

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, ANGELO G ALLEGOS,  
and MIKE FARIAS,

COPY

COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE  
FILED

AUG 19 2014

*Wendy Fines*

Plaintiffs-Appellants,

and

SAM BEATTY,

Plaintiff,

vs.

CITY OF ALBUQUERQUE,

No. 33,714

Bernalillo County

D-202-CV-2012-3136

Defendant-Appellee,

and

AMERICAN FEDERATION OF  
STATE, COUNTY AND  
MUNICIPAL EMPLOYEES 3022,

Defendant.

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BRIEF IN CHIEF

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Appeal from Decision of the Honorable Beatrice Brickhouse, Second Judicial District  
Court.

Submitted by:

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**ORAL ARGUMENT IS REQUESTED**

TABLE OF CONTENTS

Table of Authorities.....3

Summary of Proceedings.....5

Argument.....8

A. THE DISTRICT COURT ERRED IN FINDING THAT THE PLAINTIFF HAD NOT SUFFERED ANY INJURY WHEN THE DEFENDANT CITY OF ALBUQUERQUE FAILED TO FOLLOW ITS OWN PERSONNEL RULES AND REGULATIONS WHEN PROMOTING AND SETTING A HIGHER RATE OF PAY FOR OTHER CITY EMPLOYEES WITH THE EXACT SAME JOB TITLE, POSITION AND DUTIES AS PLAINTIFF.....8

B. THE DISTRICT COURT ERRED IN FINDING DEFENDANT CITY OF ALBUQUERQUE DID NOT BREACH ANY CONTRACTUAL OBLIGATIONS TO PLAINTIFF WHEN IT DID NOT FOLLOW ITS OWN PERSONNEL RULES AND REGULATIONS WHEN PROMOTING AND SETTING A HIGHER RATE OF PAY FOR OTHER CITY EMPLOYEES WITH THE EXACT SAME JOB TITLE, POSITION AND DUTIES AS PLAINTIFF.....10-11

C. THE DISTRICT COURT ERRED IN DETERMINING THERE WAS NO GENUINE ISSUE OF FACT WITH REGARD TO WHETHER THE DEFENDANT CITY OF ALBUQUERQUE HAD COMPLIED WITH ITS PERSONNEL RULES AND REGULATIONS IN SETTING THE PAY FOR OTHER M14S IN PLAINTIFFS’ SOLID WASTE DEPARTMENT WHEN THE CITY OF ALBUQUERQUE FAILED TO PRESENT EVIDENCE OF HOW THE CITY DETERMINED OR CALCULATED THE HIGHER PAY FOR THE OTHER M14S.....12

D. THE DISTRICT COURT ERRED IN DETERMINING THAT DEFENDANT CITY OF ALBUQUERQUE HAD BREACHED ITS AGREEMENT TO TRANSFER PLAINTIFF SAM BEATTY AS A M14, STEP 3.....14

Conclusion.....16

Word Count: 3264

**TABLE OF AUTHORITIES**

*Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972))  
.....Page 8 & 9 of 17

*Garcia v. Middle Rio Grande Conservancy Dist.* 121 N.M. 728, 918 P.2d 7 (1996)  
..... Page 11 of 17

*Lovato v. City of Albuquerque* 106 N.M. 287, 290, 742 P.2d 499, 502 (1987)  
.....Page 9 of 17

*Romero v. Philip Morris Inc.* 148 N.M. 713, 720, 242 P.3d 280, 287 (2010)  
.....Page 13 of 17

*Roth v. Thompson*, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992)  
.....Page 12 of 17

*Santa Fe Trail Ranch II, Inc. v. Board of County Com'rs of San Miguel County* 125 N.M. 360,  
365, 961 P.2d 785, 790 (Ct.App.,1998).  
.....Page 14 of 17

*West v. Washington Tru Solutions, LLC* 147 N.M. 424, 224 P.3d 651 (Ct.  
App.,2009).....Page 15 of 17

## SUMMARY OF PROCEEDINGS

Plaintiff/Appellant Sam Beatty worked for Appellee as supervisor (M14s) for The City of Albuquerque Solid Waste Department. [RP #72]. Plaintiff Beatty along with ten other M14 Plaintiffs filed a Complaint asserting that they were told by Defendant City that all M14s promoted and hired into Solid Waste Department would be paid the same rate of pay. [RP #73]. The City's Personnel Rules and Regulations §700 outline the procedure to determine the rate of pay for M Series employees in coordination with the CBA pay schedule. [RP #73] The Defendant City of Albuquerque admitted in its Motion for Summary Judgment that the City at the time was paying fifteen other M14s with the same title, position, authority and responsibilities as the Plaintiff at a higher rate of pay. [RP #73, #74].

Plaintiff/Appellant Sam Beatty asserted that the City breached its contractual obligations to him and his fellow Plaintiffs by not following the City Personnel Rules and Regulations when it hired or promoted other M14 supervisors in the Solid Waste Department with the same title, position and duties as Plaintiffs/Appellants at a higher rate of pay than Plaintiffs. [RP #131, #132] Defendant/Appellee City of Albuquerque filed a Motion for Summary Judgment arguing that Plaintiffs did not have standing to assert a breach of contract claim against the City of Albuquerque because: 1) the Plaintiffs/Appellants had no evidence that the City did not follow its Personnel Rules

and Regulations with regard to the promotion and setting of Plaintiffs' rate of pay; and 2) the City of Albuquerque had substantially complied with its own Personnel Rules and Regulations with regard to the pay of the higher rate of pay for the other fifteen higher paid M14s. [RP #75, #76, #131].

All the Plaintiffs filed a Response in Opposition arguing that the City Personnel Rules and Regulations and statements made by Defendant City asserted a property interest established by the City Personnel Rules and Regulations and the City owed them a duty to apply the Personnel Rules and Regulations uniformly and equally to all the M14s in the Solid Waste Department. [RP #133, #134]. Plaintiffs also asserted a genuine issue of material fact existed in that Defendant had not produced sufficient evidence that it had substantially complied with the City's Personnel Rules and Regulations when setting the rate of pay for the higher paid M14s because the City did not show how the rate was calculated. [RP #72 - #74, #131- #133].

The District Court without hearing oral arguments determined that The City of Albuquerque did not breach any contractual obligations to Plaintiffs and that Plaintiffs had suffered no injury. [RP #242 - #250]. The District Court also determined that the fact The City of Albuquerque failed to produce evidence on how the higher rates of pay were calculated for the fifteen other M14s in Plaintiffs'

department was irrelevant and immaterial to the disposition of this case. *RP#[242 - #250]*. Ten of the eleven Plaintiffs appealed the dismissal of their case and the case is currently on Appeal No. 31,151. Plaintiff Sam Beatty's claim was not dismissed because the District Court found there was a question of fact with regard to Plaintiff's Beatty's transfer and his rate of pay. *[RP #242 - #250]*.

The City of Albuquerque filed a second Motion for Summary Judgement with regard to Plaintiff Sam Beatty's transfer. *[RP #398-415]*. The City argued that Plaintiff Sam Beatty's pay was correctly calculated because of reductions in pay and changes in the CBA. *[RP #398-415]*. Plaintiff Beatty filed a Response arguing that he was promised a transfer as a M14 Step 3 and the City reduced his pay. *[RP #418-426]*. In addition, Plaintiff Beatty had asserted that he was being paid less than other M14s as asserted in the original Complaint filed by all the Plaintiffs. *[RP #251-266]*. The District Court found that since the reduction in pay resulted six months after the transfer there was no longer a dispute of material fact. *[RP #446-450]*. In addition, the District Court stated that it had previously ruled that there was no injury to Plaintiffs including Plaintiff Beatty based on the City hiring new M14s at a higher rate of pay. *[RP #446-450]*.

Plaintiff Beatty timely appealed and requests this Court combine his case with Appeal No. 31,151. *[RP #453]*.

## ARGUMENT

**A THE DISTRICT COURT ERRED IN FINDING THAT THE PLAINTIFF HAD NOT SUFFERED ANY INJURY WHEN THE DEFENDANT CITY OF ALBUQUERQUE FAILED TO FOLLOW ITS OWN PERSONNEL RULES AND REGULATIONS WHEN PROMOTING AND SETTING A HIGHER RATE OF PAY FOR OTHER CITY EMPLOYEES WITH THE EXACT SAME JOB TITLE, POSITION AND DUTIES AS PLAINTIFF.**

This case turns on whether the City of Albuquerque is required to follow its personnel policies and procedures when setting the pay of all of its M series employees. The City argued and the District Court agreed that the Personnel Rules and Regulations did not create a contract with Plaintiffs/Appellants. However that is a misstatement of the law. The U.S. Supreme Court has held:

Property interests are not created by the due process clause of the Constitution. *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. Rather, they are created by independent sources such as a state or federal statute, a municipal charter or ordinance, or an implied or express contract. *See, e.g., Bishop v. Wood*, 426 U.S. 341, 344-45, 96 S.Ct. 2074, 2077-78, 48 L.Ed.2d 684 (1976) (ordinance or implied contract may create a property interest in continued employment); *Perry v. Sindermann*, 408 U.S. 593, 600-02, 92 S.Ct. 2694, 2699-2700, 33 L.Ed.2d 570 (1972) (written contract with explicit tenure provision creates property interest; contract “implied” from policies and practices of institution



may create property interest); *Melton v. City of Oklahoma*, 879 F.2d 706, 718 n. 15 (10th Cir.) (state statute, ordinance, or express or implied contract may create property interest), *partial reh'g granted*, 888 F.2d 724 (1989); *Vinyard v. King*, 728 F.2d 428, 432 (10th Cir.1984) (*Vinyard II*) (federal statute, city charter, or contract may create a property right); *Poolaw v. City of Anadarko*, 660 F.2d 459, 463 (10th Cir.1981) (city charter may create property interest), *cert. denied*, 469 U.S. 1108, 105 S.Ct. 784, 83 L.Ed.2d 779 (1985).

*Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972)).

New Mexico Courts have also held that Personnel Rules and Regulations create a property interest and it also has been recognized that under New Mexico law a constitutionally protected property interest can arise despite the absence of a statute or formal contract. *See, Lovato v. City of Albuquerque* 106 N.M. 287, 290, 742 P.2d 499, 502 (1987).

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. The Plaintiffs have been harmed by the City's failure to follow its own rules and regulations. The Plaintiffs/Appellants receive less pay for performing

the same work as their peers. The City admits that all the Plaintiffs performed the same work and the same duties as the other M14s who are paid a higher wage. [RP #73, #74, #131] The Plaintiffs have a property interest in the Personnel Rules and Regulations that they will be applied uniformly for all M14s doing the same duties and under the same position description. The Plaintiffs/Appellants by accepting the position of a M14 at the City's Solid Waste Department believed that they would be compensated according to the Personnel Rules and Regulations. However, the City has admitted to paying higher wages to M14 employees contrary to the City's Personnel Rules and Regulations. [RP #73, #74]. While the Personnel Rules and Regulations do allow for exceptions, the City did not follow its own policies with regard to the exceptions. [RP #73, #74, #131, #133]

The District Court's decision that Plaintiffs have not been harmed is incorrect. The Plaintiffs/Appellants accepted the position as M14s believing the City would apply the same rules and regulations to every M14s hired. The City did not apply the rules and regulation uniformly. Therefore, the Plaintiffs have been harmed and the District Court should have denied the City's Motion for Summary Judgment.

**B. THE DISTRICT COURT ERRED IN FINDING DEFENDANT CITY OF ALBUQUERQUE DID NOT BREACH ANY CONTRACTUAL OBLIGATIONS TO PLAINTIFFS WHEN IT DID NOT FOLLOW ITS OWN PERSONNEL RULES AND REGULATIONS WHEN PROMOTING AND SETTING A HIGHER RATE OF PAY FOR OTHER**

**CITY EMPLOYEES WITH THE EXACT SAME JOB TITLE,  
POSITION AND DUTIES AS PLAINTIFFS.**

In New Mexico our Courts have long held:

If employer chooses to issue policy statement, in a manual or otherwise, and by its language or by employer's actions encourages reliance thereon, employer cannot be free to only selectively abide by it; having announced a policy, employer may not treat it as illusory.

*Garcia v. Middle Rio Grande Conservancy Dist.* 121 N.M. 728, 918 P.2d 7 (1996).

As stated above the City of Albuquerque's Personnel Rules and Regulations created a property interest and contract with Plaintiff/Appellants. Therefore, the City owed Plaintiffs/Appellants a duty to follow its Personnel Rules and Regulations for all its employees. The City breached its duty to Plaintiffs/Appellants by paying higher wages to other M14s doing the same work and having the same job titles. The District Court in its ruling allows the City to breach its own personnel policies and rules whenever it feels like it. The City admits it failed to follow its personnel policies with regard to M14s pay at the City's Solid Waste Department. Therefore, the City's Personnel Rules and Regulations have become illusory and arbitrary. The District Court's ruling now allows the City to breach its contractual obligations to its M14s and prevents any real recourse by the harmed M14s. The District Court ruling only allows the M14s who are being paid more than the Personnel Rules and

Regulations allow to bring an action. The M14s who were paid more than the Personnel Rules and Regulations certainly are not going to complain about being paid more contrary to the Personnel Rules and Regulations. Therefore, the City of Albuquerque is now free to pick and choose when to follow and apply the Personnel Rules and Regulations. The District Court's ruling must be reversed to prevent manifest injustice to Plaintiffs/Appellants.

**C. THE DISTRICT COURT ERRED IN DETERMINING THERE WAS NO GENUINE ISSUE OF FACT WITH REGARD TO WHETHER THE DEFENDANT CITY OF ALBUQUERQUE HAD COMPLIED WITH ITS PERSONNEL RULES AND REGULATIONS IN SETTING THE PAY FOR OTHER M14S IN PLAINTIFFS' SOLID WASTE DEPARTMENT WHEN THE CITY OF ALBUQUERQUE FAILED TO PRESENT EVIDENCE OF HOW THE CITY DETERMINED OR CALCULATED THE HIGHER PAY FOR THE OTHER M14S.**

Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to summary judgment as a matter of law. *Roth v. Thompson*, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992).

A court reviewing a summary judgment motion may not weigh the evidence or pass on the credibility of the witnesses. In its review, the court must resolve all reasonable inferences in favor of the nonmovant and must view the pleadings, affidavits, depositions, answers to interrogatories and admissions in a light most favorable to a trial on the merits. Summary judgment is an extreme remedy that should be

imposed with caution. If there is the slightest doubt as to the existence of material factual issues, summary judgment should be denied.

*Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶12, 135 N.M. 539, 91 P.3d 58 (internal citations and quotation marks omitted). The New Mexico Supreme Court has restated and renewed its position on New Mexico’s summary judgment standard stating: “New Mexico courts, unlike federal courts, view summary judgment with disfavor, preferring a trial on the merits.” *Romero v. Philip Morris Inc.* 148 N.M. 713, 720, 242 P.3d 280, 287 (2010).

The City in its Motion for Summary Judgment did not demonstrate to the Court how it calculated Plaintiffs/Appellants and the other M14s pay pursuant to the CBA and the Personnel Rules and Regulations. Rather, the City just filed an affidavit from its Human Resources Department stating the City substantially complied with the Personnel Policies. [RP #73, #74, #75]. Plaintiffs/Appellants objected to the affidavit testimony as being self serving and inappropriate for summary judgment. [RP#131, #132, #133] Our Courts have held that self serving affidavits without explanations of the conclusions are inappropriate for summary Judgement.

In our view, this self-serving affidavit without any explanation of the underlying factual basis for its conclusions does not serve to create a material issue of fact that “all reasonable beneficial use” of the property has been

deprived by the County's actions. *See Galvan v. City of Albuquerque*, 85 N.M. 42, 44-45, 508 P.2d 1339, 1341-42 (Ct.App.1973) (holding that affidavits must set forth facts admissible in evidence and explain its conclusions)

*Santa Fe Trail Ranch II, Inc. v. Board of County Com'rs of San Miguel County* 125 N.M. 360, 365, 961 P.2d 785, 790 (Ct. App.,1998). Without the underlying factual calculations on how the M14s pay was calculated, Plaintiffs/Appellants were unable to dispute the calculations. The City was allowed to create a material fact without providing the underlying calculations. The District Court erred in allowing the affidavit testimony without underlying facts to be used as a material fact for summary judgment.

**D. THE DISTRICT COURT ERRED IN DETERMINING THAT DEFENDANT CITY OF ALBUQUERQUE HAD BREACHED ITS AGREEMENT TO TRANSFER PLAINTIFF SAM BEATTY AS A M14, STEP 3.**

The City asserted that Plaintiff Beatty's pay was reduced because of a collapse of steps that was negotiated with the Union. [RP #398-415]. However, Plaintiff Beatty was promised a transfer as a M14 Step 3. [RP #418-426]. In 2008, 2009 and 2010, Plaintiff Beatty was incorrectly categorized as a M14 Step 2. The City can argue that it had a reason for reducing Beatty's pay, but it does not change the fact the City breached its promise to him to transfer him at the same grade of a M14 Step 3.

The City on its own initiative dropped Plaintiff Beatty down to a M14 Step 2. The City could have kept Beatty at the same pay by redlining his pay. This Court has held that an Employer's representations can create a contract. In *West v. Washington Tru Solutions, LLC* 147 N.M. 424, 224 P.3d 651 (Ct. App.,2009), this Court held: "Genuine issue of material fact remained whether employer's words and conduct created implied contract." In this case we have the City's promise in writing that Beatty's pay will be as a M14 step 3. [RP #418-426].

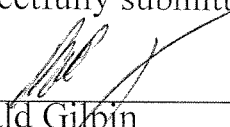
The City has no justification for reclassifying Plaintiff Beatty as a M14 Step 2 other than making a statement that his step collapsed. However, when Steps are collapsed by the Union, the Union testified that nobody is to lose pay. [RP # 418-426]. The goal of collapsing steps is to move Union Members up in pay. [RP # 418-426]. Therefore, the City did not have the permission of the Union to drop any members pay.

The failure to keep Plaintiff Beatty at the promised grade and step is only part of Plaintiff Beatty's Complaint. Plaintiff Beatty along with his fellow Plaintiffs argued that the City breached its own policies and personnel rules by paying a higher salary to other M14s doing the same duties and responsibilities as Beatty and his fellow Plaintiffs.

## CONCLUSION

**WHEREFORE**, Plaintiff/Appellant Sam Beatty respectfully requests this Court to reverse in full the decision of the District Court granting summary judgment to Appellee, and remand this matter back to the District Court for a trial on the merits. In the alternative, Plaintiff Beatty requests this Court to combine his Appeal with the Appeal of his fellow Plaintiffs' Appeal No. 31,151.

Respectfully submitted,

  
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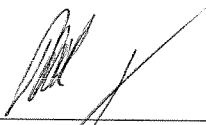


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing *Brief-in-Chief* were mailed with a Copy of the Certificate of Service Via First-Class Mail, Postage Prepaid, Addressed to the Following on this 19<sup>th</sup> day of August, 2014:

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