

**SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO**

ENDORSED
FILED IN MY OFFICE THIS

No. CV-2003-2215

AUG 22 2005

**NEW MEXICO TRANSPORTATION UNION,
ROBERT GUTIERREZ, Chairman,
and
BUS AND VAN DRIVERS IN THE
NMTU BARGAINING UNIT,**

Guadalupe M. Duran
CLERK DISTRICT COURT

GUADALUPE M. DURAN

Plaintiffs,

vs.

**CITY OF ALBUQUERQUE,
MARTIN CHAVEZ, Mayor,
JAMES LEWIS, Chief Administrative Officer,
PETER BEHRMAN, Transit Department Director,**

Defendants,

**SECOND AMENDED COMPLAINT FOR RELIEF
FOR FAILURE TO MAINTAIN A "MERIT SYSTEM"**

Plaintiffs, New Mexico Transportation Union (NMTU), Chairman Robert Gutierrez, and Transit Department employees in the bargaining unit represented by the NMTU present this Complaint seeking declaratory, compensatory, and injunctive relief for Defendants' failure to maintain a merit system of personnel management as set out in the City Charter, City Ordinances, and City Rules and Regulations, stating as grounds therefore:

1. **Plaintiffs** are the **New Mexico Transportation Union (NMTU)** and **Chairman Robert Gutierrez**, representing **City of Albuquerque Transit Department Bus and Van Drivers** in the NMTU bargaining unit.

2. Defendants are the **City of Albuquerque**, its Mayor, **Martin Chavez**; Chief Administrative Officer, **James Lewis**; and Transit Department Director **Peter Behrman**.

3. The City Charter requires the establishment and maintenance of a “merit system governing the hiring, promotion and discharge of employees and providing for the general regulation of employees.” The Charter and Merit System Ordinance establish “efficiency and ability as the applicable standards” for City employees.

4. The City Charter states that it is the duty of the City Council to “preserve a merit system by ordinance.” It is the duty of the Mayor to “(b)e responsible for the administration and protection of the merit system.”

5. The City must establish and maintain “appropriate grievance and appeal procedures for classified employees,” and must provide and maintain “an active personnel board.”

6. The City Charter requires that the Mayor shall “with the advice and consent of the Council, hire or appoint the City Attorney, *an officer to administer the merit system*, and all other senior administrative or cabinet level officers”

7. The City’s Merit System Ordinance, Section 3-1-9 (A) requires the City to establish and maintain “a system to evaluate the work performance of city employees.” The performance evaluation system must, pursuant to Section 3-1-9 (B) “to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria related to the job in question for each employee or position” provide for

“(c)ommunication with each employee as to the performance standards and critical elements of the employee’s position;” and give “(a)n opportunity during a specified period of time for the employee to demonstrate an improvement in performance.”

8. The Merit System Ordinance, Section 3-1-9 (C) requires that “(t)he work performance of (every) employee shall be officially evaluated by his or her immediate supervisor(s) at least once a year.”

9. For employees being charged with major disciplinary infractions, the City’s Merit System Ordinance, Section 3-1-23 (C) and Personnel Rules and Regulations, Section 902.2, require “review by the City Employee Mediation Program Coordinator of the circumstances on which the contemplated action is based in an effort to avoid the discipline.” The consideration of mediation must occur before management can proceed with any contemplated disciplinary action.

10. The Merit System Ordinance provides for the City Personnel Board to consist of five members, with two members being elected by the employees, two members being appointed by the Mayor, and a fifth member Chairperson to be selected by the other four. The Personnel Board’s duties include giving advice concerning “the improvement of personnel standards . . . (and) problems concerning personnel administration.”

11. The Merit System Ordinance, Section 3-1-26, requires the City to select and contract for a term not to exceed two years with Hearing Officers to hear employee grievances of demotions, suspensions, and terminations. A Hearing Officer may be

appointed by the Personnel Board or selected by the parties only when “the city does not have a contract with any Hearing Officer.”

12. In each respect described herein, the City Defendants have failed to comply with their mandatory, non-discretionary duties to establish, implement, and administer a fair merit system of personnel management for the City of Albuquerque.

COUNT 1

Failure to Maintain an Active Personnel Board

13. Each and every preceding allegation is incorporated herein.

14. The City’s Merit System Ordinance, Section 3-1-4 provides that:

(A) There shall be a Personnel Board composed of five members. Two members shall be appointed by the Mayor; they shall have significant management or personnel experience. Two members shall be selected by the employees by election and then appointed by the Mayor. The remaining member shall be selected by the other four members. . . . Board members shall serve two-year terms which expire September 1. The terms of the members who are serving when Ordinance 29-1998 was passed shall expire as follows: the term of one mayoral appointee and one elected member, chosen by lot, shall expire September 1, 2000. The terms of the remaining three members shall expire September 1, 2001.

15. None of the Personnel Board members were replaced or reappointed on September 1, 2000; there was no drawing “by lot” to see whose term expired. The City Defendants simply ignored the term limits set out in Section 30-1-4.

16. The terms of the remaining three Personnel Board members expired on September 1, 2001. Again, in 2001 Defendants took no action to resolve the Personnel Board membership issue.

17. On March 8, 2002, Second Judicial District Judge Theresa Baca issued a Permanent Writ of Mandamus, ordering the City to promptly reestablish its Personnel Board. Nonetheless, the City has not properly selected and appointed Personnel Board members.

18. The selection of three Personnel Hearing Officers was not in compliance with the New Mexico Open Meetings Act or the Merit System Ordinance.

19. On November 20, 2002, Robert Gutierrez and an attorney representing the NMTU advised the Personnel Board and City attorneys of the NMTU's intent to file a lawsuit "enjoining all further disciplinary proceedings at Transit as well as seeking to overturn any discipline that has been imposed in the past year for which there has been no appeal..." if the Union's concerns over the Personnel Board's membership and the Hearing Officers were not acknowledged or resolved.

20. The Personnel Board has functioned, for at least the past two years, without a permanent Chairperson. Instead, at each meeting of the Board, an "interim" Chairperson is selected.

21. By allowing and encouraging Personnel Board members to "serve until replaced" rather than serve until their terms end, Defendants have vitiated the term limits set out in the Ordinance.

22. By having a Personnel Board with fewer than the five members required by the Merit System Ordinance the City violates the express terms of the Ordinance.

23. Despite the requirements in the Charter and Merit System Ordinance for a Personnel Board and a fair grievance and appeal procedure for City employees, the City has failed to provide a neutral, quasi-judicial process to hear City employees' grievances and appeals.

24. The terms of three Personnel Board members are due to expire on September 1, 2005, yet no election has been scheduled and no appointment or reappointment has been made to fill the terms which are due to expire in less than two weeks.

COUNT 2

Failure to Select and Employ Fair Personnel Hearing Officers

25. Each and every preceding allegation is incorporated herein.

26. Due process requires, and the City has an obligation to select, fair and neutral Personnel Hearing Officers.

27. The City has not properly given notice, solicited and accepted applications, properly selected, and validly contracted with Personnel Hearing Officers for at least several years.

28. On at least several occasions, the Personnel Board and City Attorneys have selected a Hearing Officer to hear Transit Department cases even though there were outstanding contracts with other Hearing Officers.

COUNT 3

Failure to Conduct Performance Evaluations

29. Each and every preceding allegation is incorporated herein.
30. Despite the express requirements in the Merit System Ordinance, the Transit Department halted systematic evaluations of employee performance more than ten years ago.
31. Defendants have deliberately and knowingly violated the Merit System Ordinance when they halted performance evaluations and then subsequently failed to reestablish at least annual performance evaluations for City employees.
32. Defendants' failure to require the Charter and Ordinance-mandated employee evaluations contributes substantially to the public perception of inefficiency, needless expenses, and lack of integrity of City employees.
33. Without the mandated employee performance evaluations, Defendants are unable to make rational employment decisions, with the result that Plaintiff Union and members of the bargaining unit are subjected to favoritism, discrimination, prejudice, and unfair disciplinary, demotion, and promotion decisions.

COUNT 4

Failure to Refer to Mediation

34. Each and every preceding allegation is incorporated herein.

35. The Merit System Ordinance as well as the City Personnel Rules and Regulations and Administrative Instruction No. 1-11 provide that the first step in the grievance procedure is review of the dispute by the City Employee Mediation Coordinator.

36. Defendants have neither acknowledged nor complied with the measures set out in Section 30-1-23 (C) of the Merit System Ordinance and Rule 902.2 of the City's Rules and Regulations providing that the disciplinary process may only proceed *after* review and consideration by the Employee Mediation Program Coordinator.

37. Instead of seeking the required Mediation Program review, many City Departments, including the Transit Department, routinely either fail to send disciplinary actions to the Mediation Program or they inform the Mediation Program that the Department "declines mediation," thereby precluding any mediation effort from the start.

38. The City Defendants have deliberately failed to comply with the provisions of the Rules and Regulations requiring review by the mediation coordinator before proceeding with a disciplinary action.

COUNT 5

Failure to Appoint Officer to Oversee Merit System

39. Each and every preceding allegation is incorporated herein.

40. Despite the requirement in the City Charter that the Mayor shall "with the advice and consent of the Council, hire or appoint an officer to administer the merit system," no such officer has been hired or appointed. The City has instead decided to

delegate oversight of the merit system to the Chief Administrative Officer, contrary to the requirements in the City Charter.

COUNT 6

Violations of the New Mexico Open Meetings Act

41. Each and every preceding allegation is incorporated herein.
42. The City Personnel Board is a public body subject to the provisions of the New Mexico Open Meetings Act.
43. The City Personnel Board often addresses and decides matters that are not on the Board's agenda, thereby denying the public the right to notice and to participate in matters addressed by the Personnel Board.
44. The City Personnel Board routinely goes into closed or "executive" sessions without announcing the purpose of the closed meeting, without voting on closing the meeting pursuant to a proper reason permitted by the Open Meetings Act, and often without a valid reason for closing the meeting. The Board, for example, sometimes goes into executive session with its attorney present even though it has not announced the discussion of a pending legal matter.

COUNT 7

Willful Noncompliance With Law and Breach of Duties

45. Each and every preceding allegation is incorporated herein.

46. It is the duty and responsibility of the Mayor, the Chief Administrative Officer, and other high City officials to "comply with all laws, ordinances, regulations and resolutions of the City and all laws of the State of New Mexico."

47. Despite the evident need and requirements of law, the City Defendants have failed to conduct performance evaluations, mandatory mediation, and fair hearing practices for its employees. The City has failed to provide competent legal or administrative support for the Personnel Board, and the City has failed to allocate sufficient budgetary support to establish, maintain, and administer the merit system.

48. Defendants have been deliberately indifferent to their duties and obligations and have failed to take any meaningful action to enact, implement, maintain, protect and enforce the merit system of personnel management.

49. Defendants' disregard and neglect of the merit system described herein results in an inefficient, expensive, unprincipled personnel management and a government which lacks standards for properly determining which employees should be rewarded and promoted and which employees should be disciplined and punished for their conduct and performance.

COUNT 8

Violation of Rights to Due Process

50. Each and every preceding allegation is incorporated herein.

51. Defendants are obligated to provide the Transit Department employees with due process of law.

52. The lack of a full and functioning five-member Personnel Board, improper selection of hearing officers, failure to require systematic performance evaluations, and failure to comply with disciplinary rules and procedures effectively denies Plaintiffs' and other City employees' rights to substantive and procedural due process.

53. Plaintiffs are entitled to damages proximately resulting from Defendants' deliberate indifference to their obligations as elected and appointed City officials.

COUNT 9

Breach of the Employment Contract

54. Each and every preceding allegation is incorporated herein.

55. The City has an employment contract with Plaintiffs the terms of which are established by the City's Ordinances, Rules and Regulations, and by the Collective Bargaining Agreements between the City and its employees.

56. By violating the rules, regulations, and ordinances described herein, the City has breached its employment contracts with Plaintiffs and other City employees and is liable for damages proximately resulting from its violations of the employment contracts.

COUNT 10

Rescission of Disciplinary Actions

57. Each and every preceding allegation is incorporated herein.

58. There has not been a validly constituted Personnel Board, with four properly selected members and a Chairperson selected by the four members since at least September 1, 2000, when the terms of two members of the Board expired.

59. The Merit System Ordinance and due process have required the selection of fair and neutral Hearing Officers since at least 1990.

60. The City Charter has required the selection and employment of an official to oversee the merit system for many years.

61. The City's Rules and Regulations have required referral to a mediation coordinator since at least February 1, 2001.

62. The discipline of employees who were disciplined in the absence of any referral to the Mediation Coordinator, without prior performance evaluations, or whose grievances have been adjudicated in the absence of a full, properly constituted Personnel Board, fair and neutral Hearing Officers, or an official to oversee the Merit System, should be rescinded and reconsidered.

63. Transit Department employees who were subjected to grievance hearings before a temporary Personnel Hearing Officer selected unilaterally by the City were denied due process and the disciplinary actions against them should be rescinded and reconsidered.

64. Employees in the Transit Department bargaining unit whose adverse disciplinary actions were appealed and decided when there was no properly-constituted and selected Personnel Board or Hearing Officers, no functioning Mediation Program,

no performance evaluations, or other crucial aspects of a full and fair merit system should be rescinded and those employees should have their pay and benefits restored.

COUNT 11

Request for Injunctive Relief

65. Each and every preceding allegation is incorporated herein.

66. Defendants and other City employees and officials charged with the duty and obligation to establish, maintain, and protect a performance-based merit system have been deliberately indifferent to their duties and obligations and have failed to take any significant action to enact, implement, maintain, protect, enforce, and administer the Merit System, despite its critical importance to City employees and the public,

67. Defendants have a mandatory, non-discretionary duty to comply with the provisions of the City Charter, City Ordinances, and City Rules and Regulations concerning the merit system, mediation, performance evaluations, and disciplinary procedures.

68. Plaintiffs are City employees who are beneficially interested and have interests in common with the public in ensuring the orderly, safe, and lawful operation of the City's personnel management system in accordance with the City Charter, the laws of the City of Albuquerque, and the City's Rules and Regulations.

69. As elected or appointed officials, Defendants have sworn to uphold the law. As public servants they are authorized to act only within the law and they are prohibited from acting in violation of law.

70. Without issuance of an injunctive order Defendants will continue to refuse or delay compliance with the law and will continue to operate the City government without a valid merit system, without a qualified Personnel Board, without the required annual performance evaluations, without an official to oversee the Merit System, and without compliance with the City's Rules and Regulations.

71. Defendants have a mandatory, non-discretionary duty to comply with the New Mexico and City of Albuquerque Open Meetings Acts, and they should be enjoined against further violations or otherwise ordered to comply with the law in the future.

72. Plaintiffs have a likelihood of success on the merits, they are suffering irreparable injury because of the City's failures to comply with the law, and they have no other plain, speedy, or effective remedy outside of this lawsuit.

COUNT 12

Declaratory Judgment Action

73. Each and every allegation in the preceding paragraphs is incorporated as if fully set out herein.

74. The New Mexico Declaratory Judgment Act, Sec. 44-6-1 to 44-6-15, NMSA, permits the court "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered." Sec. 44-6-14, NMSA.

75. This is a matter of great public importance; the controversy involves the rights and legal relations of the parties seeking declaratory relief; the interests of the parties are real and adverse, and the issue is ripe for judicial determination.

76. Plaintiffs respectfully request declaratory rulings to determine whether or not, under the law and the facts in this case:

a. Defendants should hold elections and make appointments to the City's Personnel Board (without utilization of a "serve until replaced" policy) so as to assure that there is at all times a five-member Board with staggered two-year terms;

b. The City Personnel Board should cease operating on September 1 of each year and may not resume meetings or operations until four members of the Board have been properly elected or appointed, whereupon the four members shall at the next meeting of the Board select or re-approve a fifth member, who shall serve as the Board's Chairperson;

c. No binding or final ruling of the Personnel Board may be made except on a majority vote at a public meeting at which all five members are present.

d. Defendants should advertise and hold open meetings to select qualified, fair, and neutral Personnel Hearing Officers to serve two year terms;

e. Defendants should implement a system of performance evaluations in compliance with the City's Merit System Ordinance within 45 days after entry of the declaratory ruling in this case;

f. Defendants should refer all disciplinary cases involving suspension in excess of five days, demotion, or termination to the City's Mediation Coordinator without any statement about whether either party requests, accepts, or declines mediation and shall thereafter engage in a good-faith effort to resolve the dispute.

g. Mediation proceedings should require persons with authority to resolve the matter to be present or available by telephone; the mediation proceeding will include the employee, a management representative, and such advisors, if any, as may be deemed useful by the parties.

h. The Mayor of Albuquerque should hire or appoint an officer to administer and oversee the City's Merit System and should provide to the Personnel Board such staffing and competent independent legal counsel as the Board needs to maintain its operation.

i. The Personnel Board and all other City Boards and Commissions should strictly comply with the New Mexico Open Meetings Act and should be trained and instructed in the provisions of the City and State Open Meeting laws.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray they be awarded compensatory, exemplary, and injunctive relief requiring Defendants to:

A.) Immediately implement an employee performance evaluation system for City employees, including but not limited to implementation of annual performance evaluations.

B) Require adherence to principles and rules requiring that hiring, promotion, demotion, and termination of employment at the Transit Department be based primarily on the relative merit (as measured by performance and ability) of the employee.

C.) Select and appoint Personnel Hearing Officer(s) and Personnel Board member(s) in compliance with the New Mexico Open Meetings Acts and the Albuquerque Open Meetings Ordinance and conduct Personnel Board hearings and meetings in accordance and full compliance with the New Mexico Open Meetings Act.

D.) Rescind any and all disciplinary actions taken against employees in the NMTU's bargaining unit since February 1, 2001, in which the employee was required to respond to charges prior to any valid review by the City's Mediation Coordinator.

E.) Pay to Plaintiffs the damages proximately resulting from Defendants' unlawful conduct and violations of legal or constitutional rights, together with costs, including reasonable attorneys' fees.

F.) Award such other and further relief as the court deems just and equitable.

Respectfully submitted,

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I hereby certify that I faxed and/or e-mailed a copy of the Second Amended Complaint for Relief for Failure to Maintain a Merit System to Randy Autio, Deputy City Attorney, and Michael Garcia, Assistant City Attorney, on August 18, 2005.

Paul Livingston