IN THE NEW MEXICO COURT OF APPEALS

CITY OF ALBUQUERQUE,

Petitioner-Appellee,

vs.

No. 28,846

Bernalillo County
Honorable William F. Lang
District Judge

JUAN B. MONTOYA, Director
of the PUBLIC EMPLOYEE
LABOR RELATIONS BOARD and
the PUBLIC EMPLOYEE LABOR
RELATIONS BOARD,

Respondents-Appellants,

AFSCME COUNCIL 18 and
LOCAL 624,

Real Party in Interest-Cross-Appellant.

APPELLANTS' REPLY BRIEF

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ARGUMENT

POINT ONE

THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS AND IN MAKING PERMANENT THE PEREMPTORY WRIT OF SUPERINTENDING CONTROL, BECAUSE THE DISTRICT COURT LACKED JURISDICTION UNDER N.M. CONST., ART. VI, SECTION 13 TO ISSUE ITS WRIT. NO "INFERIOR TRIBUNAL" HAS YET ACTED ON OR BEEN PRESENTED WITH THE PPC OR THE "GRANDFATHER CLAUSE" ISSUE. THE PELRB'S ABILITY TO ADJUDICATE WAS IMPROPERLY TRUNCATED BY THE DISTRICT COURT'S ISSUANCE OF ITS WRIT PROHIBITING ADJUDICATION BY THE PELRB.

A. Standard of Review.

The appellate court reviews jurisdictional issues and issues of law raised on appeal under a de novo standard of review. State v. Heinsen, 2005-NMSC-035, ¶ 6, 138 N.M. 441, 121 P.3d 1040; State v. Garcia, 2005-NMCA-065, ¶ 10, 137 N.M. 583, 113 P.3d 406. Appellant's assertion that the standard of review is "abuse of discretion" is incorrect. The case cited by Appellee for the proposition that an "abuse of discretion" standard is appropriate is inapt. Cf. Sims v. Ryan, 1998-NMSC-019, 125 N.M. 357, 961 P.2d 782 (concerning relative powers of municipal court judges as between the presiding and non-presiding judges).

B. Argument.

Appellee argues this issue at Point Two of its brief. The Public Employee Labor Relations Board (PELRB) created by the Public Employee Labor Relations Act (PEBA), NMSA 1978, §§ 10-7E-1 to -26 (2003, as amended) is, first and foremost, charged with the duty and empowered to decide, initially, jurisdictional issues arising under PEBA. In the context of a jurisdictional dispute based on the "grandfather clause" of PEBA, the New Mexico Court of Appeals held, in City of Deming v. Deming Firefighters, 2007-NMCA-069, ¶ 14, 141 N.M. 686, 160 P.3d 595, that the Public Employee Labor Relations Board has the authority, initially, to determine its own jurisdiction and remanded the case to the Board to determine that question. Further, this Court stated, in City of Deming, "the PELRB must ... make the threshold determination of its jurisdiction." Id. at ¶ 16.

Appellee argues that Deming is distinguishable, because, in the case at bar, the jurisdictional conflict is between the PELRB and the district court. That the Appellee obtained a writ of superintending control that improperly truncated PELRB's jurisdiction and authority to exercise its adjudicative responsibilities under PEBA does not distinguish this case from the holding in Deming.

Appellee argues that the PELRB had no jurisdiction over a PPC filed before Appellee's local labor board. But that PPC is not the PPC that Appellant Montoya, as hearing officer, was undertaking to entertain for ultimate decision-making by the PELRB. Rather, it was the PPC filed with the State labor board, the Public

Employee Labor Relations Board, after Mr. Griego was unable to obtain a decision from the local labor board due to the recusal of the "neutral" member of that board.

Appellee argues that "exceptional circumstances" justified the issuance of the extraordinary writ of superintending control. Those claimed circumstances are (1) confusion and disruption to the City's labor-management relations system; (2) undue burden, expense and inconsistent results; (3) an appeal would not provide a plain, speedy or adequate remedy; and (4) future prohibited practices complaints might be filed with the PELRB. Appellee is mistaken. This case concerns one unusual and fairly unique situation. The "neutral" member of the local labor board recused after a hearing, creating a vacuum and leaving Mr. Griego without a forum for a fair hearing of his PPC other than by filing his PPC with the State labor board. Because the court below issued its writ, Mr. Griego still has had no hearing on his PPC.

The trial court lacked jurisdiction under Article VI, Section 13 of the Constitution to issue and make permanent its writ of superintending control against Appellants, as no "inferior tribunal" had yet acted on or been presented with the jurisdictional issue here arising under the "grandfather clause," Section 10-7E-26 (A). Moreover, the PELRB was entitled, and remains entitled, to decide that jurisdictional issue, subject to judicial review under Section 10-7E-23.

POINT TWO

THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS AND IN MAKING PERMANENT THE PEREMPTORY WRIT OF SUPERINTENDING CONTROL, BECAUSE THE CITY HAS NOT EXHAUSTED ITS ADMINISTRATIVE REMEDIES.

A. Standard of Review.

The appellate court reviews jurisdictional issues and issues of law raised on appeal under a de novo standard of review. State v. Heinsen, 2005-NMSC-035, ¶ 6, 138 N.M. 441, 121 P.3d 1040; State v. Garcia, 2005-NMCA-065, ¶ 10, 137 N.M. 583, 113 P.3d 406. Appellee's asserted standard of "abuse of discretion" is not correct.

B. Argument.

Appellee argues this issue at Point Three of its brief. Appellee argues that the PELRB had no jurisdiction and, therefore, exhaustion is not required. Clearly, the PELRB has jurisdiction to entertain PPCs that are filed with it. Statutorily, the Public Employee Labor Relations Board is empowered to hear and decide PPCs. See Section 10-7E-9. There is no issue here of a complete lack of jurisdiction, as espoused by Appellee. Rather, the issue concerns the proper interpretation of PEBA's "grandfather clause," and, as to that interpretation, the PELRB is entitled to initially decide that issue, subject to judicial review.

PEBA's "grandfather clause," Section 10-7E-26 (A), is not as clear-cut as the district court mistakenly believed. This Court did not read section 10-7E-26

(A) so literally as to "grandfather" virtually every pre-existing (before October 1, 1991) labor ordinance and its provisions; concluding, instead, that a certain provision of a pre-existing city labor ordinance that was contrary to PEBA was not "grandfathered."

Similarly, the New Mexico Supreme Court, in Regents of UMN v. Federation of Teachers, 1998-NMSC-020, ¶ 43, 125 N.M. 401, 962 P.2d 1236, did not read Section 10-7E-26 (A) so literally as to "grandfather" the university's pre-existing collective bargaining system that failed to extend the right to collectively bargain to all employees who have been afforded that right under PEBA. The Court, in Regents, at ¶ 4, noted that the PELRB's duties include the duty to enforce the provisions of PEBA. This duty, therefore, underscores the need and authority of the PELRB to first decide the jurisdictional issue arising under Section 10-7E-26 (A), an issue that is endowed with policy considerations, is not black-and-white statutorily and must be reserved for decision, at least initially, by the statutory adjudicative body empowered to decide this issue, which is the PELRB, the board created by PEBA to administer PEBA. The PELRB possesses the special expertise necessary to properly decide this issue initially.

This court properly recognized that the "grandfather clause" issue is properly relegated, for decision, to the jurisdiction and authority of the PELRB in Gallup McKinley County Schools v. Public Employee Labor Relations Board, No.

26,376, in which this Court dismissed an appeal of an order denying mandamus, in which the appellant Schools contended that the Public Employee Labor Relations Board lacked jurisdiction to conduct proceedings on a prohibited practices complaint filed with it against appellant Schools, because appellant had a duly approved local board to hear such disputes. This Court dismissed the appeal based on appellant's failure to exhaust administrative remedies.[1]

It is fundamental that a party must first exhaust available administrative remedies before applying to the court for relief. See State ex rel. Hyde Park Company v. Planning Comm'n of Santa Fe, 1998-NMCA-147, ¶¶ 12-13, 125 N.M. 830, 965 P.2d 949 (a party is required to pursue available administrative remedies before resorting to the courts for relief; the usual delay and expense inherent in all litigation is not "unusual or peculiar harm" that would justify the use of an extraordinary remedy). Whatever might be the ultimate result of the State labor board's proceedings with respect to Mr. Griego's PPC, either party may appeal under Section 10-7E-23 (B), which provides an adequate remedy.

The district court erred in denying Appellants' motion to dismiss and in issuing and making permanent its writ of superintending control. The City has failed to exhaust available administrative remedies.

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[1] The memorandum opinion is cited as persuasive authority pursuant to Rule 12-405 (C).

POINT THREE

THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS AND IN MAKING PERMANENT THE PEREMPTORY WRIT OF SUPERINTENDING CONTROL, BECAUSE THE ISSUES IN THIS CASE ARE NOT RIPE, AND, THEREFORE, THE COURT LACKED JURSIDICTION TO ISSUE ITS WRIT.

A. Standard of Review.

The appellate court reviews jurisdictional issues and issues of law raised on appeal under a de novo standard of review. State v. Heinsen, 2005-NMSC-035, ¶ 6, 138 N.M. 441, 121 P.3d 1040; State v. Garcia, 2005-NMCA-065, ¶ 10, 137 N.M. 583, 113 P.3d 406. Appellant's assertion that "abuse of discretion" is the appropriate standard is not correct.

B. Argument.

Appellee argues this issue at Point Four of its brief. Appellee argues that the writ of superintending control was necessary because the PELRB was "about to" assert jurisdiction over the PPC that had been filed with it. But the "ripeness" doctrine is intended "'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" Matter of U.S. West Communications,

1998-NMSC-032, ¶ 8, 125 N.M. 798, 965 P.2d 917 (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149 (1967)). See also Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985) (claim that application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue).

Appellee argues that the writ of superintending control was necessary to prevent harm to and disruption of the functioning of the local labor board. However, as Mr. Griego is acutely aware, that local board was not functioning as to him and his PPC filed with it. A vacuum, defeating the local board's decision-making capability, had been created by the recusal of the "neutral" member, as a consequence of which, AFSCME, on his behalf, filed his PPC with the State labor board.

The district court erred in denying Appellants' motion to dismiss and in granting and making permanent its peremptory writ of superintending control. The issues in this case are not yet ripe. There has been no resolution of the issues, both the jurisdictional issue arising out of the "grandfather clause," Section 10-7E-26 (A), and the underlying merits of the PPC, by the statutory adjudicatory body in this case, the PELRB.

POINT FOUR

THE DISTRICT COURT ERRED IN ISSUING ITS EX-PARTE WRIT AGAINST APPELLANTS. NO "EMERGENCY" WARRANTED THE ISSUANCE OF AN EX-PARTE PEREMPTORY WRIT OF SUPERINTENDING CONTROL ON FEBRUARY 28, 2008.

A. Standard of Review.

The appellate court reviews jurisdictional issues and issues of law raised on appeal under a de novo standard of review. State v. Heinsen, 2005-NMSC-035, ¶ 6, 138 N.M. 441, 121 P.3d 1040; State v. Garcia, 2005-NMCA-065, ¶ 10, 137 N.M. 583, 113 P.3d 406. Appellee's asserted standard of "abuse of discretion" is not correct.

B. Argument.

Appellee argues this issue at Point Five of its brief. Appellee does not address the fact that an "emergency," ex-parte peremptory writ of superintending control, that issued on February 28, 2008 was unnecessary and improper. There was no "irreparable harm." PELRB and its counsel were at all times available to be heard and given the opportunity to defend.[2]

[2] Contrary to Appellee's assertion, neither the hearing transcript nor the order that the court entered supports Appellee's assertion that the court determined that Appellee was better positioned than Appellant PELRB to decide Mr. Griego's PPC.

The district court erred in issuing its "emergency," ex-parte peremptory writ of superintending control against Appellants.

POINT FIVE

BECAUSE RULE 1-012 NMRA ACCORDS APPELLANTS THE OPPORTUNITY TO ANSWER, THE GRANTING OF THE WRIT PETITION AND MAKING THE EMERGENCY WRIT PERMANENT ON MAY 1, 2008 WAS CONTRARY TO RULE 1-012.

A. Standard of Review.

The appellate court reviews jurisdictional issues and issues of law raised on appeal under a de novo standard of review. State v. Heinsen, 2005-NMSC-035, ¶ 6, 138 N.M. 441, 121 P.3d 1040; State v. Garcia, 2005-NMCA-065, ¶ 10, 137 N.M. 583, 113 P.3d 406. Appellee's asserted standard of "abuse of discretion" is not correct.

B. Argument.

Appellee argues this issue at Point Six of its brief. Appellee argues that the rendition by the court of a final judgment, in this case the making of the emergency writ permanent, before Appellants had filed an answer was harmless. The entry of a final judgment against a party ought to be regarded to be of sufficient importance to warrant adherence to the Rules of Civil Procedure. Here, the cause of action against Appellants was not yet "at issue." Appellants thereafter filed an answer, but the case was already over at that point. Had there been a trial on the merits,

Appellant Montoya would at least have been accorded the opportunity to explain to the district court his actions as hearing officer, empowered to make recommendations to the PELRB, and his rationale for denying the Appellee City's motion to dismiss. Appellant Montoya was never accorded this opportunity--not when the emergency writ issued on February 28, 2008 and not when the writ was made permanent on May 1, 2008, at which time Appellants' motion to dismiss was heard and denied--in spite of the fact that the case was not even "at issue."

The court's verbal entry of a permanent writ on May 1, 2008 was erroneous and contrary to the requirements of Rule 1-012 NMRA.

POINT SIX

THE DISTRICT COURT ERRED IN GRANTING THE PEREMPTORY WRIT OF SUPERINTENDING CONTROL. THE "GRANDFATHER CLAUSE" OF PEBA SHOULD NOT BE EXPANSIVELY CONSTRUED TO PERMIT THE EMPLOYER TO SELECT TWO MEMBERS OF A THREE-MEMBER LOCAL LABOR BOARD TO ADJUDICATE LABOR-MANAGEMENT DISPUTES, WHICH IS FUNDAMENTALLY CONTARY TO PEBA.

A. Standard of Review.

The appellate court reviews jurisdictional issues and issues of law raised on appeal under a de novo standard of review. State v. Heinsen, 2005-NMSC-035, ¶ 6, 138 N.M. 441, 121 P.3d 1040; State v. Garcia, 2005-NMCA-065, ¶ 10, 137 N.M. 583, 113 P.3d 406. Issues of statutory construction and analysis of law are

reviewed de novo. State v. Marshall, 2004-NMCA-104, ¶ 6, 136 N.M. 240, 96 P.3d 801. Appellee's asserted standard of "abuse of discretion" is not correct.

B. Argument.

Appellee addresses this issue at Point One of its brief. This argument is made on behalf of Appellant Montoya, hearing officer for the PELRB, whose decisions are subject to review by the PELRB, including his denial of the City's motion to dismiss. It is not known how the adjudicatory body under PEBA, the PELRB, would rule on this jurisdictional issue arising under PEBA's "grandfather clause," Section 10-7E-26 (A). For the reasons argued previously, the PELRB should be afforded the opportunity, as is its statutory right and duty, to rule on this issue, subject to judicial review under Section 10-7E-23 (B).

This "grandfather" issue in this case arose as a result of a vacuum created in the local labor board when the "neutral" member recused after hearing Mr. Griego's PPC and the two remaining members having deadlocked, resulting in the inability of the local labor board to render a decision on Mr. Griego's PPC. As a result, AFSCME, on behalf of Mr. Griego, filed his PPC before the State labor board, the Public Employee Labor Relations Board.

In arguing its position that its local labor ordinance, § 3-2-15, is "grandfathered" under Section 10-7E-26 (A), Appellee argues that the reason for the "grandfathering" of that provision, allowing the President of the City Council

to appoint a substitute member for the recused "neutral" member, is because it is "consistent with the overall intent of PEBA." (Appellee's brief at 8, 12). Appellee argues that the "representational character" of its local labor board is preserved by the requirement in that provision of the ordinance that the President make a substitute appointment "with due regard to the representative character of the Board." (Appellee's brief at 2-3, 9-10). Appellee states that it is in the process of "seeking appointment of a member to fill the position of the absentee board member in a manner that is consistent with the representational character of the Board." (Appellee's brief at 9).

Appellee will never accomplish the goal of appointing, in a manner consistent with PEBA, a substitute "with due regard" to the representational character of the board, because the "representational character" of a local labor board as it pertains to the "neutral" position, in order to be consistent with PEBA, depends upon the two other members of that board, one representing management and one representing labor, jointly concurring on the individual to serve as the "neutral" member. See Section 10-7E-10 (B) ("one member [the "neutral"] shall be appointed on the recommendation of the first two appointees [labor and management appointees]"); Section 10-7D-10 (B)[3] of PEBA I, predecessor to the

[3] 1992 N.M. Laws, Ch. 9, § 10.

current PEBA II. The local labor board acknowledged its inability to make such joint recommendation. (R.P. 88).

Nor does Appellee offer any specific method how it would otherwise make any such appointment "with due regard to the representational character" of its local labor board in a manner that is consistent with PEBA, when that appointment of the "neutral" is made by management, i.e. the President of the City Council. The fact that this inability has persisted here for such considerable length of time reflects the obvious: it cannot be done. The effect flowing from appointment provision is that management has two seats at the table and labor has only one.

An unacceptable vacuum has been created, which dictates that the Public Employee Labor Relations Board's hearing officer, Mr. Montoya, go forward with hearing and the making of recommendations to the Public Employee Labor Relations Board, which will ultimately decide the merits of Mr. Griego's PPC and of the "grandfather clause" issue when presented to it.

The district court erred in granting its peremptory writ of superintending control. PEBA's "grandfather clause" should not be construed to permit the employer to select two members of a three-member adjudicatory body to hear labor-management disputes.

CONCLUSION

Appellants respectfully pray that the district court's order entered on June 26, 2008, granting the petition for writ of superintending control, denying Appellants' motion to dismiss and making permanent the emergency writ, be reversed; that the district court be ordered to dismiss the City's case; that the writ of superintending control be quashed; and that the matter be remanded to the Public Employee Labor Relations Board for resumption by it of its adjudicatory processes with respect to AFSCME's PPC filed on behalf of Mr. Griego, which is AFSCME v. City of Albuquerque, PELRB Case No. 162-07.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the foregoing was mailed by first-class mail this 12 day of June, 2009 to Shelley Mund, City Attorney's Office, P.O. Box 2248, Albuquerque, NM 87103 and to Shane Youtz, Esq., 900 Gold Ave. S.W., Albuquerque, NM 87102.

Assistant Attorney General