

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. CV-2003-2215

NEW MEXICO TRANSPORTATION UNION,
FRED GARCIA, Chairman, BUS AND VAN
DRIVERS IN THE NMTU BARGAINING UNIT,
and A CLASS OF SIMILARLY SITUATED
CITY EMPLOYEES

Plaintiffs,

vs.

CITY OF ALBUQUERQUE, MRTIN CHÁVEZ, Mayor,
BRUCE PERLMAN, Chief Administrative Officer,
and GREG PAYNE, Transit Department Director,

Defendants,

**THIRD AMENDED COMPLAINT FOR RELIEF
FOR FAILURE TO MAINTAIN A MERIT SYSTEM**

Plaintiffs, New Mexico Transportation Union (NMTU), Chairman Fred Garcia, and other City of Albuquerque employees present this Third Amended Complaint seeking declaratory 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 **Fred Garcia** (replacing Robert Gutierrez), representing **City of Albuquerque Transit Department Bus and Van Drivers** in the NMTU bargaining unit, and a **class of**

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similarly situated classified City employees entitled to the rights, process, protections, and benefits of the City’s Merit System Ordinance.

2. Defendants are the **City of Albuquerque**, its Mayor, **Martin Chávez**; Chief Administrative Officer, **Bruce Perlman** (replacing James Lewis); and Transit Department Director **Greg Payne** (replacing 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.” In order to establish a “merit system” of personnel management, the City Council has enacted a Merit System Ordinance, §3-1-1, et seq.,

5. Pursuant to the City Charter, the Mayor is “responsible for the administration and protection of the merit system.”

6. Pursuant to the provisions of its Charter, the City must establish and maintain “appropriate grievance and appeal procedures for classified employees,” and must maintain “an active personnel board.”

7. 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” (Underlining added).

8. The Merit System Ordinance, §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 “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.” §3-1-9 (B)

9. The Merit System Ordinance 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.” §3-1-9 (C)

10. The Merit System Ordinance, §3-1-5(D) states that “(t)he Personnel Board shall establish rules and regulations governing the conduct of its meetings and its grievance hearings;” §3-1-23(E) provides that “(t)he Chief Administrative Officer shall promulgate rules of procedure concerning disciplinary actions.”

11. 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.”

12. The Merit System Ordinance, §3-1-26, requires the City to select and contract for a term of “no more than two years” with Hearing Officers to hear employee grievances of demotions, suspensions, and terminations.

13. The Merit System Ordinance, §3-1-24, provides a Grievance Resolution Procedure as a “means for reconciling complaints concerning minor disciplinary actions and working conditions or departmental rules.”

14. On September 6, 2005, the Court entered a Stipulated Order in this case requiring the “staggered terms of Personnel Board members will be implemented as required by the Merit System Ordinance starting on September 1, 2006, so that one City representative and one employee representative will be newly appointed or reappointed or elected or reelected each year.” The Court also ordered that “no member of the Personnel Board shall serve more than two consecutive terms” and that “each September the four Board members shall meet in public to choose a fifth member who shall be the Board’s chairperson.”

15. On September 12, 2005, the parties filed a Settlement Agreement in this case; in the Settlement Agreement the City agreed to 1) comply with the Merit System Ordinance’s requirement of at least annual performance evaluations for classified employees; 2) maintain a Personnel Board whose members have staggered terms and select a Chairperson each September; 3) address the Personnel Hearing Officer selection process and employ Personnel Hearing Officers under two-year contracts, precluding any Hearing Officer from being “retained beyond a two-year term without being subject to a new

selection process;” and 4) “commit the necessary resources and personnel to ensure that the Merit System functions without compromise or violation of the applicable ordinances, rules, and policies.”

16. In each respect set out above and described herein, Defendants have ignored, circumvented, or otherwise failed to comply with some or all of the requirements of the City Charter, the Merit System Ordinance, the Court’s Order and the Settlement Agreement in this case.

17. In each respect set out above and described herein, Defendants have failed to comply with their mandatory, non-discretionary duties and obligations to establish, implement, administer, and maintain an effective merit system of personnel management for the employees of the City of Albuquerque.

COUNT 1

Violation of Rights to Due Process

18. Each and every preceding allegation is incorporated herein.

19. Defendants are obligated to provide classified City employees with due process of law.

20. The City’s violations of the City Charter, the Merit System Ordinance, and the terms of the Settlement Agreement in this case, including but not limited to the failure to appoint an official to administer the merit system, failure to properly select and replace hearing officers, failure to provide systematic and meaningful performance evaluations, failure to make and comply with disciplinary rules and procedures, failure to maintain a

grievance resolution process, and failure to allot necessary resources and money to personnel management functions effectively deny and violate employees' rights to substantive and procedural due process.

COUNT 2

Breach of the Employment Contract

21. Each and every preceding allegation is incorporated herein.

22. The City has an employment contract with Plaintiffs; the terms of the contract are established by the City Charter, the Merit System Ordinance, Personnel Rules and Regulations, and any applicable Collective Bargaining Agreements.

23. By violating the rules, regulations, and ordinances described herein, the City has breached its employment contracts with Plaintiffs and other City employees.

COUNT 3

Breach of the Settlement Agreement

24. Each and every preceding allegation is incorporated herein.

25. Acting in good faith, the NMTU Plaintiffs entered into a Settlement Agreement with the City. The Agreement was signed for the City by James Lewis, its former-Chief Administrative Officer and Assistant City Attorney Michael I. Garcia.

26. The Settlement Agreement was filed with the Court on September 12, 2007.

27. Defendants have ignored, circumvented, and substantially violated many of the terms of the Settlement Agreement.

COUNT 4

Declaratory Judgment Action

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

29. 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.

30. The application and enforcement of the Albuquerque City Charter, the Merit System Ordinance and the Personnel Rules and Regulations are matters of substantial public concern and importance; the controversy involves the rights and legal relations of the parties seeking declaratory relief; there are disputed matters of law; the interests of the parties are real and adverse; and the issues are ripe for judicial determination.

COUNT 5

Class Action

31. Each and every preceding allegation is incorporated herein.

32. Plaintiffs bring this action pursuant to Rule 1-023, N.M.R. Civ. Proc., on behalf of all other persons similarly situated.

33. The class that Plaintiffs seek to represent in this action consists of all classified City employees subject to the provisions of the City Charter, the City's Merit System Ordinance, and the City's Personnel Rules and Regulations.

34. The class is so numerous that joinder of all members of the class is impractical and there are questions of law and fact common to the class.

35. Defendants have acted or refused to act and will continue to act or refuse to act on grounds generally applicable to the class, thereby making injunctive and declaratory relief appropriate with respect to the class as a whole; the relief Plaintiffs seek is primarily declaratory and injunctive.

36. Separate actions by individual members of the class on common issues would create a risk of inconsistent adjudication and establishment of incompatible standards of conduct for Defendants.

37. Questions of law and fact common to the members of the class predominate, and a class action is superior to other available modes of litigation for the fair and efficient adjudication of the controversy in this case.

38. The claims of the named-Plaintiffs are typical of the claims of the class and Plaintiffs and their attorney will adequately represent and protect the interests of the class.

COUNT 6

Injunctive Relief

39. Each and every preceding allegation is incorporated herein.

40. 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 implement, maintain, protect, enforce, and administer the merit system, despite its critical importance to City employees and the public,

41. Defendants have a mandatory, non-discretionary duty to comply with the provisions of the City Charter, City Ordinances, and City Rules and Regulations.

42. Plaintiffs are City employees who are beneficially interested and have interests in common with the public in ensuring the lawful operation of the City's personnel management system.

43. 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 or effective merit system.

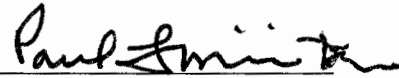
44. Plaintiffs have a likelihood of success on the merits, they are suffering irreparable injury because of the City's failures to comply with the law, and they have no other plain, speedy, or effective remedy.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray they be awarded declaratory, injunctive, and equitable relief requiring Defendants to:


- A.) Appoint or hire a person to administer the merit system and allocate sufficient money and personnel to effectively run the system.
- B.) Implement and maintain an effective employee performance evaluation system for City employees;
- C.) Strictly adhere to the provisions and requirements for selection, retention and replacement of Personnel Board members and Personnel Hearing Officers;
- D.) Adhere to principles and rules requiring that personnel actions affecting classified employees be based primarily on the relative merit of the employee, as measured by performance and ability.
- E.) Comply with the New Mexico Open Meetings Acts and the Albuquerque Open Meetings Ordinance.
- F.) Maintain fair and valid disciplinary processes and means for resolving employee grievances.
- G.) Promulgate and apply relevant procedural rules for holding of hearings and meetings of the Personnel Board and for the City's disciplinary processes.
- H.) Pay sanctions for violations of the Settlement Agreement in this case'
- I.) Provide such other and further relief as the court deems just and equitable.

Respectfully submitted,



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I hereby certify that copies of this 3rd Amended Complaint were sent by fax and/or e-mail to Assistant City Attorney's Michael I. Garcia, Robert Kidd, and Doris Duhigg, on or before December 27, 2007.



Paul Livingston