IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

MARIO ALDERETE, DONALD MEDINA, JESSE SERNA, GEORGE ALLEN WYLER, JERONIMO RIVERA, GILBERT KOZLOWSKI, RICHARD BARROS, JOSEPH TAFOYA, ANGELO GALLEGOS, and MIKE FARIAS,

Plaintiffs/Appellants,

And

SAM BEATTY,

Plaintiff,

v.

Ct. App. No. 33, 151
(related appeal Ct. App. No. 33, 380)

CITY OF ALBUQUERQUE,

Defendant/Appellee,

And

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES 3022,

Defendant.

APPELLEE'S ANSWER BRIEF

Appeal from the Second Judicial District Court
The Honorable Beatrice Brickhouse, Presiding
No. D-202-CV-2012-03136

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I. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

This appeal arises from an Order granting summary judgment pursuant to Rule 1-056 NMRA as to ten of the eleven original Plaintiffs[1]. **[BIC 9, 11, 13]** Plaintiffs Mario Alderete, Donald Medina, Jesse Serna, George Allen Wyler, Jeronimo Rivera, Gilbert Kozlowski, Richard Barros, Joseph Tafoya, Samuel Beatty, Angelo Gallegos, and Mike Farias are "M14 series" mid-level managers in the City of Albuquerque's Solid Waste Department. **[RP 2]** Plaintiffs filed a complaint for damages against their employer, Defendant/Appellee City of Albuquerque ("the City") and the American Federation of State, County, and Municipal Employees Local 3022 ("AFSCME" or "Local 3022"). **[RP 1-5]** Plaintiffs all presently are, or were in the past, members of the Local 3022 Union. **[RP 2]** Plaintiffs sought damages from the City for an alleged breach of contract, and from Local 3022 for an alleged breach of the duty of fair representation. **[RP 1-5]**

Plaintiffs asserted that the City's personnel rules and practices and Collective Bargaining Agreement ("CBA") with Local 3022 required the City to pay all managers performing the same duties the same salary. **[RP 4]** Plaintiffs further

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[1] Plaintiff Beatty's case is still below, not having been resolved in the summary judgment motion. All eleven of the plaintiffs are collectively referred to as the Plaintiffs; the ten appealing plaintiffs are referred herein as the Plaintiffs/Appellants.

asserted that Local 3022 failed to assist them in their grievance against the City. **[RP 4]**

The City filed a Motion for Summary Judgment pursuant to Rule 1-056 NMRA, on March 14, 2013. **[RP 70]** The Honorable Judge Beatrice Brickhouse granted the City's Motion on July 8, 2013, as to the Plaintiffs/Appellants (Mario Alderete, Donald Medina, Jesse Serna, George Allen Wyler, Jeronimo Rivera, Gilbert Kozlowski, Richard Barros, Joseph Tafoya, Angelo Gallegos, and Mike Farias). **[RP 248]** The City's motion was denied as to Plaintiff Samuel Beatty. **[RP 248-249]** The ten Plaintiffs/Appellants against whom the court ordered summary judgment timely filed their Notice of Appeal on August 6, 2013. **[RP 290]**

II. SUMMARY OF RELEVANT FACTS AND PROCEEDINGS

In the underlying action, the City sought summary judgment against all the Plaintiffs as to the alleged breach of the City's Personnel Rules and Regulations, as well as the alleged breach of the CBA. **[RP 92-101]** The City asserted that the Plaintiffs did not have standing to bring a claim for breach of contract through the Personnel Rules and Regulations, and that even if they did have standing, that the City had substantially complied with the Personnel Rules and Regulations and did not breach the implied contract. **[RP 93-96]** The City also asserted that the Appellants did not have standing to bring a claim of breach of contract under the

CBA, and that even they did have standing, the City did not breach the CBA. **[RP 96-98]**

In seeking summary judgment, the City presented portions of the Personnel Rules and Regulations, the CBA with Local 3022, and an affidavit from the City's Deputy Human Resources Director, Mary Scott. **[RP 79-91]** The City's Personnel Rules and Regulations classify employees into "series," and each series is further broken into "grades," which are further divided into "steps." **[RP 85-86]** Employees in each grade may be placed at differing steps, based each individual's education, experience, and longevity as an employee, as determined by the Personnel Rules and Regulations. **[RP 71, 86-88]** The City presented evidence through the affidavit that pay variations amongst the twenty-seven Solid Waste Supervisors in the M14 grade are permissible under the Personnel Rules and Regulations. **[RP 71-75, 79-88]** Three of the Solid Waste Management Department ("SWMD") M14 managers arrived at their present steps as a result of job transfers through settlement agreements. **[RP 72, 88]** Thirteen of the M14 managers arrived at their present pay rate after being promoted to the M-series from a B-series position. **[RP 73, 86-87]** Five of the twenty-seven were promoted from the B-series to the M-series before the Personnel Rules and Regulations were changed in 2006, making their pay rate different. **[RP 73, 87]** One employee, Juan Jojola, while promoted from the B-series to the M-series, negotiated his pay

based on his experience to one step above what he would be otherwise due under the Personnel Rules and Regulations. **[RP 73, 87]** Three of the other M14 employees were promoted within the M-Series, and received a salary in accordance with the Personnel Rules and Regulations. **[RP 74, 87]** Another M14 was reclassified from an M12 position to an M14 position and received a pay adjustment pursuant to the Personnel Rules and Regulations. **[RP 75, 87-88]** A final employee, Samuel Beatty, was a lateral transfer from the Transit Department to the Solid Waste Management Department, and received the same rate of pay before and after his transfer. **[RP 74, 87]**

As partial basis for its Motion for Summary Judgment, the City asserted that the Plaintiffs did not have standing to bring a claim for breach of contract through the Personnel Rules and Regulations, because each Plaintiff suffered no injury in fact, having been paid the salary that corresponded to his step and circumstances under the Personnel Rules and Regulations. **[RP 93-94]** The City further stated, "an upward deviation in another employee's salary does not create any actual harm to Plaintiffs." **[RP 94]**

Defendant/Appellee AFSCME Local 3022 filed its Response in Support of the City of Albuquerque's Motion for Summary Judgment on March 29, 2013. **[RP 105]** Local 3022 supported the City's Motion, based on the Union's position that the City had not violated an agreement with the Plaintiffs, and that the

Plaintiffs, therefore, had no basis to bring a claim against AFSCME based on a breach of the duty of fair representation. **[RP 105-109]**

Plaintiffs filed their Response in Opposition to Defendant City's Motion for Summary Judgment on May 5, 2013. **[RP 129]** In their Response, Plaintiffs argued that they had an implied contract created by the City's Personnel Rules and Regulations, and the Personnel Rules and Regulations created a property interest held by each City employee. **[RP 134-135]** Within this, Plaintiffs argued that the CBA and Personnel Rules and Regulations established an implied expectation of uniform pay amongst M14 employees. **[RP 134-135]** Plaintiffs further argued that the City did not follow pay determination requirements established by the Personnel Rules and Regulations as to all M14 employees. **[RP 135]** Further, Plaintiffs alleged that the City failed to provide specific pay information for each M14 employee to allow the court to determine whether or not specific pay rates were in compliance with the Personnel Rules and Regulations. **[RP 135]**

The City filed its Reply to the Plaintiffs' Response to the Motion for Summary Judgment on May 16, 2013. **[RP 151]** The City argued that the Plaintiffs' claimed disputes were artificial, and did not rise to the level of disputed material facts. **[RP 155-157]** The City asserted that whether or not the Personnel Rules and Regulations create a contract is without consequence, because in substantially complying with the Personnel Rules and Regulations, a breach of any

such contract could not exist, and, moreover, that Plaintiffs failed to demonstrate their standing to bring a breach of contract claim. **[RP 158]** In response to the Plaintiffs' contention that the City had not provided specific pay information for each M14 employee, the City provided the raw data and calculations for each employee's salary. **[RP 174-185]**

The district court granted the City's Motion for Summary Judgment on July 8, 2013. **[RP 242]** The court held that the City had met its *prima facie* burden to show that there was no breach of the Personnel Rules and Regulations with respect to ten of the Plaintiffs (the Plaintiffs/Appellants), and that the ten had not provided sufficient evidence to justify a trial. **[RP 245]** Specifically, the court held that the City did not breach any contractual obligation owed to the Plaintiffs/Appellants, and that by making an exception to the Personnel Rules and Regulations as to one employee (Juan Jojola) the Plaintiffs/Appellants had not suffered an injury. **[RP 245-248]**

III. ARGUMENT

A. Introduction

Plaintiffs/Appellants argue that summary judgment was erroneously granted for three reasons: (1) the district court erred in determining that Plaintiffs/Appellants did not suffer any injury; (2) the district court erred in determining that the City did not breach any contractual obligations to Plaintiffs/Appellants; and (3) the district

court erred in determining there was no genuine issue of material fact based on a lack of support for the evidence provided by the City. **[BIC 7, 10, 11]** In this Answer Brief, the City will discuss the third contention first, and show there was not a genuine issue of material fact because the City provided sufficient evidence to establish the manner of calculating pay for the employees. The first and second issues as stated by the Plaintiffs/Appellants are interrelated. First, the City will define the contract at issue and address why no breach occurred. Second, the City will address the injury, or lack thereof, suffered by Plaintiffs/Appellants.

B. Standard of Review

On appeal, summary judgment is reviewed de novo. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280 (internal quotation marks and citations omitted). Each of the following issues relate to whether the trial court erred in granting summary judgment to the City and are subject to this standard.

C. No Genuine Issue of Material Fact Exists; the City's Proffered Evidence Was Sufficient to Establish the Facts as to the Manner of Calculating Pay; and No Rebuttal Was Offered.

This counter-argument was made in the City's Reply to Plaintiff's Response to the City's Motion for Summary Judgment. **[RP 151-155]**

While summary judgment is viewed with disfavor, it does not follow that summary judgment is never appropriate. The New Mexico Supreme Court has noted, "[b]y our refusal to align our state's approach with that of the federal courts,

we do not intend to imply that summary judgment is never appropriate." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 9 (internal quotation marks and citations omitted). Instead, summary judgment is appropriate when the moving party has established a *prima facie* case for summary judgment, showing "evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Id.* ¶ 10 (internal quotation marks and citations omitted). The burden then shifts to the non-moving party to "demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Id.* (internal quotation marks and citations omitted). This demonstration cannot consist solely of an argument that these facts might exist or to restate the allegations contained in the complaint. *Id.* The party must bring forward evidence that results in reasonable inferences and justifies a trial on the merits. *Id.*

Plaintiffs/Appellants argue the *prima facie* burden was not met by the City. As support for this contention, they quote *Santa Fe Trail Ranch II. Inc. v. Bd. Of County Com'rs*, 1998-NMCA-099, ¶ 15, 125 N.M. 360, 961 P.2d 785. In *Santa Fe Trail Ranch*, the court found the affidavit provided by the non-movant to be insufficient because it lacked certain key pieces of information. *Id.* Specifically, the court deemed the affidavit lacking because it "does not explain who [the land-use experts] are, what they considered, or what their opinions are." *Id.* Without

any explanation of an underlying factual basis, the affidavit was inadequate to create a material issue of fact. *Id.*

While a lack of explanation may be fatal, the City's affidavit did not suffer that fatal flaw. By comparison, see, *Galvan v. City of Albuquerque*, 1973-NMCA-049, 85 N.M. 42, 508 P.2d 1339. *Galvan* also involved an affidavit filed by the party opposing summary judgment. *Id.* ¶ 2. This affidavit was written by a police officer offering an expert opinion. *Id.* ¶ 3. The court found the affidavit deficient because it was not competent evidence. *Id.* ¶ 5. The affidavit did not identify the tests performed, how such tests were performed, or explain its conclusion. *Id.* ¶ 6. Thus, it was not entitled to consideration. *Id.*

The City's supporting affidavits are sufficient and do warrant consideration. Unlike the affidavits in *Santa Fe Trail Ranch* and *Galvan*, the City provided an affidavit that contained a thorough explanation of the facts and how the City reached its conclusions. The affidavit of Mary Scott contains an explanation of the formula used calculate each employee's salary, the section of the Personnel Rules and Regulations from which the formula originated, and which formula applied to which employee. **[RP 87-88]** Additionally, the City provided a further breakdown of the formula expressed in mathematical terms instead of prose and the raw data involved in calculating the salary of each employee. **[RP 162-183]**

The City's explanation and its supporting data provide the exact components missing from the affidavits in *Santa Fe Trail Ranch* and *Galvan.* The City's conclusion that each Plaintiff/Appellant was paid in accordance with the contract is supported by a cogent explanation and underlying facts. Unlike *Santa Fe Trail Ranch* and *Galvan*, the City's affidavit does not consist of a bare conclusion. The City's affidavit is sufficient to establish the *prima facie* case for summary judgment. The district court did not err in considering the affidavit testimony.

D. The City Did Not Breach the Contract.

The breach of contract issue raised by Appellants fails, first on the threshold issue of standing; then by the very terms of the contract implied by the Personnel Rules and Regulations; and, finally, even if the terms of the contract were as the Plaintiffs/Appellants state (and the City maintains that they are not), due to the City's substantial compliance with the terms of the contract, no breach occurred and no injury occurred. This argument was raised in the City's pleadings below. **[RP 93-96,157-158]**

1. Plaintiffs/Appellants Do Not Have Standing.

An employee has an expectation that the City will abide by the agreement made with that employee. The employee has no right and no standing to complain that other employees negotiated a more favorable arrangement. The implied contract does not promise that.

New Mexico Courts have generally required litigants to demonstrate standing as a matter of judicial policy when invoking the court's authority to decide the merits of a case. *ACLU of New Mexico v. City of Albuquerque*, 2008-NMSC-045, ¶ 10, 144 N.M. 471, 188 P.3d 1222. "To acquire standing to litigate a particular issue, a party must demonstrate (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *City of Sunland Park v. Santa Teresa Services Co.*, 2003-NMCA-106, ¶ 40, 134 N.M. 243, 75 P.3d 843 (internal citations and quotation marks omitted). In the case at bar, the first element is at issue. "An injury in fact is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *State of N.M. ex rel. CYFD v. John R.*, 2009-NMCA-025, ¶ 17, 145 N.M. 636, 203 P.3d 167.

One must allege an violation of his rights in order to have an injury in fact. In *John R.*, this Court considered a Termination of Parental Rights case. *Id.* ¶ 4. During the pendency of the case, the child turned fourteen and was denied separate counsel by the trial court. *Id.* ¶ 12-14. The child's father argued that the child had a right to separate counsel. *Id.* ¶ 15. CYFD contended that because the right to counsel belonged to the child, the father was not injured in fact. *Id.* ¶ 16. This Court rejected that argument, holding the father had a legally protected interest in

his rights as a parent and the outcome of the Termination of Parental Rights case could present an actual and concrete violation of that right. *Id.* ¶ 18.

The closest Plaintiffs/Appellants have come to articulating an injury is stating that the City paid other employees higher wages than those specified by the Personnel Rules and Regulations. Unlike the father in *John R.* who had a definite stake in the outcome of the case regarding the termination of his parental rights, Plaintiffs/Appellants do not have any stake in the wages of their coworkers. This is especially true if the coworkers are making the wages promised under the Personnel Rules and Regulations and any exceptions are still within the specified range of salaries. The wages of coworkers are not a legally protected interest akin to the right to parent. The City did not invade any of Plaintiffs/Appellants legally protected interests.

Plaintiffs/Appellants do not have standing because they lack an injury in fact. An injury in fact is an essential element of standing. This case could have been properly dismissed on these grounds.

2. The Terms of the Contract Are Not As Plaintiffs/Appellants Allege.

The present issue is not whether the City's personnel rules create an implied contract. The New Mexico law is well settled that employee handbooks or personnel rules can create an implied contract between the employer and employee. *See Trujillo v. Northern Rio Arriba Elec. Co-op, Inc.*, 2002-NMSC-

004, ¶ 22, 131 N.M. 607, 41 P.3d 333; *Newberry v. Allied Stores, Inc.*, 1989-NMSC-024, ¶ 7, 108 N.M. 424, 773 P.2d 1231; *and Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-029, ¶ 11, 121 N.M. 728, 918 P.2d 7.

However, the terms of that implied contract can be debated. What was promised? What did the employee believe was promised? Was the employee's expectation reasonable? Here, nothing in the implied contract states, suggests or infers that all employees will receive the same pay regardless of skills and experience. Quite the contrary. The steps within each grade are intended to address the variety of skills and experience that individuals bring to the workplace. Employees are not robotic fungible items. The City's personnel rules do not promise to treat them as such.

"To create contractual rights...the terms of the representation must be sufficiently explicit to create a reasonable expectation of an implied contract." *Trujillo v. Northern Rio Arriba Elec. Co-op, Inc.*, 2002-NMSC-004, ¶ 22 (internal citations omitted). "[B]efore these expectations can be 'reasonable,' they must satisfy a certain threshold of objectivity." *Kiedrowski v. Citizens Bank*, 1995-NMCA-011, ¶ 9, 119 N.M. 572, 893 P.2d 468.

While explicit representations create a reasonable expectation, no explicit representation in the Personnel Rules and Regulations was made to the Appellants that they, along with other M14s, would be paid identically. They were promised

only that the each individual's pay would be set initially in accordance with provisions in the rules and subsequent increases would be in accordance with the rules. The rules provisions for pay increases upon promotion and other changes are all expressed in terms of ranges. The City's actions were in accordance with the personnel rules.

The facts in the *Trujillo* case are analogous. In *Trujillo v. Northern Rio Arriba Elec. Co-op, Inc.*, 2002-NMSC-004, ¶ 21, the employee claimed the employer terminated him in violation of an implied contract based, in part, upon the employee policy manual. He relied on three portions of this manual; two sections dealing with performance evaluations and another section dealing with discipline. *Id.* ¶ 23. The employee argued that these provisions were connected and the employer was required to give him an evaluation before termination. *Id.* The court rejected his argument because there was not any language in the provisions requiring evaluations as a prerequisite to termination. *Id.* Additionally, the section on discipline stated progressive discipline would not applicable in all cases. *Id.* The court found the employee's expectations were not reasonable and an implied contract based on these expectations did not exist. *Id.*

In this case, no explicit representations exist to create the guaranteed equal pay that Plaintiffs/Appellants claim. Like *Trujillo,* the so-called implied contract does not contain the explicit promise the Plaintiffs/Appellants are claiming (to pay

all M14 managers the same wage). Quite the opposite, the Personnel Rules and Regulations enumerate how an employee should be compensated within a range, based on each employee's circumstances. **[RP 72-75, 80-84, 86-88]** Although the Personnel Rules and Regulations provide sufficiently specific information so as to create an implied contract that each employee will be paid according to his or her individual circumstances, there is no indication, specific or otherwise, that would allow a reasonable employee to believe he is guaranteed the same pay as all co-workers in a grade. Like *Trujillo*, the court would be forced to read an additional provision or connection into the City's agreements with Plaintiffs/Appellants to find an implied contract.

By contrast, in *Kiedrowski v. Citizens Bank*, 1995-NMCA-011, ¶ 4, the employer varied from the handbook terms and attempted to rely on a general disclaimer that the handbook made no promises.

In *Kiedrowski*, the employee sued for a breach of implied contract based, in part, on an employee handbook. The employer moved for summary judgment. *Id.* ¶ 4. The district court granted the motion on all the counts related to the implied contract based on the employee handbook. *Id.* The employee argued that the employer's adherence to procedures in the employee handbook created a reasonable expectation that she would be subject to the disciplinary procedures in the handbook. *Id.* ¶ 11. The employer argued that this was unreasonable due to

the disclaimer in the handbook that denied the existence of a contractual relationship based on the policies as published in the handbook. *Id.* ¶ 8. The court reasoned that if the employee expectations were not reasonable, the employer was entitled to judgment as a matter of law. *Id.* ¶ 10. It ruled that the employee's reliance met this objectively reasonable standard because the employer instructed all of its managers (including the employee) to follow the procedures in the handbook, the employee followed the procedures in the handbook, and the employer applied some of the procedures to the employee. *Id.* ¶ 11. This "systematic application of its termination policies could reasonably create an expectation in [the employee] that the same would be done in her case." *Id.* Thus, the court held it was within the province of the jury to resolve this question of fact. *Id. Kiedrowski* is not analogous.

In contrast, the City did follow its own rules and it does not claim the rules are meaningless. Here, the expectation that all M14s would be paid the exact same wage was and is not objectively reasonable, especially given that under the Inspection of Public Records Act (IPRA) all state salaries, including those of Plaintiffs/Appellants' colleagues, are public and can be easily ascertained. Inspection of Public Records Act, NMSA 1978, §§ 14-2-4 to -12 (1993, as amended through 2013). Plaintiffs/Appellants, at the time they each obtained his respective position, knew or should have known that some range of variance of

salary within the position's grade existed. Moreover, given that the Personnel Rules and Regulations themselves assign varying ways of calculating pay, it is not objectively reasonable to believe that all M14s would be paid the same wage. If an employee's expectations do not meet a standard of objective reasonability, the employer is entitled to summary judgment as a matter of law. See *Kiedrowski v. Citizens Bank*, 1995-NMCA-011, ¶ 11 ("Any employee expectations to that effect were not objectively 'reasonable,' entitling the employer to a judgment as a matter of law.")

Plaintiffs/Appellants also frame the implied contract issue as a constitutionally protected property interest created by the Personnel Rules and Regulations, guaranteeing that City employees will be paid the same rate, by the CBA's pay schedule. **[BIC 8]**

In support of that contention, Plaintiffs/Appellants cite to *Lovato v. City of Albuquerque,* 1987-NMSC-086, 106 N.M. 287, 742 P.2d 499. That case is distinguishable: In *Lovato*, the court found that an employee on an assignment for thirteen years had a constitutionally protected right to the assignment, stating that the fact that the City kept the employee in the assignment for thirteen years, combined with the merit system and personnel rules, as they applied to permanent positions, created a protected interest in continued employment within the assignment. *Id.* ¶ 11. Given the constitutionally protected property interest, the

court held that Lovato could not be removed from the thirteen-year assignment without due process of law. *Id.* ¶ 12. If anything, the *Lovato* analysis works against the Plaintiffs/Appellants who all knew their starting pay; signed off and now complain that they should be receiving a different pay.

Lovato stands for the principle that when an employee has a constitutionally protected property interest in his or her job, the employee cannot be re-assigned or terminated from that job without due process of law. *Lovato*, 1987-NMSC-086, ¶12. A protected interest may be construed when "the independent source of rules and understandings" point to such a finding. *Id.* ¶ 11.

In the present case, the City has not taken any action that could be construed as interfering with the Plaintiffs/Appellants' protected interest in their jobs, because no action has been taken to re-assign or terminate their employment. Further, Plaintiffs/Appellants' protected interest in their salary, if any (and none is admitted), has not been implicated. Each is making the salary owed to him under the Personnel Rules and Regulations. Furthermore, as discussed in detail below, it is nonsensical to argue that one's breach of contract claim is proven with due process standards.

Here, the City's Personnel Rules and Regulations prescribe policies and guidelines that relate to pay classification gradations for employees. **[RP 80-84]** The expectation or promise that employees within the M14 position will all make

the same salary cannot be found within the contract, nor is it objectively reasonable. It is not within the province of this court to add provisions to an existing contract when there are no ambiguities. *See, Twin Forks Ranch, Inc. v. Brooks,* 1998-NMCA-129, ¶ 20, 125 N.M. 674, 964 P.2d 838, ("Reformation should not be used by the court to add to, modify, or redraft the terms of a contract in light of newly discovered information: It is not the role of the court to rewrite the terms of the parties' agreement.")

3. The City Substantially Complied With the Contract.

Substantial compliance is typically analyzed in a two-step process: (1) "ascertain the intent of the legislature and analyze whether this intent would be frustrated by anything less than strict compliance"; and (2) "determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted and accomplishes the reasonable objectives of the statute". *State v. Jones*, 1998-NMCA-076, ¶ 18, 125 N.M. 556, 964 P.2d 117 (internal quotations and citations omitted). The directives issued by a rule-making body cannot possibly account for every contingency, thus, these directives must be interpreted with intelligence. *Lane v. Lane*, 1996-NMCA-023, ¶ 17, 121 N.M. 414, 912 P.2d 290. The courts must discern the purpose of the rule and "act in accordance with its essence if not necessarily its letter." *Id.*

State v. Jones, 1998-NMCA-076, ¶ 1, involved, in part, the interpretation of N.M.S.A. Section 66-8-109(B), as part of an appeal from a Driving While Intoxicated conviction. The statute in question read:

> The person tested shall be advised by the law enforcement officer of the person's right to be given an opportunity to arrange for a physician, licensed professional or practical nurse or laboratory technician or technologist who is employed by a hospital or physician of his own choosing to perform a chemical test in addition to any test performed at the direction of a law enforcement officer.

Id. ¶ 16. The officer making the original arrest recited a notice that failed to include the terms "of his own choosing". *Id.* ¶ 17. The court examined the statute and determined the intent was to inform the arrested person of his or her right to arrange to have an independent chemical test performed. *Id.* ¶ 19. Because words other than those used in the statute can convey this information, the court determined that strict compliance was not required. *Id.* The missing terms were inherent in the notice actually given and the court reached a conclusion of substantial compliance. *Id.*

Similarly, the actions of the City were adequate and sufficient to fulfill the purpose of the Personnel Rules and Regulations. The intent of the relevant portions of the Personnel Rules and Regulations is to compensate individuals based on their education, experience, and qualifications. Without a small amount of flexibility or discretion, the City would frustrate the intent of the rules. By example, an employee, Juan Jojola, had additional experience. In order to

compensate him fairly based on his circumstances, the City gave Mr. Jojola a pay rate at one step higher than he would ordinarily be entitled.

Employers seek to hire the best qualified individuals. To prevent employees from working at a common level of mediocrity, employers reward the better employees; they reward experience. Experienced employees may do the same work as a new employee, but hopefully, they do it better and more efficiently, hence are more productive to the employer. When that occurs, the employer desires to reward the superior employee and must be able to do so. Fair compensation does not inherently mean compensation is equal. Instead, it accounts for each employee's abilities. The City furthers the purpose of the Personnel Rules and Regulations by providing sufficient flexibility to appropriately compensate employees. Thus, the City substantially complied with the Personnel Rules and Regulations and did not violate them.

E. Plaintiffs/Appellants Did Not Suffer A Compensable Injury Because The City Did Not Violate A Legal Right Held By Plaintiffs/Appellants For Which The Law Provides A Remedy.

The City preserved this counter-argument, framed as an issue of standing, in the pleadings below. **[RP 93-94, 158]**

Plaintiffs/Appellants' claim, in their complaint against the City, is framed as one of breach of contract. However, they argue that their injury is based on a violation of a property interest created by the Personnel Rules and Regulations.

Actions for breach of contract and actions guarding property interests are two different types of claims. Plaintiffs/Appellants are attempting to apply an alleged injury for a purported violation of property interests to breach of contract. First, they have no contract breach due to another another person's salary. Furthermore, their efforts are futile because Plaintiffs/Appellants do not have an injury under a due process violation either.

Black's Law Dictionary provides the following definition for an injury: "[t]he violation of another's legal right, for which the law provides a remedy; a wrong or injustice." Black's Law Dictionary 672 (Bryan A. Garner et al. ed., 9th ed. 2010). Thus, in order to prove an injury, Plaintiffs/Appellants must show three elements: (1) that they had a legal right; (2) this legal right was violated; and (3) the law provides a remedy. They are unable to meet the first element under a breach of contract claim or a due process claim.

1. Plaintiffs/Appellants Do No Injury Under a Breach of Contract Theory.

Using the definition provided by Black's Law Dictionary, to prove an injury under a contract, Plaintiffs/Appellants must first establish that they had a legal right under the contract. As discussed above, the expectation of uniform pay was neither promised nor reasonable, and, therefore, could not and did not create a valid contract. Without a legal right, there can be no injury. Plaintiffs/Appellants are unable to show that they had an injury under the facts of their complaint.

2. Plaintiffs/Appellants Do Not Have an Injury Under a Due Process Theory.

In their Brief in Chief, Plaintiffs/Appellants argue that the district court erred in ruling that Plaintiffs/Appellants did not suffer an injury. As support for this argument, they discuss the formation and basis of property interests. Then, they frame their expectations of uniform pay as a property interest. Plaintiffs/Appellants' argument is flawed because they do not and cannot show that the Personnel Rules and Regulations create a property interest in uniform pay.

Plaintiffs/Appellants provide a long list of federal cases which demonstrate the proposition that property interests "are created by independent sources such as a state or federal statute, a municipal charter or ordinance, or an implied or express contract." **[BIC 7-8]** This statement is true, but it is not the relevant issue. There is no dispute that the property interests are created in such a fashion. Instead, the issue is: what property interest, if any, is created by the City's Personnel Rules and Regulations?

In analyzing the nature of property interests protected by the Fourteenth Amendment, two United States Supreme Court Cases cited by Plaintiffs/Appellants are particularly helpful. Both cases were decided the same year, with similar facts and different conclusions. This is helpful in outlining the contours of property interests for our purposes.

The first case holds that the plaintiff did not have a property interest. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972). In 1968, David Roth was hired as an assistant professor at a state university under a contract which provided for a fixed, one year term. *Id.* 566. After he completed that term, he was informed that he would not be rehired. *Id.* In that state, state university professors acquire tenure after four years of year-to-year employment. *Id.* During the one year contract, and after acquiring tenure, state university professors may only be discharged for cause upon written charges and pursuant to certain procedures. *Id.* 567. Roth argued that because he was not provided with notice of any reason for nonrentention or an opportunity for a hearing, the state violated his right to procedural due process. *Id.* 569. The court noted:

> Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Id. 577. The Court held that Roth's property interest was created and defined by the terms of his employment. *Id.* 578. These terms only secured his appointment up to a specific date and they did not include any provision for renewal. *Id.* Because the terms creating the property interest did not support an interest in re-employment, and there was not a statute or any rule or policy securing such an interest, Roth did not have a property interest sufficient to require a hearing. *Id.*

The second case, a companion to *Roth*, illuminates the possible creation of a property interest under slightly different circumstances. *Perry v. Sindermann*, 408 U.S. 593 (1972). Sindermann was employed for a decade in a state college system under a series of one year contracts before the Regents decided not to offer him a new contract. *Id.* 594. The college at which he was employed did not have a formal tenure system. *Id.* 600. However, Sindermann argued that there was a de facto tenure program under which he qualified for tenure. *Id.* He based this upon statements within the official faculty guide stating that teachers should feel as though they have permanent tenure and upon guidelines promulgated by the Coordinating Board of the college system stating that a person with seven years or more of service has a form of job tenure. *Id.* The court held that an expectancy is insufficient to create a property interest, but it may be possible under these circumstances to demonstrate a legitimate expectation. *Id.* 602-603. The circumstances may create an implied contract securing this interest. *Id.* 601-602.

In the instant case, one must view the property interest claimed by Plaintiffs/Appellants and determine if it is a mere desire or expectancy such as in *Roth* or legitimate expectation created by an implied contract such as in *Perry*. This case is more like *Roth*. The Personnel Rules and Regulations do create a contract right, just as the terms of employment in *Roth* created a right. This right is limited to the promise to receive wages in accordance with certain rules, just as the

terms of employment in *Roth* secured employment for a certain amount of time. However, the Personnel Rules and Regulations do not contain any promise that further restrictions on wages will not occur, just as the terms of employment in *Roth* did not make any reference to contract renewal. Unlike *Perry*, no further source for such an understanding exists in the City documents. Furthermore, such an understanding would be objectively unreasonable, as discussed above. Without first establishing that such a property interest exists, Plaintiffs/Appellants are unable to demonstrate an injury based on the violation of a property interest.

Finally, this claim is for breach of contract, not a violation of a protected property interest without procedural due process. The cases Plaintiffs/Appellants cite are all based on a claim rooted in the Fourteenth Amendment's protection of a property interest. This argument compares apples and hammers. Yes, both exist in this world, but it is useless to describe how something is like a hammer when we must really assess whether or not it is like an apple. Moreover, placing aside the issue of whether or not this claim was even pled, to say that Plaintiffs/Appellants have such a claim yields an absurdity. The remedy for a violation of such a claim would be to obligate the City to provide procedural protections, i.e. notice and opportunity for other employees to be heard whenever the City gives an employee a pay raise, transfer, demotion or promotion. (*See Perry v. Sindermann*, 408 U.S. 593, "Proof of such a property interest would not, of course, entitle him to

reinstatement. But such proof would obligate college officials to grant a hearing at his request where he could be informed of the grounds for his nonrentention and challenge their sufficiency.")

IV. CONCLUSION

The district court did not err when it granted summary judgment to the City. The City provided sufficient evidence to satisfy its *prima facie* burden as the movant. The facts and the law support the City's position. The court was also correct in concluding that the City did not breach the contract created by the Personnel Rules and Regulations. Plaintiffs/Appellants did not suffer an injury. The City respectfully requests that this Court affirm the decision of the district court and uphold the grant of summary judgment.

V. STATEMENT REQUESTING ORAL ARGUMENT

The City requests oral argument due to the potential far reaching implications of a decision in this case. Namely, a decision affects the ability of employees to negotiate their salary and could call into question the entire compensation process used by the City and other similarly situated government entities including the state, counties and other municipalities. Additionally, a decision may also influence the expenditure of taxpayer funds as they relate to employee salaries.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, Pursuant to Rule 12-213 NMRA(G), that this Answer Brief was written with Microsoft Word 2010, proportionally spaced Times New Roman font, with a count of 6,497 words as indicated by the Word Count feature. This information is true and accurate to the best of my knowledge.

Melissa M. Kountz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Answer Brief were served on the following by U.S. First Class Mail on February 19, 2014:

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