SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, COUNCIL 18, AFL-CIO, LOCALS 624, 1888 AND 2962,

Petitioners,

v. **No.** D-202-CV-2014-06034

CITY OF ALBUQUERQUE,

Respondent.

VERIFIED PETITION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

COME NOW Petitioners American Federation of State, County and Municipal Employees, Council 18, AFL-CIO, CLC, Locals 624, 1888 and 2962 (collectively, "AFSCME"), by and through their counsel of record, Youtz & Valdez, P.C. (Shane Youtz, Stephen Curtice, James Montalbano), and pursuant to Rule 1-066 NMRA, hereby file their verified Petition for Temporary Restraining Order and Preliminary Injunction, and as grounds therefore state:

I. INTRODUCTION

This Complaint seeks a temporary restraining order and injunctive relief regarding the parties' rights and obligations under the City's Labor-Management Relations Ordinance ("LMRO"). It does so in the context of the City's threat to unilaterally change terms and conditions of employment of employees represented by Petitioners following the expiration of

existing collective bargaining agreements. As explained in greater detail below, it is Petitioners' belief that such actions violate the City's obligation to bargain in good faith under the LMRO. This litigation does not involve any question whether the LMRO is entitled to grandfather status under the Public Employee Bargaining Act, but rather simply involves a determination of the City's obligations under the LMRO itself.

II. FACTUAL BACKGROUND

AFSCME Local 624 (blue collar) last entered into a collective bargaining agreement in 2008, which expired on June 30, 2010. AFSCME Local 2962 last entered into a collective bargaining agreement in 2008; it was set to expire on June 30, 2009, but was extended for one year by an MOU. It finally expired on June 30, 2010. AFSCME Local 624 (transit) last entered into a collective bargaining agreement in 2008, which expired on June 30, 2011. AFSCME Local 1888 last entered into a collective bargaining agreement in 2010, which was set to expire on June 30, 2012, but was extended under its own terms for one year when neither party reopened negotiations. It finally expired on June 30, 2013.

The City adopted the LMRO in 1971, which was most recently amended in 2002. It is codified at ABQ Ord. §§ 3-2-1 through -18, and is available at: http://www.amlegal.com/library/nm/albuquerque.shtml (last visited November 6, 2013). The LMRO is incorporated by reference herein. Because the LMRO was enacted prior to 1991, it has been recognized as a "grandfathered" ordinance under Section 26 of the Public Employees Bargaining Act ("PEBA"), NMSA 1978, §§ 10-7E-1 through -26 (2003, as amended through 2005), such that the City "may operate" under it rather than PEBA. *See City of Albuquerque v.*

Montoya, 2012-NMSC-007; *AFSCME v. City of Albuquerque*, 2013-NMCA-012 [*AFSCME I*]; *AFSCME v. City of Albuquerque*, 2013-NMCA-063 [*AFSCME II*].

Section 3-2-7 of the LMRO requires the City and AFSCME to "bargain concerning hours, salary, wages, working conditions and other terms and conditions of employment…." Moreover, this duty "includes an obligation to confer in good faith with respect to terms and conditions of employment." *Id.* The LMRO further makes it a "prohibited practice" for the City to "refus[e] to negotiate in good faith with a certified exclusive bargaining representative of an employee organization." LMRO, § 3-3-9(A)(4).

In the event that the City and the Unions are unable to negotiate a collective bargaining agreement, the LMRO provides for mediation (where the mediator "shall not have the power to [sic] compulsion." LRMO, § 3-2-14(A). If the mediation fails, the LMRO allows for, but does not require, "voluntary binding total package final offer arbitration." LMRO, § 3-2-14(B). The LMRO does not provide for any method for breaking an impasse in the event that the City does not consent to "voluntary binding total package final offer arbitration." Moreover, under the LMRO, City employees are not permitted to strike in order to press their demands. *See* Abq. Ord. § 3-2-9(B)(7) (prohibiting "[a]n employee organization, a group of city employees, or a city employee individually" from "[e]ngaging in, inducing, or encouraging any city employee or group of employees to engage in a strike, a work stoppage, or work slowdown"); § 3-2-11 (setting forth penalties for a strike, including decertification of the union, termination of the collective bargaining agreement, fines and injunctive relief).

On or about September 12, 2014, the City sent virtually identical letters to each Petitioner (copies of which were attached to the Complaint in this case). Through those letters, the City indicated that it was imposing terms and conditions of employment which are mandatory

subjects of bargaining without agreement with the Union on several of those terms. The City and the Union **have agreed** on some of economic the terms proposed to be imposed by the City, most notably that employees in each of the four bargaining units should be granted a 3% raise for Fiscal Year 2015. That change is not part of this dispute, and Petitioners do not seek to enjoin its effect.

As detailed in the affidavit of Rocky Gutierrez, for all four bargaining units, the City has engaged in bad-faith, regressive bargaining leading up to this imposition by: (1) repudiating prior TAs, (2) proposing contract terms after reaching a good-faith impasse which are regressive in nature and go against prior supposed "Last Best Offers," (3) and proposing regressive bargaining terms as the bargaining sessions progressed. The Union sought to have the City's bad-faith bargaining remedied by the City's Labor-Management Relations Board, the body empowered to resolve Prohibited Practices Complaints under the LMRO. From 2011 to the present, the Union has filed four PPCs directly related to the City's bargaining practices. Although the Board is required to set a hearing within five days of the filing of such complaints, to date no hearing on any of the PPCs has been held.

III. LEGAL ARGUMENT

A. The Opinions of the Court of Appeals; the LMRO's Relationship to the PEBA and the National Labor Relations Act.

Although all of the collective bargaining agreements at issue here had expired, they were continued as a result of injunctions issued by this Court in the litigation that produced the Court of Appeals decisions in *AFSCME I* and *AFSCME II*. Those two decisions of the Court of Appeals are difficult to reconcile for the current dispute.

In the first case (Dist. Ct. Case No. D-202-CV-2010-07003), the Honorable District Court Judge Valerie Huling issued a Memorandum Opinion on November 29, 2010. In the Course of that litigation, the City ***conceded*** that, subject to the provisions of the Bateman Act, PEBA's "evergreen clause" did apply to it. The City argued to the District Court:

> While it is true that collective bargaining agreements are to remain in force in the event of an impasse that precludes renegotiation of a current agreement, NMSA 1978, § 10-7E-18 (2003), there is understandably no provision of law … that allows a municipality to violate the Bateman Act and agree to pay wages that exceed the budget.

Judge Huling accepted the City's concession; in that decision she noted: "Defendant argues that the Bateman Act, which requires municipalities to 'live within their annual incomes,' should be harmonized with PEBA's evergreen clause to mean that, in the event of a collective bargaining impasse that is past the termination date of the previous applicable agreement, all provisions except for economic components would remain in effect." *See* Mem. Op. and Order, Case No. No. D-202-CV-2010-07003, ¶ 13 (Nov. 29, 2010). This view, the Court noted, "comports with the July 1, 2010, order of this Court following an emergency hearing on the issue. ***There is no dispute that all non-economic provisions will remain in place***." *Id.* ¶ 13, n.2 (emphasis added). The City did not appeal from this decision.

Although the Union did appeal, the Court of Appeals affirmed the decision of the District Court. *AFSCME I*, 2013-NMCA-012, ¶ 23 ("On the record before us, we thus conclude that Section 10-7E-17(E) applies to the economic components of the extension of the expired collective bargaining agreements under the PEBA evergreen provision."); *id.* ¶ 28 ("The PEBA grandfather clause applies to the LMRO impasse resolution procedures notwithstanding the failure of the LMRO to require binding arbitration to resolve impasses. The PEBA evergreen clause does not apply to the economic components of the existing collective bargaining

agreements, at least in the manner in which this case was argued, because of the PEBA's requirements that provisions of collective bargaining agreements that require an expenditure of funds are subject to the 'specific appropriation of funds' and 'the availability of funds' in Section 10-7E-17(E). … We affirm."). In the second case, *AFSCME II*, 2013-NMCA-063, the Court of Appeals reversed a decision of the Honorable District Court Judge Clay Campbell (District Court Case No. D-202-CV-2011-06910), which, like the previous case, applied PEBA's evergreen clause to the City of Albuquerque.

Although the Court of Appeals in *AFSCME II* concluded that the evergreen clause of PEBA did not apply, it noted that it was not necessary to preclude the City from unilaterally implementing new terms and conditions of employment, because the LMRO itself would preclude such an action: "The LMRO does not permit the City to unilaterally impose conditions of employment once a CBA has expired. Instead, the LMRO includes provisions for impasse resolution through mediation and voluntary binding arbitration. These provisions ensure that the Unions are participants in the determination of employment conditions even after a CBA has expired. This is consistent with the PEBA's overarching purpose." *AFSCME II*, 2013-NMCA-063, ¶ 9.

Neither *AFSCME I* nor *AFSCME II* directly involved an interpretation of the good-faith bargaining requirement of the LMRO; rather, each involved the different question whether PEBA's evergreen clause should apply to the City despite its grandfathered status under Section 10-7E-26(A) of the PEBA. To the extent that *AFSCME II* did discuss the good-faith bargaining requirement of the LMRO, it determined that the LMRO would not allow unilateral implementation of new terms and conditions of employment upon contract expiration.

Because these decisions are murky, it is necessary to rely on general, black-letter principles of labor law, recognized to be applicable to the public sector by *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-31, 123 NM 239.

The LMRO, like the PEBA, is clearly patterned after the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-69. In particular, the LMRO's provisions regarding good-faith bargaining are virtually identical to the comparable provisions of the Public Employees Bargaining Act. *See* NMSA 1978, §§ 10-7E-17(A)(1) (providing that public employers and unions "shall bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties"); 10-7E-19(F) (2003) (making it a prohibited practice for a public employer to "refuse to bargain collectively in good faith with the exclusive representative"). More importantly, these provisions are substantially identical to the relevant provisions in the National Labor Relations Act upon which they were modeled. *See* 29 U.S.C. § 158(a)(5) (known as "Section 8(a)(5)," and making it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees…."); 29 U.S.C. § 158(d) (defining "to bargain collectively" to mean "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment….").

It is by now black-letter law that "[a]bsent cogent reasons to the contrary, we should interpret language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted." *Las Cruces Prof'l Fire Fighters*, 1997-

NMCA-31. This interpretative rule applies with equal force to the interpretation of the City's obligations under the LMRO.

B. The "Status Quo Doctrine" Under the NLRA, as Necessarily Modified for Application Under the LMRO, Prevents the City from Implementing Changes to Terms and Conditions of Employment Even at Impasse.

The United States Supreme Court has long held that it is a per se violation of the duty to bargain in good faith for an employer to make unilateral changes to an employee's wages, hours, and other terms and conditions of work that are mandatory subjects of bargaining. *See NLRB v. Katz*, 369 U.S. 736, 743 (1962) ("We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal."). This prohibition against unilateral changes in terms and conditions of employment applies both where a union is newly certified and the parties have yet to reach an initial agreement, as in *Katz*, and where the parties' agreement has expired and negotiations have yet to result in a subsequent agreement. *See Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991).

Sometimes called the "status quo doctrine," this aspect of the obligation to bargain in good faith requires that "[a]fter a [collective bargaining agreement] has expired, … the employer maintain the status quo, that is, the terms of the expired contract, during negotiations for a new agreement." *United Paperworkers Int'l Union, Local 274 v. Champion Int'l Corp*., 81 F.3d 798, 801-02 (8th Cir.1996); *see also Local Joint Executive Bd. of Las Vegas, Culinary Workers Union Local 226 v. NLRB*, 309 F.3d 578, 581-82 (9th Cir. 2002); *Finley Hosp.*, 359 NLRB No. 9, at 2-3 (2012) ("Preserving the status quo facilitates bargaining by ensuring that the tradeoffs made by the parties in earlier bargaining remain in place."). That is, even when the contractual right to terms and conditions of employment do not survive expiration of the collective bargaining

agreement, the right under the LMRO not to have those terms and conditions unilaterally modified does survive. As the Supreme Court has noted under Section 8(a)(5), of the NLRA, "most terms and conditions of employment are not subject to unilateral change. … They are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them." *Litton*, 501 U.S. at 206.

As the Court of Appeals noted in announcing the general rule of following NLRA-based precedent, "the special circumstances of public employment may on occasion require an interpretation of the PEBA different from the interpretation of essentially the same language of the NLRA[.]" *City of Las Cruces*, 1997-NMCA-031, ¶ 15. One of these "special circumstances of public employment" is the LMRO's removal of the union's ability to strike in response to unilateral implementation following contract expiration. Thus, the "status quo doctrine," as applied to the LMRO, should require the City to maintain the status quo until the impasse has been resolved, either through negotiation or the City's impasse resolution procedures.

Even though the New Mexico Court of Appeals has recognized that the LMRO is grandfathered such that the "evergreen clause" of the PEBA[1] does not apply to the City, the Court at the same time recognized the application of the "status quo doctrine" to the LMRO: "The LMRO does not permit the City to unilaterally impose conditions of employment once a CBA has expired. Instead, the LMRO includes provisions for impasse resolution through mediation and voluntary binding arbitration. These provisions ensure that the Unions are participants in the determination of employment conditions even after a CBA has expired. This is consistent with the PEBA's overarching purpose." *AFSCME II*, 2013-NMCA-063, ¶ 9. This

[1] *See* NMSA 1978, § 10-7E-18(D) (2003) ("In the event that an impasse continues after the expiration of a contract, the existing contract will continue in full force and effect until it is replaced by a subsequent written agreement.").

is an explicit recognition that the City may not implement changes in terms and conditions of employment even on impasse. Were it possible for the City to do so, how could it be said that "the Unions are participants in the determination of employment conditions even after a CBA has expired"?

In the alternative, as Justice Chavez suggested at the August 12, 2013 oral argument in *AFSCME II*, Sup. Ct. Case No. 33,924, the LMRO could be interpreted to require the parties to resolve an impasse by resort to the judiciary. That is, the last subsection of the "impasse resolution procedures," after noting that arbitration was voluntary, provides: "The impasse procedures set forth herein are voluntary and shall not constitute a condition precedent to the bringing of ***any*** action for relief in an appropriate tribunal, nor shall failure or refusal of the city government or any employee organization to participate in said voluntary impasse procedures constitute a defense in any such action or proceedings." LMRO, § 3-2-14(E) (emphasis added).

C. Even Were the Court Not to Modify the Status Quo Doctrine under the LMRO, the City is Still Precluded from Imposing the Changes Set Forth in the September 12, 2014, Letter.

In the private sector, an employer may make unilateral changes following an expired collective bargaining agreement if the parties have negotiated to a good-faith impasse on the contract as a whole. *Local Joint Executive Bd. of Las Vegas, Culinary Workers Union Local 226 v. NLRB*, 309 F.3d 578, 582 (9th Cir. 2002) ("Therefore, an employer must maintain the *status quo* after the expiration of a collective bargaining agreement until a new collective bargaining agreement has been negotiated ***or the parties have bargained to impasse***." (emphasis added)). More importantly, in the private sector, the employer can only unilaterally implement new terms or conditions of employment if parties have reached a genuine, good faith impasse. *E.g.*, *American Automatic Sprinker Sys.*, 323 NLRB 920 (1997) (finding that the employer violated

the NLRA by imposing terms and conditions because it had bargaining in bad faith and failed to reach a ***valid*** impasse); *Benjamin F. Winninger & Son*, 286 NLRB 1177 (1987) (finding that where employer engaged in bad-faith surface bargaining, no valid impasse justified imposition of new terms and conditions of employment). Particularly relevant here, where the impasse was produced through the employer's bad-faith, regressive bargaining proposals, it is not a valid impasse that will permit unilateral implementation. *Carey Salt Co.*, 358 NLRB No. 124 (2012).

In the private sector, even if the employer has reached a valid, good faith impasse in bargaining, it may only make "unilateral changes that are reasonably comprehended within the employer's preimpasse proposals." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd. sub nom. Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

Thus, even should this Court not modify the status quo doctrine to meet the unique circumstances of public employment, the City is still precluded from implementing the changes identified in the September 12, 2014, letter. For Locals 624 (Blue Collar) and 2962, the terms the City seeks to impose are different, and more harsh, than those it presented in its last best and final offer that led to the impasse in 2010. *See* Gutierrez Aff., ¶¶ 12-16; 30-34. The City has rescinded agreement on articles it has previously agreed to. *See id.*; *see also Valley Oil Co.*, 210 NLRB 370, 385 (1974) (a party's withdrawal of already agreed-upon provisions is indicia of bad-faith bargaining). In all four bargaining units, the City engaged in bad-faith, regressive bargaining to generate the impasse and lead to the imposition of new terms and conditions of employment. Unless and until the Union's Prohibited Practices Complaints are heard and remedied by the Labor Board, or this Court, the City is not free in any event to impose terms and conditions of employment not agreed to by the Union.

Of course, as noted, the City and the Union have agreed that: (1) bargaining unit employees will receive a 3% increase to their current rate of pay; (2) Article 3, will be modified to provide for an 80/20 split on premium for various insurance programs; and (3) the City will continue to pay 9.86% of the employee's PERA statutory contribution. Those matters should not be enjoined by this Court.

D. A Temporary Restraining Order Would be Appropriate.

Through the Complaint, this Petition and the Affidavit of Rocky Gutierrez in support, Plaintiffs have demonstrated the need, and grounds, for a preliminary injunction. *See National Trust for Historic Preservation v. City of Albuquerque*, 117 N.M. 590, 595, 874 P.2d 798, 803 (Ct. App. 1994) ("To obtain a preliminary injunction, a plaintiff must show that (1) the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood plaintiff will prevail on the merits.").

Petitioners, as the exclusive representative of those city employees within recognized bargaining units, will be irreparably harmed if a preliminary injunction is not issued to prohibit the City from implementing unilateral changes to the terms and conditions of employment during this cause of action, because AFSCME would be unable to fairly negotiate its collective bargaining agreements and would be subject to the City's unilateral determination of the terms and conditions of employment. As described in the Affidavit of Rocky Gutierrez, the Union, and the employees of the bargaining unit whose terms and conditions of employment have changed, will suffer irreparable injury unless the injunction is granted.

There would be no damage to the City nor damage to the public interest if a preliminary injunction is issued to stay enforcement of the LMRO, because such a stay would merely maintain the status quo between the parties. Any harm caused by a preliminary injunction is outweighed by the irreparable injury to the Plaintiffs from the denial of an order staying enforcement of the proposed changes described below.

As explained thoroughly above, the City's actions violates the LMRO. The Union has tried, unsuccessfully, to have the Labor-Management Relations Board hear its Prohibited Practices Complaints related to the City's bad-faith bargaining, but the violations are manifest. The Union is likely to succeed on the merits.

Any harm caused by a temporary restraining order or permanent injunction is outweighed by the irreparable injury to the Plaintiffs from the denial of an order precluding the City from unilaterally imposing new terms and conditions of employment and requires the City to maintain those terms and conditions of employment established by the previous collective bargaining agreement until the parties have bargained to impasse and have resolved that impasse under the LMRO. The rights, status and legal relations of the parties requires the court to enter a temporary restraining order or preliminary injunctive relief pursuant to Article VI, Section 13 of the New Mexico Constitution.

WHEREFORE Petitioners respectfully request that this Court:

A. Grant a temporary restraining order and preliminary injunction which precludes the City from unilaterally imposing new terms and conditions of employment upon the expiration of a collective bargaining agreement on which the City and Union have not reached agreement. In this circumstance, that injunction should preclude the following changes identified in the September 12, 2014 letter:

Local 624 (Blue Collar)

a. Changes to Article 1, Sections 1.3.3 and 1.3.4, Labor Management Relations.

b. Changes to Article 3, Section 3.2, Insurance Programs.

c. Changes to Article 20, Promotional Procedures and Policies.

d. Changes to Article 24, Disciplinary Actions.

e. Changes to Article 25, Grievance and Appeal Procedures.

f. Changes to Article 35, Layoff/Reduction in Force & Recall.

g. Changes to Article 40.2, Section 40.2.1, regarding MOUs.

Local 2962

a. Changes to Article 1, Sections 1.3.3 and 1.3.4, Labor Management Relations.

b. Changes to Article 20, Promotional Procedures and Policies.

c. Changes to Article 24, Disciplinary Actions.

d. Changes to Article 25, Grievance and Appeal Procedures.

e. Changes to Article 40.2, Section 40.2.1, regarding MOUs

Local 624 (Transit)

a. Changes to Article 1, Sections 1.3.3 and 1.3.4, Labor Management Relations

b. Changes to Article 20, Promotional Procedures and Policies.

c. Changes to Article 24, Disciplinary Actions.

d. Changes to Article 25, Grievance and Appeal Procedures.

e. Changes to Article 40.2, Section 40.2.4, regarding MOUs.

Local 1888

a. Changes to Article 1, Sections 1.3 relating to Union Time to administer to collective bargaining agreement.

b. Changes to Article 5, Vacation Leave.

c. Changes to Article 6, Sick/Illness Leave.

d. Changes to Article 24, Investigations and Disciplinary.

e. Changes to Article 25, Grievance and Appeal Procedures.

h. Changes to Article 35, Layoff/Reduction in Force and Recall

B. The injunction should require the City to maintain those terms and conditions of employment until the parties have bargained to good-faith impasse ***and*** have resolved that impasse under the LMRO.

C. The injunction **should not** include those items identified in the City's letters on which the City and the Union are in agreement. Those items (for all four bargaining units) are:

a. Bargaining unit employees will receive a 3% increase to their current rate of pay.

b. Article 3, will be modified to provide for an 80/20 split on premium for various insurance programs.

c. The City will continue to pay 9.86% of the employee's PERA statutory contribution.

D. Schedule an emergency hearing on the Petition for Temporary Restraining Order and Preliminary Injunction.

E. Grant any other relief this Court finds just and proper.

Respectfully Submitted,

Rocky Gutierrez on behalf of AFSCME Council 18, Locals 624, 1888 and 2962

and

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SWORN AND SUBSCRIBED TO BEFORE ME this 18th day of September, 2014, by the foregoing signatories.

Notary Public

My Commission Expires: 11-15-14