

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

No. CV-2003-2215

NEW MEXICO TRANSPORTATION UNION,  
ROBERT GUTIERREZ, INTERIM CHAIRMAN,  
and

BUS and VAN DRIVERS IN THE NMTU  
BARGAINING UNIT,

Plaintiffs,

vs.

CITY OF ALBUQUERQUE, MARTIN CHAVEZ, MAYOR,  
JAMES LEWIS, CHIEF ADMINISTRATIVE OFFICER,  
ROBERT M. WHITE, CITY ATTORNEY,  
PETER BEHRMAN, TRANSIT DEPARTMENT DIRECTOR,

Defendants.

**DEFENDANTS' ANSWER TO PLAINTIFFS' SECOND AMENDED  
COMPLAINT FOR RELIEF FOR FAILURE  
TO MAINTAIN A "MERIT SYSTEM"**

Defendants by and through their counsel of record answers Plaintiffs' Second Amended Complaint for Relief for Failure to Maintain a "Merit System" as follows:

As to the introductory paragraph of Plaintiffs' Second Amended Complaint, Defendants do not understand it to require admission or denial; to the extent it does, all allegations in it are denied.

1. As to the allegations of Paragraph 1 of Plaintiffs' Second Amended Complaint, Defendants admit the same.

2. As to the allegations of Paragraph 2 of Plaintiffs' Second Amended Complaint; Defendants admit the same.
3. As to the allegations of Paragraph 3 of Plaintiffs' Second Amended Complaint, Defendants admit the same.
4. As to the allegations of Paragraph 4 of Plaintiffs' Second Amended Complaint, Defendants admit the same.
5. As to the allegations of Paragraph 5 of Plaintiffs' Second Amended Complaint, Defendants admit the same.
6. As to the allegations of Paragraph 6 of Plaintiffs' Second Amended Complaint, Defendants admit the same.
7. As to the allegations of Paragraph 7 of Plaintiffs' Second Amended Complaint, Defendants admit the same.
8. As to the allegations of Paragraph 8 of Plaintiffs' Second Amended Complaint, Defendants admit the same.
9. As to the allegations of Paragraph 9 of Plaintiffs' Second Amended Complaint, Defendants admit the same.
10. As to the allegation of Paragraph 10 of Plaintiffs' Second Amended Complaint, Defendants admit the same.
11. As to the allegations of Paragraph 11 of Plaintiffs' Second Amended Complaint, Defendants admit the same.
12. As to the allegations of Paragraph 12 of Plaintiffs' Second Amended Complaint, Defendants deny the same.

## COUNT 1

### FAILURE TO MAINTAIN AN ACTIVE PERSONNEL BOARD

13. As to the allegations of Paragraph 13 of Plaintiffs' Second Amended Complaint, Defendants incorporate by reference their answers to Paragraphs 1 through 12.

14. As to the allegations of Paragraph 14 of Plaintiffs' Second Amended Complaint, Defendants state the quoted language appears in the City's Merit System Ordinance, Section 3-1-4.

15. As to the allegations of Paragraph 15 of Plaintiffs' Second Amended Complaint, Defendants admit that Personnel Board members were not replaced on September 1, 2001, but deny all remaining allegations of that paragraph.

16. As to the allegations of Paragraph 16 of Plaintiffs' Second Amended Complaint, Defendants admit that Personnel Board members were not replaced on September 1, 2001 and deny all remaining allegations of that paragraph.

17. As to the allegations of Paragraph 17 of Plaintiffs' Second Amended Complaint, Defendants admit the allegations of the first sentence and deny the remaining allegations of that paragraph.

18. As to the allegations of Paragraph 18 of Plaintiffs' Second Amended Complaint, Defendants deny the same.

19. As to the allegations of Paragraph 19 of Plaintiffs' Second Amended Complaint, Defendants admit the same.

20. As to the allegations of Paragraph 20 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

21. As to the allegations of Paragraph 21 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

22. As to the allegations of Paragraph 22 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

23. As to the allegations of Paragraph 23 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

24. As to the allegations of Paragraph 24 of Plaintiffs' Second Amended Complaint, Defendants admit the same.

## **COUNT 2**

### **Failure to Select and Employ Fair Personnel Hearing Officers**

25. As to the allegations of Paragraph 25 of Plaintiffs' Second Amended Complaint, Defendants incorporate by reference their answers to Paragraphs 1 through 24.

26. As to the allegations of Paragraph 26 of Plaintiffs' Second Amended Complaint, they state a legal conclusion requiring no admission or denial. To the extent they require admission or denial, Defendants admit a general duty to provide due process exists, but deny the remaining implications of that paragraph.

27. As to the allegations of Paragraph 27 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

28. As to the allegations of Paragraph 28 of Plaintiffs' Second Amended Complaint, Defendants admit the same occurred on one or more occasions due to the hearing officers' recusal in cases in which Plaintiffs' counsel acted as a party's representative.

## **COUNT 3**

### **Failure to Conduct Performance Evaluations**

29. As to the allegations of Paragraph 29 of Plaintiffs' Second Amended Complaint, Defendants incorporate by reference their answers to Paragraphs 1 through 28.

30. As to the allegations of Paragraph 30 of Plaintiff's Complaint, Defendants admit Transit has not carried out systematic performance evaluations in a number of years, the exact number being unknown.

31. As to the allegations of Paragraph 31 of Plaintiff's Complaint, Defendants deny the same.

32. As to the allegations of Paragraph 32 of Plaintiff's Complaint, Defendants deny the same.

33. As to the allegations of Paragraph 33 of Plaintiff's Complaint, Defendants deny the same.

### **COUNT 4**

#### **Failure to Refer to Mediation**

34. As to the allegations of Paragraph 34 of Plaintiffs' Second Amended Complaint, Defendants incorporate by reference their answers to Paragraphs 1 through 33.

35. As to the allegations of Paragraph 35 of Plaintiffs' Second Amended Complaint, Defendants deny the same, and specifically aver that the Merit System calls for a review of the circumstances on which the contemplated action is based.

36. As to the allegations of Paragraph 36 of Plaintiffs' Second Amended Complaint, Defendants deny the same.

37. As to the allegations of Paragraph 37 of Plaintiffs' Second Amended Complaint, Defendants admit the Transit Department had declined mediation on several occasions, but deny that this occurs presently, and deny that it occurs routinely across the City.

38. As to the allegations of Paragraph 38 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

## **COUNT 5**

### **Failure to Appoint Officer to Oversee Merit System**

39. As to the allegations of Paragraph 39 of Plaintiff's Second Amended Complaint, Defendants incorporate by reference their answers to Paragraphs 1 through 38.

40. As to the allegations of Paragraph 40 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied. Defendants also specifically aver that the Merit System Ordinance, § 3-1-1, designates the chief administrative officer to administrate the merit system.

## **COUNT 6**

### **Violations of the New Mexico Open Meetings Act**

41. As to the allegations of Paragraph 41 of Plaintiffs' Second Amended Complaint, Defendants incorporate by reference their answers to Paragraphs 1 through 40.

42. As to the allegations of Paragraph 42 of Plaintiffs' Second Amended Complaint, Defendants admit the same.

43. As to the allegations of Paragraph 43 of Plaintiffs' Second Amended Complaint, Defendants deny the same.

44. As to the allegations of Paragraph 44 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

## **COUNT 7**

### **Willful Noncompliance With Law and Breach of Duties**

45. As to the allegations of Paragraph 45 of Plaintiffs' Second Amended Complaint, Defendants incorporate by reference their answers to Paragraphs 1 through 44.

46. As to the allegations of Paragraph 46 of Plaintiffs' Second Amended Complaint, Defendants admit the same.

47. As to the allegations of Paragraph 47 of Plaintiffs' Second Amended Complaint, Defendants deny the same.

48. As to the allegations of Paragraph 48 of Plaintiffs' Second Amended Complaint, Defendants deny the same.

49. As to the allegations of Paragraph 49 of Plaintiffs' Second Amended Complaint, Defendants deny the same.

## **COUNT 8**

### **Violation of Rights to Due Process**

50. As to the allegations of Paragraph 50 of Plaintiffs' Second Amended Complaint, Defendants incorporate by reference their answers to Paragraphs 1 through 49.

51. As to the allegations of Paragraph 51 of Plaintiffs' Second Amended Complaint, Defendants admit the general obligation of due process, but deny any remaining implications of that paragraph.

52. As to the allegations of Paragraph 52 of Plaintiffs' Second Amended Complaint, Defendants deny the same.

53. As to the allegations of Paragraph 53 of Plaintiffs' Second Amended Complaint, Defendants deny the same.

## **COUNT 9**

### **Breach of the Employment Contract**

54. As to the allegations of Paragraph 54 of Plaintiffs' Second Amended Complaint, Defendants incorporated by reference their answers to Paragraphs 1 through 53.

55. As to the allegations of Paragraph 55 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal

conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

56. As to the allegations of Paragraph 56 of Plaintiffs' Second Amended Complaint. Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

## **COUNT 10**

### **Rescission of Disciplinary Actions**

57. As to the allegations of Paragraph 57 of Plaintiffs' Second Amended Complaint, Defendants incorporate by reference their answers to Paragraphs 1 through 56.

58. As to the allegations of Paragraph 58 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

59. As to the allegations of Paragraph 59 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

60. As to the allegations of Paragraph 60 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

61. As to the allegations of Paragraph 61 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations require an admission or denial, those allegations are denied.

62. As to the allegations of Paragraph 62 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

63. As to the allegations of Paragraph 63 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

64. As to the allegations of Paragraph 64 of Plaintiffs' Second Amended Complaint, Defendants deny the same.

#### **COUNT 11**

### **Request for Injunctive Relief**

65. As to the allegations of Paragraph 65 of Plaintiffs' Second Amended Complaint, Defendants incorporated by reference their answers to Paragraphs 1 through 64.

66. As to the allegations of Paragraph 66 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

67. As to the allegations of Paragraph 67 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

68. As to the allegations of Paragraph 68 of Plaintiffs' Second Amended Complaint, Defendants admit the same.

69. As to the allegations of Paragraph 69 of Plaintiffs' Second Amended Complaint, Defendants admit the same.

70. As to the allegations of Paragraph 70 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

71. As to the allegations of Paragraph 71 of Plaintiffs' Second Amended Complaint, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

72. As to the allegations of Paragraph 72 of Plaintiffs' Second Amended prayer, Defendants state that those allegations call for a legal conclusion and therefore, require no admission or denial. To the extent it can be construed that those allegations do require an admission or denial, those allegations are denied.

## **COUNT 12**

### **Declaratory Judgment Action**

73. As to the allegations of Paragraph 73 of Plaintiffs' Second Amended Complaint, Defendants incorporated by reference their answers to Paragraphs 1 through 72.

74. As to the allegations of Paragraph 74 of Plaintiffs' Second Amended Complaint, Defendants agree that the stated law governs declaratory judgment actions and is applicable to this case.

75. As to the allegations of Paragraph 75 of Plaintiffs' Second Amended Complaint, Defendants admit the same.

76. As to the allegations of Paragraph 76 and its subparts of Plaintiffs' Second Amended Complaint, Defendants admit that the issues Plaintiffs state

are ripe for review by this Court, but deny that Plaintiffs are entitled to the relief they seek in whole or in part.

77. As to the allegations contained in Plaintiffs' Second Amended Complaint's prayer, Defendants deny that Plaintiffs are entitled to the relief they seek in whole or in part.

78. All allegations of the Second Amended Complaint not specifically admitted or denied above are hereby denied.

#### **FIRST AFFIRMATIVE DEFENSE**

The actions of Defendants were in good faith and in the proper exercise of governmental functions and some or all Defendants are entitled to qualified immunity.

#### **SECOND AFFIRMATIVE DEFENSE**

Plaintiffs have failed to exhaust applicable administrative remedies.

#### **THIRD AFFIRMATIVE DEFENSE**

None of the individual Defendants acted knowingly or willfully outside the scope of their official duties, nor have they intentionally violated any provisions of the City Ordinances. Thus, they are not liable for any violations or for any penalties that otherwise might be assessed thereunder.

#### **FOURTH AFFIRMATIVE DEFENSE**

Plaintiffs fail to state a claim upon which relief may be granted in whole or in part.

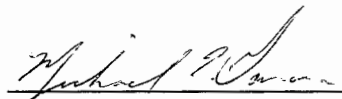
Plaintiffs' claims are barred by the doctrines of res judicata and collateral estoppel, or claim preclusion and issue preclusion.

**SEVENTH AFFIRMATIVE DEFENSE**

Plaintiffs failed to mitigate their damages, if any.

**WHEREFORE**, Defendants request an Order of this Court dismissing Plaintiffs' Complaint in its entirety, assessing the Defendants' costs to the Plaintiffs, and for such other and further relief as the Court deems just and proper in the premises.

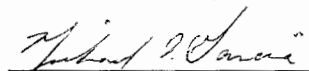
Respectfully submitted:  
**CITY OF ALBUQUERQUE**  
Robert M. White  
City Attorney

  
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(505) 768-4500

I hereby certify that a true copy of the foregoing was mailed to:

Paul Livingston  
Attorney for Plaintiffs  
P. O. Box 250  
Placitas, NM 87043

on this 29<sup>th</sup> day of August, 2005.

  
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Michael I. Garcia