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, SAM BEATTY, ANGELO GALLEGOS, MIKE FARIAS,

Plaintiffs/Appellants,

v. Ct. App. No. 33,714

CITY OF ALBUQUERQUE AND AMERICAN FEDERATION OF STATE, COUNTY MUNICIPAL EMPLOYEES 3022,

Defendants/Appellees.

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

ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE AND COURSE OF PROCEEDINGS

This case was filed in the Second Judicial District Court by eleven Solid Waste Management Department ("SWMD") employees against both the City of Albuquerque ("the City") and the American Federation of State, County, and Municipal Employees, Local 3022 ("AFSCME"). **[RP 2]** The complaint sets forth two causes of action: (1) breach of contract, and (2) breach of the duty of fair representation. **[RP 3]** The breach of contract claim applies to the City and the breach of duty of fair representation claim applies to AFSCME. **[RP 4]**

The City filed a motion for summary judgment, pursuant to Rule 1-056 NMRA, on all claims against it. **[RP 70]** The district court granted this motion as to ten of the eleven plaintiffs. **[RP 241]** One Plaintiff, Sam Beatty ("Beatty"), in his response to the summary judgment motions, raised new factual allegations that the City had breached the contract created by the Personnel Rules and Regulations ("PRRs") and a transfer memorandum. **[RP 132]** This assertion was enough to allow his claim to survive this first summary judgment motion, when all of his colleagues' claims, which were based solely on a breach of the contract created by the PRRs, were dismissed. **[RP 241]** All of the plaintiffs whose claims were dismissed filed

an appeal (Ct. App. No. 33,151); this appeal is now fully briefed and pending before this Court. **[RP 289]**

AFSCME also filed a motion for summary judgment in the Second Judicial District Court. **[RP 202]** The district court granted this motion in its entirety. **[RP 323]** All plaintiffs appealed to this Court. **[RP 337]** This second appeal (Ct. App. No. 33,380) is also fully briefed and pending before this Court.

Finally, the City filed a renewed motion for summary judgment which fully addressed Beatty's new claims. **[RP 398]** The district court granted this renewed motion. **[RP 446]** Beatty appealed to this Court. **[RP 453]** This final appeal is the one at issue in this brief.

SUMMARY OF RELEVANT FACTS

The City of Albuquerque uses a classification system to determine compensation of employees. **[RP 85]** Employees are first classified into different series based upon their general duties and job descriptions. **[RP 85]** Within each series, employees are further classified by grade. **[RP 86]** The higher a grade, the more responsibility is inherent to the position. **[RP 86]** Each position is assigned a grade. **[RP 86]** Finally, within each grade, there are multiple steps of compensation. **[RP 86]** These steps give the City a small amount of flexibility in compensating employees to account for each

employee's unique skills, e.g. to reward employees for differences in experience, education, or ability. **[RP 86]** The compensation step is typically determined by the City's PRRs. **[RP 86]** The PRRs contain formulas or standards for assigning employees a specific step of compensation based on their circumstances. **[RP 86]** However, exceptions are possible and anticipated. **[RP 87]** For an exception, the hiring manager must send a justification memorandum to the City's Chief Administrative Officer ("CAO") explaining the exception and requesting permission. **[RP 83]**

The original eleven Plaintiffs are all mid-level supervisors within the SWMD. **[RP 85-86]** This places them within the management or "M" series. **[RP 86]** Specifically, they hold the position "Solid Waste Supervisor". **[RP 86]** This position is assigned a grade of "M14". **[RP 86]** They are all on compensation step 2, but other employees with the same position and within the same grade are on higher compensation steps. **[RP 86]** With the exception of one employee, Juan Jojola ("Jojola"), all of the Solid Waste Supervisors hired under the current PRRs were placed in the compensation step dictated by the PRRs. **[RP 87]** Jojola was placed one compensation step above that suggested by the PRRs to account for his extensive experience. **[RP 87]**

Beatty is unique amongst the eleven original plaintiffs. Beatty was transferred to the SWMD from the Transit Department. **[RP 87]** As part of the transfer agreement, Beatty retained the same compensation he received before the transfer. **[RP 87]** This meant that because Beatty had been an M14, step 3 employee at the Transit Department, he would be an M14, step 3 employee at SWMD. **[RP 87]** The transfer occurred and Beatty retained the same compensation both before and after the transfer. **[RP 87]**

During approximately the same time period as Beatty's transfer, AFSCME negotiated to change the compensation within the M-series pay plan. **[RP 184]** Specifically, AFSCME sought to "collapse" the steps. **[RP 184]** All step 2 employees would be moved to step 3 and receive an increase in pay. **[RP 184]** The steps would then be renumbered. **[RP 184]** On a practical level, collapsing the steps resulted in step 2 employees receiving a small increase in pay, **[RP 184]** while employees on the previous step 3 saw no difference in pay, but were now labeled step 2 employees. **[RP 184]** Beatty, as a step 3 employee before his transfer, saw no difference in pay and was, after the collapse, merely re-labeled as a step 2 employee. **[RP 184]**

In 2010 the economic recession resulted in across-the-board pay cuts for City employees. **[RP 407]** This was unrelated to the prior step collapse or to Beatty's transfer. **[RP 407]**

ARGUMENT

Introduction

Beatty argues summary judgment was erroneously granted for four reasons: (1) the district court erred in ruling Beatty did not suffer an injury; (2) the district court erred in ruling the City did not breach the contract formed by the PRRs; (3) the district court erred in ruling there was no material issue of fact; and (4) the district court erred in determining the City did not breach its agreement to transfer Beatty. **[BIC 8, 10-11, 12, 14]** The first three arguments are word-for-word identical to the arguments in the prior appeal brought by the other original Plaintiffs. The City will address Beatty's unique claim first, and then discuss each of the general claims. Beatty's argument is nonsensical; on the one hand he argues that he should be given some sort of preferential or special treatment, but on the other, he argues that all Solid Waste Supervisors should make a uniform wage regardless of qualifications or experience. These contradictory positions are inherently flawed.

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.

The District Court Properly Granted Summary Judgment as to Beatty's Claim When No Genuine Issue of Material Fact Exists; the City Did Not Breach Any Personnel Rule or Regulation in Beatty's Transfer.

The City preserved its counter-arguments as to Beatty's unique claims in its pleadings below. **[RP 403-404, 409-413, 435-437]** Once the party moving for summary judgment has made a *prima facie* case that no genuine issue of material fact exists and the party is entitled to judgment as a matter of law, the nonmoving party must adduce specific evidence which would justify a trial on the merits. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10.

Beatty's Pay Was Consistent with His Administrative Transfer.

Beatty argues that the City broke its promise to transfer him at the same pay grade and rate from the Transit to the Solid Waste Department. This argument is without merit.

No dispute exists: Beatty was administratively transferred to the Solid Waste department; this process is governed by the PRRs § 704. **[RP 401, 419]** A lateral administrative transfer ensures that an employee's pay rate and pay grade will not change when he or she moves into a new position. **[RP 401, 409]** While Beatty's transfer memorandum created an agreement that he would maintain the same pay grade in moving from one position to another, it did not establish that he would maintain the same pay grade and rate throughout the duration of his employment with the City. **[RP 432]**

Beatty was transferred from the Transit Department to the Solid Waste Department in March 2008 as an M14 Step 3, and his pay rate did not change in the transfer. **[RP 399-400, 407]** Later changes to Beatty's pay grade and rate were independent of his administrative transfer, and were the result of the collective bargaining process, as described below. The City complied with its PRRs in all respects in Beatty's administrative transfer.

The City established each and every one of these facts in its Motion for Summary Judgment and the supporting evidence. Beatty contended that the City's position was untrue, but entirely failed to produce any evidence disputing the City's facts, and thus was unable to justify a trial on the merits.

Beatty's Pay Grade was Collapsed through the Collective Bargaining Process, and His Pay Rate Established According to the PRRs.

Beatty further claims that the City "on its own initiative" altered his pay grade from an M14 Step 3 to an M14 Step 2. This claim is meritless because it disregards the role of the collective bargaining process in shaping the pay grades and rates of bargaining unit members.

As a Union member, Beatty was represented by AFSCME Local 3022 in 2008 contract negotiations. **[RP 2, 402]** Beatty was reclassified as an M14 Step 2 as a direct result of Local 3022's negotiations with the City, in which the Union and the City agreed that certain steps should be combined, or "collapsed" within the "M" series unit. **[RP 402]** Notably, Beatty's hourly pay rate increased during this time – from $17.43 to $18.32 on August 2, 2008, and from $18.32 to $19.09 on or about June 20, 2009. **[RP 402-403, 407]** Beatty does not complain of the pay increases he received as a step 2 employee, even though these raises violate his proposition that his rate of pay should be frozen evermore following the administrative transfer memo.

Beatty further contends that Union members are not to lose pay when steps are collapsed. Putting aside the flaws in Beatty's assertion, in fact Union members did not lose pay as a result of the collapse that occurred in 2008. In fact, Beatty's hourly rate was reduced only once, and not as a result of the collapse of "M" series steps. **[RP 403, 407]** Rather, this reduction was due to a City-wide pay cut that occurred on July 3, 2010. As a result of this

pay cut Beatty's hourly rate decreased from $19.09 to $18.80, a reduction of 1.5%[1]. **[RP 403, 407]** This pay cut was imposed on all City employees; Beatty was not uniquely targeted. **[RP 432]**

In sum, the collapse of Beatty's pay grade was proper, and in accordance with collective bargaining agreement between AFSCME and the City. Also, Beatty generally saw increases in his hourly pay rate; his pay was only reduced once, and that was in response to a City-wide pay cut. Again, Beatty asserted that these facts were untrue, but failed to produce any evidence that substantiated his assertions. Beatty could not meet his burden to justify a trial on the merits with these unsupported contentions.

The City Did Not Violate the PRRs When it Did Not Red Circle Beatty's Pay.

Finally, Beatty argues for the first time that the City could have kept him at the same pay rate by "redlining" [sic] his pay. This argument is without merit on two grounds. First, Beatty improperly raises it for the first time on appeal, and second; the City's "red circling" procedures did not apply to Beatty in this matter.

"To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[.]" Rule 12-216(A) NMRA.

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[1] The percentage pay cut individuals suffered depended on their hourly rate or salary. Those employees in Beatty's pay ranged experienced a 1.5%; others experience less or greater percentage pay reductions.

A matter must first be "brought to the attention of the trial court" before being raised on appeal. *Chrysler Credit Corp. v. Beagles Chrysler-Plymouth*, 1971-NMSC-112, ¶ 4, 83 N.M. 272, 491 P.2d 160; *see also, Romero v. Bank of the Southwest*, 2003-NMCA-124, ¶ 16, 135 N.M. 1, 83 P.3d 288 ("Preservation turns on whether the district court and opposing party were sufficiently alerted to the question.").

Despite having never raised this issue previously, Beatty now argues before this Court that the City could have "red circled" his pay. While Beatty properly preserved the issue as to whether or not the City followed its PRRs in establishing his pay, he has not sought relief based on an alleged failure to "red circle" his pay. Given that Beatty did not previously alert the district court or the City of this claim in the record below, Beatty is barred from raising it on appeal.

However, even if Beatty's claim concerning "red circling" was properly preserved, (the City maintains that it was not), this claim would still be without merit. "Employees whose rate of pay is higher than the maximum of the pay range for their position are 'red circled'." **[RP 81]** "Red circled" employees are not eligible for pay increases until their pay rate "conforms to the maximum range for the assigned grade." **[RP 81]**

In fact, "red circling" was never appropriate or necessary in Beatty's situation. When Beatty was administratively transferred from Transit to Solid Waste, his pay grade and rate remained the same and did not exceed the maximum of the pay range for his position. **[RP 401-402, 432]** When the steps were collapsed, Beatty's pay did not decrease and still did not exceed the maximum for his position. **[RP 402, 432]** Moreover, when the "M" series steps were collapsed, no other affected employee was red circled. Beatty cannot expect preferential compensation in contrast to the pay rates his Union has negotiated for on his behalf.

No Genuine Issue of Material Fact Exists.

The City's affidavits are adequate to meet its *prima* facie burden in a motion for summary judgment. The City's counter argument to this claim was raised and preserved in its pleadings below. **[RP 154-156]**

Summary judgment is viewed with disfavor by New Mexico courts. However, this does not mean that summary judgment should never be granted. The New Mexico Supreme Court has held, "[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). 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 a 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.*

Beatty argues the *prima facie* burden was not met by the City, because it did not include a demonstration of how it calculated the pay of each party. Beatty claims that without this demonstration, the affidavit is self-serving and improperly considered.

It is true that a court may not rely upon self-serving affidavits granting summary judgment. However, the City's affidavits are easily distinguished from those that are self-serving. In *Santa Fe Trail Ranch II Inc. v. Bd. of County Com'rs*, 1998-NMCA-099, 125 N.M. 360, 961 P.2d 785, the court dealt with the issue of self-serving affidavits. There, the court found the affidavit to be deficient because it lacked certain key pieces of information.

Id. ¶ 15. Specifically, the affidavit was lacking because it "does not explain who [the experts] are, what they considered, or what their opinions are." *Id.* Without any explanation of the underlying factual basis, the affidavit was inadequate to create a material issue of fact. *Id.*

A lack of explanation is fatal. In *Galvan v. City of Albuquerque*, 1973-NMCA-049, 85 N.M. 42, 508 P.2d 1339, the court examined another affidavit suffering the same flaw. That affidavit was written by a police officer offering an expert opinion. *Id.* ¶ 3. The affidavit did not identify the tests performed, how such tests were performed, or explain its conclusion. *Id.* ¶ 6. It was not entitled to consideration when ruling on the motion for summary judgment. *Id.*

The City's supporting affidavit does not suffer from this flaw. 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 affiant reached each of her conclusions. The affidavit of Mary Scott contains an explanation of the formula used to calculate each employee's salary, the section of the PRRs from which the formula originated, and which formula applied to which employee. Additionally, the City provided a further breakdown of each formula expressed in mathematical terms and the raw data involved in calculating the salary of each employee.

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 employee was paid in accordance with the contract is supported by a cogent explanation and underlying facts. Unlike the affidavits in the earlier two, distinguishable cases, the City's supporting affidavit contains more than a bare conclusion. The City provided every element of the calculation (the formula, the data, the salary tables, etc.); all of which were also available to Beatty through formal or informal discovery. Assuming access to a calculator or a pad and pencil, Beatty had everything he needed to perform and dispute the City's conclusions. The City's affidavit is sufficient to establish the *prima facie* case for summary judgment. The district court did not err in considering it.

The District Court Did Not Err in Granting Summary Judgment.

The breach of contract issue raised by Beatty fails, first on the threshold issue of standing; then by the very terms of the contract implied by the PRRs; 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]**

Beatty Does Not Have Standing.

Beatty along with his fellow plaintiffs complained that they were not all treated the same. Now, Beatty complains that his situation is unique and he, unlike his fellows, should, in fact, be treated differently and better. Exactly how he should be treated is unclear. He relies on his 2008 transfer memo, but, under his argument, while he would not have had one pay cut, he would not have had two pay raises, and, since he claims he was guaranteed a 'step 3' in perpetuity, and with the elimination of 'step 3', he would be out of a job.

Beatty has an expectation that the City will abide by the agreement made with him. He has no right and no standing to complain that other employees negotiated a more favorable arrangement. The implied contract between the City and Beatty makes no such promise.

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 a violation of his rights in order to have an injury in fact; Beatty cannot make any such allegation. 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 Beatty has come to articulating an actual injury is stating that the City paid other employees higher wages than those specified by the

PRRs. Unlike the father in *John R.*, who had a definite stake in the outcome of the case regarding the termination of his parental rights, Beatty does not have any stake in the wages of his coworkers. This is especially true if the coworkers are making the wages promised under the PRRs and any exceptions are still within the specified range of salaries. The wages of other coworkers are not a legally protected interest akin to the right to parent. The City did not invade any of Beatty's legally protected interests.

Beatty does not have standing because he lacks an injury in fact. An injury in fact is an essential element of standing. This case could have been properly dismissed on these grounds.

The Terms of the Contract Are Not As Beatty Alleges.

The present issue is not whether the PRRs create an implied contract. The New Mexico law is well settled that employee handbooks or personnel rules, such as the PRRs, 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, nothing in this implied contract states, suggests, or alludes to all employees receiving the same pay regardless of individual skills or experience. To the contrary, the steps within each grade are intended to address the variety of skills and experience that individuals bring to the workplace.

"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 PRRs was made to Beatty that he, along with all other M14s, would be paid identically. He was only promised that his pay would be set initially in accordance with provisions in the PRRs and subsequent increases would be in accordance with the PRRs. This was done. The City's actions were in accordance with the PRRs.

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 Beatty claims. Like *Trujillo,* the so-called implied contract does not contain the explicit promise the Beatty is claiming (to pay all M14 managers the same wage). Quite the opposite, the PRRs 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 PRRs provide sufficiently specific information so as to create an implied contract that each employee will be paid according to his or her individual circumstances, as Beatty was, no indication, specific or otherwise, provides an expectation to a

reasonable employee that 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 Beatty to find an implied contract.

Kiedrowski is not analogous. 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. That 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.*

In contrast, the City did follow its PRRs and it does not claim the PRRs 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 Plaintiff/Appellant's 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). Beatty, at the time he obtained his position, knew or should have known of some variance of salary within the position's grade existed. Moreover, given that the PRRs 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.") Neither the PRRs nor any practice of the City could form the claimed expectation.

Beatty also frames the implied contract issue as a constitutionally protected property interest created by the PRRs, guaranteeing that City employees will be paid the same rate, by the CBA's pay schedule. **[BIC 8]**

In support of that contention, Beatty cites to *Lovato v. City of Albuquerque,* 1987-NMSC-086, 106 N.M. 287, 742 P.2d 499. That case is inapplicable to the current situation. 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 PRRs, as they applied to permanent positions, created a protected interest in continued employment within the assignment. *Id.* ¶ 11. A protected interest may be construed when "the independent source of rules and understandings" point to such a finding. *Id.* 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 Beatty, who knew his starting pay; signed off, and now complains that he should be receiving a different pay.

In the present case, the City has taken no action that could be construed as interfering with the Beatty's protected interest in his job; no action has been taken to re-assign or terminate his employment. Further, Beatty's protected interest in his salary has not been implicated. He is making the salary owed to him under the PRRs. 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 PRRs 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.")

The City Substantially Complied With the PRRs.

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.*

The concept of substantial compliance applies. *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 PRRs. The intent of the relevant portions of the PRRs 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 PRRs. 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 PRRs by providing sufficient flexibility to appropriately compensate employees. Thus, the City substantially complied with the PRRs and did not violate them.

Beatty Has No Injury.

Beatty's claim, in his complaint against the City, is framed as one of breach of contract. However, he argues that his injury is based on a violation of a property interest created by the PRRs. Actions for breach of contract and actions guarding property interests are two different types of claims. Beatty is attempting to apply an alleged injury for a purported violation of property interests to breach of contract. First, no contract breach exists based on a different person's salary. Furthermore, his efforts are futile because Beatty does 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.

Beatty Has No Injury Under a Breach of Contract Theory.

Using the definition provided by Black's Law Dictionary, to prove an injury under a contract, Beatty must first establish that he has 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. Beatty is unable to point to any provision of the contract which guarantees uniform pay. Without a legal right, there can be no injury. Beatty is unable to show that he has an injury under the facts of his complaint.

Beatty Has No Injury Under a Due Process Theory.

In his Brief in Chief Beatty argues that the district court erred in ruling that Beatty did not suffer an injury. As support for this argument, he discusses the formation and basis of property interests. Then, he frames his expectations of uniform pay as a property interest. Beatty's argument is flawed because he does not and cannot show that the PRRs 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 PRRs?

In analyzing the nature of property interests protected by the Fourteenth Amendment, two United States Supreme Court Cases cited by Beatty 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.

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 non-retention

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 a de facto tenure program qualified him 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 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 Beatty 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 PRRs 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 PRRs 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. Nothing exists in the PRRs, or anywhere else, that defines an interest the pay of another or in uniform pay. Furthermore, such an understanding would be objectively unreasonable, as discussed above.

Beatty merely states how property interests are created and then asserts he has one, but never explains how this asserted interest is created under the very rules he quotes. Without first establishing that such a property interest exists, Beatty is 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 Plaintiff/Appellant cites are all based on a claim rooted in the Fourteenth Amendment's protection of a property interest. This has nothing to do with a breach of contract claim. 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 any 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 non-retention and challenge their sufficiency.")

CONCLUSION

The City's evidence established that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Beatty failed to adduce any evidence that would then justify a trial on the merits. The District Court was correct in ruling that Beatty did not have an injury. Its summary judgment should be affirmed.

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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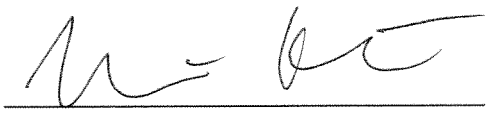
CERTIFICATE OF COMPLIANCE

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 7,147 words, as indicated by the Word Count feature. This information is true and accurate to the best of my knowledge.



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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 October 3, 2014.

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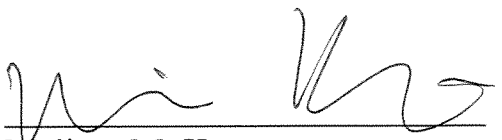

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