COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
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**IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO**

EMILY KANE,

Petitioner/Appellee,

v.

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

THE CITY OF ALBUQUERQUE,

Respondent/Appellant.

APPELLANT'S REPLY BRIEF

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

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**ORAL ARGUMENT
IS REQUESTED**

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I. THE CITY'S PROHIBITIONS AGAINST CANDICACY ARE CONDITIONS OF CITY EMPLOYMENT THAT MEET WELL-ESTABLISHED CONSTITUTIONAL STANDARDS

A. Courts Have Historically Found Government Employer Prohibitions Against Candidacy To Be Supported By Legitimate Governmental Interests

Kane argues that the City's prohibitions against employee candidacy are subject to, and fail, strict scrutiny because they violate her First Amendment rights. Answer Brief at 1-14. Numerous authorities prove her wrong.[1]

Challenged legislation merits strict scrutiny only when it affects a fundamental right. Pinnell v. Bd. of Cty. Comm'rs of Santa Fe Cty., 1999-NMCA-074, ¶ 19, 127 N.M. 452, 982 P.2d 503. Kane has no fundamental right to be a candidate for public office, or to hold public employment. See Clements v. Fashing, 457 U.S. 957, 963 (1982); Zielasko v. State of Ohio, 693 F. Supp. 577, 585 (N.D. Ohio 1988) ("Zielasko I"), aff'd, 873 F.2d 957 (6th Cir. 1989) ("Zielasko II"); see also Waters v. Churchill, 511 U.S. 661, 679 (1994) (noting that an at-will

[1] Although Kane generally alleged that the City's prohibitions also violate the Fourteenth Amendment (RP:2), she never articulated or proved any specific equal protection violation. See Brief-in-Chief at 23-26. Nor does she argue any in her Answer Brief. Indeed, while claiming the City treated her differently than other firefighters, Kane states, "To be clear, Respondent does *not* make an equal protection argument here." Answer Brief at 17, n.2 (emphasis in original). Kane has not presented, proven, or preserved a challenge to the City's prohibitions on Fourteenth Amendment grounds. See State ex rel. Gonzales v. Manzagol, 87 N.M. 230, 234, 531 P.2d 1203, 1207 (1975) ("An unequal protection claim may not be made in the abstract."). In any event, the bases supporting the constitutionality of the City's prohibitions on First Amendment grounds also establish their constitutionality under the Fourteenth Amendment. See Brief-in-Chief at 22-23.

government employee generally has no right to public employment based on the Constitutional at all). Kane has no fundamental right to maintaining dual-positions as an elected representative to the state legislature and as a City employee. See Hill v. Galliher, 65 So.3d 362, 373 (Ala. 2010) (noting the court had not found "any authority granting citizens the right to simultaneously hold both elected office and the employment of their choice"). Strict scrutiny does not apply in the absence of a fundamental right.[2]

Courts balancing the interests implicated by candidacy prohibitions or "resign-to-run" requirements similar to the City's provisions have routinely applied rational basis review as most appropriate. See Clements, 457 U.S. at 963-73 (using rational basis); Worthy v. State of Michigan, 142 F. Supp. 2d 806, 810-18 (E.D. Mich. 2000) (applying Clements, Anderson v. Celebrezze, 460 U.S. 780 (1983), and rational basis review); Grizzle v. State Election Bd., 634 F.2d 1314, 1321-22 (11th Cir. 2011) (citing Anderson and holding district court erred in applying strict scrutiny); Zielasko I, 693 F. Supp. at 583-87 (using Clements and Anderson in balancing candidacy, voters' rights, and governmental interests under rational basis review); U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 564-66 (1973) (noting Pickering v. Bd. of Educ., 391 U.S. 563 (1968)

[2] The Charter provision and personnel rule also do not implicate strict scrutiny review under the Fourteenth Amendment because they apply equally to all City employees and do not involve suspect classifications, such as race or ancestry. See Pinnell, at ¶ 19.

considerations in finding the Hatch Act's prohibitions against public employee political activities were supported by important governmental interests).[3]

Kane's reliance on Molina-Crespo v. U.S. Merit Sys. Prot. Bd., 486 F. Supp. 2d 680 (N.D. Ohio 2007) as requiring that strict scrutiny be applied to the City's prohibitions is misplaced. Answer Brief at 5-6. Consistent with historical precedent, Molina-Crespo used rational basis review in holding the Hatch Act's provisions were supported by legitimate governmental interests. 486 F. Supp. 2d at 689-91. Thereafter, Molina-Crespo acknowledged the plaintiff's argument that strict scrutiny should be applied, and found that the Act's prohibition against candidacy was narrowly tailored because employees remained free to engage in a wide range of other political activities. 486 F. Supp. 2d at 691-93. Thus, it held that, even if strict scrutiny applied, the challenged provision was constitutional. Id. Molina-Crespo did not hold that strict scrutiny was the required standard.

Other courts examining candidacy prohibitions for public employees under both standards have found that legitimate governmental interests support

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[3] Kane's effort to distinguish away the holdings in Gonzales and State ex rel. Harkleroad v. N.M. State Police Bd., 103 N.M. 270, 705 P.2d 676 (1985) misses the mark. Answer Brief at 19-23. Both cases relied on seminal and relevant U.S. Supreme Court authorities in concluding that the prohibitions against public employees seeking or holding elective public office were constitutional restrictions on their employment. See Gonzales, 87 N.M. at 232-34, 531 P.2d at 1205-07 (relying on United Pub. Workers v. Mitchell, 330 U.S. 75 (1947), Broadrick v. Oklahoma, 413 U.S. 601 (1973), and Letter Carriers); Harkleroad, 103 N.M. at 271-72, 705 P.2d at 677-78 (relying on Letter Carriers and Broadrick).

constitutionality even under strict scrutiny review. See Joyner v. Mofford, 706 F.2d 1523, 1532 (9th Cir. 1983) (prohibition against incumbent public officials running for any other elective office advanced substantial and important state interests such that it survived both rational basis and strict scrutiny); Oklahoma State Election Bd. v. Coats, 610 P. 2d 776, 781 (Okla. 1980) (governmental interests in efficiency, objectivity, and public employee integrity supported constitutionality of statute prohibiting candidacy for other office under either rational basis or strict scrutiny).

The City has presented "precise" and recognized governmental interests served by its prohibitions against employees seeking or holding elective public office. See Brief-in-Chief at 14-23, 26-28; see also Pinnell, at ¶ 32 (holding that county's interest in conducting its government in an organized and efficient manner was a legitimate governmental purpose). Anderson does not require, as Kane suggests, that the City establish "actual" harms, as opposed to articulating "potential" harms sought to be avoided. Answer Brief at 11-12.

Nor does rational basis review require a showing of actual harms. A court may even hypothesize as to any possible legitimate governmental objectives that are served by the challenged enactment. Zielasko I, 693 F. Supp. at 586 (cited authority omitted); see also In re Hodgdon, 19 A.3d 598, 605 (Vt. 2011) (describing judicial "resign-to-run" canon as serving "prophylactic" interests);

Montano v. Los Alamos Cty., 1999-NMCA-108, ¶ 11, 122 N.M. 454, 926 P.2d 307 (a classification may be supported by "possible" governmental interests rationally related to the classification).[4]

The City's prohibitions against candidacy protect integrity – both real and perceived – in City government, which promotes positive City relations throughout the state. The prohibitions ensure that a City employee's loyalties are not divided, or personally motivated, on votes cast in the state legislature affecting land use, water rights, taxes, labor, employment, municipal bond matters – and even the HDOA – where the City's interests may conflict with those of the elected employee's constituency, or the elected employee. The prohibitions protect against Hatch Act violations and their detrimental consequences should penalties be imposed.

Kane bore the burden of showing that the City's prohibitions serve "*no* valid governmental interest, [are] unreasonable and arbitrary as to amount to mere caprice." Montano, at ¶ 11 (quoted authority omitted) (emphasis in original). Kane cannot meet her burden, and the district court erred in concluding that she did.

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[4] Molina-Crespo, Joyner, and Coats indicate that, even if strict scrutiny were applied, the City's prohibitions against candidacy would not be held to evidentiary standards of showing actual or probable harm. All three courts found that the government's stated interests in efficiency and integrity were sufficient, by themselves, for satisfying a heightened scrutiny standard.

B. No Evidence Supports Kane's Claim That The City Enforced Its Candidacy Prohibitions Against Her Because Of The Content Of Political Speech

In efforts to elevate her First Amendment claim to strict scrutiny review, Kane tries to create a fundamental "free speech" right where none exists. She asserts the City opposed her candidacy because of her political viewpoints and the content of political speech in pursuing public office. Answer Brief at 14-19.

The record lacks any evidence of Kane's political viewpoints or political speech. It was the mere fact of Kane's candidacy – and nothing more – that prompted the City's actions as she continued pursuing elective public office, without City approval, after being advised it violated the City Charter and personnel rules. See Exs. 1-7. Kane's conduct constituted willful and disruptive insubordination. See id.

Kane's argument that the City's purportedly different treatment of her as compared to firefighters Torres, Luna, and Montoya proves it did so *because of her political* viewpoints and speech is nonsensical. No evidence exists of these other firefighters' political viewpoints or speech to support concluding that the City treated Kane differently because of hers as compared to theirs.

Moreover, Kane failed to prove she was similarly situated to these other firefighters to show that she was treated dissimilarly on any grounds. Brief-in-Chief at 24-26. Evidence of disparate treatment does not exist. The district court's

conclusions that the City knew about all the other firefighters' elective office pursuits when they occurred, and chose not to pursue disciplinary action against them, is not supported by substantial evidence. See Brief-in-Chief at 24-26. The stipulated facts do not reach as far as Kane argues. Answer Brief at 16, n.1.

Because the fact of Kane's candidacy prompted the City's actions – not political views or speech – Murphy v. Cockrell, 505 F.3d 446 (6th Cir. 2007) actually supports the City rather than Kane. See Answer Brief at 14-15. Murphy noted that a public employee may be lawfully terminated because of the mere fact of that employee's candidacy. 505 F.3d at 450. But the Murphy defendant testified that she terminated the plaintiff's employment because of campaign statements she made questioning the defendant's experience and criticizing the defendant's change of party allegiance shortly before her nomination. 505 F.3d at 448-49. No similar evidence exists in this case.

C. The City's Prohibitions, At Most, Minimally Affect Ballot Access And Voters' Rights

The City's prohibitions do not "severely" restrict ballot access and voters' rights. Answer Brief at 7-10. The City's prohibitions do not impact such interests at all, or do so only to a minimal, and therefore, constitutional degree.[5]

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[5] Indeed, Anderson distinguished the ballot access situation before it from the content-neutral "resign-to-run" provision found constitutional in Clements, noting that Clements upheld restrictions on candidacy that serve legitimate state goals which are unrelated to First Amendment values. 460 U.S. at 788, n.9.

Ballot access cases focus on the degree to which the challenged restrictions *exclude* certain classes of candidates from the electoral process based on whether the restrictions unfairly or unnecessarily burden the availability of opportunity to get on the ballot. Clements, 457 U.S. at 964. In general, laws that offend voters' First Amendment associational rights affect, in some way, the actual right to vote or the ability of voters to advance their political views through candidates who are prevented from running. Zielasko I, 693 F. Supp. at 585-86. Neither situation results from the City's prohibitions against its employees seeking or holding elective public office.

Government employer prohibitions against employees becoming candidates are conditions of employment that do not exclude persons interested in elective office from getting on the ballot. Such restrictions simply require that employees choose between their current public employment and running for elective office. See Joyner, 706 F.2d at 1533 ("resign-to-run" statute did not prevent state officials from becoming candidates for other offices, it merely required that they not occupy a state office while seeking another elective office); see also Worthy, 142 F. Supp. 2d at 813 (noting the fact that the plaintiff found her options unappealing or inconvenient did not transform the "resign-to-run" provision into an unconstitutionally burdensome restriction on ballot access).

Had the City disciplined Kane for violating its prohibitions against candidacy, such discipline would not have impacted her ability to get on the ballot itself. It would have impacted only her City employment. While Kane may have been forced to choose between continued, active City employment and running for the state legislature, having to make that choice does not unconstitutionally burden her actual access to the ballot as a candidate. See Joyner and Worthy, *supra* at 8.

Nor are voters' rights infringed by the City's prohibitions. "[T]he right to vote is the right to participate in an electoral process." Burdick v. Takushi, 504 U.S. 428, 441 (1992). While voters have the right to be able to cast their votes at the polls, they have no fundamental right to vote for a specific person, for persons having City employment, or for firefighters in particular. See Zielasko II, 873 F.2d at 961 ("[N]o one is guaranteed the right to vote for a specific individual.").

Moreover, the City's prohibitions against candidacy apply to all employees, regardless of political affiliations or beliefs. They do not deprive voters of candidates based on political beliefs, and do not preclude voters from associating with candidates who share their political beliefs. The public's right to vote is not, *per se*, hindered by the City's prohibitions against candidacy. Regardless of whether or not City employees (or firefighters in particular) appear on ballots throughout the state, New Mexico voters remain free to go to the polls and cast their votes for party candidates whose political beliefs align with their own.

Government employer prohibitions against employee candidacy, and similar "resign-to-run" laws, impose minimal burdens on candidate and voters' interests that survive rational basis review. See Joyner, 706 F.2d at 1533 (provision restricting state officials from running for other public office, at worst, imposed on officeholders a loss of income and possibility of being without public employment – burdens which were easily outweighed by the government's legitimate interests in orderly, consistent, and honest government); Zielasko II, 873 F.2d at 960-62 (provision precluding the election or appointment of any person over 70 years of age to state judicial office did not unconstitutionally affect potential candidate's or voter's rights; plaintiff had no fundamental right to public employment or to run for elective office; voter had no guaranteed right to vote for a particular individual and remained free to campaign, support, and vote for her party's candidate); Worthy, 142 F. Supp. 2d at 817 (holding "resign-to-run" provision placed a minimal burden on voters' First Amendment rights).

D. The City's Prohibitions Should Not Be Found Unconstitutional On Grounds That Do Not Apply To Kane

Kane contends the City's prohibitions are unconstitutional as overbroad because they prohibit even non-partisan candidacy. Answer Brief at 12-14. Kane asserts the court should forbid enforcement of the City's prohibitions "pending a limiting instruction or partial invalidation." Id. at 14.

The U.S. Supreme Court disfavors striking laws as facially overbroad and, instead, favors applying overbreadth scrutiny to fact situations as presented on a case-by-case basis. See Broadrick. 413 U.S. at 612-16; see also Clements, 457 U.S. at 972, n.6 (holding that judge challenging "resign-to-run" provision could not challenge the provision's application to him because it might be unconstitutional as applied to others, reasoning that the First Amendment would not suffer if the challenged provision's constitutionally is litigated on a case-by-case basis).

The constitutionality of the City's prohibitions against candidacy for non-partisan elective office is an issue best left for a day when it is squarely before the court. Kane challenged the constitutionality of the prohibitions as applied to her bid for partisan elective office. Analyzing whether the City's prohibitions are overbroad as against non-partisan elective offices wastes judicial resources. Broadrick and Clements counsel against making such unnecessary determinations.

Finally, the City's prohibitions against partisan elective public office involve constitutionally proscribable conduct by public employees. See Brief-in-Chief at 14-28; *supra* at 1-5, 7-10. To the extent that non-partisan political activity is impermissibly threatened, if at all, by the City's prohibitions, that does not make the prohibitions substantially overbroad and invalid as a whole. See Letter Carriers, 413 U.S. at 580-81 (reversing district court's decision that Hatch Act was unconstitutionally overbroad, reasoning that some provisions covered

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, 15, 18. In response, the City referenced Gonzales as support for the constitutionality of its prohibitions. TR:29. 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

P. 2d at 780 (state statute which restricted district attorney from running for other elective office did not impose additional qualifications on the candidacy for federal public office).[6]

F. The City's Prohibitions Protect Against Hatch Act Violations And Are Supported By The Same Legitimate Governmental Interests Supporting The Hatch Act

Kane argues "[t]he City does not have statutory standing to sue pursuant to the Hatch Act," and that the district court did not have subject matter jurisdiction to determine "[t]he federal Hatch Act does not apply to this action as any federal money . . . is de minimis." Answer Brief at 23-25. Kane's arguments misapprehend the City's reliance on the Hatch Act.[7]

The City has not sued Kane for any Hatch Act violation. The City's interests in abiding by the law and protecting against the consequences of Hatch Act violations are legitimate and important. See Brief-in-Chief at 14-15, 20-21. The governmental interests supporting Hatch Act prohibitions against public

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[6] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) does not support Kane. Answer Brief at 30. In Thornton, the Court distinguished the term limits provision before it from cases involving government employer prohibitions against employees seeking elective public office, noting that such employer prohibitions did not impose additional qualifications for candidacy. 514 U.S. at 835, n.48.

[7] Kane argues the City's interests in protecting against its employees seeking and holding elective public office are already sufficiently protected by the CBA with Kane's union, which provides that the City may allow firefighters to take unpaid leave while serving in elected office. Answer Brief at 12. The fallacy and irony of Kane's argument is self-evident.

employee political activities similarly support the City's prohibitions against its employees seeking or holding elective public office. See Brief-in-Chief at 14-28.[8]

II. KANE FAILS TO REBUT THE CITY'S SHOWING THAT § 10-7F-9 DOES NOT PREEMPT THE CHARTER PROVISION

The City stands on the preemption analysis in its Brief-in-Chief (at 29-43), and believes that Kane's response merits limited reply as follows:

A. Legislative History Favors The City

Kane represents that a preliminary version of NMSA 1978, § 10-7F-9 (2010) provided: "A hazardous duty officer who is an employee of a political subdivision of the state shall not, as a condition of the employment, be prohibited from seeking election to, or serving as a member of, the governing body of any other political subdivision of the state." Answer Brief at 32-34.[9] Another provision stated that the HDOA "govern[s] the relationships between hazardous duty officers, as employees, and the state or any of its political subdivisions, including home rule municipalities." Id. Both provisions were removed from the final act adopted. Id.

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[8] Kane's arguments that the legitimate governmental interests supporting the Hatch Act are no longer viable (Answer Brief at 10-11) are refuted by the continued existence of the Hatch Act itself, and the City's numerous authorities upholding restrictions on public employee candidacy, and "resign-to-run" provisions, for the same and similar governmental interests served by the Hatch Act.

[9] Kane cites no source for her legislative history assertions. The City takes her assertions at face value for purposes of reply.

The removal of these provisions actually supports the City's position that § 10-7F-9's "except as otherwise provided by law" language preserved the City's prohibitions against employees, including firefighters, seeking or holding elective public office as a condition of City employment. See Brief-in-Chief at 30-34.

B. The City Charter Provision And Personnel Rule Are "Law"

Kane argues that the City Charter provision and personnel rule fall outside the "except as otherwise provided by law" exemption in § 10-7F-9 because they are not "laws," and that the City never argued that its enactments qualify as "law." Answer Brief at 35. Kane is wrong. The City cited authorities establishing that its enactments are "law" and, therefore, fall within the exception language in § 10-7F-9. See Brief-in-Chief at 29-34.

C. Governing Authorities Do Not Support Kane's "General Law" Arguments

The City's prohibitions against candidacy serve important governmental interests and regulate its internal relationships with firefighters as City employees. See Brief-in-Chief at 14-23, 26-28, 37-40; see also *supra* at 1-5. Kane argues that § 10-7F-9 is a "general" law for preemption purposes because it applies, geographically, throughout the entire state. Answer Brief at 35-36. However, whether a law is "general" for purposes of preemption analysis relates to its affect on inhabitants statewide, not its geographic reach. See Brief-in-Chief at 37-38.

Kane contends that citizens statewide have an interest in knowing that employers are respectful toward firefighters, and that firefighters are guaranteed certain rights and privileges in the workplace. Answer Brief at 36-37. Relevant authorities do not support stretching the meaning of "general" law to such a degree (see Brief-in-Chief at 37-38), and Kane cites no specific authority that would support doing so.

D. Kane's "Expressly Denies" Arguments Are Legally Irrelevant

Kane argues that, because the entire HDOA applies generally to home rule municipalities, and affords firefighters various rights regarding investigations against them, personnel files, and financial privacy, such provisions establish that § 10-7F-9 "expressly denies" the City's home rule authority to prohibit its firefighters from seeking or holding elective public office. Answer Brief at 38-39. Her arguments fail under governing standards and rest on stretched implications. See Brief-in-Chief at 39-40.

Kane's reliance on ACLU v. City of Albuquerque, 1999-NMSC-044, 128 N.M. 315, 992 P.2d 866 is misplaced. Answer Brief at 39-40. The statutes in ACLU did not permit exceptions "as otherwise provided by law." Thus, ACLU's preemption analysis was not driven by the considerations that govern the exemption language in § 10-7F-9.

E. The Charter Provision Is Governmental, Rather Than Legislative, In Nature, Because It Regulates Employee Conduct

The City Charter prohibition against candidacy is a reasonable condition on City employment that is supported by legitimate interests in promoting efficiency and integrity in providing governmental services. See Brief-in-Chief at 14-23, 26-29; see also *supra* at 1-5, 7-10. It is an internal management policy regulating the employer/employee relationship. See Hill, 65 So.3d at 377 (policy prohibiting college employees from simultaneously holding an elected State office was an internal-management policy).

Kane argues that interpreting NMSA 1978, § 3-15-13(A) (1984) to preserve the City's Charter provision leads to absurd results because a home rule municipality could pass legislative Charter provisions contrary to state statutes. Answer Brief at 43. But, as noted in State ex rel. Haynes v. Bonem, 114 N.M. 627, 845 P.2d 150 (1992), § 3-15-13(A) preserves municipality Charter provisions that are governmental – not legislative – in nature. See Brief-in-Chief at 34-36.

Kane asserts that the sovereign's law controls where two governmental or regulatory statutes conflict. Answer Brief at 43-44. Section 10-7F-9's exception for other law prevents any conflict here. See Brief-in-Chief at 30-34. Moreover, § 3-15-13(A) concedes the State's sovereign authority to a conflicting home rule municipality Charter provision that is governmental in nature.

F. The City's Prohibitions Do Not Violate Article X, Section 6(D) Of The New Mexico Constitution

The legislative powers granted to home rule municipalities do not include enacting 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). If the City's prohibitions against candidacy fall within Article X, Section 6(D), the City has demonstrated that they do not violate its terms. See Brief-in-Chief at 40-42.

Kane argues that Article X, Section 6(D) does not apply at all because the City's prohibitions are not private or civil laws governing civil relationships. Answer Brief at 44-45. If that is the case, then the prohibitions are a constitutional exercise of the City's home rule powers unimpaired by Article X, Section 6(D). Kane offered no response to the City's showing that its candidacy prohibitions qualified as "incident to the exercise of an independent municipal power." See Brief-in-Chief at 40-42.

G. Section 3-17-1 Does Not Invalidate The City's Prohibitions Against Candidacy For Elective Public Office

Kane concedes that the City Charter's prohibition against candidacy is not unlawful under NMSA 1978, § 3-17-1 (1993). Answer Brief at 45. She offered no response to the City's showing that § 3-17-1 also does not invalidate Personnel Rule 311.3. See Brief-in-Chief at 30, n.4, 42-43.

III. THE CBA PROVIDES ONLY THAT THE CITY MAY CONSIDER GRANTING LEAVE FOR A FIREFIGHTER TO SERVE IN ELECTIVE PUBLIC OFFICE

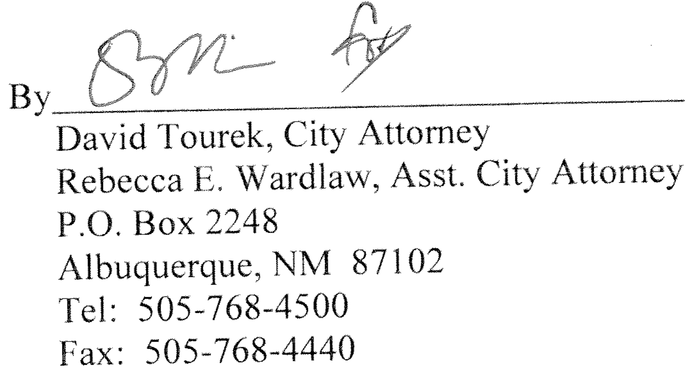
Kane argues that the CBA provision "evinced intent" to decline enforcing City provisions prohibiting elective public office candidacy as against firefighters. Answer Brief at 46-47. The CBA's plain language refutes Kane's argument. The provision simply acknowledges that the City may choose to grant leave for firefighters to serve in non-City elective public office.

IV. CONCLUSION

For all the foregoing reasons, the district court's injunctive relief and declaratory judgment in Kane's favor should be reversed, declaratory judgment should be entered 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.

Respectfully submitted,

CITY OF ALBUQUERQUE
CITY ATTORNEY'S OFFICE



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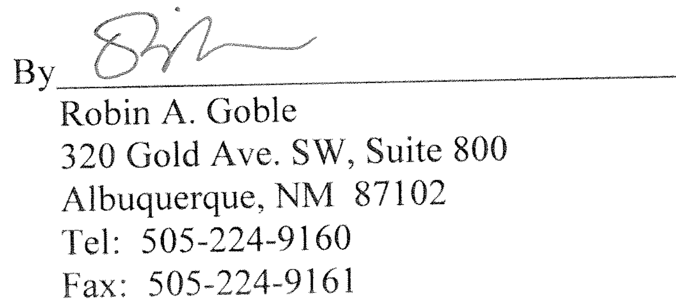

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STATEMENT OF COMPLIANCE

This brief complies with the limitations of Rule 12-213(F)(3) NMRA because this brief contains 4,374 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.

This brief complies with the typeface requirements of Rule 12-305(C)(1) NMRA because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 font size Times New Roman.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was served on the following by U.S. First Class Mail on April 15, 2013:

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