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

**EMILY KANE,**

**Petitioner/Appellee,**

**vs.**

**THE CITY OF ALBUQUERQUE,**

**Respondent/Appellant.**

**Ct. of Appeals No. 32,683**
**(related appeal Ct. App. No. 32,383)**
**BCDC No. D-202-CV-2012-0575**

---

# APPELLEE'S ANSWER BRIEF

---

Michael J. Cadigan
Kristina Caffrey
CADIGAN LAW FIRM, P.C.
3840 Masthead NE
Albuquerque, NM 87110
(505) 830-2076
*Attorneys for the Appellee*

## TABLE OF CONTENTS

## Table of Authorities

### Cases

## Statutes



## Other Authorities

The Court of Appeals should affirm the award of attorney's fees and costs entered by the District Court.

## I. KANE IS A PREVAILING PARTY UNDER 42 U.S.C. § 1983 AND 42 U.S.C. § 1988 AND HAS A STATUTORY RIGHT TO ATTORNEY FEES

### Standard of Review

The City confuses and conflates the appropriate standard of review. It titles its first section "Kane Has No 42 U.S.C. § 1983 Constitutional Right to Support the Attorney's Fees Award Under 42 U.S.C. § 1988" and then writes, "A discretionary decision based on an misapprehension of the law is an abuse of discretion that must be reviewed de novo," quoting *In re N.M. Indirect Purchasers Microsoft Corp.*, 2006-NMCA-007, ¶ 6, 140 N.M. 879, 149 P.3d 976. The City then moves on to its argument that Appellee Kane has no cognizable constitutional right at issue. Thus, the City seems to argue that the "misapprehension of the law" is the constitutional outcome and invites an unnecessary mini appeal-within-appeal that distracts attention from the attorney fees issue.

"We review the award of attorney's fees for abuse of discretion." *Nava v. City of Santa Fe*, 2004-NMSC-039, ¶24, 136 N.M. 647, 103 P.3d 571, quoting *Gonzales v. New Mexico Department of Health,* 2000-NMSC-029, ¶ 35, 129 N.M. 586, 11 P.3d 550.

### Kane is a Prevailing Party

The City overstates the burden of proving that one is a "prevailing party" for purposes of 42 U.S.C. § 1988. One of the City's own cited cases, *Bogan v. Sandoval County Planning and Zoning Commission*, 119 N.M. 334, 345, 890 P.2d 395, 406 (Ct. App. 1994), states, "To be a 'prevailing party' within the meaning of Section 1988, the plaintiff need not prevail on all of the major issues in the litigation. Rather, the plaintiff need only 'succeed[ ] on any significant claim' and obtain 'some of the relief sought,'" citing *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791, 109 S.Ct. 1486, 1493, 103 L.Ed.2d 866 (1989). The U.S. Supreme Court also sets a low burden: a party is considered "prevailing" for purposes of receiving attorney's fees if he or she "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties." *Hensley v. Eckerhart*, 461 US 424, 433 (1983).

In its Brief in Chief, the City does not dispute that Ms. Kane prevailed in the District Court. Instead, it writes at page 12, "Should the City obtain reversal of the district court's decision...the district court's award of attorney's fees to Kane...must also be reversed." It offers no citation for this proposition, and then again writes on page 12, "Therefore, the fees award must be reversed it, on appeal, the City's Charter and personnel rule provisions...are found to be constitutional." It again offers no citation for this proposition. What may or may not happen on

appeal is entirely irrelevant for purposes of 42 U.S.C. § 1988, and the City has cited no authority as to why it should be relevant.

42 U.S.C. § 1988 speaks very plainly: "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee." It does not state any requirement that the prevailing party must also prevail *on appeal*, and the City has cited no law suggesting that the prevailing party must be an *ultimately* prevailing party. It is the City's burden on appeal to provide authority for its position that a reversal on the merits mandates a reversal of attorney's fees, and until the City provides that authority, Appellee Kane is a "prevailing party." Until the Court of Appeals rules on the merits appeal, Appellee Kane is a "prevailing party." Until either of those events occur, Appellee Kane is entitled to attorney fees.

Any other reading would be absurd. It would allow any litigant on the losing end of a civil rights case to delay paying attorney's fees simply by pursuing appeals—whether or not those appeals are frivolous or meritorious. In commenting on another public-interest, fee-shifting statute, the Inspection of Public Records Act, the New Mexico Court of Appeals recently said that fee-shifting statutes impose "the cost of litigation on the party who unsuccessfully resists a statutorily-compelled, socially beneficial action." *Rio Grande Sun v. Jemez Mountains Public School District*, 2012-NMCA-091, ¶ 9, 287 P.3d 318. In chastising a District Court

that had drastically reduced an attorney fee award, the Court of Appeals wrote, "As with other fee-shifting statutory schemes, IPRA's fee requirement encourages individuals to enforce IPRA on behalf of the public...Consequently, attorney fees awarded 'should reflect the full amount of fees fairly and reasonably incurred by [the p]laintiff in securing an award' under the statutory scheme." *Id.* at ¶ 19, quoting *Jones v. General Motors Corp.* 1998-NMCA-020, ¶ 25, 124 N.M. 606, 953 P.2d 1104. Indeed, "[w]ithout this incentive, prospective plaintiffs might have difficulty pursuing their claims and enforcing IPRA on behalf of the public." *Id.*

Without the incentive of attorney's fees payable after prevailing at the trial court level, prospective plaintiffs would have great difficulty pursuing their claims and enforcing civil rights protections on behalf of the public. And without the incentive of attorney's fees payable at *every* court level regardless of appellate options, attorneys would have no incentive to take civil rights cases and, in many situations, would not have the financial means to do so.

Additionally, the City's argument that attorney's fees are unavailable for a Fourteenth Amendment claim is baseless. On page 14 of its Brief, the City writes, "42 U.S.C. ¶ 1988 does not provide for awarding attorney's fees for prevailing on a Fourteenth Amendment equal protection clause claim." It cites to *Alford v. City of Lubbock*, 484 F.Supp. 1001, 1008 (N.D. Tex. 1979). Here is what that case says about the Fourteenth Amendment: "attorney for the plaintiffs has pleaded for

attorney's fees. Plaintiffs' attorney seeks the recovery of his fees under 42 U.S.C. s 1988. That statute does not allow for recovery of attorney's fees, however, when recovery is gained under the ADEA or the Equal Protection Clause. Accordingly, the plea for attorney's fees is denied." That is the entirety of the reference to the Fourteenth Amendment. No citation. No discussion. No commentary. Only two other cases have cited *Alford* since 1979. One is *Cheng v. GAF Corp.*, 713 F.2d 886 (2nd Cir. 1983), which only provided a citation with no discussion or commentary and was later overruled. The other, *Crosland v. Charlotte Eye, Ear and Throat Hospital*, 686 F. 2d 208 (4th Cir. 1982) cited *Alford* in relation to statutes of limitations in employment lawsuits. The Court should disregard the City's argument in this respect. It should also disregard the City's attempts to use a backwater case with no citations—no citations to previous precedent, and no citations in later opinions—to resist fees and costs associated with Appellee Kane's Fourteenth Amendment claim.

Furthermore, in *Case v. Unified School District No. 233, Johnson County, Kansas*, 157 F.3d 1243, 1247-1248 (10th Cir. 1998), the 10th Circuit allowed fees on an unsuccessful Fourteenth Amendment claim because that claim was "intrinsically linked" to a successful First Amendment claim; the trial court rejected a request for a reduction in fees "because the plaintiffs did not prevail on all of their claims; [instead] the court found that the defendants' proposed

reduction was not justified because the Fourteenth Amendment claims were 'intrinsically related' to the First Amendment claims."

Here, the First Amendment and Fourteenth Amendment claims go hand-in-intrinsically linked-hand, and in fact, all the claims are intrinsically linked to the First Amendment. At the December 3, 2012 hearing on the attorney fees motion, the City attempted to argue that witness fees did not relate to a constitutional claim, but the Court rebuffed that argument, saying, "I'm convinced by Mr. Cadigan's arguments that it did go to the claims related to the constitutionality of the City Charter...[the witnesses] showed that the City did know those provisions were overly broad and that is why no discipline was brought up on those individuals. I think I did make that statement at the hearing." December 3, 2012 Transcript at 18:11-18.

**Kane Sought to Vindicate a Constitutional Right**

42 U.S.C. § 1983 reads, "Every person who, under color of any statute, ordinance, regulation, custom, or usage...subjects, or causes to be subjected, any citizen of the United States ...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The City attempts to show that Appellee Kane has no protection under 42 U.S.C. § 1983 because she has no "right" to seek or hold elective public office.

The City continues to define the right at issue much too narrowly, and it also ignores the operative language in 42 U.S.C. § 1983: "any citizen of the United States." It does not limit itself to "any non-public employee." It does not say, "deprivation of any rights specifically listed in the City of Albuquerque Charter." 42 U.S.C. § 1983 is purposefully broad and expansive to incentivize civil rights actions for private *and* public benefit, and the application of 42 U.S.C. § 1983 and its accompanying fee-shifting provision, 42 U.S.C. § 1988, should likewise be broad and expansive in order to incentivize civil rights actions for both private and public benefit.

The First Amendment right to political participation is much broader and more expansive than the City understands. Although *State ex rel Harkleroad v. New Mexico State Police Board*, 103 N.M. 270, 705 P.2d 676 (1985) and *State ex rel. Gonzales v. Manzagol*, 87 N.M. 230, 531 P.2d 1203(1975) may initially seem to support the City's position, subtle differences make these two cases distinguishable from the present situation. In *Gonzales*, the employee worked for the State of New Mexico as a Water Resource Assistant in the Office of the Engineer. This was a non-exempt, classified position governed by the State Personnel Act. After an initial appointment to the Santa Fe City Council, Gonzales then sought election to the City Council. The Office of the Engineer then moved to dismiss Gonzales from his employment. *Id.* at 231, 1204. Gonzales framed his

conflict differently than Ms. Kane and the City have framed the conflict here. Gonzales argued that requiring him to resign his State employment imposed an unconstitutional restriction on him as an elected public officer. *Id.* at 232, 1205. The New Mexico Supreme Court saw it differently: "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.* at 232, 1205. The Supreme Court then stated that the Legislature of New Mexico "had the constitutional power...to thereby provide, as a qualification or standard for his continued employment by the State in a position covered by the State Personnel Act, that he not hold 'political office.'" *Id.* at 232, 1205. The Legislature had this power because of Article 7, Section 2(B) of the New Mexico Constitution, which states, "The *legislature* may provide by law for such qualifications and standards as may be necessary for holding an *appointive position* by any public officer or employee" (emphasis added).

The Supreme Court did *not* rule that the State could prevent an elected public officer from holding state employment. Rather, it instead found that because Gonzales held an "appointive position" as a "public officer or employee," the *Legislature* could, via the State Personnel Act, create the rule that anyone holding "appointive position" as a "public officer or employee" could not be an *elected*

public officer. The difference between these two concepts is that the State derives authority for the latter from Article 7, Section 2(B) of the New Mexico Constitution. The City of Albuquerque has not shown from where it would derive similar authority.

Mr. Gonzales did not argue a facial violation of the First Amendment, but only argued that the State Personnel Act was overbroad (as shown in the merits appeal, these are two different analyses). The Court did not find the State Personnel Act overbroad, but as shown in the merits appeal, the State Personnel Act is not equivalent to the "total ban" of the City's Charter and Regulations. Moreover, the Office of the Engineer showed a much more cognizable, specific risk of conflict: "the fact that Petitioner is serving on the governing body of the City of Santa Fe may very well place him in a position of conflict with his state employment *in regard to water rights claimed by the City of Santa Fe*." *Id.* at 234, 1207 (emphasis added). Because both the State Office of the Engineer and the City Council of Santa Fe manage water rights, the state could identify a cognizable risk of conflict. Here, the City of Albuquerque Fire Department (which employs Ms. Kane as a firefighter) and the New Mexico House of Representatives do not both manage efforts to rescue people from burning buildings.

*State ex rel Harkleroad v. New Mexico State Police Board*, 103 N.M. 270, 705 P.2d 676 (1985) involved a challenge to a New Mexico State Police

Department Rule. Mr. Harkleroad asserted that the Rule was vague and overbroad. The Court relied on 1973's *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548 (1973) in finding the Rule not vague or overbroad. The Court stated, "Furthermore, Rule 134 is not fatally overbroad because it does not proscribe constitutionally protected conduct" and then quoted from *Letter Carriers*: the "right to participate in political activities [was] not absolute in any event ... [P]lainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited." *Harkleroad* at 272, 678. In citing to only *Letter Carriers*, the Court ignored several other cases expanding upon or questioning *Letter Carriers*, such as *Clements v. Fashing*, 457 U.S. 957 (1982), *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and also ignored the general line of public-employee-speech rights cases beginning with *Pickering v. Board of Education*, 391 U.S. 563 (1968). New Supreme Court precedent, including *Clements*, requires that any restriction on candidacy be considered in terms of its severity and impact on voters. The New Mexico Supreme Court did not do this in *Harkleroad.*

The City's position also finds little basis in the new federal precedent. Again, what the City wishes to define as an extremely narrow interest—the right to seek and hold elected office while employed by a governmental entity—actually

encompasses and implicates far broader rights of both the candidate and the electorate. The right to candidacy is far from a "well-settled" area of law. The Supreme Court decisions giving rise to the City's belief that no right to candidacy exists actually show an inability to come to consensus regarding the level of protection of candidacy as a First Amendment right. *Clements v. Fashing*, 457 U.S. 957 (1982) is only a plurality opinion. In Parts III and IV of that opinion, Justice Rehnquist wrote only for himself and Justices Burger, Powell, and O'Connor. It is from Part III, which represents the opinion of only four Justices, that comes the statement that candidacy is not a fundamental right. A subsequent Supreme Court opinion analyzing candidacy rights noted that *Clements* is only a plurality opinion: *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983).

*Clements* does not end the inquiry, in part because the right to "candidacy" is not the only one at issue. The Supreme Court has recognized that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter,* 405 U.S. 134, 143 (1972). If candidacy restrictions "limit the field of candidates from which voters might choose[,]...[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Anderson* 460 at 786 (internal quotations omitted). When government attempts to restrict political candidacy, it places

"burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms." *Anderson* 460 at 787, quoting *Williams v. Rhodes,* 393 U.S. 23, 30-31(1968). *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) confirmed that in "*Bullock v. Carter*, we minimized the extent to which voting rights cases are distinguishable from ballot access cases." The hybrid and overlapping nature of candidate and voter rights means that the analysis varies as the restrictions vary.

*Clements* itself acknowledged that the analysis would differ from the rational-basis scrutiny typically applied to non-fundamental rights. "Decision in this area of constitutional adjudication is a matter of degree, and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions." *Clements* 457 at 963. At its core, the "inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity." *Id.* at 964 (internal quotation marks omitted).

The Supreme Court solidified its analysis of candidacy restrictions in *Anderson v. Celebrezze* 460 at 789: the court

must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

*Burdick v. Takushi*, 504 U.S. 428, 434 (1992) used the same standard.

Furthermore, "[w]hen the plaintiffs' rights are subject to 'severe' restrictions, those restrictions survive only if they are 'narrowly tailored and advance[ ] a compelling state interest.'" *Grizzle v. Kemp*, 634 F.3d 1314, 1322 (11th Cir. 2011) (internal citations and quotation marks omitted). *See also Burdick v. Takushi,* 504 U.S. 428, 434 (1992) ("severe" regulation must be "narrowly drawn to advance a state interest of compelling importance.") Alternately, if government imposes "reasonable" or "nondiscriminatory" restrictions on candidacy, the government's "important regulatory interests" will normally suffice. *Grizzle* at 1322.

*Molina-Crespo v. U.S. Merit Systems Protection Bd.*, 486 F.Supp.2d 680 (N.D.Ohio 2007) adds a further wrinkle:

There is an argument that strict scrutiny should be applied in this case; as Molina-Crespo argues, this is the *federal* government dictating to *state* employees, as opposed to the factual situations involved in *Mitchell, Letter Carriers,* and *Broadrick.* As such, a strong case can be made that the normal 'employer-employee' relationship generally analyzed in Hatch Act cases does not apply, and, therefore, neither would the lowered level of constitutional protections.

*Molina-Crespo* at 691-692 (emphasis in original). The court there found no binding case law which "analyzed the question therefore implicated; whether the *federal* Act applied to a *state* employee takes the analysis outside the realm of government employer-employee speech, and accordingly elevates the level of speech protections (and, of course, the level of scrutiny)." *Id.* at 692 (emphasis in original). *Molina-Crespo* drew attention to the complications when different levels of government are involved. In *Molina-Crespo*, a federal act applied to a state employee running for a county office. Here, a city act applies to a city employee running for a state office. The *Molina-Crespo* court worried that the implication of the rights of another governmental entity (the state employing Mr. Molina-Crespo) affected the level of scrutiny. Here, the City's act implicates the right of another governmental entity—the State of New Mexico, which has many interests in candidates for *state* office and the rights of *state* voters. The Ohio District Court then did apply strict scrutiny. *Id.* at 693.

The Supreme Court has also broadened the nature of public-employee First Amendment rights in general. In *Connick v. Myers*, 461 U.S. 138, 148 (1983), the Supreme Court announced, "Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." Additionally, the Court affirmed that "a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of

government employment." *Id.* at 140. Although the government-as-employer may have interests in controlling the expression of its employees, courts must seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State as an employer, in promoting the efficiency of the public services it performs." *Id.* at 142, quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

The City has identified the Constitutional right at issue as a right to "candidacy." However, just as the rights of candidates and voters do not separate themselves easily, the right to candidacy implicates broader rights of commenting on matters of public concern. Candidates for public office necessarily will speak on matters of public concern—and speech on matters of public concern constitutes core political speech under the First Amendment. Kane argued in the merits appeal that the City had not only subjected her to the deprivation of rights of candidacy, but also to the deprivation of the broader right of commenting on matters of public concern. See Appellee Kane's Answer Brief in Case 32,383, pages 11-14.

Most importantly, 42 U.S.C. § 1983 does not limit itself to "fundamental rights." It does not distinguish between levels of scrutiny. Whether or not the right to candidacy is fundamental, important, or some other adjective, the courts have come to some consensus that is a *right*—even if they do not agree on what kind of right. They have also come to consensus that candidacy rights implicate voter

rights. If it is a right—no matter how big, small, fundamental, or important—42 U.S.C. § 1983 and 42 U.S.C. § 1988 cover the costs of fighting for it.

In the precedent, including in *State ex rel Harkleroad v. New Mexico State Police Board*, 103 N.M. 270, 705 P.2d 676 (1985) and *State ex rel. Gonzales v. Manzagol*, 87 N.M. 230, 531 P.2d 1203(1975), courts *balanced* the First Amendment right of citizens with the interest of their governmental employer. Just because these two cases came to the decisions they did does not mean that no right to candidacy exists; it simply means that the laws at issue in those cases achieved a better balance between that right to candidacy and the government's interest that the laws at issue in this case. The balancing act will come out differently in every case depending on the factors present and the precedent applied, but the results of the balancing act do not affect the conclusion that some right exists to candidacy.

Furthermore, the burden of proving that § 1983 and § 1988 applies to an action is very low. In *Ramah Navajo School Bd., Inc. v. Bureau of Revenue*, 720 P.2d 1243, 104 N.M. 302 (N.M. App. 1986) (abrogated on other grounds), the plaintiff sought attorney's fees under § 1988, but the New Mexico Court of Appeals first had to determine if the plaintiff had actually pled a § 1983 action and if he was eligible for § 1988 attorney's fees. A § 1983 action requires only two things: the plaintiff must allege deprivation of a federal right, and the plaintiff must argue that the person who deprived him or her acted under the color of state law.

*Ramah* at 305, 1246. The plaintiff need not specifically mention "42 U.S.C. § 1983," and indeed, in *Ramah* the plaintiff had not mentioned it in the original pleading, but the New Mexico Court of Appeals still allowed the collection of attorney's fees.

The *Ramah* case clearly expresses the broad and expansive reading that courts should take of § 1983 and § 1988. Those two statutes exist to encourage civil rights litigation that benefits both public and private parties. A very low pleading threshold furthers this goal. Just because Kane's original complaint may or may not have mentioned a section of United States Code, this does not strip away § 1983 coverage. Just because courts have not agreed on the fundamentalness of candidacy rights, this does not strip away § 1983 coverage. Emily Kane is a citizen of the United States. Political participation is a right guaranteed by the United States Constitution. The City of Albuquerque acted under color of law in attempting to strip Ms. Kane of that right. This matter is clearly under the § 1983 umbrella, and now the analysis moves to § 1988's allowance for attorney fees.

## II. THE AWARD OF ATTORNEY'S FEES WAS APPROPRIATE

### Standard of Review

"We review the award of attorney's fees for abuse of discretion." *Nava v. City of Santa Fe*, 2004-NMSC-039, ¶24, 136 N.M. 647, 103 P.3d 571, quoting *Gonzales v. New Mexico Department of Health*, 2000-NMSC-029, ¶ 35, 129 N.M.

586, 11 P.3d 550. "The test is not what we would have done had we heard the fee request, but whether the trial court's decision was clearly against the logic and effect of the facts and circumstances before the court." *In re N.M. Indirect Purchasers Microsoft Corp.*, 2006-NMCA-007, ¶ 6, 140 N.M. 879, 149 P.3d 976, quoting *In re Estate of Greig,* 107 N.M. 227, 230, 755 P.2d 71, 74 (Ct.App.1988). "We customarily defer to the District Court's judgment [on attorney fee awards] because an appellate court is not well suited to assess the course of litigation and the quality of counsel." *Case v. Unified School District No. 233, Johnson County, Kansas*, 157 F.3d 1243, 1249 (1998) (citations omitted).

The trial court "has far better means of knowing what is just and reasonable than an appellate court." *Id.* (citations omitted). "It is well[ ]settled that an award of attorney's fees on the basis of reasonable compensation is a finding not to be disturbed unless patently erroneous as reflecting an abuse of discretion." *In re N.M. Indirect Purchasers Microsoft Corp.*, 2006-NMCA-007, ¶ 6,140 N.M. 879, 149 P.3d 976, quoting *Hertz v. Hertz,* 99 N.M. 320, 331, 657 P.2d 1169, 1180 (1983).

**Precedent**

Appellee Kane must provide some perspective to the appeal here. The District Court in this case awarded a total of $7,644.50 in fees and $242.70 in costs. RP: 253. This figure is vastly incomparable to the figures in the City's cited precedent. In *Nava v. City of Santa Fe*, 2004-NMSC-039, ¶ 25, 136 N.M. 647, 103

P.3d 571, the original fees and costs request was $110,657.13. In *Rio Grande Sun v. Jemez Mountains Public School District*, 2012-NMCA-091, ¶ 3, 287 P.3d 318: $22,899.50 for 125.4 hours spent in prosecuting the case, plus $834.85 in expenses, $132 in costs, and post-judgment interest. *Case v. Unified School District No. 233, Johnson County, Kansas*, 157 F.3d 1243, 1246 (1998): $481,330.83 for the original request. *Kennedy v. Dexter Consolidated Schools*, 2000-NMSC-025, ¶ 36, 129 N.M. 436, 10 P.3d 115: a total of 1,000 hours for two attorneys. *In re N.M. Indirect Purchasers Microsoft Corp.*, 2006-NMCA-007, ¶ 6, 140 N.M. 879, 149 P.3d 976: $6,100,000 ($6.1 million) awarded. *Ramos v. Lamm*, 713 F.2d 546 (1983): $709,933.50 in fees and $32,782.43 in costs (not adjusted for inflation) awarded. Another leading 10th Circuit case on attorney's fees, *Anchondo v. Anderson, Crenshaw & Associates, LLC*, 616 F.3d 1098, 1102 (2010) involved an award of $63,333.52.

**Applicable Law**

"As the attorneys of prevailing plaintiffs in a civil rights action, the appellants were entitled to an award of attorney's fees, expenses, and costs *associated* with the prosecution of the case." *Case v. Unified School District No. 233, Johnson County, Kansas*, 157 F.3d 1243, 1247 (1998) (emphasis added). "A lodestar is determined by multiplying counsel's *total* hours reasonably spent on the case by a reasonable hourly rate." *Rio Grande Sun v. Jemez Mountains Public*

*School District*, 2012-NMCA-091, ¶ 20, 287 P.3d 318 (emphasis added), quoting *In re N.M. Indirect PurchasersMicrosoft,*2007-NMCA-007, ¶ 34, 140 N.M. 879, 149 P.3d 976.

"In determining what is a reasonable time in which to perform a given task or to prosecute the litigation as a whole, the court should consider that what is reasonable in a particular case can depend upon facts such as the complexity of the case, the number of reasonable strategies pursued, and the responses necessitated by the maneuvering of the other side." *Case* at 1250, quoting *Ramos v. Lamm*, 713 F.2d 546, 554 (10th Cir. 1983). "Because mandating that the district court identify hours reasonably expended by billing entry or litigation activity would, in many cases, be practically impossible," "[t]here is no requirement ... that district courts identify and justify each disallowed hour. Nor is their [sic] any requirement that district courts announce what hours are permitted for each legal task." *Id.* (citations omitted) "More important is the discretionary determination by the district court of how many hours, in its experience, should have been expended on the specific case, given the maneuverings of each side and the complexity of the facts, law, and litigation." *Id.*

If the trial court does need to make a change, a general reduction is the appropriate method. "When a court is dissatisfied with the detail or contemporaneousness of such records, it may *reduce* fees accordingly." *Kennedy v.*

*Dexter Consolidated Schools*, 2000-NMSC-025, ¶ 35, 129 N.M. 436, 10 P.3d 115 (emphasis added). In *Case*, when the district court "could not decipher from the billing records how much time was spent on [unsuccessful] standing issues, it considered this fact in making a general reduction in lodestar hours." *Case* at 1252.

The process does not have to be difficult. *Anchondo v. Anderson, Crenshaw & Associates, LLC*, 616 F.3d 1098, 1102 (2010) outlines a simple, easy method of verifying that attorney's fees are appropriate. "The court looked to prevailing market rates in the New Mexico community for attorneys of their experience and found $195 per hour reasonable for local counsel...and $300 per hour reasonable for national FDCPA class action specialist," and then "turned to the number of hours expended... [t]he district court reviewed carefully the detailed billing records, concluded they demonstrate that counsel exercised appropriate billing judgment and avoided duplicative efforts, and found the number of hours expended on this litigation is reasonable;" the court further determined that "neither an upward nor a downward adjustment of the lodestar amount is necessary under the circumstances of this case." *Id.* (internal quotation marks omitted).

That process satisfied the 10th Circuit, which in review wrote, "we decline to look behind the district court's affirmation that it carefully reviewed the relevant materials and determined that the hours counsel recorded were reasonable" and

voiced "reluctance to disturb a presumptively valid lodestar fee determination on the basis of a conclusory objection." *Id.* at 103.

**The City's Objections**

All of the City's objections to the attorney fee award invite the Court of Appeals to look behind the district court's affirmation (TR-2 page 3:10-17) that it carefully reviewed the relevant materials and determined the hours counsel recorded were reasonable. The City's objections also ask the Court of Appeals to disturb a presumptively valid lodestar fee and substitute an unnecessarily detailed review—a review with the level of detail explicitly rejected by *Case v. Unified School District No. 233, Johnson County, Kansas*, 157 F.3d 1243, 1250 (10th Cir.1998). Additionally, "[w]hen a court is dissatisfied with the detail or contemporaneousness of such records, it may *reduce* fees accordingly." *Kennedy v. Dexter Consolidated Schools*, 2000-NMSC-025, ¶ 35, 129 N.M. 436, 10 P.3d 115 (emphasis added).

If the City of Albuquerque was dissatisfied with aspects of billing records, it should have asked for a general reduction and offered a specific percentage, instead of calling upon the Court of Appeals to spend valuable time and energy parsing billing records. The City of Albuquerque, however, never asked for a general reduction. At the December 3, 2012 hearing, the City asked for a two-

thirds reduction of research time (TR-2 page 7:20-23), an elimination of duplicative entries (page 8:19-21), elimination of witness fees, elimination of a fee for attending a pre-litigation proceeding (page 13:4), elimination or reduction of fees for time spent preparing the motion for attorney's fees (page 10:2-6), and a total denial of attorney's fees and costs (page 6:12-14). The City never asked for a general reduction. At best, the City failed to frame its request in a proper manner in line with precedent. At worst, it waived the issue of a general reduction.

Additionally, Counsel for Appellee Kane made a great amount of voluntary reductions: time spent by a law school student, duplicative costs, attendance at the pre-litigation administrative hearing, and duplication of paralegal entries (page 17:16-20).

The City's specific items of dissatisfaction are easily explained and resolved.

Page 7 of the City's Brief in Chief: "Time billed for drafting findings and conclusions was included even though they were never filed, and it was never shown how much of that work related to Kane's First Amendment claim."

"In determining what is a reasonable time in which to perform a given task or to prosecute the litigation as a whole, the court should consider that what is reasonable in a particular case can depend upon facts such as the complexity of the case, the number of reasonable strategies pursued, and *the responses necessitated by the maneuvering of the other side*." *Case* at 1250, quoting *Ramos v. Lamm*, 713

F.2d 546, 554 (10th Cir. 1983) (emphasis added). At one point, both sides in the case believed that findings and conclusions of law would become necessary. However, the two sides then agreed to stipulate to certain facts, making the findings and conclusions unnecessary. In drafting and then not filing the proposed findings and conclusions, Appellee Emily Kane merely responded to the maneuvering of the other side.

Page 7 of the City's Brief in Chief: Time billed "provided no detail as to how much of the time billed was devoted to Kane's First Amendment claim, as distinguished from other claims."

As explained above, the Court of Appeals does not have to and should not go digging through billing records. The City of Albuquerque could have, in accordance with the law set out above, asked for a general reduction in the fee award to address this alleged problem. It did not.

Page 7 of the City's Brief in Chief : "Over $600 in fees were requested for time related to calling firefighters Torres, Luna, and Montoya as witnesses to support Kane's disparate treatment, equal protection claim."

"In determining what is a reasonable time in which to perform a given task or to prosecute the litigation as a whole, the court should consider that what is reasonable in a particular case can depend upon facts such as the complexity of the case, the number of reasonable strategies pursued, and *the responses necessitated*

*by the maneuvering of the other side.*" *Case* at 1250, quoting *Ramos v. Lamm*, 713 F.2d 546, 554 (10th Cir. 1983) (emphasis added). Kane identified the testimony of Torres, Luna, and Montoya as relevant and had to prepare those witnesses for testimony. She planned to call these witnesses at a hearing. However, the City then agreed to certain stipulated facts, including facts about Torres, Luna, and Montoya, which meant that Kane did not have to call them after all. Additionally, the "disparate treatment" claim also falls under the First Amendment. In the merits appeal (Court of Appeals number 32,383, Appellee's Response Brief pages 15-19), Kane argued that disparate treatment may also be actionable under the First Amendment because it proves that the City infringed not only on Kane's candidacy rights, but also her broader rights of speech as a public employee still entitled to comment upon matters of public concern.

The City made its objection to the witness fees at the December 3, 2012 hearing. The Court considered the argument but allowed the fees and costs (TR-2 page 18:1-2).

Page 7 of the City's Brief in Chief: Most hours did not relate to First Amendment claim.

"When a court is dissatisfied with the detail or contemporaneousness of such records, it may *reduce* fees accordingly." *Kennedy v. Dexter Consolidated Schools*, 2000-NMSC-025, ¶ 35, 129 N.M. 436, 10 P.3d 115 (emphasis added). "A lodestar

is determined by multiplying counsel's *total* hours reasonably spent on the case by a reasonable hourly rate." *Rio Grande Sun v. Jemez Mountains Public School District*, 2012-NMCA-091, ¶ 20, 287 P.3d 318 (emphasis added), quoting *In re N.M. Indirect PurchasersMicrosoft,*2007-NMCA-007, ¶ 34, 140 N.M. 879, 149 P.3d 976. There are two possibilities here: 1) The District Court preliminarily determined that the *total* attorney hours (attorney hours, not law student hours) and hourly rate were both reasonable, that they resulted in a presumptively reasonable lodestar amount, and that no reduction was necessary to account for non-First Amendment claims; or 2) The District Court did not find the preliminary lodestar satisfactory, but the City did not provide a generalized reduction plan, leaving the Court with the lodestar amount. The City has not shown that *the Court* was dissatisfied with the billing records, the City has not shown that the initial lodestar amount was per se unreasonable, and the City has ignored the fact that Kane's counsel *voluntarily* eliminated the hours worked by a law student. Under these conditions, the City's argument is both unsupported and facile.

In fact, a review of the December 3, 2012 hearing transcript shows that the Court went through the necessary steps and shows that possibility #1 above is correct: "I did have an opportunity to review the pleadings...as well as going through disputed items in the billing that was submitted by Mr. Cadigan...So I did review all that. Is there anything further you'd like to argue?" (TR-2 page 3:10-16)

Page 8 of the City's Brief in Chief: The City notes that fees for preparing the bill for attorney's fees should not be awarded.

"An award of reasonable attorneys' fees may include compensation for work performed in preparing and presenting the fee application." *Case v. Unified School District No. 233, Johnson County, Kansas*, 157 F.3d 1243, 1254 (10th Cir.1998), quoting *Mares v. Credit Bureau of Raton,* 801 F.2d 1197, 1205 (10th Cir.1986)

Page 9 of the City's Brief in Chief: the Court's order did not contain a specific analysis.

The level of analysis required by law is very low. "Because mandating that the district court identify hours reasonably expended by billing entry or litigation activity would, in many cases, be practically impossible," "[t]here is no requirement ... that district courts identify and justify each disallowed hour. Nor is their [sic] any requirement that district courts announce what hours are permitted for each legal task." *Case* at 1250 (citations omitted) "More important is the discretionary determination by the district court of how many hours, in its experience, should have been expended on the specific case, given the maneuverings of each side and the complexity of the facts, law, and litigation." *Id.* See also *Anchondo v. Anderson, Crenshaw & Associates, LLC*, 616 F.3d 1098, 1102 (2010). The law simply does not require the level of analysis that the City of Albuquerque wants.

Page 9 of the City's Brief in Chief: the District Court did not make reductions based on the vagueness of the entries and their failure to itemize.

First, the District Court did make reductions of specific items, and in fact, counsel for Appelle volunteered those reductions. Secondly, when the Court agreed to entertain further arguments at the December 3, 2012 hearing, the City never made a general reduction request. Third, a general, across-the-board reduction is committed firmly to the Court's discretion. "[A] general reduction of hours claimed in order to achieve what the court determines to be a reasonable number is not an erroneous method, so long as there is sufficient reason for its use." *Case* at 1250, quoting *Mares v. Credit Bureau of Raton,* 801 F.2d 1197, 1203 (10th Cir.1986). Despite the availability of the general reduction method, "the district court's discretion in awarding fees cannot be so broad as to allow it *carte blanche* to give a victorious plaintiff half the time to obtain a favorable result as the defendants spent in losing." *Id.* at 1254. Indeed, in the *Case* case, the trial court did make a general reduction, and on appeal the losing side asked for an even greater reduction. The 10th Circuit wrote, "Even under the abuse of discretion standard, however, we are not comfortable affirming an 80% reduction in appellants' hours to a level over 50% below the time spent by the defendants in a hotly litigated case involving novel First Amendment issues without at least some explanation for why defendants' evidence of reasonable hours and the time defendants actually spent

was not relevant to determining appellants' reasonable hours." *Id.* at 1254. And similarly to this situation, the prevailing plaintiffs in *Case* had already voluntarily slashed various fees from their billings. See *Case* at 1247. Counsel for Appellee Kane voluntarily removed some fees (see above) and now the City asks for a carte blanche to give a victorious plaintiff half as much time to obtain a favorable result as the City spent in losing. The standard of review is abuse of discretion, and the City simply offers no explanation for why the Court abused its discretion. A difference of opinion between the Court and the City as to a reasonable reduction or reasonable lodestar does not necessarily, immediately rise to *abuse of discretion.*

Page 9 of the City's Brief in Chief: Costs of subpoenas were not related to the First Amendment claim.

Costs are also recoverable under the Declaratory Judgment Act, which does not require a nexus to a Constitutional claim.

Page 9 of the City's Brief in Chief: Billing entries were "vague and failed to distinguish between how much time was devoted to Kane's 1st Amendment claim as opposed to all her other claims."

As explained above, the Court of Appeals does not have to and should not go digging through billing records. The City of Albuquerque could have, in accordance with the law set out above, asked for a general reduction in the fee award to address this alleged problem. It did not. "A lodestar is determined by

multiplying counsel's *total* hours reasonably spent on the case by a reasonable hourly rate." *Rio Grande Sun v. Jemez Mountains Public School District*, 2012-NMCA-091, ¶ 20, 287 P.3d 318 (emphasis added), quoting *In re N.M. Indirect Purchasers Microsoft*, 2007-NMCA-007, ¶ 34, 140 N.M. 879, 149 P.3d 976. The starting point is total hours reasonably spent on the case.

Additionally, the 10th Circuit's recounting of the attorney fee decision in the trial court's decision in *Anchondo v. Anderson, Crenshaw & Associates, LLC*, 616 F.3d 1098, 1107 (2010) seems particularly apt and on point here:

> ACA's brief culminates in a plea for a substantial across-the-board cut in counsel's compensable hours, with an associated complaint that it is unclear from the district court's reasoning whether it even considered this option. Actually, the reason there is no mention of an across-the-board reduction in the district court's decision is abundantly clear: the court had reviewed counsel's billing records, concluded that they showed proper billing judgment, and found the hours expended to be reasonable. That determination, coupled with the court's prior calculation of appropriate hourly rates of compensation, provided a fully adequate basis for an appropriate fee award.

Similarly, there is a perfectly valid explanation as to why the district court's order has no mention of an across-the-board reduction: the court had reviewed counsel's billing records (see TR-2 page 3:10-17), concluded that they showed proper billing judgment, and found the hours expended—in light of the Court's intimate knowledge of the case and its development—to be reasonable. The Court then highlighted a few items it did not find reasonable—for example, time spent by a law student (page 4:13-14). Because a trial court "may rely on its own knowledge

of the rates normally charged in the area," *Rio Grande Sun v. Jemez Mountains Public School District*, 2012-NMCA-091, ¶ 14, 287 P.3d 318, the court had a fully adequate basis for an appropriate fee award.

Page 13 of the City's Brief in Chief: "those witnesses related to Kane's disparate treatment, equal protection claim and were irrelevant to her First Amendment claim."

The "disparate treatment" claim actually falls under both the Fourteenth and First Amendments. In the merits appeal (Court of Appeals number 32,383, Appellee's Response Brief pages 15-19), Kane argued that disparate treatment may also be actionable under the First Amendment because it proves that the City infringed not only on Kane's candidacy rights, but also her broader rights of speech as a public employee still entitled to comment upon matters of public concern. Additionally, in *Case v. Unified School District No. 233, Johnson County, Kansas*, 157 F.3d 1243, 1247-1248 (10th Cir. 1998), the 10th Circuit allowed fees on an unsuccessful Fourteenth Amendment claim because that claim was "intrinsically linked" to a successful First Amendment claim; the trial court rejected a request for a reduction in fees "because the plaintiffs did not prevail on all of their claims; [instead] the court found that the defendants' proposed reduction was not justified because the Fourteenth Amendment claims were 'intrinsically related' to the First Amendment claims." Here, the argument that the

City of Albuquerque treated Ms. Kane differently from other similarly-situated individuals is sufficiently interconnected with the argument that the City of Albuquerque treated Ms. Kane in a manner that violated the First Amendment as to justify not reducing the fee.

Page 17 of the City's Brief in Chief: "Not conducting a lodestar analysis."

The City believes that the trial court did not conduct a proper lodestar analysis. However, there is a perfectly plausible alternative theory to the City's position. We return again to *Anchondo* at 1107:

> ACA's brief culminates in a plea for a substantial across-the-board cut in counsel's compensable hours, with an associated complaint that it is unclear from the district court's reasoning whether it even considered this option. Actually, the reason there is no mention of an across-the-board reduction in the district court's decision is abundantly clear: the court had reviewed counsel's billing records, concluded that they showed proper billing judgment, and found the hours expended to be reasonable. That determination, coupled with the court's prior calculation of appropriate hourly rates of compensation, provided a fully adequate basis for an appropriate fee award.

Page 17 of the City's Brief in Chief: there was "no inquiry into reasonableness."

Counsel for Appellee Kane voluntarily reduced some of the fees. The Court accepted those reductions. The fact that the Court accepted and acknowledged those reductions—and then made no further reductions—shows that an inquiry into reasonableness did occur. See, e.g. TR-2 pages 3:10-17, 4:13-19, 8:22-9:2, 13:19-20, 16:15-16, 17:16-23, 18:11-18.

Page 18 of the City's Brief in Chief: Billing records were insufficiently detailed.

Again, a discrepancy between what the City of Albuquerque legal department considers "insufficiently detailed" and what the District Court deems "insufficiently detailed" does not automatically become an abuse of discretion, and an abuse of discretion is the standard of review. While the City of Albuquerque may have wanted more detailed records, the Court itself never cast doubt upon the level of detail of the billing records. The law allows trial courts to bring to bear their special knowledge of the case: "We customarily defer to the District Court's judgment because an appellate court is not well suited to assess the course of litigation and the quality of counsel." *Case* at 1249 (citations omitted). A trial court "has far better means of knowing what is just and reasonable than an appellate court." *Id.* (citations omitted).

Page 18 of the City's Brief in Chief: The court must determine whether the prevailing party's attorney exercised billing judgment, which consists of winnowing the hours actually spent down to the hours reasonably spent.

The City assumes that exercising billing judgment *requires* winnowing. This takes the argument too far. Yes, a trial court should determine whether an attorney exercised billing judgment, but "the district court's discretion in awarding fees cannot be so broad as to allow it *carte blanche* to give a victorious plaintiff half the

time to obtain a favorable result as the defendants spent in losing." *Case* at 1254. If the billing judgment is self-evident, then winnowing is not required. Again, as in *Anchondo*, it is equally likely, if not more likely, that the trial court here found the billing—minus the specific items identified by the Court—presumptively reasonable.

Page 19 of the City's Brief in Chief: witness costs should not be recoverable.

Kane identified the testimony of Torres, Luna, and Montoya as relevant and had to prepare those witnesses for testimony. She planned to call these witnesses at a hearing. However, the City then agreed to certain stipulated facts, including facts about Torres, Luna, and Montoya, which meant that Kane did not have to call them after all. Additionally, costs are available through the Declaratory Judgment Act.

## III. CONCLUSION

The City of Albuquerque has appealed the award of $7,644.50 in attorney fees and $242.70 in costs to a party who prevailed in pursuing a civil rights action. It now asks the Court of Appeals to spend time and energy combing through billing records even though Counsel for Appellee Kane, the trial court itself, and the City's counsel all agreed on large reductions. It asks the Court to do this in clear contravention of applicable precedent. The District Court engaged in the proper analysis and did not abuse its discretion. As the standard of review is abuse

of discretion, the Court of Appeals should not disturb the duly awarded attorney's fees and costs.

## IV: Statement Regarding Oral Argument

Because of the relatively small amount of money at issue, the relative lack of legal controversy, and the City's waiver of the general reduction argument, oral argument is not necessary for this case.

Respectfully submitted,

CADIGAN LAW FIRM, PC

By: _____

Michael J. Cadigan
Kristina Caffrey
3840 Masthead NE
Albuquerque, NM 87109
(505) 830-2076
(505) 830-2076 (fax)
*Attorneys for Petitioner/Appellee*

## STATEMENT OF COMPLIANCE

This brief complies with the limitation of Rule 12-213(F)(3) NMRA because this brief contains 10,992 words, excluding the parts of the brief exempted from 12-213(F)(1) NMRA, according to the word count obtained using Microsoft Word 2007.

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 2007 in 14 font size Time New Roman.

Kristina Caffrey

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Answer Brief were served on the following by email and by U.S. Mail – First Class on August 16, 2013:

David Tourek, City Attorney
Rebecca E. Wardlaw, Asst. City Attorney
CITY OF ALBUQUERQUE
P. O. Box 2248
Albuquerque, NM 87102
(505) 768-4500
(505) 768-4440 (fax)
*Attorneys for Respondent/Appellant*

Robin Goble
CONKLIN, WOODCOCK & ZIEGLER PC
320 Gold Ave SW, Suite 800
Albuquerque, NM 87102
(505) 224-9160
(505) 225-9161 (fax)
*Attorney for Respondent/Appellant*

Mark Caffrey for
Kristina Caffrey