

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

JUN 11 2013

Wardlaw

EMILY KANE,

Petitioner/Appellee,

v.

Ct. App. No. 32,383

No. D-202-CV-2012-05075

THE CITY OF ALBUQUERQUE,

Respondent/Appellant.

NOTICE OF ERRATA

COMES NOW, Respondent/Appellant The City of Albuquerque, by and through its attorneys of record, David Tourek (City Attorney), Rebecca E. Wardlaw (Assistant City Attorney), and Robin A. Goble (Conklin Woodcock & Ziegler, P.C.), and provides the following corrected citations to the Transcript of Proceedings as set out in Appellant's Brief-in-Chief and Appellant's Reply Brief:

Appellant's Brief-in-Chief

<u>Page</u>	<u>Citation</u>	<u>Correction</u>
2	TR:92-97	TR:99-104
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8	TR:5, 31	TR:5, 33
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Appellant's Reply Brief

<u>Page</u>	<u>Citation</u>	<u>Correction</u>
12	TR:8, 15, 18	TR:8-9, 16, 19
12	TR:29	TR:31

The corrections result from a slight variation in the pagination between the copy of the Transcript of Proceedings obtained from the Court Reporter for purposes of preparing the Docketing Statement, and the Transcript of Proceedings as prepared for and filed with the Court of Appeals. Copies of pages containing corrections in bold are attached. Counsel apologizes for any inconvenience caused to the Court and the parties.


Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing Notice of Errata was served on the following by U.S. First Class Mail on June 11, 2013:

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FEB 08 2013

Wendy E. Jones

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THE CITY OF ALBUQUERQUE,

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APPELLANT'S BRIEF-IN-CHIEF

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ORAL ARGUMENT
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Attorneys for Respondent/Appellant

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:99-104. 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>.

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:61-70; 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:65. 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:66-67. However, Arencon said, "This was obviously after the fact." TR:66. 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:69.

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:21, 56. 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, **33** (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, **33**.

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, 33.

No other evidence regarding firefighters seeking elective office in the past ten years was presented. TR: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:35. 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:72-85), 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:72-89. 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:77-81. 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:86-89. 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.

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:23-24.

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

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:8-9, 16, 19. 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:26-28.

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,

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:26.

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:35. 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

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constitutionally proscribable partisan conduct, and the extent to which pure expression may be impermissibly threatened by other provisions did not make the statute substantially overbroad and so invalid on its face).

E. The City's Prohibitions Do Not Add Qualifications For Elective Public Office

Kane did not allege that the City's prohibitions added candidacy qualifications for public office in violation of the New Mexico Constitution. RP:1-3. She raised that argument for the first time in responding to the City's motion for declaratory judgment, and reasserted it briefly at hearing. RP:81; TR:8-9, 16, 19. In response, the City referenced Gonzales as support for the constitutionality of its prohibitions. TR:31. The City's reference to Gonzales was sufficient preservation.

Gonzales held constitutional a state statute that prohibited the state employee from holding elective office on the Santa Fe Council and, in doing so, rejected the employee's argument that the statute imposed an unconstitutional restriction on him holding the elective office. 87 N.M. at 232, 531 P.2d at 1205. Gonzales found the state statute imposed a restriction on the public employment the state employee held, and not on the elective office that he wanted to hold. Id.; see also Hill, 65 So.3d at 377 (policy prohibiting college employees from simultaneously holding an elected State office did not alter the qualifications necessary to run for office – it established requirements for retaining college employment); Coats, 610