

IN THE NEW MEXICO COURT OF APPEALS

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

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

Appellants/Plaintiffs,

v.

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

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

Appellees/Defendants.

APPELLANT/PLAINTIFFS' BRIEF IN CHIEF

ORAL ARGUMENT REQUESTED

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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 3,018 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 appropriations process for the City of Albuquerque and exhibits entered regarding the appropriation and availability of funds.

INTRODUCTION

The City of Albuquerque (“City”) attempts to nullify the ability of all New Mexico municipal employees to rely upon multi-year agreements by taking the extreme and completely novel position that all multi-year collective bargaining agreements (“CBA”) are contingent upon yearly appropriations. Therefore, the City effectively argues that a municipality may change the terms of an existing, non-expired CBA unilaterally by simply refusing to appropriate funds in the future. In reality, the only issue in this case is whether the Judiciary can enforce the wage and benefit terms (“economic terms”) of an established and unexpired 2008 CBA between the Albuquerque Police Officer’s Association (“APOA”) and the City. In its complaint, APOA asserts that the City breached the existing, non-expired CBA with APOA when the City refused to honor the final promised pay increases and instead reduced wages and other benefits promised. [RP 1-4]. The City conceded in its pleadings below that it entered into a valid CBA with the APOA and admits that “salary increases were planned before there was a reduction in revenue to the general fund...” [RP 31, ¶¶ 6, 12, and 13]. In its Answer, the City denies violating the CBA. [RP 32 ¶ 18]. Instead, it offers the affirmative defense that the Bateman Act prevents the City from honoring the CBA. [RP 33, ¶ 6].

For purposes of appeal and despite the over-reaching and unfounded constitutional concerns and assertions to the contrary made by the City throughout

proceedings below, this is a case of simple statutory construction. When a CBA is entered into in accordance with the provisions of PEBA, the statute expressly prohibits a public employer from violating any of the terms of that CBA and expressly provides for the enforcement of existing terms. NMSA 1978, §§10-7E-19(H) and -22 respectively. Pursuant to the plain and unambiguous language of PEBA, the two factual questions in this case are: 1) whether the City had funding available for the expenditures contained within the CBA when it and the APOA entered into it; and 2) whether the City appropriated funding to cover the entirety of those expenditures. NMSA 1978, §10-7E-17(E). Therefore, whether the CBA can be enforced by the Judiciary depends upon whether the funding for the entirety of the economic terms (three full years of wage and benefit increases) was both appropriated and available when the City entered into the agreement. These same conditions are also required for a municipality to avoid violating the Bateman Act. See NMSA 1978, §6-6-11.

The District Court erred when ruling that the APOA failed to raise a material question of fact regarding the City's appropriation of funds. The City's Labor-Management Relations Ordinance ("LMRO") expressly addresses and defines the requirements for an appropriation when the City wishes to enter into a multi-year collective bargaining agreement. ROA 1994, §3-2-18. The APOA attached exhibits to its original complaint to establish that the City took each of the steps

expressly required by the LMRO to appropriate funding for employee contracts that contain multi-year expenditures. [RP 7-9]. Additionally, the APOA offered an affidavit from a former city employee who oversaw the negotiation and approval of the 2008 CBA providing further evidence that the City appropriated the future funding required for the CBA as required by Section 3-2-18 of the LMRO. [RP 179, ¶¶ 9-11]. Rather than dispute this evidence, the City raised irrelevant concerns about the fiscal year 2011 budget, asserting “that’s not how budgeting at the City or State level works” despite the express language of their own ordinance, and claiming that economic terms in multi-year CBAs are conditional upon new appropriations each and every year. [Tr. 9, Vol. 2].

Ultimately, fact finding regarding past appropriations and availability of revenue when the CBA was created in 2008 does not raise constitutional concerns regarding separation of powers as argued by the City and mentioned by the District Court. [Tr. 40, Vol. 2]. These concerns are unfounded because this case involves the mere enforcement of an existing CBA prior to its expiration rather than the negotiation and creation of a new CBA or an impasse during said negotiations.

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]. The CBA

contained provisions relating to wages, wage increases, hours, and terms and conditions of employment. The Mayor executed the multi-year CBA with APOA on April 7, 2008 and sent it to City Council with an executive communication detailing the economic terms found in the new contract. [RP 7-8]. The City Council then unanimously approved the CBA on June 2, 2008. [RP 9 & 10]. In other words, the City of Albuquerque approved a multi-year employment contract and then appropriated funds to cover its economic terms as required by local ordinance, multiple state statutes, and the NM State Constitution. Both parties relied on the CBA for multiple years.

The immediate dispute in this case is over a provision of the CBA expressly requiring the City to raise salaries of Police Department personnel by specific, fixed amounts described in the CBA. The City now refuses to raise the salaries of Police Department personnel to the levels mandated by the CBA for Fiscal Year 2011. [RP 7].

The APOA filed suit against the City for breach of contract, alleging in its complaint that the City Council had previously “approved and funded all pay increases.” [RP 3]. Prior to trial on the merits, the district court granted the City’s motion for summary judgment. [RP 434 and Tr. 43, Vol. 2]. Specifically, the Court ruled that APOA failed to raise a material question of fact regarding the appropriation of funds by the City in 2008 [Tr. 41, Vol 2] but opined that the

APOA did raise a question of material fact regarding the availability of funds. [Tr. 42, Vol 2]. Throughout proceedings, the City made the unsupportable arguments that the APOA could not prevail in their action because it failed to present evidence of new appropriations in 2009, 2010, and 2011 [Tr. 7, Vol. 2], that the City simply does not appropriate for multi-year expenditures and so all multi-year expenditures are contingent upon conditions subsequent [Tr. 9, Vol. 2], and cited to Int'l Ass'n of Firefighters v. City of Carlsbad, 2009-NMCA-097, 147 N.M. 6, 216 P.3d 256, for the proposition that the Judiciary cannot enforce an existing CBA. [Tr.10-11, Vol. 2].

After denial of its Motion for Reconsideration, APOA filed a Notice of Appeal on August 31, 2011, asking this Court to reverse the lower court's grant of the City's Motion for Summary Judgment. [RP 440].

ARGUMENT

I. STANDARD OF REVIEW ON SUMMARY JUDGMENT

In summary judgment proceedings, the burden rests upon the movant to show there is no genuine issue or material fact to submit to a fact finder. Southern Union Gas Co. v. Briner Rust Proofing Co., 65 N.M. 32, 331 P.2d 531 (1958). Summary judgment is improper so long as one issue of material fact remains. Fidelity Nat'l Bank v. Tommy L. Goff, Inc., 92 N.M. 106, 538 P.2d 470 (1978);

Frontier Leasing, Inc., v. C.F.B., Inc., 96 N.M. 491, 632 P.2d 726 (1981). Even if the trial court is of the opinion that it must eventually decide the issues in favor of the party moving for summary judgment, if there is a genuine issue on an essential fact, such as evidence to be heard at trial, no attempt should be made to try the case in advance through the summary proceedings. Johnson v. J.S. & H. Constr. Co., 81 N.M. 42, 462 P.2d 627 (Ct. App. 1969). In ruling on a motion for summary judgment, a court is not bound by the petitioner's assertions of conclusions of law whether in a petition, complaint, or motion even if the conclusions are admitted by the opposing party. Vives v. Verzino, 2009-NMCA-083, 146 N.M. 673, 213 P.3d 823.

II. THE DISTRICT COURT ERRED WHEN IT RULED THAT THE APOA DID NOT RAISE A QUESTION OF MATERIAL FACT REGARDING WHETHER THE CITY APPROPRIATED FUNDS TO COVER THE ENTIRETY OF THE CBA IN 2008. THE APOA PROFFERED EVIDENCE THAT THE CITY TOOK THE STEPS NECESSARY FOR AN APPROPRIATION THEREBY SHIFTING THE BURDEN TO THE CITY TO PROVE THAT THE FUNDS WERE UNAVAILABLE.

A. PEBA mandates that the City appropriate the funds and have the funds available to cover any economic expenditures contained in a new CBA at the time the City enters into the agreement.

The APOA does not deny that economic considerations, such as available revenue, play a necessary role in the negotiation and creation of a new CBA. The

current PEBA statute expressly directs that any provision in a CBA involving the expenditure of funds by a municipality must be accompanied by an appropriation of available funds:

[A]n agreement provision by a public employer other than the state or the public schools and an exclusive representative that requires the expenditure of funds shall be contingent upon the specific appropriation of funds by the appropriate governing body and the availability of funds.

Section 10-7E-17(E).

As a result, a city or county has complete power during the creation of a new CBA to appropriate money in a manner that will limit the range of bargaining that can take place. S. Barry Paisneral & Michelle R. Haubert-Barela, *Correcting the Imbalance: The New Mexico Public Employee Bargaining Act and the Statutory Rights Provided to Public Employees*, 37 N.M. L. Rev. 357, 383-384 (2007).

B. The definition of and the requirements to make an appropriation for a multi-year Collective Bargaining Agreement are expressly provided by the City's Labor-Management Relations Ordinance. The APOA raised a question of material fact when it proffered evidence that the City engaged in each of these steps.

The APOA proffered evidence that the City took the steps necessary to appropriate revenue to cover all three years of the CBA as described in its own

Labor-Management Relations Ordinance. An “appropriation” is “a legislative body's act of setting aside a sum of money for a public purpose.” Black's Law Dictionary (9th ed. 2009). Section 3-2-18 mandates an appropriation in order to approve a CBA with a multi-year commitment and describes the precise steps necessary to accomplish such an appropriation:

Any contract between the city and an employee organization,... which contains a multi-year commitment shall require the review and approval by the City Council. In order for any contract to be approved by the City Council, the City Council must approve the economic components of the contract through an executive communication and adopt a resolution providing an appropriation or deappropriation or both to cover the cost of the contract.

ROA 1994, §3-2-18.

In its complaint, APOA not only alleges that the City appropriated the 2010 pay increases and benefits in dispute in this case, but also supports those allegation with the City's own Council history. When the Mayor signed the CBA, he sent it to the City Council with an executive communication calling the Council's attention to the multi-year nature of the contract and detailing the economic terms. [RP 7]. After sending to the Finance & Government Committee for budget consideration, the City Council approved the CBA on June 2, 2008. [RP 8-9].

Since approval requires the adoption of a resolution appropriating or deappropriating funds to cover the expenditures found in the CBA, it can be assumed, as a matter of law, that such appropriations occurred when the City Council approved the CBA and passed the resolution required by its Labor Management Relations Ordinance. The City has offered no evidence to the contrary.

- C. **Judicial enforcement of an existing Collective Bargaining Agreement does not violate separation of powers because PEBA expressly prohibits public employers from breaching an existing CBA that was entered into in accordance with the provisions of PEBA and provides for enforcement when breached without imposing any mediation or arbitration requirements that would lead to new expenditures.**

PEBA provides for the direct enforcement of an existing, non-expired CBA rather than allowing, much less mandating, arbitration. There are two distinct periods of time when parties to a CBA may reach an impasse and be directed to dispute resolution by statute: 1) during the creation and negotiation of a CBA (commonly known as “interest arbitration”); or 2) when one party no longer wants to abide by the terms of an existing CBA (commonly known as “grievance arbitration”). S. Barry Paisneral & Michelle R. Haubert-Barela, *Correcting the Imbalance: The New Mexico Public Employee Bargaining Act and the Statutory Rights Provided to Public Employees*, 37 N.M. L. Rev. 357, 372 (2007)(discussing the methods of resolving disputes between management and labor in the public

sector as an alternative to the right to strike in the public sector). Some states have passed legislation that allows or even mandates grievance arbitration when a party to an existing CBA desires a change in its terms prior to expiration. *Id.* The New Mexico PEBA statute contains no such provision. Instead, Section 10-7E-19(H) expressly prohibits the violation of an existing CBA that was entered into in accordance with the provisions of the Act. NMSA 1978, §10-7E-19(H) (“A public employer or his representative shall not... refuse or fail to comply with a collective bargaining agreement.”). In turn, PEBA also contains a provision expressly allowing for enforcement of a CBA’s original terms:

Collective bargaining agreements and other agreements between public employers and exclusive representatives shall be valid and enforceable according to their terms when entered into in accordance with the provisions of the Public Employee Bargaining Act.

NMSA 1978, §§ 10-7E-22.

When engaging in statutory construction, the court will consider the plain language of the statute and construe all the provisions together. City of Deming v. Deming Firefighters Local 4521, 2007-NMCA-069, ¶ 21, 141 N.M. 686, 160 P.3d 595. The court will not construe the statute in such a way that any provision is considered meaningless. IAFF v. Carlsbad, 2009-NMCA-097, ¶ 11. A ruling that

enforcement of an existing CBA requires a new appropriation or arbitration adds language to PEBA that the legislature did not include.

III. A CBA CONTAINING A MULTI-YEAR MUNICIPAL EXPENDITURE DOES NOT VIOLATE THE BATEMAN ACT WHEN THE LEGISLATIVE BODY APPROPRIATES SUFFICIENT FUNDS TO COVER THE ENTIRE FINANCIAL OBLIGATION AT THE TIME THAT AN AGREEMENT IS ENTERED INTO AND THE FUNDS WERE AVAILABLE AT THE TIME THE EXPENDITURE WAS APPROVED.

The District Court did not expressly rule whether the multi-year expenditures in this CBA violate the Bateman Act, but the issue is implicit in the Court's concerns about the need to seek guidance from the Court of Appeals. [Tr. 40, Vol. 2]. The City raised and both parties briefed the issue below.

A. When alleging that an agreed to debt is void under the Bateman Act, a municipality bears the burden of proving that funds were unavailable at the time the legislative body approved the debt and appropriated funds for it.

Once a plaintiff establishes that a municipality entered into an agreement containing a multi-year expenditure and appropriated the funds necessary to cover the expenditures, the municipality must prove that funds were not available before the debt can be declared void under the Act. The Bateman Act is an affirmative defense which must be pled and proven with the burden upon the party asserting it.

McAtee v. Gutierrez, 48 N.M. 100, 146 P.2d 315, 316 (1944). In other words, there is a presumption that a municipality has the funds available if they appropriate them and the municipality bears the burden of overcoming that presumption. National Service League v. City of Santa Fe, 370 N.M. F.Supp. 1128, 1134 (1973)(“the fact that the sum of \$21,000 was specifically allocated for these services at the time...belies any inference that the funds were not available.”). Proof much less bald assertions that a municipality later spent the money elsewhere is insufficient to meet this burden of proof. Id (“That these funds may have been diverted from the allocation...and are not readily available for this purpose is of no import.”).

B. The Bateman Act allows municipalities to enter into agreements containing multi-year expenditures as long as the revenues to cover the entirety of the expenditure are available at the time the agreement is approved.

The proper test for whether a particular expenditure qualifies as a debt that cannot be paid and so is voided under the Bateman Act is well-settled. The purpose of the Bateman Act is to prevent counties and municipalities from contracting debts that they are not able to pay. Treloar v. County of Chaves, 130 N.M. 794, 32 P.3d 803 (2001). Specifically, Section 6-6-11 precludes local legislative bodies and school boards from committing future revenues that they have not yet raised:

It is unlawful for any board of county commissioners, municipal governing body or any local school board, for any purpose whatever to become indebted or contract any debts of any kind or nature whatsoever during any current year which, at the end of such current year, is not and cannot then be paid out of the money actually collected and belonging to that current year, and any indebtedness for any current year which is not paid and cannot be paid, as above provided for, is void.

NMSA 1978, §6-6-11.

Despite the broad language of the Bateman Act, it cannot support the Motion for Summary Judgment in the instant case. Once the APOA submitted evidence that funds to cover the entire three years of economic terms of the CBA were appropriated in 2008, the burden shifted to the City to prove that the funds were not available. The record below reveals that the City did not even attempt to show that the funds were unavailable in 2008 much less meet their burden of proof. The District Court acknowledged that a genuine question of material fact remains regarding availability of the funds in 2008.

CONCLUSION

Whether the City appropriated and also had funds available to cover the entire three years of wage increases and benefits found in the CBA at the time it was entered into in 2008 remain as disputed questions of fact. Therefore, the APOA respectfully requests that this Court reverse the lower Court's decision to grant the City's Motion for Summary Judgment and remand for further proceedings.

Respectfully submitted,

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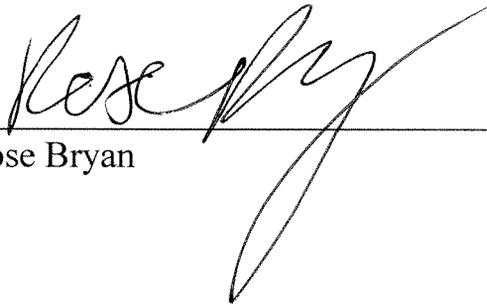
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