

BEFORE THE LABOR-MANAGEMENT RELATIONS BOARD
OF THE CITY OF ALBUQUERQUE, NEW MEXICO

**NEW MEXICO TRANSPORTATION UNION,
ROBERT GUTIERREZ, Interim Chairman
CITY MOTORCOACH OPERATORS,
and SUN VAN DRIVERS,**

Complainants,

vs.

Case No. LB-2003-31

**CITY OF ALBUQUERQUE,
MARTIN CHAVEZ, Mayor,
JAY CZAR, Chief Administrative Officer,
ALBUQUERQUE CITY COUNCIL,**

Respondents.

**UNION'S OPPOSITION TO ASSISTANT CITY
ATTORNEY PAULA FORNEY'S MOTION TO DISMISS
COMPLAINT OF PROHIBITED LABOR PRACTICES**

Complainants New Mexico Transportation Union and its Interim Chairman, Robert Gutierrez, present the following opposition to the Motion to Dismiss submitted to the Labor Board by Assistant City Attorney Paula Forney on February 11, 2004. In her Motion, Ms. Forney contends that "establishing a guideline prior to negotiations is not a prohibited practice" (Memorandum at p. 4) and that "Complainants' 13(C) claims are not properly before the Labor Board." (Memo at p. 6).

Rashly claiming that “the union’s actions are nothing more than an attempt to endlessly harass the respondent on previously decided issues” (Memo at p. 7), Ms. Forney asks the Labor Board to “dismiss Respondent’s 13(c) claims” and “dismiss Respondents’ claims that applying a guideline constitutes bad faith negotiations.” (Id., underlining added). Since Ms. Forney purports to represent one or more of the respondents, her request for relief makes no sense at all, unless it is assumed that when she says “Respondents” she means “Complainants.”

But even with the assumption that Ms. Forney has confused “respondents” with “complainants,” her contentions are untimely, inappropriate, and not in accordance with either the law or the administrative rules and principles guiding the Labor Board. For the reasons set out below, Ms. Forney’s Motion should be recognized as being abusive and disrespectful of the Labor Board and the function and intent of both the Board and the Labor-Management Relations Ordinance.

1. Ms. Forney’s Motion to Dismiss is Untimely

The Union submitted its Complaint of Unfair and Prohibited Labor Practices to the City on September 19, 2003. City Employee Relations Officer Barbara Keiser replied immediately, denying “any and all allegations of a Prohibited Labor Practice.” Following the Union’s “Motion to Deem Union’s Allegations Admitted” due to Ms. Keiser’s failure to provide a specific response to the Complaint, Ms. Forney submitted a second Answer on October 3, 2003.

Ms. Forney submitted her Motion to Dismiss on February 11, 2004, more than four months after the second Answer. The City Labor Board's Rules and Regulations, however, plainly provide that:

Any motion that raises an issue that may be dispositive of the case shall be filed within thirty days of the time when the movant knew or should have known of the issue, or within thirty days of the filing of the answer to the complaint, whichever is later.

Labor Board Rule 4.6. Since Ms. Forney cites to Labor Board cases and decisions from the late 1990's as grounds for her preclusive motion to dismiss, it is apparent that she "knew or should have known" of the purported grounds for dismissal as soon as she read the Union's Prohibited and Unfair Practices Complaint. Accordingly, "within thirty days of the filing of the answer to the complaint" is the later of the two dates, and Ms. Forney's motion and memorandum are filed far too late for the Board to consider them.

Since the question of the Assistant City Attorneys' late filing of a "dispositive" motion is squarely before the Labor Board, however, the Board should consider the fact of the late submission, the reasons for such late filing, and the appropriate response of the Board. In this case, there are only two possibilities: 1) Ms. Forney was ignorant of the rules of the Labor Board; or 2) Ms. Forney knew about the rules but deliberately ignored them.

Although the Board could simply ask Ms. Forney to answer the question of why she filed her Motion to Dismiss three months after the deadline, it should also take note of the resources available to the Assistant City Attorney in this case. As an Assistant City Attorney, Ms. Forney has the luxury of a paralegal assistant, David Palmer, a secretary, and all the

resources of a multi-attorney City Legal Department. The Union's attorney, on the other hand, has none of those advantages. Furthermore, as the wife of former-Assistant City Attorney Bruce Thompson, the primary architect of many of the obstructive principles and practices used against this Union over the years, Ms. Forney has another unusual resource that the Union's counsel (fortunately) lacks. Thus, either way, whether by ignorance or design, Ms. Forney's late filing of her Motion is inexcusable.

As for the Board's response to the late filing, the answer is obvious. The Board should sanction Ms. Forney for her misconduct, and an appropriate sanction would be the denial of her Motion to Dismiss, an admonition to not repeat such behavior, and the award of reasonable attorneys' fees to the Union's attorney, for expending the time and effort to bring this matter to the attention of the Labor Board.

2. Ms. Forney's Motion to Dismiss is Inappropriate and Deceitful

The Motion to Dismiss "filed" by Ms. Forney in this case is also inappropriate for at least several other reasons. The first of those reasons lies in the scope of her representation and the fact that she is purporting to represent "the City of Albuquerque" at the same time she attempts to "represent" and thus, speak for, Mayor Martin Chavez, Chief Administrative Officer Jay Czar and the City Council of the City of Albuquerque. While the Mayor and the CAO may well speak with only one voice, it should be apparent that the voice of the City Council is likely to be far different.

The Union's Complaint in this case raises issues about the Mayor's giving of a "bonus" amounting to \$7.2 million to City employees without resort to the labor negotiation process, the use of a "guideline" (set in this case at zero percent), and the application of two City Council Ordinances relating to collective bargaining, one establishing the "Guidelines Committee," and the other requiring City Council approval of the administrations' collective bargaining results. It seems apparent to the Union, as it should be to the Labor Board, that the representation of two such diverse interests as those of the City Council and the Administration of Mayor Chavez cannot properly be done by one attorney.

It is equally apparent that in this case, as in many cases before this, that the attempt to represent both council and administration through one attorney will inevitably cause confusion and will result in corruption of the process. Accordingly, at the very least the Labor Board should require the City Attorney, Bob White, to make a choice concerning Ms. Forney's representations, and should at the same time advise the City Council about the situation and allow the Council to make its own choice of representative, either through the City Legal Department and Mr. White, or through the selection of independent counsel. Again, Ms. Forney's failure to raise or address this important question of Council and Administration representation by one attorney with an inherent conflict of interest leaves room to doubt both her competence and her ethics.

Another good reason the Assistant City Attorney's Motion to Dismiss the Union's claims is inappropriate, of course, is that it is directed by a member of the City Legal

Department to a Board whose members are neither attorneys nor judges, but which is represented by another attorney in the City Legal Department. In her Memorandum Brief, which notably cites only one case, King v. Lujan, 98 N.M. 179, 181 (1982), Ms. Forney alludes to a number of legal principles, generally incorrectly. In each instance Ms. Forney merely presents the view of the City Legal Department. And rather than respecting either the law or the rights of the concerned parties, Ms. Forney invariably takes a harsh and abusive position against the interests of the opponents of those she represents, and she also betrays the real interests of those she purports to represent.

For example, in conjunction with the citation noted above, Ms. Forney states that the “purpose of a dismissal for failure to prosecute is to prevent a party from harassing the opposing party with a pending action for an unreasonable time and to avoid situations where a party is permitted to keep an action pending indefinitely.” Memorandum at p. 5. She concludes that:

It has now been over six years since the decisions in these two cases became final. The union’s efforts to again raise this same issue in the present proceeding appear to be nothing more than an attempt to re-litigate a claim that has previously been decided by the board. To permit the union to again raise this issue is to permit the union to endlessly harass the respondents on an issue that has already been decided, exactly the type of ongoing harassment that is clearly disfavored by the New Mexico Courts.

Memorandum at pp. 5, 6. The implication that the bus and van drivers’ Union, a small independent association of City employees, is *harassing* either the City or Ms. Forney is ridiculous.

Moreover, Ms. Forney manages to combine her own distorted view of the law with insults against the unions and their membership. At the same time she attempts to trick the Board and City employees in general, advancing the notion that it is the unions that “endlessly harass the respondents on an issue that has already been decided,” rather than honestly stating that illegal actions of the Administration include the use of a zero percent “guideline” to keep the employees from receiving pay raises for over three years have kept the City from having a meaningful or honest collective bargaining process for many more years than that. Ms. Forney’s position on the Union’s contractual rights under its federally mandated 13(c) Agreement with the City is no less extreme or more correct.

While Ms. Forney cites to a “lack of prosecution” by the Union, that is a complete and entirely remarkable distortion of the legal result urged by Judge Theresa Baca when she announced that was compelled to “remand this (Labor Board Complaint LB-97-18) back to the Labor Board and order that a hearing pursuant to the ordinance shall be held.” Transcript, EXHIBIT 1, at p. 3. Although Ms. Forney attempts to transform the district court’s ruling on appeal of that case into a victory for the City, there is no excuse for her dishonest distortion of the district court’s ruling.

For example, when Mr. Thompson argued against the Court’s opinion that there had been a denial of the Union’s right to due process, Judge Baca responds:

Let me explain why, and I choose that (denial of due process) with thought. And the reason is, I have to tell you after reading these transcripts, I was quite shocked. And I don’t – unlike Mr. Livingston, I do not attribute to the City

bad faith, I really do not. I do think it shown through a lot of this in these transcripts. That's specially – you're very lucky in your board members, I think. They are very concerned in doing a good job, but continually just got off on the wrong track and didn't seem to have a sense of what a hearing means, or quite frankly, how that fits into due process, and that really bothers me. And I don't know what the answer to that is because if you have good people with a desire to do their job, then you're more than half way there. So maybe it's training that needs to happen or maybe rules, or I don't know what it is. My attempt here is not to make it more difficult for the City, but to try to help.

Transcript, at p. 11. The preliminary issue then was the same as the issue now, not so much the merits of the application of a “guideline” to negotiations, but the Labor Board's inability to hold a hearing. Neither the Labor Board or the Court ever reached the merits of the guideline issue, primarily because of the Labor Board's inability to hold a meaningful hearing.

Judge Baca notes numerous examples “of the continued attempt throughout these transcripts to avoid an actual hearing:

It seems to me people are also saying, “Let's take a short cut. We don't really need to do that. Let's do this.” And they spend so much time and energy, that I don't understand why they don't just have a hearing.

Transcript, at p. 15. The Judge even tells Mr. Thompson that “part of why everyone is at such a bad place is that there is no real process with guidelines or rules that people can follow. . . It just really is very bad.” Transcript, at p. 16. Then, as now, the fault for the Labor Board's (and accordingly, the City's) inability to hold a hearing should be place squarely where it belongs: on the incompetent “legal advice” of obstructive City attorneys.

Assistant City Attorney Thompson callously told the Court there was no denial of due process because “the City didn’t have to give a hearing at all. The City could say we negotiate these things. . . the only right to a hearing process is because the City has created that right, and that doesn’t create a property interest.” According to Mr. Thompson, “we are required to follow our rules, but that’s not a constitutional violation . . . and once you start talking constitutional, it raises unnecessary issues for what the Court is deciding today.” The Judge’s response to Mr. Thompson was:

THE COURT: To you.

MR. THOMPSON: Well, I understand what you’re saying.

THE COURT: Okay. But by not following the rules, the applicable City ordinance, due process was not provided, and I am going to make that a finding. By not following the City ordinance, due process was not provided. And that’s how strongly I feel about it, and I can have an academic argument with you about property rights and whether you indeed, as a City, have the ability to just say, “Forget it, we are not going to have anything at all,” sometime when we’re drinking something, but not today. But I want those words in there because that is how strongly I feel about it, and that is to the level of - I don’t want to get mellow (sic) dramatic here, but this is an ugly picture in these transcripts, and I think I can just stop. I mean, you understand me.

Transcript at pp. 18, 19. Mr. Thompson said he “understood.” While the fact that Ms. Forney is married to Mr. Thompson might, under some circumstances, be irrelevant to the issues before the Labor Board, her imputation of an attempt by the Union in this case

to endlessly harass the respondents on an issue that has already been decided, exactly the type of ongoing harassment that is clearly disfavored by the New Mexico Courts.

is both deceitful and contemptuous of the rule of law and the Court, and it raises serious concern about what is going on here and why both Mr. Thompson and Ms. Forney have been allowed to obstruct administrative justice and the legitimate concerns of the City's unionized employees over a period of more than six years. The denial of due process to all of the employees of the City of Albuquerque with respect to their rights to bargain collectively is not a trivial problem or concern. Furthermore, the problem, from the Union's perspective, is not so much that the Labor Board's process is flawed, or that the Board is suffering from a lack of rules (which have been improved in the years since Mr. Thompson was falsely representing that there was no *constitutional* violation), but that the Labor Board is continually receiving incompetent, deceitful, and obstructive legal advice from its attorneys: in this case first Mr. Thompson, and now his wife, Paula Forney.

Ms. Forney has directed her abusive contentions to the Labor Board, knowing full well that the Board has no alternative but to seek the legal advice of a City Attorney's office that has already made up its institutional mind on every one of the subjects of the motion. It should be obvious to the Board members that they are playing "patsy" to a City Legal Department that has its own view of the process to which the Unions in this case, and in many other cases before the Board, are entitled, and that view is "no process at all."

If the Board has no alternative to asking its in-house attorney, John DuBois to give it "legal advice" about ruling on Ms. Forney's motion, then the outcome is so clearly predictable as to constitute a blanket corruption of the process, not merely denial of due

process in this one case. Accordingly, the presentation of these issues to a Labor Board that lacks independent legal counsel is both inappropriate and deceitful, and it should be sanctioned accordingly.

Again, the question of what the appropriate sanction is must be addressed. And again, the award of attorneys' fees and costs provides just one answer. But even more importantly, the problem lies in the process, and the Board should act affirmatively to demand its own independent counsel, at the same time it makes it clear that even the City attorneys have a duty and an obligation to act responsibly, ethically, and in accordance with law.

3. Ms. Forney's Motion to Dismiss is Wrong as a Matter of Law

The final (and perhaps most fundamental) reason for denying Ms. Forney's Motion to Dismiss and for sanctioning its submission is that the Motion is wrong as a matter of law. Motions to Dismiss, in the civil context, are based on acceptance of the facts of the complaint as true, and a conclusion by the Court that even assuming those facts as true there is an inability to "state a claim" as a matter of law. This principle is fundamental to the practice of law and the application of dismissal motions to claims of the parties in a court of law.

As Ms. Forney is surely aware, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Scheuer v. Rhodes, 416 U.S. 232, 236-37 (1974). Here, as in a court of law, Complainants need only present "a short and plain statement of the claim" which will give the Respondents (and the Labor Board) fair notice

of what plaintiff's claims are and the grounds upon which they rest. Conley v. Gibson, 355 U.S. 41, 47 (1957). The City Respondents have "fair notice" of the claims against them; thus, Ms. Forney has no legal basis on which to ground a Motion to Dismiss.

The only case cited by Ms. Forney in her brief in support of the Motion to Dismiss, King v. Lujan, 98 N.M. 179, 181 (1982), has nothing to do with the facts of this case. King involves the agreement to purchase a cocktail lounge and a liquor license. It implicates a statute of limitations which is not applicable to this case, and has no relevance to the issues before the Labor Board whatsoever. The Assistant City Attorney is merely playing the Labor Board, the Unions, and everyone else as if they are fools, incapable of understanding or recognizing her disingenuous approach to the law.

Furthermore, once the City has filed an Answer to the factual allegations, admitting or denying them, there is no basis for a motion to dismiss that represents a blanket denial of the claims. While Ms. Forney is surely aware of these principles, she disregards and ignores them, at least for her purpose of her presentation of an insulting and abusive motion to a Labor Board that lacks the legal knowledge and the counsel of an independent attorney necessary to see through these reprehensible tactics.

In this case, the City Labor Board, in 1998, reached a "decision" that was based on a previous Labor Board's "hearing." Significantly, the prior Labor Board, which was so incapable of actually hearing the case included Paul Broome, now the City's "Employee Relations Consultant." The successor Board, which purported to "decide" the case without

actually “hearing” it, included present Board member Deborah Lattimore. To her credit, Ms. Lattimore wrote a strong dissent, referring to “the ‘so-called’ hearing by the previous Board” and pointing out that it “did not reflect a complete and fair proceeding.” EXHIBIT 2. Unfortunately the present Labor Board, chaired by Patrick Halter, appears intent on making exactly the same mistakes made by its predecessors, including the refusal to hold a hearing and the imposition of delay and confusion on the same issues that have never been decided, Ms. Forney’s misrepresentations to the contrary notwithstanding.

While the Assistant City Attorney may vainly argue otherwise, it is undeniable that the Labor-Management Relations Ordinance sets out a simple and unambiguous right to a hearing:

(D) Any controversy concerning prohibited practices will be submitted to the Board within 30 days of the occurrence of the alleged prohibited practice. Proceedings against the party alleged to have committed a prohibited practice shall be commenced by service upon the accused party and the Board of a written notice together with a copy of the charges. The accused party shall have five work days within which to serve on the opposing party and the Board a written answer to such charges. Within five work days after service of the answer, the Board or its designee shall schedule a hearing to be conducted as soon as possible, and at such hearing, the parties shall be permitted to be represented by counsel and to summon witnesses and submit evidence.

Section 3-2-9(D), Labor Management Relations Ordinance. In this context the Assistant City Attorney’s effort to convince the Board that it should not hold a hearing is both contrary to law and abusive of due process and the rights of the Unions, their members, and City employees in general.

The City's legislative branch, the City Council, has made changes in the law in order to put into effect the rights to a hearing on Prohibited Practice Complaints so clearly set out in the City's Ordinances. Those are found in the section 3-2-10, and they include certain rights that were not available when Mr. Thompson was representing the Labor Board back in 1997-1999:

The Board's hearings and decisions shall be on the record. The Board shall have the authority to administer oaths, subpoena witnesses and compel the production of documents as it deems necessary to the conduct of its proceeding and its subpoenas shall be enforceable in the District Court.

Section 3-2-10(A).

The City Attorneys' and Administration's attempts to dilute, compromise, or deny the Boards' authority and to deny City employees and unions their rights to hearings are both contrary to the City Council's legislative intent and action and subversive of the process of law. Not only does Ms. Forney forego her obligation to inform and encourage the Labor Board to hold the hearings required by law, but she deliberately withholds and denies the plain implication and effect of the law as it has been expressed by the City Council and as it is supposed to be applied by the Labor Board. The Assistant City Attorneys' Motion to Dismiss, having the effect of denying the hearings to which Complainants are entitled, must be firmly rejected and should be soundly sanctioned.

It would be bad enough if the City Attorneys took their obstructive position in an ordinary case. Here, however, with all seven of the City's labor unions having expired contracts, and with the City's collective bargaining process in disrepair, the attempt by Ms.

Forney to deny a hearing before the Labor Board is unprecedented and oppressive. The Mayor acknowledged that the collective bargaining process was broken when he acted outside the purview of the Labor Board to give a “bonus” to City employees in lieu of the pay increases and collective bargaining processes to which he concedes they are entitled.

Not only should the City Legal Department in general, and Ms. Forney in particular, be enjoined, ordered, and instructed to halt their attempts to deny a hearing over the disruption (or destruction) of collective bargaining in the City of Albuquerque and the disabling of the collective bargaining process, but the Mayor and the City Council should join in an initiative to require the City Labor Board to hear, decide, and resolve the issues brought before it in this case and in other cases. If the Labor Board is unable or unwilling to do so, given the seriousness and extent of the problem, then it has no alternative but to resign, leaving the important functions of the Board to others who are more capable or more willing to take decisive action in a time of evident crisis.

The Board’s new Rules and Regulations provide that “the Board may suspend from practice before the Board any person who engages in . . . disruptive or unduly disrespectful behavior.” While Ms. Forney’s conduct in advancing a frivolous and entirely incompetent Motion to Dismiss may not be exactly the kind of misconduct the drafters of that rule had in mind, her conduct in this case is no less disruptive or disrespectful than someone who physically threatens the Board and the Board’s process of prohibited practice claim adjudication.

4. Conclusion

For all the reasons stated above, Assistant City Attorney Paula Forney's Motion to Dismiss the Unions' Prohibited and Unfair Labor Practice claims is itself an unreasonable attack on the rights of the parties, the integrity of the Labor Board, and the rule of law. The Assistant City Attorney's Motion to Dismiss should certainly be denied. In addition, the Labor Board should seriously consider admonishing Ms. Forney, requesting her removal from the case, and awarding sanctions against her for her misconduct.

Respectfully submitted,

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I hereby certify that I faxed copies of the foregoing to the Office of Boards and Commissions for distribution to the members of the Labor Board, and to opposing counsel, Paula Forney and Bob White, City Attorney on Tuesday, March 9, 2004.

Paul Livingston