IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

Appellants,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 3022,

Appellee.

Ct. App. No. 33,380

APPELLEE'S ANSWER BRIEF

Respectfully submitted,

YOUTZ & VALDEZ, P.C.
Shane Youtz
Stephen Curtice
James A. Montalbano
900 Gold Avenue S.W.
Albuquerque, NM 87102
(505) 244-1200 – Telephone

Attorneys for Defendant AFSCME Local 3022

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Ordinances and Other Authorities **Page**

COMES NOW Appellee, the American Federation of State, County and Municipal Employees, Local 3022 ("AFSCME"), and files this Answer Brief.

INTRODUCTION

In this case, decided by the District Court on summary judgment, Plaintiffs claim that AFSCME breached its duty of fair representation in not processing a grievance on their behalf against the City of Albuquerque. That grievance was based entirely on the claim that other employees with the same job title were paid a higher rate. Plaintiffs claim AFSCME should have filed a grievance on their behalf to fix this pay inequity.

As the District Court found, however, Plaintiffs' claim suffers from two fatal defects. First, Plaintiffs cannot show that the City breached any provision of the collective bargaining agreement, as opposed to any claimed violations of the Personnel Rules and Regulations. The problem with any claim against AFSCME based on the City's alleged violation of the Rules and Regulations is that AFSCME is not a party to any employment contract created by those Rules and Regulations and has no ability to grieve any claimed breach of that contract. Second, even if Plaintiffs could show that the City breached the Personnel Rules and Regulations, and even if AFSCME could have filed a grievance based on that breach, Plaintiffs do not claim that their pay was incorrectly determined under the Rules and Regulations. Indeed, it is undisputed that they are paid ***precisely*** what those Rules

and Regulations and the collective bargaining agreement provide. Rather, Plaintiffs claim other employees are paid too much.

Because AFSCME cannot file a grievance unless the City breached the collective bargaining agreement to which it is a party, and because it is undisputed that Plaintiffs were paid correctly under that agreement, the District Court properly granted summary judgment against Plaintiffs.

SUMMARY OF PROCEEDINGS

A. Procedural History.

Plaintiffs are eleven employees of the City of Albuquerque ("City"), working as Solid Waste Supervisors. Plaintiffs' two-count Complaint alleged: (1) that the City breached its contractual obligations—under its "personnel rules and practices" as well as the Collective Bargaining Agreement ("CBA") with AFSCME—by not paying all Solid Waste Supervisors the same amount for their labor, and (2) that AFSCME breached its duty of fair representation by not presenting a grievance on their behalf. **[RP 1-5]**. Importantly, Plaintiffs do not claim that ***their*** salary had been improperly calculated; rather, they complained that "when Plaintiffs were hired into their respective M14 position, the City had informed them that all new M14s in their Department started at the same salary," that "City personnel rules and regulations require all new hire management

employees to start at the same pay grade[,]" and that "seven M14s were hired in a higher salary bracket than Plaintiffs." **[RP 2, ¶¶ 9-10]**.

The City filed a Motion for Summary Judgment, **[RP 70-91]**, and a Memorandum in Support **[RP 92-101]**. The motion was fully briefed. **[RP 105-19 (AFSCME's Response in Support); 129-47 (Plaintiffs' Response in Opposition); 151-85 (City's Reply)]**. The District Court granted the motion with respect to ten out of the eleven Plaintiffs. **[RP 242-50]**

The District Court noted that for those ten plaintiffs, there was no dispute as to which section of the City's Personnel Rules and Regulations governed their salary determinations upon promotion to their current position, that they received the pay increases and step placement prescribed by those Rules and Regulations, and that they were receiving the pay that corresponds with that step under the Rules and Regulations and the CBA. The Court concluded, on those undisputed facts, that "Plaintiffs cannot establish a breach of contract claim merely by showing that the City placed others at higher pay steps so long as the City did not breach any contractual obligation it owed to Plaintiffs." **[RP 246]**.

The Court also rejected Plaintiffs' argument that, because the City allowed one employee to negotiate a higher step increase upon promotion, it had breached its contractual obligations to them: "Plaintiffs do not point to any contractual provision that prohibits the City from making exceptions, that obligates the City to

make exceptions for them, or that creates the expectation that they would be placed at a step higher than Section 705.5 [of the personnel rules and regulations] permits." ***[Id.]***. Plaintiffs appealed from this Memorandum Opinion and Order, which has been given the Court of Appeals Docket No. 33,151, and has been fully briefed.[1] In their briefing to this Court in Case No. 33,151, Plaintiffs have dropped any argument that the City breached the CBA, and instead argue that it violated its own Personnel Rules and Regulations.

AFSCME, likewise, filed a Motion for Summary Judgment, **[RP 203-33]**, and a Memorandum in Support **[RP 234-41]**. The matter was fully briefed. **[RP 252-67 (Plaintiffs' Response in Opposition); 268-87 (AFSCME's Reply)]**. The District Court granted the motion. **[RP 324-29]**. Citing *Akins v. United Steelworkers of America*, 2010-NMSC-031, ¶ 11, 148 N.M. 442, the District Court identified the elements for Plaintiffs' duty of fair representation case against AFSCME: "(1) the existence of a collective bargaining agreement between the Union and the City; (2) breach of the terms of the collective bargaining agreement by the City; (3) they sought help from the Union to remedy the breach; (4) the Union failed or refused to provide representation related to the breach; and (5) the

[1] As noted, the District Court found an issue of fact regarding the eleventh Plaintiff Sam Beatty, specifically whether his salary had been improperly reduced upon his lateral transfer. **[RP 248-49]**. The City subsequently filed a Motion to Dismiss or, in the Alternative, Motion for Summary Judgment relating to Mr. Beatty, which the District Court granted. That matter has also been appealed, and given the Court of Appeals Docket No. 33,714.

Union's failure or refusal to pursue the grievance was arbitrary and in bad faith." **[RP 326]**.

As the Court noted, AFSCME's Motion for Summary Judgment related to the second element—whether the City breached the CBA. Because it was "undisputed that the CBA incorporates the pay rates for the M-14 series" and it "also is undisputed that Plaintiffs are being paid in accordance with the pay rates contained in the CBA" the District Court determined that AFSCME made its prima facie case for summary judgment. **[RP 326]**. The Court rejected Plaintiffs' "attempt to raise a fact issue by arguing that the 'CBA and the City Personnel Rules and Regulations must be read together.'" ***[Id.]***. The Court concluded that "even if the Court were to presume that the CBA controls which step an employee is assigned to, summary judgment would still be proper. There is no evidence—nor even are there allegations—that Plaintiffs were assigned to the wrong step." **[RP 327]**.

The Court also rejected Plaintiffs' reliance on *Howse v. Roswell Indep. School Dist.*, 2008-NMCA-095, 144 N.M. 502. The plaintiff in *Howse* "believed that she had been incorrectly assigned to step zero because she had been employed at the school district for many years." **[RP 328]** By contrast:

> As far as the record reflects, Plaintiffs here never complained to the Union that they had been assigned to the wrong step. In responding to the Union's summary judgment motion, Plaintiffs point to no provision of the CBA that the City breached by placing others at

> higher steps or placing them at their current steps, nor have they provided evidence that they were placed at the wrong step. Given the absence of evidence of a breach of the CBA by the City, the Court need not reach the issue addressed in *Howse*, which is whether the Union's failure to pursue a grievance was arbitrary or unexplained.

[*Id.*] Plaintiffs timely appealed.

B. Factual Summary.

As noted, this case was decided on summary judgment, with the District Court rejecting Plaintiffs' attempts to generate fact issues. The following facts are taken from the summary judgment motion **[RP 203-10 (statements of fact); 253-56 (Plaintiffs' response, admitting all but five of the thirty-four listed facts)]**, with purported factual disputes noted.

The City of Albuquerque Human Resources Department maintains a classification plan for City employees. The current classification plan contains: (1) job "series," (2) "grades" within each series, and (3) "steps" within each grade. Plaintiffs' Complaint deals with Solid Waste Supervisors within the M-14 series and grade. Currently, there are six steps within the M-14 series and grade, although the first step is a probationary step. There used to be twelve steps within that series and grade, but over the years the Union has negotiated a reduction in steps to the current six.

AFSCME is the exclusive bargaining representative for a bargaining unit that consists of City of Albuquerque employees within the "M-Series." That

bargaining unit includes Plaintiffs and other Solid Waste Supervisors. Collective bargaining between the City and the Union is governed by the City's Labor-Management Relations Ordinance ("LMRO") (Abq. Ord. § 3-2-1 *et seq.*)[2] Section 3-2-5 of the LMRO, entitled "Management Rights" reserves for the City's discretion, and removes from the collective bargaining process, certain rights. That includes the right to "hire, promote, evaluate, transfer and assign employees." § 3-2-5(B). Moreover, Section 3-2-7, governing the City's and the Union's obligation to bargain in good faith provides:

> The city government and any employee organization recognized as the exclusive representative for a unit, through their designated agents, shall bargain concerning hours, salary, wages, working conditions and other terms and conditions of employment not in violation of law or local ordinance and ***not in conflict with the provisions of §§ 3-1-1 et seq., the Merit System; Personnel Regulations, establishing classified and unclassified service, methods of service rating of classified employees, methods of initial employment, promotion recognizing efficiency and ability as applicable standards, discharge of employees, and grievance and appeal procedures for classified employees***; provided, however, that the provisions of a collective bargaining agreement which has been ratified and approved by the Mayor shall, where in conflict with any other provision of §§ 3-1-1 *et seq.* govern. This duty includes an obligation to confer in good faith with respect to terms and conditions of employment.

(Emphasis added).

---

[2] Those ordinances are available at: http://www.amlegal.com/albuquerque_nm/ (last visited July 1, 2013); *see also City of Aztec v. Gurule*, 2010-NMSC-006 (municipal ordinances are properly recognized as laws, not matters of fact).

The Merit System Ordinance ("MSO") (Abq. Ord. § 3-1-1 *et seq.*), referred to in that section of the LMRO provides at Section 3-1-27:

> The provisions of this article shall apply to all city employees; provided, however, that where a collective bargaining agreement, which has been ratified and approved by the Mayor in accordance with §§ 3-2-1 et seq., Labor-Management Relations, conflicts with a provision of this article, the collective bargaining agreement shall, with respect to those employees covered by the agreement, govern over such provision of this article unless it is one establishing:
>
> > Classified and unclassified service;
> > Methods of service rating of unclassified employees; or
> > Methods of initial employment, promotion recognizing efficiency and ability as the applicable standards, and discharge of employees.
>
> In the case of a conflict between a collective bargaining agreement and a provision establishing any of the above, this article shall govern.

Under Section 3-1-10(A) of the MSO, the City determines the classification plan. Under Section 3-1-27 of the MSO and Section 3-2-7 of the LMRO, the development of the classification plan is excluded from the collective bargaining process. Consistent with those provisions of the LMRO and the MSO, the CBA in place at the relevant time[3] reserves the same management rights as set forth in Section 3-2-5 of the LMRO.

Before AFCME negotiates a new CBA, the City Council Guideline Committee determines how much money is "on the table" for wage increases. In

[3] Plaintiffs' Complaint alleges that "[i]n the Spring of 2011, Plaintiffs were made aware that seven M14s were hired in a higher salary bracket [sic—presumably step] than Plaintiffs."

order to eliminate a step, the Union has to negotiate to move all of the employees within that step to the higher step. This consumes some of the money the City Council Guideline Committee has determined is available for wage increases, and reduces the amount of money available for other "across-the-board" wage increases.

As noted, Plaintiffs have not even alleged that their own pay is not in accordance with one of the steps of the M-14 series and grade as set forth in the CBA. As a result, there was no contract violation for AFSCME to grieve. Although AFSCME could not file a grievance unless there is a violation of the CBA, former Union Acting President Lee Whistle and certain of the Plaintiffs met with John Soleday, who was then the Director of Solid Waste, regarding Plaintiffs' complaint about their pay. Mr. Soleday told them: "When you guys became supervisors, you signed the P-1, so you agreed with your salaries when you signed that paperwork to become a supervisor." Mr. Whistle then sent a letter on those Plaintiffs' behalf to Mr. Soleday's replacement, Jill Holbert, to request a "desk audit" of Plaintiffs' positions, which, Mr. Whistle explained, was the only other recourse available to Plaintiffs. The City denied the request.

Although the Union did not file a grievance on behalf of Plaintiffs, Section 3-2-6(K) of the LMRO gives the Plaintiffs the individual right to file a grievance with their supervisor or the City Human Resources Department. In response to an

Interrogatory, all of the Plaintiffs indicated that they had not filed a grievance under this provision.

In their Response to the City's MSJ, Plaintiffs argued that the City's Personnel Rules and Regulations form a contract between the City and the employee. Notably, Plaintiffs argued: "The city Personnel Rules and Regulations create a property interest with every City employee that the City will pay them according to the pay schedule of the CBA ***and will apply the Personnel Rules and Regulations uniformly when establishing an employees' pay***." (Emphasis added) **[RP 134]**. Similarly, Plaintiffs argued that they "have been harmed by the City's failure to follow ***its own rules and regulations***," (emphasis added), and that they "are suing the City because the City did not follow ***its own rules and regulations*** as they relate to the pay schedule of the CBA." (Emphasis added) **[RP 135-36]**.

Section 903 of the City's Personnel Rules and Regulations provide a "grievance resolution" provision. It makes clear that a grievance includes a "formal written complaint[] of … application of existing rules or policies." The procedure to grieve application of the Rules and Regulations applies to "all classified employees who are not covered by collective bargaining agreements." Those individuals covered by a CBA "who claim to be aggrieved by the interpretation of a collective bargaining agreement shall be referred to the Labor-Management Relations Board." *See also* LMRO, § 3-2-9(A)(6) (making it a prohibited practice

for the City to "violat[e] a written agreement in force which was negotiated under the provisions of this article"); § 3-2-9(D) (requiring "[a]ny controversy concerning prohibited practices" to be "submitted to the Board within 30 days of the occurrence of the alleged prohibited practice"). Plaintiffs have not even alleged that they filed a grievance concerning the City's application of its Rules and Regulations as provided in Section 900 or that they filed a Prohibited Practice Complaint pursuant to the LMRO.

As noted, Plaintiffs admitted all but five of AFSMCE's thirty-four statements of undisputed fact. Those allegedly disputed facts are:

> 17. Although the City and the Union bargained over the amounts within each step of the pay schedule under the City's classification plan, no provision of Section 2 of the CBA gives the Union the right to determine, or even provide input, on the placement of employees within the City's classification plan.
>
> 18. In the City's Motion for Summary Judgment, it noted that the CBA "does not contain a provision relating to pay adjustments upon promotion, transfers, or reclassification."
>
> 20. That Exhibit D, [the pay schedule from a CBA] upon which Plaintiff relied, was taken from the 2012-2013 version of the CBA. It does not in any way describe how an employee is to be placed within the various steps under the M-14 series and grade; instead, it simply establishes the rates of pay for each step.
>
> 22. Like Exhibit B to this Motion [excerpts from the 2010-2011 CBA], and Exhibit D to Plaintiffs' Response to the City's Motion for Summary Judgment, none of those CBA sections contained in the City's Reply in any way describe how an employee is to be placed within the various steps under the M-14 series and grade; instead, they simply establish the rates of pay for each step.

> 26. Under Section 25 of the relevant CBA, a grievance is defined as "a complaint that alleges violations of written agreements or disciplinary actions lacking 'just cause.'" See Ex. B [to MSJ], § 25.1.1 (emphasis added). It does not include a violation of the City's Personnel Rules and Regulations or matters excluded from the collective bargaining process by the LMRO.

Plaintiffs, however, proffered an ***identical*** response to each which, as the District Court noted, did not create an issue of fact:

> AFSCME through the CBA sets the pay scale for employees in the M series. (AFSCME's Exhibit B). In order to correctly place the employee at the correct pay grade the CBA and the City Personnel Rules and Regulations must be read together. The CBA has to be considered to place an M series employee at the correct rate of pay. (Exhibit 1, Deposition of Jill Holbert, p.25, lines 22-25, p. 26, lines 1-11, Exhibit 2, CBA Pay scale, Exhibit 3, City Personnel Rules and Regulations §700 et al.)

[RP 253-55]. The relevant section of the CBA dealing with wages is set forth below and clearly does not dictate into what step employees are to be placed upon promotion, transfer or hire:

> 2. PAY PROVISIONS
>
> 2.1 Pay Schedule
>
> 2.1.1 The hourly pay rates of bargaining unit employees earning $14.42 per hour (30,000 per year) or less in effect on July 2, 2010 shall be reduced by 0.0% effective July 3, 2010.
>
> The hourly rate of bargaining unit employees earning $14.43 per hour (30,001 per year) or more effective July 2, 2010 shall be reduced by 1.5% effective July 3, 2010.
>
> All hourly pay rates on all bargaining unit pay plans in effect on July 2, 2010 that are at $14.42 per hour or lower will remain unchanged.

All hourly pay rates on all bargaining unit pay plans in effect on July 2, 2010 that are at $14.43 per hour or higher shall be reduced by 1.5% effective July 3, 2010.

Bargaining Unit employees earning $ 14.42 per hour (30,000 per year) or less shall take zero (0) days of leave without pay for the term of this Agreement.

Bargaining Unit Employees earning $14.43 to $28.84 per hour (30,001 to $60,000 per year) shall take tow (2) days of leave without pay for the term of this Agreement. These days will be scheduled between the Supervisor and the employee. If the days have not been agreed upon between the Supervisor and the employee by January 1, of year of this Agreement, the Supervisor shall schedule the days to be taken without pay.

Bargaining Unit employees earning $28.85 per hour ($60,001 per year) or more shall take four days of leave without pay for the term of this Agreement.

2.1.2 M – Series Pay Plan Effective July 3, 2010

Grade	Probation					
Steps	1	2	3	4	5	6
M11	12.22	13.22	14.37	15.84	17.45	19.24
M12	13.85	14.77	16.30	17.98	19.83	21.83
M13	15.66	16.97	18.72	20.63	22.75	25.06
M14	17.36	18.81	20.71	22.85	25.20	27.77
M15	19.14	20.70	22.84	25.17	27.77	30.58
M16	21.04	22.79	25.12	27.70	30.55	33.66
M17	23.27	25.19	27.76	30.59	33.78	37.21
M18	26.41	28.59	31.52	34.75	38.33	42.24
M19	29.22	31.62	34.87	38.43	42.41	46.74
M20	32.18	34.86	38.42	42.36	46.74	51.51

[RP 166-67]

ARGUMENT

BECAUSE PLAINTIFFS HAVE NOT IDENTIFIED ANY PROVISION OF THE CBA THAT THE CITY VIOLATED, THEIR "HYBRID" DUTY OF FAIR REPRESENTATION CASE AGAINST AFSCME FAILS AS A MATTER OF LAW.

A. Standard of Review / Statement of Preservation.

This case was decided on Summary Judgment. Summary judgment is appropriate where there are no issues of material fact and the movant is entitled to judgment as a matter of law. On appeal, this presents a question of law which this Court reviews de novo. *Self v. United Parcel Service, Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396. AFSCME preserved these arguments by filing its motion for summary judgment.

B. Description of the Duty of Fair Representation.

Plaintiffs alleged two counts in their Complaint against the City and AFSCME: (1) Breach of Contract (against the City) and (2) Breach of the Duty of Fair Representation ("DFR") (against AFSMCE). **[RP 1-5, ¶¶ 21-29]**. This is a classic "hybrid" DFR case. *See Callahan v. N.M Fed. of Teachers-TVI*, 2006-NMSC-10, ¶ 6 n.2, 139 N.M. 201. "The 'hybrid' suit is a judicially created exception to the general rule that an employee is bound by the result of grievance or arbitration remedial procedures provided in a collective-bargaining agreement.'" *Howse v. Roswell ISD*, 2008 NMCA 95, ¶ 16 (quoting *Edwards v. Int'l Union,*

United Plant Guard Workers of Am., 46 F.3d 1047, 1051 (10th Cir.1995)). The Supreme Court has described the comparable private-section hybrid DFR suit as follows:

> Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. Yet the two claims are inextricably interdependent. To prevail against either the company or the Union, ... [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union.

DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 164-65 (1983) (citations and internal quotations omitted; alteration in the original).

In order to prevail on this claim, Plaintiffs must establish: (1) the existence of a collective bargaining agreement between the Union and the City; (2) breach of the terms of the collective bargaining agreement by the City; (3) they sought help from the Union to remedy the breach; (4) the Union failed or refused to provide representation related to the breach; and (5) the Union's failure or refusal to pursue the grievance was arbitrary and in bad faith. *Akins v. United Steelworkers of America*, 2010-NMSC-031, ¶ 11, 148 N.M. 442; *see also Webb v. ABF Freight Sys. Inc.*, 155 F.3d 1230, 1238-39 (10th Cir. 1998). Whether Plaintiff sues the employer or the union, the elements are the same. *Webb*, 155 F.3d at 1238-39; *Chauffeurs, Teamsters and Helpers Local 391 v. Terry*, 494 U.S. 558, 564 (1990)

("Whether the employee sues both the labor union and the employer or only one of those entities, he must prove the same two facts to recover money damages: that the employer's action violated the terms of the collective bargaining agreement and that the union breached its duty of fair representation.").

It is well settled that in a hybrid claim the breach of contract claim and the fair representation claim are "inextricably interdependent." *DelCostello*, 462 U.S. at 164. Therefore, "unless a plaintiff 'demonstrates both violations, [s]he cannot succeed against either party.'" *Garrison v. Cassens Transport Co.*, 334 F.3d 528, 538 (6th Cir. 2003); *see also Felice v. Sever*, 985 F.2d 1221,1226 (3rd Cir. 1993) ("[i]n a 'hybrid' suit, the plaintiff will have to prove that the employer breached the collective bargaining agreement in order to prevail on the breach of duty of fair representation claim against the union, and vice versa."). Obviously, if Plaintiffs cannot establish that the City breached the relevant CBA, their suit against the Union fails as a matter of law. *See, e.g.*, *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 664 (7th Cir.1992) (affirming the dismissal of a hybrid suit where the district court held that the employer had not breached the CBA without reaching the fair representation issue); *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 557-58 (6th Cir.1990) (same).

C. Plaintiffs cannot identify how the CBA was violated.

On appeal, as they did below, Plaintiffs do not identify specifically what section of the CBA the City allegedly breached. Instead, Plaintiffs claim that "[t]he City Personnel Rules and Regulations do allow the City to pay a higher salary to a newly promoted employee if the City follows a procedure to justify why the deviation occurred[,]" and that AFSCME "could have filed an initial grievance requesting the City to explain why several M14s performing the same work and duties as Plaintiffs were being paid more, and requested proof the City followed its procedure to deviate from the Personnel Rules and CBA pay schedule." *See* Br. in Chief, at 6-7. This claims completely misstates AFSCME's role in enforcing the CBA and its concurrent duty of fair representation in doing so.

That "CBA pay schedule" is reproduced above, and it clearly does not purport to dictate what step the City hires or promotes an individual into. Instead, it simply reflects the negotiated wage for each step within each grade of employee within the bargaining unit. For the purposes of evaluating the CBA, this distinction is critical, because the CBA itself defines a grievance to be "a complaint that alleges ***violations of written agreements*** or disciplinary actions lacking 'just cause.'" **[RP 218, §25.1.1]**.

For example, the CBA requires that the City pay an employee classified as an M-14 the amount listed for their step in the pay schedule. It does not, however,

have anything to say on how the City determines which step the employee is placed in. If an employee is classified as an M-14, Step 2, but is paid $1.00 an hour less than what the CBA indicates for that step, the City is in violation of the CBA. The remedy for such a violation under Section 25 of the CBA is to file a grievance and, possibly, take the matter to arbitration. Of course, it is undisputed that Plaintiffs are paid the amount the CBA indicates for the step into which they were placed.

If, however, upon hire, transfer or promotion the employee is classified as an M-14, Step 2, but the Rules and Regulations indicate that he or she should be placed at Step 3, there is no violation of the CBA. Instead, the potential violation is of the City's Rules and Regulations, a separate set of promises (to which the Union is not a party) with a separate grievance process to resolve breaches. It is undisputed that the Rules and Regulations contain their own grievance resolution process to correct "application of existing rules or policies." It is likewise undisputed that Plaintiffs never availed themselves of this process.

The Rules and Regulations and the CBA contain separate promises with separate dispute resolution processes if the City has violated those promises. Plaintiffs can only establish their breach of the duty of fair representation claim against AFSCME if they can show that the City breached the promises made ***in the CBA*** and that, further, the Union breached its duty of fair representation in the

manner in which it handled Plaintiffs' grievance related to that breach. Nothing in Plaintiffs' Brief in Chief shows an actual factual dispute on the essential element that the City breached the CBA.

Because Plaintiffs can identify no violation of the CBA, they have fallen back on a claimed violation, by the City, of the City's own Rules and Regulations. Indeed, Plaintiffs claim that the Rules and Regulations form a contractual relationship between the City and them. The Union need not take a position on whether the City violated the Rules and Regulations for this DFR suit, because the Union only has the right and ability to grieve alleged violations of the CBA, which is the agreement between the City and the Union. It may well be, as Plaintiffs have alleged, that the Rules and Regulations form a contract between the City and its employees. Even so, the Union is not a party to that contract and cannot file a grievance that does not allege a violation of the CBA.

Instead, the Rules and Regulation contain their own grievance process, available to employees who are alleging violations of the Rules instead of a CBA. Of course, Plaintiffs have neither taken advantage of that process nor filed an individual grievance under the CBA, as authorized by the LMRO, nor filed a Prohibited Practice Complaint against the City under the LMRO. The important fact, however, is that unlike the grievance procedure available under the CBA for a violation of its terms, the grievance procedure available for claimed violations of

the Personnel Rules and Regulations is not available to AFSCME, but is instead only available to employees.

D. Plaintiffs' pay was properly calculated under the CBA and the Rules and Regulations.

Moreover, Plaintiffs have the additional problem that it is undisputed that their pay was correctly determined under both the CBA and the Rules and Regulations. They claim, nonetheless, that AFSCME should have filed a grievance based on the fact that certain other employees—also members of AFSCME's bargaining unit to whom it owes the same duty of fair representation—were paid more. It is unclear what the appropriate remedy would be had the Union sought to file that grievance. If those other employees were, indeed, hired at too high a rate, and if Plaintiffs were able to identify a CBA provision that the City violated, the mostly likely remedy for that violation would be to require the City to reduce the pay of the other employees. That is, Plaintiffs would have AFSCME file a grievance to ***reduce*** the pay of other bargaining unit employees. Under such circumstances, it cannot be a breach of the duty of fair representation for the Union to decline to file a grievance under the CBA. *See O'Peil v. Com., State Civil Service Comm'n*, 332 A.2d 879, 882 (Pa. Cmwlth. 1975) ("Suffice it to state that we conclude that [the plaintiff] has not met his burden of establishing discriminatory conduct toward himself where he is receiving the full compensation allowable to him by law. If some employe[e]s are receiving more than they are

entitled to receive, the remedy is not to increase the compensation of those employe[e]s being properly compensated and thereby create additional improper pay levels.").

As much as the Union dislikes this fact, there is no implicit or explicit promise in the Rules and Regulations that all employees in the same position would get the same pay; indeed, because the pay on promotion is calculated based on the pay at the previous position, it is contemplated that the pay would ***not*** be the same. There is nothing improper in such a system. *See Hollingsworth v. State, Through Dept. of Public Safety*, 354 So.2d 1058, 1059-60 (La. App. 1977) ("An imbalance can occur in any department, and pay discrepancies to a slight extent exist throughout the system. Such discrepancies are caused primarily by the provisions of the Civil Service pay rules and the way the pay plan is structured, and not from any internal administrative adjustments.").

Plaintiffs try to argue that their suit should proceed under *Howse*, 2008-NMCA-095. Plaintiffs even go so far as to describe the suit as "precisely on point with the facts of this case." *See* Brief in Chief, at 7. Because, as noted, Plaintiffs pay was correctly determined under the Rules and Regulations and the CBA, that is incorrect.

For one, as the District Court noted, unlike in this case, the plaintiff in *Howse* did claim that she was placed in the wrong step under the CBA. 2008-

NMCA-098, ¶¶ 3-4. That is, the Plaintiff in *Howse* claimed that ***her*** pay violated the CBA, not the pay of certain other employees.

Additionally, in that case the Court of Appeals reversed the District Court's grant of Summary Judgment, finding an issue of fact on an entirely different element—whether the Union had a good-faith basis for not pursuing the plaintiff's grievance. *Id.* ¶ 1 ("We reverse the summary judgment because there were issues of fact ***concerning the reasons*** CWA failed to file a written grievance in the pay scale dispute." (Emphasis added)). That issue of fact was generated because the "only evidence in the record supporting these findings by the district court [that the union had a good-faith belief that the grievance lacked merit] is contained in Yankee's signed, written 'declaration.'" *Id.* ¶ 9. Because that declaration "was not verified under oath by someone authorized to administer an oath" the court concluded that "[i]ts contents are therefore inadmissible because the document does not satisfy the affidavit requirement of Rule 1-056(E) NMRA." *Id.* Without the inadmissible declaration, "there is no evidence in the record establishing CWA's rationale for not pursuing Howse's grievance." *Id.* Based on this procedural posture, the Court did not consider whether, had the declaration been properly authenticated, it would be sufficient for summary judgment. Nor did it consider any issue related to the first element of a duty of fair representation claim—whether the collective bargaining agreement had, in fact, been breached.

Ramirez v. Dawson Prod. Partners, Inc., 2000–NMCA–011, ¶ 10, 128 N.M. 601 (stating that "cases are not authority for propositions they do not consider").

This appeal, in contrast, is focused on a different element of Plaintiffs' claim, that the collective bargaining agreement had, in fact, been breached. *Howse* has no bearing on this question. Even so, to the extent that the *Howse* is dispositive, this presents a problem for Plaintiffs, as on remand the District Court found no violation of the collective bargaining agreement and dismissed all claims against the School District and the Union. This was upheld by the Court of Appeals on the summary calendar. *See Howse v. Roswell Independent School Dist.*, Proposed Summary Disposition, Case No. 31,772 (Ct. App. Feb. 15, 2012) & Mem. Op. (Ct. App. May 18, 2012).

CONCLUSION

For the foregoing reasons, AFSCME respectfully requests that this Court **AFFIRM** the decision of the District Court.

Dated: July 14, 2014

Respectfully submitted,

YOUTZ & VALDEZ, P.C.

Shane Youtz
Stephen Curtice
James A. Montalbano
900 Gold Avenue S.W.

Albuquerque, NM 87102
(505) 244-1200 – Telephone

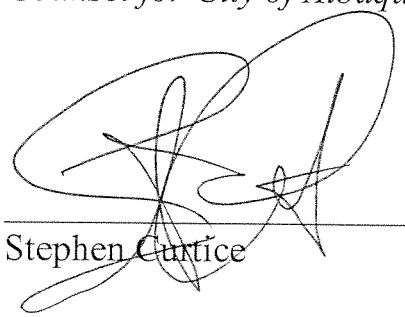
Attorneys for Defendant AFSCME Local 3022

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2014, a true and correct copy of the foregoing Appellee's Brief in Chief was mailed, via regular U.S. mail, postage pre-paid and affixed thereto, to the following:

Donald G. Gilpin
The Gilpin Law Firm, LLC
6100 Indian School Rd. NE, Ste. 201
Albuquerque, NM 87110
Counsel for Appellants

Rebecca E. Wardlaw
Samantha Hults
Assistant City Attorneys
P.O. Box 2248
Albuquerque, NM 87102
Counsel for City of Albuquerque



Stephen Curtice