether the Hatch Act prohibited an Albuquerque metropolitan court security officer from running in the partisan election for sheriff. TR:72-76. Although the opinion concluded the Hatch Act did not apply, the equipment purchased with federal funds was not used by metropolitan court security officers. Id. Kane's counsel also argued the grant aid received by the Fire Department for purchasing equipment was too *de minimis* when compared to the Department's total budget for Kane's candidacy to pose a Hatch Act violation risk. TR:80-83. Her counsel asserted that the total annual operating budget for the Department is around $70 million per year, but Kane submitted no evidence to either support her counsel's assertions or to establish how much of that figure was for wages, salaries, and general operational expenses as opposed to equipment needs. Id.

In granting requested relief to Kane, and in denying the City's declaratory judgment motion, the district court stated the following findings and conclusions:

1. the City has no valid interest in preventing City employees from running for or holding non-City elective offices;

2. the City failed to establish a credible, foreseeable conflict of interest arising out of simultaneous service as a City firefighter and service as an elected state representative (a partisan political office);

3. the City failed to establish an impact on the actual or foreseeable operation of the City as a result of Kane holding a non-City political office while a City employee;

4. the harms asserted by the City as arising from City employee service in the state legislature were just conjecture and speculation;

5. at least three City firefighters have sought and held political offices while employed by the City;

6. those firefighters were not sanctioned or disciplined by the City in any way;

7. the City had actual knowledge that those firefighters sought and held political offices;

8. the blanket prohibition in the City Charter against City employees holding a non-City elected office is overbroad and thus unconstitutional;

9. the blanket prohibition against City employees seeking election to, and holding office of the State of New Mexico or any of its political subdivisions contained in Section 311.3 of the City's Personnel Rules and Regulations is overbroad and thus unconstitutional;

10. the New Mexico Hazardous Duty Employee-Employer Relations Act, NMSA 1978, § 10-7F-9, preempts and voids the prohibition on political activity contained in the City's home rule Charter, Article X, Section 3, as applied to City firefighters, including Kane;

11. the federal Hatch Act does not apply because none of Kane's salary is funded by federal tax dollars and any federal grant money received by the Albuquerque Fire Department is *de minimis* in relation to the department's $70,000,000 operating budget; and

12. the City entered into a CBA whereby it agreed that members of the firefighters' union may hold elected office and may be granted leave without pay to serve in elected office. RP:132-34.

Well-settled governing principles, and the record facts, establish the district court erred in granting Kane's application and in denying the City's declaratory judgment motion.

III. ARGUMENT

A. The City's Prohibitions Against Employees Seeking Or Holding Elective Office Of The State Or Any Of Its Political Subdivisions Are Constitutional And Lawful

1. Preservation of issue.

This issue was preserved by the City's response to the application, its declaratory judgment motion filings, and argument at the hearing. RP:15-16, 20-23, 53-54, 114-17; TR:22.

2. Standards governing review.

When injunctive relief rests on resolving a question of law, the question of law is reviewed de novo. Aragon v. Brown, 2003-NMCA-126, ¶ 9, 134 N.M. 459, 78 P.3d 913. Constitutional questions are reviewed *de novo*. New Mexicans for Free Enter. v. City of Santa Fe, 2006-NMCA-007, ¶ 11, 138 N.M. 785, 126 P.3d 1149. All legislative acts, including municipal ordinances, are presumed to be constitutional. Garcia v. Village of Tijeras, 108 N.M. 116, 118, 767 P.2d 355, 357 (Ct. App. 1988). "City ordinances are treated no differently than statutes for purposes of judicial review." New Mexicans for Free Enter., at ¶ 45.

In reviewing the constitutionality of a law, the appellate court indulges in every presumption favoring its validity. Garcia, 108 N.M. at 118, 767 P.2d at 357. If an act can be applied or interpreted to avoid constitutional conflict, such construction should be adopted by the court. Id. at 122, 767 P.2d at 361. An

appellate court must uphold the law unless it is satisfied beyond all reasonable doubt that it exceeds constitutional limitations. Id. at 118, 767 P.2d at 357. The party attacking the law has the burden of establishing its invalidity. Id.

3. Kane has no fundamental Constitutional right to seek or hold elective public office, and the Charter and personnel rule prohibitions are rationally related to legitimate governmental interests.

It is well-settled that a public employer may, consistent with the First Amendment and other provisions of the federal Constitution, prohibit its employees from running for political office. State ex rel. Harkleroad v. N.M. State Police Bd., 103 N.M. 270, 271, 705 P.2d 676, 677 (1985); U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 556 (1973). A government's action in enacting legislation prohibiting its employees from running for public office does not in and of itself violate the First Amendment. Harkleroad, 103 N.M. at 271-72, 705 P.2d at 677-78 (citing State ex rel. Gonzales v. Manzagol, 87 N.M. 230, 531 P.2d 1203 (1975)). "Far from recognizing candidacy as a 'fundamental right,' [the United Stated Supreme Court has] held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'" Clements v. Fashing, 457 U.S. 957, 963 (1982) (quoted authority omitted).

Governmental employer prohibitions against employees seeking or holding elective public office have existed for decades. The federal Hatch Act prohibits

federal public employees from running for the nomination, or serving, as a candidate for election to a partisan political office. 5 U.S.C.A. § 7323(a)(3) (enacted in 1939). The Hatch Act also prohibits an individual employed by a municipality, whose principal employment is in connection with an activity financed in whole or in part by federal loans or grants, from being a candidate for elective public office if the individual's salary is paid completely, directly or indirectly, by federal funds. 5 U.S.C.A. §§ 1501-1502.[2] New Mexico, like the other 49 states, has a statute prohibiting state personnel from holding partisan political office while employed with the state that is patterned after the federal Hatch Act. See NMSA 1978, § 10-9-21(B) (enacted in 1961); see also Gonzales, 87 N.M. at 232, 531 P.2d at 1205; Broadrick v. Oklahoma, 413 U.S. 601, 603-07 (1973) (Oklahoma statute, which prohibited candidacy for nomination or election to any public office, like analogous provisions of the other 49 states, was patterned on and served the same function as, the federal Hatch Act).

Article X, Section 3 of the Charter, and Personnel Rule 311.3 align directly with these longstanding federal and state prohibitions against government employees seeking or holding elective public office. Because such prohibitions do

[2] At the time of events relevant to the decision on appeal, the Hatch Act prohibited municipal employees whose principal employment is in connection with an activity that receives federal funding from being candidates for public elective office. The requirement that a municipal employee's salary be paid by federal funds was added by amendment on December 28, 2012. See 5 U.S.C.A. § 1502(a)(3).

not impact any fundamental constitutional right, they have consistently withstood the test of time as being rationally related to numerous legitimate governmental interests.

Prohibitions against local government employees from running for elective public office serve legitimate governmental interests in ensuring that programs receiving federal funding are administered in a non-partisan manner, and protecting against the public perceiving that employees involved in administering the programs are partisan politicians exerting inappropriate partisan influence. Molina-Crespo v. U. S. Merit Sys. Prot. Bd., 486 F. Supp. 2d 680, 691 (N.D. Ohio 2007). Permissible legislative motivations for limiting the political activity of public employees extend far beyond ensuring impartial decision-making, and may include ensuring that government employees will not be used to build a political machine, and that their employment and advancement will not be based on their political activity or influence. See United Pub. Workers v. Mitchell, 330 U.S. 75, 101 (1947); see also Letter Carriers, 413 U.S. at 565-66.

Prohibitions against government employees seeking or holding elective public office further serve the related goal that government employees would be free from pressure or invitation to vote in a certain way or perform political chores to curry favor with their superiors rather than to act out their own beliefs. Letter Carriers, 413 U.S. at 566. It is not only important that government and its

employees in fact avoid practicing political justice; it is also critical that they appear to the public to be avoiding it "if confidence in the system of representative Government is not to be eroded to a disastrous extent." Id. at 565; see also Asher v. Lombardi, 877 S.W.2d 628, 630 (Mo. 1994) (a governmental entity has a legitimate interest in maintaining public confidence in an impartial civil service removed from partisan political pressures).

Consistent with these firmly established precedents, the New Mexico Supreme Court has upheld prohibitions against state personnel seeking or holding elective public office under circumstances similar to Kane's. In Gonzales, a state Water Resource Assistant was elected to serve on the Santa Fe City Council. 87 N.M. at 230-31, 531 P.2d at 1203-04. He sought an order prohibiting the State Personnel Director and State Engineer from discharging him from his state employment pursuant to a statute prohibiting state personnel from holding political office. Id.

Gonzales noted that generally recognized dangers are inherent in political activity by a public officer or employee. Id. at 234, 531 P.2d at 1207. The court further reasoned that the state employee's service on Santa Fe's governing body might very well place him in a position of conflict with his state employment as to water rights claimed by the city. Id. Moreover, proper performance of his duties as a City Councilman and also as a state employee was "almost certain to create

conflicting demands upon his time, his energies, his capacities and his loyalties." Id. For these reasons, the court held that the proscription he sought to evade was a reasonable restriction on his state employment. Id.

In Harkleroad, a New Mexico State Police personnel rule prohibiting officers from running for or holding elective public office was upheld as a constitutional restriction on an officer's employment. 103 N.M. at 271-73, 705 P.2d at 677-79. The officer challenged a disciplinary suspension imposed when he continued pursuing candidacy for Governor of New Mexico after his supervisor advised him that such conduct was prohibited by department rule and ordered him to refrain from seeking elective office while employed with the department. Id. at 270-71, 705 P.2d at 677-78. In upholding the disciplinary suspension, the court stated the department had imperative interests in prohibiting its officers from running for an elective public office. Id. at 272, 705 P.2d at 678. Those interests included avoiding potential situations where an officer might appear to devote less than full attention to necessary duties due to commitments to a political office. Id.

Government employers also have legitimate interests in regulating employee conduct to prevent conflicts of interest that could interfere with efficient governmental operations. Because public employees often occupy trusted positions in society, views they express that contravene governmental policies can impair the proper performance of their employer's functions. Garcetti v. Ceballos,

547 U.S. 410, 419 (2006). Like private employers, government employers need a significant degree of control over their employees' conduct for, without such control, there would be little chance for providing efficient public services. Garcetti, 547 U.S. at 418; cf., NMSA 1978, § 10-6-3 (1943) (any public employee who accepts another public office or employment for which compensation is authorized or any private employment who, by reason of such employment, fails for thirty successive days to devote his time to the usual and normal extent during ordinary working hours to performing the duties of his original public employment shall be deemed to have resigned from that employment).

The Charter and personnel rule prohibitions against employees seeking or holding elective public office also avoid potential conflicts of interest resulting from legislative conduct that may be in the best interests of the elected official's constituents, but adverse and harmful to that same elected official's own employer. A legislator is expected to vote with due regard to the views of her constituents. Clements, 457 U.S. at 968. The City has an interest in protecting itself against Kane potentially making decisions in elective public office that serve more to further her political ambitions than the responsibilities of her City employment. See id. Indeed, Article X, Section 3 of the Charter has already been recognized to regulate potential conflicts of interest arising from City employees serving in elective public offices. See Cottrell v. Santillanes, 120 N.M. 367, 370, 901 P.2d

785, 788 (Ct. App. 1995) (noting that Article X, Section 3 of the Charter regulates conflicts of interest of City employees).

The benefits of prohibitions like those contained in the Charter and personnel rule run both ways. Such prohibitions serve the important governmental interests of eliminating conflicts of interest that arise when public officials are simultaneously subject to the demands of both their constituencies and their political parties, broadening opportunities for political and public participation, reducing the opportunities for corruption inherent in dual office-holding and, through all these methods, increasing citizens' confidence in their government's integrity and effectiveness. Golden v. Clark, 564 N.E.2d 611 (N.Y. 1990) (upholding constitutionality of city's Charter provision, entitled "Conflicts of Interest," that prohibited certain city office holders from also holding offices in political parties at the national, state or county level).

The City's interest in protecting federal funding streams for its activities constitutes yet another legitimate basis for prohibiting its employees from seeking or holding elective public office while actively employed with the City. The federal Hatch Act prohibits a municipal employee, whose principal employment is in connection with an activity that receives federal loans or grants, from being a candidate for partisan elective office if the employee's salary is paid completely, directly or indirectly, by federal funds. 5 U.S.C.A. §§ 1501-1502.

If the federal entity responsible for enforcing the Hatch Act determines that a violation has occurred that warrants dismissal of the employee, the City must dismiss the employee and not rehire that individual for at least 18 months. 5 U.S.C.A. §§ 1504-1506. Alternatively, the City must forgo an amount of otherwise available federal funds equal to 2 years' pay at the rate the employee was receiving when the violation occurred. Id. The district court's ruling eviscerates the City's ability to protect itself against the consequences of Hatch Act violations, and places it in the untenable position of being at risk for losing valuable employee resources – or foregoing substantial federal funding to retain them – for employee conduct purportedly beyond the City's control.[3]

With these principles in mind, courts have unwaveringly held that government employer prohibitions against employees pursuing or holding elective public office are not unconstitutionally overbroad. See Gonzales, 87 N.M. at 234,

[3] The district court's conclusion that the Hatch Act did not apply to Kane's candidacy was erroneous under the facts as well as the law in effect at the time. No evidence supported the district court's finding that the federal funds received by the Fire Department were *de minimis* "in relation to the $70,000,000 million operating budget of the Department." (RP:133) Kane's counsel merely argued the $70 million figure. Argument of counsel is not evidence. State v. Salas, 2010-NMSC-028, ¶ 19, 148 N.M. 313, 236 P.3d 32. Moreover, federal funding in excess of $2.5 million is not, in and of itself, a *de minimis* amount of money. See Palmer v. U.S. Civil Serv. Comm'n, 297 F.2d 450 (7th Cir. 1962) (*de minimis* rule was inapplicable to Director of Illinois Department of Conservation where evidence showed the State had received over $2 million of federal funds over a six-year period of time). The district court also relied on irrelevant evidence in stating, "[n]one of Petitioner's salary is funded by federal tax dollars" (RP:133) because no such requirement existed in the statute at that time.

531 P.2d at 1207 (state statute prohibiting state personnel from holding any public office was not overbroad); Harkleroad, 103 N.M. at 272, 705 P.2d at 678 (State Police rule prohibiting officers from running for or accepting political office was not unconstitutionally overbroad because it did not proscribe constitutionally protected conduct); Broadrick, 413 U.S. at 603-07, 616-18 (Oklahoma statute prohibiting state employee candidacy for nomination or election to any public office was not unconstitutionally overbroad as it prohibited partisan activity in a neutral manner); Molina-Crespo, 486 F. Supp. 2d at 693 (Hatch Act's prohibition against public employees running for partisan elective office is narrowly tailored to the perceived harm and not overbroad because covered local employees remain free to engage in a wide range of political activities despite the prohibition against seeking or holding partisan elective office).

Article X, Section 3 of the Charter and Personnel Rule 311.3 are unquestionably constitutional as rationally related to legitimate governmental interests under these standards. Kane's constitutional challenges to the Charter provision and personnel rule fail whether couched in terms of First or Fourteenth Amendment rights. See Asher, 877 S.W.2d at 629-31 (Missouri statute modeled on the federal Hatch Act, which prohibited state corrections officer from pursuing candidacy for county sheriff, did not violate his First or Fourteenth Amendment rights); Garcia, 108 N.M. at 121-22, 767 P.2d at 360-61 (from an equal protection

standpoint, the court presumes the constitutionality of an ordinance where it does not trammel fundamental rights or involve a suspect classification); Clements, 457 U.S. at 966-72 (legitimate governmental interests rationally related to statute placing restrictions on government office holders' access to candidacy for other political offices disposed of their challenges on both First and Fourteenth Amendment grounds).

Nor did Kane raise or prove an equal protection violation on any other bases. The Charter provision and personnel rule are not patently arbitrary or discriminatory because their prohibitions are facially neutral and apply equally to all City employees. They contain no "invidious" classification to support an equal protection claim on such grounds. See Block v. Vigil-Giron, 2004-NMCA-003, ¶ 13, 134 N.M. 24, 84 P.3d 72 (equal protection focuses on the validity of legislation that permits some individuals to exercise a specific right while denying it to others); Clements, 457 U.S. at 972-73 (equal protection clause did not authorize Court to review manner in which state had decided to govern itself where the challenged statute did not present an invidious classification scheme).

If Kane sought to prove an equal protection violation based on purportedly dissimilar treatment via the evidence regarding firefighters Torres, Luna, and Montoya, such efforts fail under the law and facts. Before there can be an equal protection violation of any kind, there must first be a "protected right." "A

claimant must show how he is unequally treated [and thereby deprived of a protected right] before an [equal protection] issue arises." Gonzales, 87 N.M. at 234-35; 531 P.2d at 1207-08; Village of Ruidoso v. Warner, 2012-NMCA-035, ¶ 5, 274 P.3d 791 (an equal protection challenge must relate to a protected right). Because Kane has no constitutionally protected right to seek or hold elective public office, any equal protection claim based on purported dissimilar treatment fails as a matter of law.

Kane's evidence also failed to sufficiently establish that she was similarly situated to other firefighters, but treated dissimilarly for impermissible discriminatory reasons. She bore the burden of demonstrating a discrimination against her of some substance. See Clements, 457 U.S. at 967. "An unequal protection claim cannot be made in the abstract." Gonzales, 87 N.M. at 234, 531 P.2d at 1207. Other than herself, Kane presented evidence of only three other firefighters seeking or holding office in the past ten years. Torres and Luna's councilor and trustee offices were minor non-partisan positions (RP:126-27) having no ability to decide issues that could directly impact City operations – unlike a seat in the state legislature. Kane offered no evidence establishing that the City knew about Torres and Luna's councilor and trustee service when it occurred, or that either Torres or Luna knew they were violating the Charter and Personnel Rules while in those offices.

Montoya was selected (not elected) to serve as the pueblo's Governor (RP:126-27), and Kane offered no evidence that Montoya's position was a partisan office. Montoya's situation was further dissimilar to Kane's given her insistence that she remain actively employed while serving at the legislature if elected. Kane also distinguished herself in her knowing and flagrant violation of the Charter provision and Personnel Rules. Her refusal to follow established City policies, and persistence in pursuing a candidacy she knew violated the Charter and Personnel Rules even after her supervising officer counseled her against doing so, constituted insubordination that distinguished her situation vis-à-vis her employer from the other three firefighters' situations. Kane's evidence regarding Torres's Bernalillo mayoral candidacy actually proved he was treated similarly because, like Kane, he was instructed to discontinue his pursuit of elective public office when his actions came to his supervisors' attention.

For these reasons, substantial evidence does not support the district court's findings that at least three firefighters sought and held "political" offices while employed with the City, or that the City "had actual knowledge" the firefighters sought and held those "political" offices. RP:134. "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." Garcia, 108 N.M. at 121, 767 P.2d at 360. The district court engaged in strained and illogical inferences to reach these factual findings under the record.

To the extent the district court relied on these findings in concluding that the Charter provision and personnel rule are unconstitutional, the district court also incorrectly applied the law to the facts. City of Rio Rancho v. Young, 119 N.M. 324, 326, 889 P.2d 1246, 1248 (Ct. App. 1995) ("When a legal conclusion is challenged on appeal, the appellate standard of review is whether the law was correctly applied to the facts, viewing them in the manner most favorable to the prevailing party.").

The district court departed from over sixty years of precedent in holding that the Charter provision and Personnel Rule 311.3 are overbroad and unconstitutional. The district court's reasoning that the City has a valid interest in preventing its employees from running for and holding City elective office (RP:132) – but has no valid interest in preventing its employees from running for and holding non-City elective office (id.) – establishes its misapprehension of the issues before it. The Charter provision and personnel rule are not an improper exercise of jurisdiction over the state and its other political subdivisions beyond the City's own borders. The City's prohibitions permissibly regulate internal relations with its own employees to promote government efficiency, avoid conflicts of interest, and protect against Hatch Act violations. See 14-23, *supra*.

The district court also held the City to erroneous standards in concluding the City "failed to establish a credible, foreseeable conflict of interest arising out of

service as a City firefighter and service as an elected state representative, a partisan elective office," "failed to establish that there would be an impact on the actual or foreseeable operation of the City as a result of Petitioner Kane holding a non-City political office," and that "[t]he harms that were cited by the City were based on conjecture and speculation." RP:133. Conflicts of interest inherent to government employees seeking or holding elective public office are established legal presumptions that justify government employer prohibitions against such conduct. See Letter Carriers, Mitchell, Clements, Garcetti, Gonzales, Harkleroad, Molina-Crespo, Asher, and Golden, *supra*; see also Cottrell, 120 N.M. at 370, 901 P.2d at 788 (Article X, Section 3 of the Charter regulates conflicts of interest of City employees). No actual conflict or impact on government operation need be proven. The City's prohibitions, modeled on the Hatch Act, are prophylactic – nothing in the Hatch Act requires the showing of any actual adverse effect in a particular case for its provisions to apply. See 5 U.S.C.A. § 7323(a)(3); 5 U.S.C.A. § 1502. Well-settled law refutes the district court's dismissive characterization of the City's conflict of interest arguments as mere "conjecture and speculation."

"When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." Garcetti, 547 U.S. at 418; see also Brown v. Glines, 444 U.S. 348, 368 n.11 (1980) (J. Brennan, dissenting) (the predicate for upholding liberty restrictions as a condition of public employment is,

in part, the voluntariness of the decision to accept Government employment). By accepting employment with the City, Kane necessarily accepted the permissible restrictions set forth in Article X, Section 3 of the Charter and Personnel Rule 311.3 – and the district court erred in holding otherwise.

4. The Charter provision and Personnel Rule 311.3 do not impose additional public office eligibility requirements in conflict with those set by the New Mexico Constitution.

Kane asserted that the Charter and personnel rule prohibitions against City employees seeking or holding elective public office conflicted with the state constitution by imposing eligibility requirements beyond those constitutionally required. RP:81; TR:8, 15, 18. The New Mexico Supreme Court and Court of Appeals have rejected such reasoning.

In Gonzales, the state official argued that requiring him to resign his state employment imposed an unconstitutional restriction on him for holding elective public office. 87 N.M. at 232, 531 P.2d at 1205. The Supreme Court disagreed, stating: "No effort is being made to impose any restriction upon the elective public office which Petitioner holds or upon him as the holder of that office. It is his appointive position as a 'public officer or employee' which is in danger by his persistent action in holding a 'political office.'" Id. (internal quotation marks in original); see also Cottrell, 120 N.M. at 370, 901 P.2d at 788 (Article X, Section 3 of the City's Charter does not add qualifications for elective office beyond those

contained in the state Constitution). Thus, to the extent the district court found the Charter provision and Personnel Rule 311.3 overbroad and unconstitutional on this basis, the district court was wrong.

B. Section 10-7F-9 Of The HDOA Does Not Preempt And Void The Prohibition Against Political Activity Contained In Article X, Section 3 Of The City's Home Rule Charter As Applied To City Firefighters

1. Preservation of issue.

This issue was preserved by the City's response to the application, its declaratory judgment motion filings, and argument at the hearing. RP:15-16, 24, 54-56, 115-20; TR:24-26.

2. Standards governing review.

Questions of law involving interpretation of statutes and constitutional amendments are reviewed *de novo*. New Mexicans for Free Enter., at ¶ 11. Ordinances are treated the same as statutes for purposes of judicial review. Id. at ¶ 45; see also City of Aztec v. Gurule, 2010-NMSC-006, ¶ 16, 147 N.M. 693, 228 P.3d 477 (municipal ordinances are treated as law). Where laws can be construed together to preserve the objectives of each, they should be so construed when no contradiction or unreasonableness would result. Spaw-Glass Constr. Servs., Inc. v. Vista de Santa Fe, Inc., 114 N.M. 557, 560, 844 P.2d 807, 810 (1992).

Interpreting statutes and constitutional clauses begins with the language of the text, giving words their ordinary meaning. City of Albuquerque v. Montoya,

2012-NMSC-007, ¶ 12, 274 P.3d 108; New Mexicans for Free Enter., at ¶ 11. The court should not depart from the statute's 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. v. N.M. Fed'n of Teachers, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236. Neither should the court read into a statute or ordinance language which is not there if it makes sense as written. Id. Statutes should also be construed so that no part is rendered surplusage or superfluous. Id.

The court will not construe a constitutional clause that is clear and unambiguous on its face. New Mexicans for Free Enter., at ¶ 11. If the clause's meaning is not clear on its face, by virtue of having more than one fair and reasonable interpretation, the court may consider history and context to shed light on the terms used and to ascertain the will of the people. Id.

3. Article X, Section 3 of the City's home rule Charter falls within the HDOA's "except as otherwise provided by law" exception.[4]

In 1970, New Mexico adopted a home rule amendment to the state Constitution which authorized a change in the then existing relationship between state and local governments. State ex rel. Haynes v. Bonem, 114 N.M. 627, 630,

[4] The district court's preemption conclusion did not include Personnel Rule 311.3. RP:134. The following grounds for upholding the Charter provision apply equally to Rule 311.3, except for Section III(B)(4), which relates only to charters.

845 P.2d 150, 153 (1992). That amendment gave citizens of a municipality the right to adopt a home rule charter. Id. at 630-31, 845 P.2d at 153-54; see also N.M. Const. art. X, § 6. A municipality that adopts such a charter becomes a "home rule municipality." Haynes, 114 N.M. at 631, 845 P.2d at 154. Albuquerque became a home rule municipality upon adopting its Charter in 1971. See Preamble, City of Albuquerque Charter (adopted at Special Election, June 29, 1971).

Two significant benefits result from becoming a home rule municipality. The first is "a generous grant of authority by the home rule amendment, which gives the municipality blanket authority to act as long as the legislature has not expressly denied that authority." New Mexicans for Free Enter., at ¶ 14; N.M. Const. art. X, § 6(D) (a home rule municipality may "exercise all legislative powers and perform all functions not expressly denied by general law or charter"). "Thus, home 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." Haynes, 114 N.M. at 631, 845 P.2d at 154.

Second, home rule municipalities enjoy autonomy from state interference in matters of local concern. New Mexicans for Free Enter., at ¶ 14. Municipal home rule is intended to "enable municipalities to conduct their own business and control their own affairs, to the fullest possible extent, in their own way" by delegating to municipalities autonomy in matters concerning their local community. Haynes,

114 N.M. at 631, 634, 845 P.2d at 154, 157. Home rule autonomy rests on the principle that "the municipality itself knew better what it wanted and needed than did the state at large." Apodaca v. Wilson, 86 N.M. 516, 520, 525 P.2d 876, 880 (1974).

The home rule amendment devolves onto home rule municipalities remarkably broad powers, and provides chartered municipalities with the utmost ability to take policymaking initiative. New Mexicans for Free Enter., at ¶ 16. The amendment makes clear that its purpose is "to provide for maximum local self-government" and that "[a] liberal construction shall be given to the powers of municipalities." N.M. Const. art. X, § 6(E).

The district court erroneously cast aside the City's broad home rule powers to regulate conflict of interest matters with its employees through Article X, Section 3 of the Charter in holding that § 10-7F-9 of the HDOA, enacted in 2010, preempts and voids the Charter provision as applied to City firefighters. RP:134. The statute, which defines "hazardous duty officer" to include employed firefighters, provides: "A hazardous duty officer shall not be prohibited by an employer from engaging in any political activity when the officer is off duty, *except as otherwise provided by law*." NMSA 1978, § 10-7F-2(B)-(C) and § 10-7F-9 (2010) (emphasis added). The Charter provision falls within this express exception to the statute.

The phrase "as otherwise provided by law" is interpreted broadly to include all types of law. See Republican Party of N.M. v. Taxation & Revenue Dep't, 2012-NMSC-026, ¶ 13, 283 P.3d 853 (2012) ("as otherwise provided by law" allows exceptions under statutes, regulations, court rules, and constitutional provisions); City of Las Cruces v. Pub. Empl. Labor Relations Bd., 1996-NMSC-024, ¶ 12, 121 N.M. 688, 917 P.2d 451 ("as otherwise provided by law" includes exceptions created by administrative regulations); Albuquerque Commons P'ship v. City of Albuquerque, 2011-NMSC-002, ¶¶ 12-14, 149 N.M. 308, 248 P.3d 856 (construing "except as otherwise provided by statute or common law" to include both state and federal law). Municipal enactments are law. City of Aztec, at ¶ 16.

The "except as otherwise provided by law" language in § 10-7F-9 expressly creates an exception to the statute's prohibition against employers regulating off duty political activities of firefighters. The exception clearly allows employers to prohibit off duty political activities of their firefighters as permitted by other law. See Albuquerque Commons P'ship, at ¶¶ 12-14 (statute which exempted the state and its political subdivisions from an award of post-judgment interest "except as otherwise provided by statute or common law" allowed collection of post-judgment interest against the state and its political subdivisions as other law, including federal, so permitted). Because government employers may lawfully prohibit their employees from seeking or holding elective public office, the Charter

provision falls squarely within § 10-7F-9's exception. See 14-23, *supra*. The district court ignored plain language in § 10-7F-9 that permits lawful restrictions on political activity by public employers in erroneously concluding that the statute "preempts and voids" Article X, Section 3 of the Charter as applied to firefighters. Reversal is warranted on this basis alone.

4. The Municipal Charter Act provides that the City's Charter provision prevails over any inconsistent state statute.

No inconsistency exists between the Charter provision and § 10-7F-9 of the HDOA because they can be construed harmoniously with each other under the "except as otherwise provided by law" provision. But even if the two laws were inconsistent with each other – which they are not – the Charter provision prevails.

The Municipal Charter Act, NMSA 1978, §§ 3-15-1 to 3-15-16, supplements and implements the broad powers conferred to municipalities by home rule amendment. Haynes, 114 N.M. at 631, 845 P.2d at 154. A municipality's "charter may provide for any system or form of government that may be deemed expedient and beneficial to the people of the municipality . . . provided, that the charter shall not be inconsistent with the *constitution* of New Mexico...." NMSA 1978, § 3-15-7 (1965) (emphasis added). Consistent with these powers, the act specifically protects municipalities against state legislative interference with their charters:

> A municipality organized under the provisions of the Municipal Charter Act *shall be governed by the provisions of the charter* adopted

> pursuant to that act, and no law relating to municipalities inconsistent with the provisions of the charter shall apply to any such municipality.

NMSA 1978, § 3-15-13(A) (1984) (entitled "Charter controls when statute is inconsistent"); see also Haynes, 114 N.M. at 631 n.6, 845 P.2d at 154 (the Municipal Charter Act provides that no law relating to municipalities that is inconsistent with the *governing* provisions of a home rule charter shall apply to that municipality) (dictum) (emphasis in original).

Although it recognized the argument was not raised, the Haynes court analyzed § 3-15-13(A) as supporting its holding that the statutes at issue did not apply to the City of Clovis – a home rule municipality. 114 N.M. at 631 n.6, 845 P.2d at 154. Haynes reasoned that § 3-15-13(A) "is not restricted to matters of local concern and extends even to charter provisions of statewide concern, thereby restricting application of legislation more than required by the Constitution." Id. The Court noted that only municipal *legislative* powers are subject to express denial by general law or charter. Id. (citing NMSA 1978, § 3-15-13(B) (municipality adopting charter may exercise all *legislative* powers not expressly denied charter municipalities by general law or charter) (emphasis in Haynes)).

The statutes at issue in Haynes required that a commission-manager form of government have a five member commission in conflict with the city's charter, which provided for a different number of commissioners. Id. at 628, 845 P.2d at 151. Because the statutes pertained to governmental matters and not to legislative

powers, Haynes reasoned that, to the extent the statutes were inconsistent with the Clovis charter, they did not apply to it as a home rule municipality. Id. at 631 n.6, 114 P.2d at 154.

Like the provision in Haynes, the City's Charter provision is administrative in nature. See Johnson v. City of Alamogordo, 1996-NMSC-004, ¶ 7, 121 N.M. 232, 910 P.2d 308 (it is generally accepted that a dichotomy exists between a government's administrative acts and legislative acts). The Charter provision is not a legislative act penalizing conduct as unlawful, or regulating conduct generally, as to all of the City's citizens or other persons coming within the City's boundaries. Rather, the Charter provision sets conditions of employment only for those who work for the City, and manages conflict of interest issues in a manner "*expedient and beneficial to the people of the municipality.*" See NMSA 1978, § 3-15-7 (emphasis added); see also Cottrell, 120 N.M. at 370, 901 P.2d at 788 (Article X, Section 3 of the Charter regulates conflicts of interest of City employees); Garcetti, 547 U.S. at 418 (government employers, like private employers, need a significant degree of control over their employees' conduct to promote the efficient provision of public services). Section § 3-15-13(A) establishes that even if the Charter provision were inconsistent with § 10-7F-9 of the HDOA, the Charter provision prevails.

5. Section 10-7F-9 of the HDOA is not a "general law" that "expressly denies" municipalities the power to prohibit their employed firefighters from holding elective public office.

HDOA's express exception for other law, and NMSA 1978, § 3-15-13(A), by themselves, are sufficient grounds for reversing the district court's preemption ruling. Nonetheless, the Charter provision remains viable despite § 10-7F-9 of the HDOA even if treated as legislative rather than administrative in nature.

"A municipality which adopts a 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); NMSA 1978, § 3-15-13(B) (1984). A test of whether a statute is a "general law" is whether it affects all, most, or many of the inhabitants of the state and is therefore of statewide concern, or whether it affects only the inhabitants of the municipality and is only of local concern. Haynes, 114 N.M. at 633, 845 P.2d at 156. "Even if a statute applies to all municipalities throughout the state, it is not necessarily a general law if it does not relate to a matter of statewide concern." Id. at 632, 845 P.2d at 155.

Whether firefighters may be prohibited by their employers from holding elective public office while remaining actively employed firefighters is a subject that is predominantly of interest to the citizens they serve as opposed to citizens of the state at large. See Haynes, 114 N.M. at 634, 845 P.2d at 157 (the number of commissioners in the Clovis governing body was a subject predominantly, if not

entirely, of interest to the Clovis citizens); see also Gonzales, 87 N.M. at 234, 531 P.2d at 1207 (dual service as a city councilman and state employee would almost certainly create conflicting demands on state employee's time, energies, capacities and loyalties). Although Kane contended that the people of the state, generally, have an interest in having firefighters serve in the state legislature (RP:2; TR:11-12), no constitutional associational right requires that voters have particular individuals as their candidates. See Golden, 564 N.E.2d at 617 (voters have a constitutional right to advance candidates that represent their views, but this right does not require that any particular individual be able to serve as their candidate).

The City's powers include providing for any system of government "that may be deemed expedient and beneficial" to its citizens, "preserv[ing] peace and order within the municipality," and "providing for the safety, preserving the health, promoting the prosperity and improving the morals, order, comfort and convenience of the municipality and its inhabitants." NMSA 1978, § 3-15-7, § 3-17-1(B) (1993), and § 3-18-1(G) (1972). To that end, municipal employers need a significant degree of control over their employees' conduct in the interests of providing efficient public services. See Garcetti, 547 U.S. at 418. "The legislature is not constitutionally empowered to deny to home rule municipalities their powers of local government." Haynes, 114 N.M. at 634, 845 P.2d at 157.

Moreover, § 10-7F-9 of the HDOA does not expressly deny municipalities the power to prohibit their employed firefighters from holding elective public office. A clear "statement of the authority or power denied must be contained in such general law . . . or otherwise no limitation exists." Apodaca, 86 N.M. at 521-22, 525 P.2d at 881-82. Determining whether a statute "expressly denies" home rule power involves an inquiry into whether the statute evinces any intent to negate such municipal power, whether it manifests clear intent to preempt that governmental area from municipal policymaking, or whether municipal authority to act would be so inconsistent with the statute that the statute is the equivalent of an express denial. New Mexicans for Free Enter., at ¶ 19.

Section 10-7F-9's plain language establishes that it does not "expressly deny" the City's power to promote and protect the many legitimate governmental interests served by prohibiting its employees – including firefighters – from holding elective public office while remaining actively employed. By qualifying the statute's prohibition with the phrase, "except as otherwise provided by law," the HDOA expressly *preserves* the viability of the Charter's prohibition of certain political activity by City firefighters. See New Mexicans for Free Enter., at ¶ 21 (viewing minimum wage statute's recognition of existing ordinances setting higher local wages as contemplating a lack of uniformity in the law state-wide, which cut against any intent to preempt or deny municipal power in setting minimum wages).

Thus, even if § 10-7F-9 of the HDOA were a general law addressing an issue of concern to the state's citizens at large – which it is not – the statute, on its face, does not preempt and void the Charter provision prohibiting firefighters from holding elective public office.

6. The Charter prohibition is incident to the exercise of an independent municipal power.

The home rule amendment's grant of legislative powers "does not include the power to enact private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power." N.M. Const. art. X, § 6(D). Laws affecting the relationship between private employers and their employees have been found to be civil laws governing civil relationships within the meaning of the home rule amendment. New Mexicans for Free Enter., at ¶ 23. The Charter provision affecting the City's public employer relationship with its employees presents a situation akin to the private employer/private employee relationship and ordinance addressed in New Mexicans for Free Enter.

As long as a municipality can point to a power delegated to it, and the regulation of the civil relationship is reasonably incident to and clearly authorized by that power, the exemption in N.M. Const. art. § 6(D) applies. New Mexicans for Free Enter., at ¶ 27. If the intrusion into the private relationship is in pursuit of the public interest and clearly within the independent municipal power, the municipality is permitted to pass a law regulating a private or civil relationship as

long as the law does not generate non-uniformity issues. Id. at ¶ 32. The Charter provision easily meets these standards.

All municipalities are empowered to provide for the general welfare of their residents. See NMSA 1978, § 3-17-1(B). The City also has the power to "protect generally the property of its municipality and its inhabitants" and to "preserve peace and order within the municipality." NMSA 1978, § 3-18-1(F) and (G). These are independent municipal powers within the meaning of the home rule amendment. New Mexicans for Free Enter., at ¶ 29. The connection between prohibiting public employees from holding elective public office and furthering these general welfare interests and police powers is well-established by the myriad authorities upholding such restrictions on public employee political activity. See 14-23, *supra*. Thus, the Charter provision serves a public purpose and is within the City's general welfare and police powers.

The Charter provision does not raise serious concerns about generating non-uniformity in New Mexico law. Non-uniformity concerns involve the disorder and confusion that would result from the City rejecting, for example, the Uniform Commercial Code or adopting a contributory negligence regime. See New Mexicans for Free Enter., at ¶ 35. The Charter's prohibition creates no such conflict, and is consistent with the state's own prohibition against state employees holding public elective office. See NMSA 1978, § 10-9-21(B). Moreover, the

exception in § 10-7F-9 of the HDOA permitting employer regulation of firefighter off duty political activity "as otherwise provided by law" evinces the state legislature's lack of any expectation of complete state-wide uniformity of law on the subject, and leaves room for the Charter's lawful restriction on firefighter conduct. See New Mexicans for Free Enter., at ¶ 21 (minimum wage statute's recognition of existing ordinances contemplated a lack of uniformity in the law state-wide); Albuquerque Commons P'ship, at ¶ 15 (it is presumed the legislature is aware of, and well informed as to, existing law when it enacts statutes).

7. No inconsistency exists between Article X, Section 3 of the Charter and § 10-7F-9 of the HDOA.

A municipality's governing body "may adopt ordinances or resolutions not inconsistent with the laws of New Mexico . . . ." NMSA 1978, § 3-17-1. The City was unable to find any cases applying § 3-17-1 to a Charter provision as opposed to an ordinance. Moreover, applying § 3-17-1 to the Charter provision places the statute in conflict with § 3-15-13(A)'s mandate "that no law relating to municipalities inconsistent with the provisions of the charter shall apply to any such municipality." No conflict arises, however, if § 3-17-1 is construed as not applying to a charter provision. See Spaw-Glass Constr. Servs., Inc., 114 N.M. at 560, 844 P.2d at 810 (statutes should be construed harmoniously to preserve the objectives of each if no unreasonableness would result).

The Charter provision survives even if subjected to § 3-17-1 analysis. The test for determining whether an inconsistency exists is whether the ordinance permits an act the general law prohibits or prohibits an act the general law permits. New Mexicans for Free Enter., at ¶ 39. "If an ordinance merely complements a statute, instead of being 'antagonistic' to it, it is not in conflict with state law." Id. HDOA's "except as otherwise provided by law" exemption precludes any inconsistency between the Charter prohibition and the statute. See 30-34, *supra*. By falling within the exemption in § 10-7F-9, the Charter provision complements the statute in a non-antagonistic way. The district court's ruling that § 10-7F-9 of the HDOA preempts and voids Article X, Section 3 of the City's Charter, as applied to firefighters, should be reversed.

C. The City's CBA With Kane's Union Does Not Contractually Guarantee Her The Right To Hold Elective State Office While Remaining Actively Employed With The City

1. Preservation of issue.

This issue was preserved by the City's response to the application, its declaratory judgment motion filings, and argument at the hearing. RP:16, 24, 57-58, 120; TR:24-25.

2. Standards governing review.

Courts give contract terms their plain and ordinary meaning in determining the parties' intent. Lenscrafters, Inc. v. Kehoe, 2012-NMSC-020, ¶¶ 18-20, 282

P.3d 758; Continental Potash v. Freeport-McMoran, Inc., 115 N.M. 690, 704, 858 P.2d 66, 80 (1993). Ambiguity does not exist merely because the parties disagree on the construction to be given. Lenscrafters, Inc., at ¶ 18.

3. The CBA acknowledges the City's discretion to grant permanent employees leave without pay to serve in non-City elective office, and does not give Kane a contractual right to hold elective state office, while actively employed, in violation of the City Charter and Personnel Rules.

The CBA with Kane's union provides: "Sufficient leave of absence without pay may be granted to permanent employees to enable them to hold a non-City public office to which they have been elected." TR:33. These terms plainly recognize that the City has discretion to grant firefighters leave without pay to serve in non-City elective public office if the City so chooses. It is consistent with the Charter and personnel rule prohibitions against active employees holding elective public office. The City may allow a firefighter leave without pay to hold elective public office as an alternative to terminating employment – similar to the arrangement made for Montoya. The CBA does not create any contractual right for Kane to serve as a state legislator without taking leave, while remaining on the City's payroll, and in violation of the Charter and Personnel Rules.

The district court's finding that, under the CBA, the City "agreed" that firefighters "may hold elected office" is factually and legally erroneous if intended to mean the City's firefighters are contractually exempt from the Charter and

Personnel Rule prohibitions against active employees holding elective public office. The CBA's plain language creates no such exemption for firefighters and is consistent with the Charter provision and Personnel Rules prohibiting active employees from holding elective public office. Moreover, a contract provision attempting to circumvent the City Charter would be void. See NMSA 1978, § 3-15-13(A) (a municipality organized under the Municipal Charter Act shall be governed by the provisions of the charter adopted pursuant to that act).

IV. CONCLUSION

For all the foregoing reasons, the district court's order granting injunctive relief and declaratory judgment to Kane should be reversed, declaratory judgment should be granted in the City's favor, and Kane's Application For Temporary Restraining Order, Preliminary Injunction And Permanent Injunction And For Declaratory Judgment should be dismissed, in its entirety, with prejudice.

V. STATEMENT REQUESTING ORAL ARGUMENT

The City requests oral argument because this matter involves issues of significant importance regarding the constitutionality of provisions in the City's Charter and Personnel Rules and Regulations, and the City's ability to protect legitimate governmental interests by prohibiting its employees – including City firefighters – from seeking or holding elective public office.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

This brief complies with the limitations of Rule 12-213(F)(3) NMRA because this brief contains 10,541 words, excluding the parts of the brief exempted by Rule 12-213(F)(1) NMRA, according to the Word Count obtained using Microsoft Word 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the forgoing Brief-in-Chief were served on the following by U.S. First Class Mail on February 8, 2013:

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