IN THE NEW MEXICO COURT OF APPEALS

ALBUQUERQUE POLICE OFFICERS' ASSOCIATION, JOEY SIGALA, FELIPE GARCIA, TOM NOVICKI and MATT FISHER,

Appellants/Plaintiffs,

v.

CITY OF ALBUQUERQUE, ALBUQUERQUE POLICE DEPARTMENT, and MAYOR RICHARD BERRY,

Appellees/Defendants.

Ct. App. No. 31,632
[Consolidated 31,606 & 31,632]
Second Judicial District Court
No. CV-2010-08640

APPELLANT/PLAINTIFFS' ANSWER BRIEF

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEW MEXICO CASES

NEW MEXICO CONSTITUTION, STATUTES & RULES

OTHER AUTHORITIES

STATEMENT OF COMPLIANCE

As required by Rule 12-213(G), counsel for Plaintiff/Appellant certifies that this brief complies with the type-volume limitation of Rule 12-213(F)(1). According to Microsoft Word 2007, the body of the Brief in Chief, as defined by Rule 12-213(F)(1), contains 2,552 words.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-appellants request oral argument pursuant to Rule 12-214(B). Oral argument would be helpful to the resolution of this case because the issues involve multiple matters of first impression and matters of public importance potentially affecting the validity of the employment contracts of the employees of municipalities throughout the state of New Mexico. The panel may also have questions regarding the factual underpinnings of the case, including the nature of the activities undertaken under Section 1.3.1 to administer the CBA.

INTRODUCTION

This case requires the Court to determine whether the express language of Section 10-7E-18(D) of the Public Employees Bargaining Act (the "Evergreen Clause") requires public employers honor the non-economic terms of an expired CBA while negotiating a new agreement ("Evergreening") or whether the grandfather clause of Section 10-7E-26(A) allows a public employer to make unilateral and piecemeal changes to work conditions at will and without good faith bargaining once a CBA has expired.

The City of Albuquerque ("City") attempted to unilaterally nullify one provision within an expired collective bargaining agreement ("CBA") with the Albuquerque Police Officers' Association ("APOA") without relying on the negotiation and impasse procedures of either the Public Employees Bargaining Act ("PEBA") or its own Labor-Management Relations Ordinance ("LMRO"). This change in bargaining terms without APOA input occurred via letter to APOA officials while both parties were in the midst of negotiating a new CBA to replace the expired one and embroiled in litigation regarding the City's unilateral change of mandatory bargaining terms (payment of wages) found in the same CBA prior to expiration of the CBA. [RP 368]. The District Court granted APOA's petition for injunctive relief and rejected the City's arguments that the expired CBA

provision was not evergreened because it conflicted with the City's LMRO and violated the Bateman Act and the New Mexico Constitution.

The City's extreme and egregious conduct in this case proves the necessity of PEBA's evergreen clause and reveals the City's true position – that the expiration of a CBA marks the end of a bargaining unit's collective bargaining rights generally rather than merely the end of that particular contract. The City did not follow the negotiation or impasse procedures laid out in either PEBA or its own LMRO but now argues that the evergreen clause should not apply because the negotiation and impasse procedures of its own LMRO should be grandfathered in place of the evergreen clause and provide enough protection for collective bargaining rights to qualify for grandfathering. The City's position is not only without legal support but also defies basic logic.

SUMMARY OF PROCEEDINGS

The City and the APOA entered into a Collective Bargaining Agreement ("CBA"), effective July 1, 2008 through June 30, 2011. [RP 5-6]. In February 2011, as the expiration of the CBA approached, the parties entered into negotiations regarding the terms of a new CBA.

The expired CBA includes a provision, Section 1.3.1, that allows the Union President and Vice-President to take reasonable time during working hours to

"handle grievances and application of this Agreement" including proceedings of the Personnel Board, the Labor Board, and internal department grievances. [RP 367]. Rather than relying upon the negotiation and impasse procedures outlined in the City's LMRO or PEBA to change this provision, the City simply announced a unilateral change via a letter from the Chief Administrative Officer on July 1, 2011. [RP 368]. In response, APOA filed a Petition for Preliminary Injunction. [RP 362].

Issuing oral findings from the bench, the District Court found that Section 10-7E-18(D) applied to the expired CBA and granted the injunction with most of the Court's reasoning and findings outlined from the bench. [RP 437-38 and TR-III, 56:11-]. Specifically, the Court rejected the City's characterizations of Section 1.3.1 as an economic term [TR 62:22 – 63:8] and found that the Evergreen Clause of PEBA must be applied to "maintain and even and uninterrupted flow of …services." [TR-III, 61:3-62:20].

ARGUMENT

I. STANDARD OF REVIEW

Questions of statutory construction and, specifically, construction of the Public Employee Bargaining Act ("PEBA") and the City of Albuquerque's Labor-Management Relations Ordinance ("LMRO") are reviewed *de novo*. City of

Deming v. Deming Firefighters Local 4521, 2007-NMCA-069, ¶ 6, 141 N.M. 686, 160 P.3d 595. The City's defenses based on the N.M Constitution are also reviewed *de novo*. Gomez v. Chavarria, 2009-NMCA-035, ¶ 6, 146 N.M. 46, 206 P.3d 157. A District Court's grant of equitable relief is reversed only when a clear abuse of discretion is shown. Padilla v. Lawrence, 101 N.M. 556, 562, P.2d 964, 970 (Ct. App. 1984).

II. WITHOUT AN EVERGREEN CLAUSE ANALOGOUS TO SECTION 10-7E-18(D) OF PEBA, THE NEGOTIATING AND IMPASSE PROVISIONS OF THE CITY'S LMRO CANNOT BE GRANDFATHERED BECAUSE SECTION 10-7E-18(D) PROTECTS COLLECTIVE BARGAINING RIGHTS DURING CONTENTIOUS NEGOTIATIONS BY PROVIDING ALL PARTIES WITH AN INCENTIVE TO BARGAIN IN GOOD FAITH.

A. The plain language of Section 10-7E-18(D) reveals the Legislature's intention is to hold parties to the previous terms they bargained in good faith until a new written agreement is entered into.

The New Mexico Legislature did not enact a provision allowing parties to choose whether or not to include an evergreen provision within negotiated CBAs even though this or silence regarding evergreen provisions were both options available when drafting the PEBA. Instead, PEBA expressly mandates the continuation of an expired CBA until a new written agreement is entered into either by agreement or through impasse procedures. NMSA, §10-7E-18(D).

Admittedly, a public employer's provisions need not be identical to PEBA in order to stand under the grandfather clause. NMSA, §10-7E-26(A). In fact, the Court of Appeals has held that PEBA does not require binding arbitration in order for an City's impasse provisions to qualify for grandfather status. Deming, 2007-NMCA-069 at ¶ 22. However, to reach this ruling, the Court relied on the definition of "collective bargaining" found in Section 10-7E-4(F) of PEBA finding that it does not contain "any specific qualitative requirements" or minimal requirements of effectiveness. *Id.* at ¶ 21-22. Further, the Court relied on the legislative history which revealed that PEBA originally required only advisory mediation. *Id.* As the Court opined, to rule otherwise would have required the Court to add language to the statute that the legislature didn't adopt and would thereby render the grandfather clause meaningless. Id. at ¶ 23.

When construing the Section 10-7E-18(D) evergreen clause, we have the opposite situation. While it is included within the section on impasse procedures, the evergreen clause does not merely present options regarding what type or quality of techniques parties will turn to resolve disputes in the negotiation process. Instead, it maintains the status quo until an agreement can be reached thereby protecting the continuing existence of collective bargaining rights. The City's LMRO does not require any type of impasse arbitration in the event the parties cannot agree on the terms of a new CBA. LMRO § 3-2-14. Therefore, without an

evergreen clause, the City need only delay negotiations or refuse to bargain in good faith until a CBA expires in order to secure the ability to dictate working conditions and leaving employees vulnerable to coercion during the remainder of negotiations. Since public employees lack the right to strike, public employers would be able to change any work conditions they desired without the inconvenience of collective bargaining - as the City did in this case.

Further, the City's unilateral and piecemeal change of the past CBA by proclamation rather than relying upon the negotiation and impasse procedures outlined in their own LMRO provisions proves the necessity of PEBA's evergreen provision. The City has argued throughout proceedings and in their Brief in Chief that the negotiation and impasse provisions of the LMRO, Sections 3-2-13 & 14 respectively, should enjoy grandfather status. However, it disregarded those provisions when it announced the end of Section 1.3.1. The instant case illustrates and the City has repeatedly demonstrated its real position: that the expirations of a particular CBA marks the end of all collective bargaining rights in general and grants the City the opportunity to unilaterally compel work conditions at will. The absence of an evergreen clause combined with public employees' inability to strike will allow public employers like the City to ignore the rights of employees to bargain terms and conditions of employment.

The City's argument that PEBA's evergreen clause cannot stand because it conflicts with another portion of the LMRO and its reliance on Section 3-2-13(C)(7) of the LMRO is misplaced. [BIC at page 8]. As a threshold matter, the grandfather clause and well-settled analysis for whether a local provision qualifies for grandfathering is what determines whether the parties will look to PEBA or the LMRO. Additionally, this portion of the LMRO is only one small fraction of the activities undertaken by the APOA President and Vice-President as Section 1.3.1 of the CBA applies to activities far beyond the mere negotiation of new CBAs every three years. *See Infra* Part II.C. Also, since the employee negotiation team for a CBA will include more than the President and Vice-President of the union, Section 3-2-13(C)(7) also applies to a broader group of employees than Section 1.3.1 of the CBA.

B. Existing precedent regarding a public employee union's duty of fair representation and potential liability for failure to adequately represent its members reveals the need for evergreening and the the absurd and draconian consequences of the City's attempt to dispose of Section 1.3.1 of the CBA without good faith negotiations.

The New Mexico Supreme Court has repeatedly upheld union members' right to sue a union when its representatives have failed to adequately represent the interests of their members pursuant to a collective bargaining agreement. The union's duty of fair representation "extends beyond the bargaining table to the 'day-to-day adjustment of working rules and the protection of employees' rights

secured by the contract.'" Callahan v. N.M. Federation of Teachers –TVI, 2006-NMSC-010, ¶ 9, 139, N.M. 201, 205, 131 P.3d 51, 55 (quoting Jones v. Int'l Union of Operating Engineers, 72 N.M. 322, 330, 383 P.2d 571, 576 (1963).

The City enjoys the certainty and protection of the grievance procedures it bargained for in the CBA. The right of individual APOA members to bring suit against the City for a wide variety of employment issues is tightly limited by the CBA and is managed by the union. Without time to tend to these obligations to help resolve disputes between the City and its members, the APOA would not only be unable to implement and maintain the benefits that the City voluntarily bargained for and still enjoys, but would also be subject to suit by its members. A ruling that the City may pick out and nullify Section 1.3.1 while still relying upon and holding public employees to the remaining grievance and dispute resolution provisions found in the CBA would seriously threaten APOA's continued operation and existence.

C. PEBA generally and Section 10-7E-18(D) specifically are express limitations on the power of public employers and the home rule provision of the N.M. Constitution does not give the City the authority to pre-empt a state statute with an ordinance.

The New Mexico Constitution provides that a municipality that adopts a home rule charter "may exercise all legislative powers and perform all functions not expressly denied by general law or charter." N.M. Const. art. X, §6(D). In

has not expressly denied that authority" with a general law. New Mexicans for Free Enterprise v. The City of Santa Fe, 2006-NMCA-007, ¶ 14, 138 N.M. 785, 126 P.3d 1149 (holding that the state Minimum Wage Act is a general law but that it does not expressly deny a city's power to enact a higher minimum wage locally.) PEBA is a general law applicable statewide that, at a minimum, precludes public employers from unilaterally dictating work conditions of their organized employees. The grandfather clause of PEBA does not grant municipalities an exception simply because they had a scheme of collective bargaining in place prior to 1991 and cannot be used to justify abrogating public employees' bargaining rights.

III. EVERGREENING SECTION 1.3.1 OF THE CBA DOES NOT VIOLATE PEBA, THE BATEMAN ACT, OR THE PROHIBITION ON CONSTITUTIONAL DEBT BECAUSE IT IS NOT AN ECONOMIC TERM AND HONORING THE PROVISION UNTIL A NEW AGREEMENT IS REACHED DOES NOT REQUIRE AN APPROPRIATION.

The Evergreen clause of PEBA contains an exception for economic terms within an expired CBA that would require new appropriations: "However, this shall not require the public employer to increase any employees' levels, steps, or grades of compensation contained in the existing contract." NMSA § 10-7E-18(D). The District Court rejected the City's erroneous and misleading

characterizations of Section 1.3.1 of the CBA as "City pay for union work" and "payroll to engage work for another employer." [TR-III, 37:7-38:6]. Judge Campbell touched on the flaw in the City's reasoning when he pointed out that the logical conclusion of accepting the City's overly broad definition of "economic" is that every single term in any contract that has ever existed could be assigned some dollar amount and therefore, be considered an economic term. [TR-III, 38:7-17]. In its Brief in Chief, the City has still failed to draw a line or offer a workable analysis for how to distinguish which terms in the expired CBA are economic and, therefore, exempt from the Evergreen clause as well as unenforceable under the Bateman Act the prohibition on Constitutional debt.

The City did concede below that non-economic provisions would include "investigations of employee misconduct" and "discipline." [TR-III, 40:3-8]. However, these are examples of a few of the many activities that the President and Vice-President must attend to pursuant to the CBA. Historically, Section 1.3.1 is what has made it possible for these two employees to implement the CBA's purpose to maintain cooperative relationships between the City and its officers as well as ensure that disputes, alleged misconduct, and individual employee grievances do not interfere with the orderly and uninterrupted operation of the Police Department.

IV. EVERGREENING SECTION 1.3.1 OF THE CBA DOES NOT VIOLATE THE ANTI-DONATION CLAUSE OF THE NEW MEXICO CONSTITUTION BECAUSE THE CITY DERIVES BENEFIT FROM THIS PROVISION AS WELL AS AN ENTIRE COLLECTION OF EMPLOYEE GRIEVANCE AND OTHER PROVISIONS WITHIN THE CBA DESIGNED TO RESOLVE THE CITY'S DISPUTES WITH ITS EMPLOYEES.

While New Mexico's appellate bench has not had the opportunity to address this particular issue, the New Mexico Public Employees Labor Board has issued multiple rulings rejecting the argument that a public employer receives no value for the paid time that union officials spend working on management-labor matters and so paid leave violates the anti-donation clause of the New Mexico Constitution. The State Labor Board held, "a state employee who is also a union official of a state bargaining unit is on official state business while attending labor-management relations meetings, grievance meetings and other meetings necessary for the administration of the contract." PELRB Case No. 105-09, July 27, 2009, PELRB Director, Juan Montoya.

Despite the arbitrary liberties taken by the City in describing these officers as "union employees" throughout proceedings, the President and Vice-President of APOA are indeed police officers and, of course, employees of the City. These two officers are no different than the human resources staff, members of the Labor Board, or any other City employee who works to resolve employee disputes. Further, Section 1.3.1 of the CBA cannot be isolated. It is part of an entire

collection of terms where consideration was given and received in order to build a workable CBA that presumably benefited both parties or it would not have been enacted by the City in the first place. [TR-III, 53:18-24].

CONCLUSION

APOA asks that the Court affirm the Order of the District Court regarding the applicability of the evergreen clause of PEBA and order enjoining the City from violating the terms of the expired CBA until a new CBA is either entered into by the parties or impasse procedures are utilized to resolve the lack of existing CBA.

Respectfully submitted,

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