

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

No. CV 2003-02215

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

Plaintiffs,

vs.

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

Defendants.

**THE CITY'S RESPONSE TO MOTION TO ENFORCE  
SETTLEMENT AGREEMENT**

The City of Albuquerque, through its undersigned attorneys, respectfully responds to Plaintiffs Motion to Enforce Settlement Agreement. For the reasons that follow, the Court should deny the motion.

**1. The City has not breached the Settlement Agreement regarding the Personnel Board Members and terms.**

Plaintiffs address issues regarding personnel board members and terms, personnel hearing officers, annual performance evaluations, and necessary resources. Concerning personnel board elections, Plaintiffs make no mention about the elections that were held in 2006 on schedule. For 2007, the City held an election for the Personnel Board October 23rd. A number of factors delayed the process. To begin with, the City Clerk's office is

a key department in the personnel board elections, as well as in other municipal elections. Millie Santillanes, the former City Clerk, unexpectedly died in August 2007, and an interim clerk had to be appointed. This compounded difficulties already involved with the regular elections and the unusual case of a recall election of a city councilor this year. Yet a further complicating factor was the reorganization and absorption of the Boards and Commissions office into Office of Administrative Hearings, which had been under the City Clerk's office, then became administratively attached to the Legal Department, and is in the process of becoming an independent department of the City of Albuquerque.

Nevertheless, the City has held those elections as evidence by *Exhibit A*. And more to the point, Plaintiffs have articulated no actual harm or violation of due process that prejudiced them or any other employee of the City of Albuquerque in any way whatsoever.

Plaintiffs, however, ask the Court to stop all hearings on personnel matters and halt the process that is available. They seek to halt employees' rights to notice and an opportunity to be heard on their grievances in the forums that exist, and essentially argue that the removal of *all* process will somehow accomplish due process. It is not difficult to see that their proposed remedy would cause far more real damage than a late election would. Finally, it should be noted that in recent years, personnel grievances, arbitrations, and board hearings were backed up with terminations not having been heard in some cases for over a year. At present, the City is mostly up to date in dealing with these matters, and the Court should decline any invitation from Plaintiffs to set things back.

The reorganization of administrative hearing functions under one department was intended to achieve many of the goals Plaintiffs claim to want. First, due to the very

large volume of red light camera and speeding violations under the STOP ordinance, and the increased burden on existing hearing officers, the City has sought to increase the number of hearing officers who will hear personnel grievances as well under the new Hearing Officer Ordinance. Furthermore, the City must work out the new process in accordance with its Purchasing Ordinance in requesting contract hearing officers. So then, far from being willful violations of the settlement agreement, they are at worst missed deadlines, all of which occurred in good faith attempts to comply with the City's duties under its ordinances, and to improve the way it does business, and increase the resources available to handle personnel matters. Reorganization and transfer of Boards and Commissions functions also affected the personnel hearing officer contracts. And while those are late, they are in the request-for-proposal stage and should be sent out for advertisement within the next couple of weeks, proposals which are intended to increase the number of available hearing officers.

Based on the foregoing, Plaintiffs complaints have already become moot as to the Personnel Board, and very soon will be as to the hearing officers. Courts do not generally decide abstract or moot questions. *KOB TV, L.L.C., v. City of Albuquerque*, 2005-NMCA-049, P 37, 137 N.M. 38.

Plaintiffs' arguments, moreover, generally address the composition of the Personnel Board. As such, the Court should be aware of Plaintiffs' counsel's own behavior before the very board with which he finds such fault. In September 2006, during a personnel board hearing in which he was representing a client against the City, and after participating in the public comment portion, Mr. Livingston handed a handwritten note to Personnel Board member Jesse Lopez, the unions' elected

representative on the board. Assistant City Attorney Shelley Mund called the passing of the note to the attention of the Board's chair, Mr. Sean Olivas, and requested that the contents of the note be made public. Chairman Olivas asked Mr. Lopez to disclose the contents of the note as part of the public record. Mr. Lopez refused, however, put the note in his pocket and left the hearing, thereby destroying the quorum of the Board, and requiring it to adjourn without hearing any more cases that day. *See Exhibit B, Affidavit of Shelley Mund.* Upon information and belief, Mr. Livingston's conduct there resulted in at least one Disciplinary Board complaint against him by Board's Chair. Mr. Lopez rejected subsequent attempts to learn the contents of the note, and soon thereafter Mr. Lopez resigned from the Personnel Board. Ms. Mund's case set for hearing that day, which involved the termination of an employee, was not heard till January 2007. *See Id.*

Relevant to this case, however, is Mr. Livingston's own sabotage and subversion of the very process he poses as upholding. His conduct there is relevant to consider the strength of his arguments here, as well as his fitness in making them as a representative of the NMTU. See Rules 16-304 (C), 16-305(B), (C), NMRA. To the extent he conducted himself in this manner on behalf of NMTU, it reflects unclean hands on the part of NMTU and should bar relief here. To the extent he acted on his own, it should disqualify him from representing NMTU here. *See, e.g., Sanders v. Rosenberg*, 1997-NMSC-002, P 10, 122 N.M. 692 (Supreme Court refused to limit disqualification of attorneys in custody cases only for violations of ethical or court rules).

2. Performance Evaluations.

The City is in the process of locating and gathering information that shows its level of compliance with the Ordinance, which it will provide to the Court and to opposing counsel before the hearing on this matter.

3. Standing.

Finally, it should be noted that no individually named Plaintiff appears in the caption of this motion. Robert Gutierrez was the chair of NMTU at the time of the filing of this lawsuit, but no longer is. It is unclear at whose behest this motion is filed, and the City would appreciate some clarification in this regard.

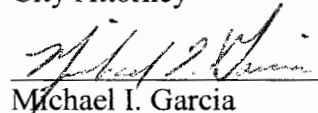
4. Conclusion.

For the foregoing reasons, the City respectfully requests the Court to deny Plaintiffs' Motion, and for such other and further relief the Court deems just and proper.

Respectfully submitted:

**CITY OF ALBUQUERQUE**

Robert M. White  
City Attorney



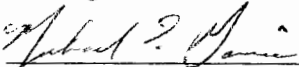
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Michael I. Garcia  
Assistant City Attorney  
P. O. Box 2248  
Albuquerque, NM 87102  
(505) 768-4500

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

Paul Livingston  
Attorney at Law  
P. O. Box 250  
Placitas, NM 87043

this 31st day of October, 2007.

  
\_\_\_\_\_  
Michael I. Garcia



Office of the City Clerk  
P.O. Box 1293  
Albuquerque, NM 87103  
Phone (505) 768-3030 Fax (505) 768-2845

Martin J. Chávez, Mayor

Randy M. Autio, Interim City Clerk

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To: Martin J. Chávez, Mayor  
From: Randy M. Autio, Interim City Clerk  
Date: Tuesday, October 23, 2007  
Subject: Personnel Board Election

Attached is the official ballot count for the Personnel Board Election held on Tuesday, October 23, 2007. Section 3-1-4B of the Merit System Ordinance, as amended, states in part:

*"When there is a vacancy to be filled, the person who receives the most votes in the employee election shall be appointed by the Mayor to fill the vacancy;... All appointments shall be sent to the Council for advice and consent..."*

The attached is submitted for your transmittal to the City Council pursuant to the Merit System Ordinance.

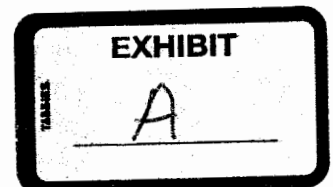
**BALLOT COUNT**  
October 23, 2007

**Ballots Dispensed:**

<b>Joe (Jose) E. Chavez</b>	<b>144</b>
<b>Anthony Montoya Jr., P.E.</b>	<b>93</b>
<b>Linda A. Myers</b>	<b>211</b>

**Total:** **448**

**Signatures:** **447**



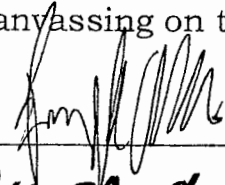
*\*A provisional ballot was inadvertently placed in the ballot box instead of being placed in a provisional envelope; therefore the vote was counted.*

**Challenged:** **0**

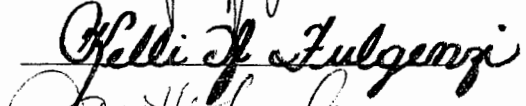
We the undersigned in the presence and witnesses to each other hereby certify that the above is an accurate count of the ballots cast for the Personnel Board Election held on October 23, 2007.

The following individuals were witnesses for the canvassing on the 23<sup>rd</sup> day of October 2007.

1.) Randy M. Autio, Interim City Clerk



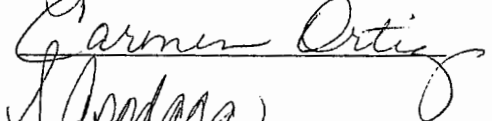
2.) Kelli Fulgenzi



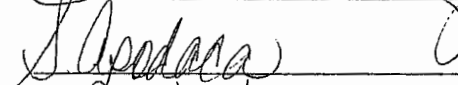
3.) Jeanette Lovato



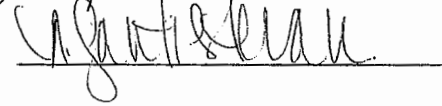
4.) Carmen Ortiz



5.) Stephanie Apodaca



6.) Ashley Santistevan



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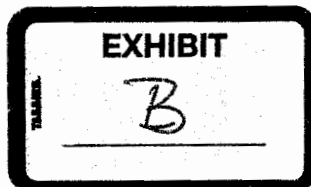
CITY OF ALBUQUERQUE, MARTIN CHAVEZ,  
Mayor, JAMES LEWIS, Chief Administrative Officer,  
PETER BEHRMAN, Transit Department Director,

Defendants.

**Affidavit of Shelley Mund**

**County of Bernalillo )**  
**) ss.**  
**State of New Mexico )**

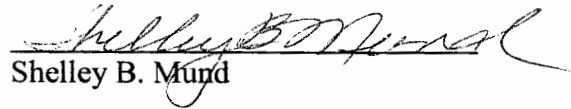
1. I am over the age of 18, have personal knowledge of the matters stated herein,  
and am an attorney licensed to practice law in the State of New Mexico.
2. I am employed as an Assistant City Attorney for the City of Albuquerque,  
New Mexico.
3. On September 27, 2006, I attended a meeting of the City of Albuquerque  
Personnel Board for the purposes of representing the City's Aviation  
Department in a matter before the Board (PB-06-17, Floyd Garcia).



4. Mr. Livingston was representing a client against the City in the September 27, 2006 Personnel Board hearing.
5. During the public comment portion of the Board's agenda, Mr. Livingston addressed the Board.
6. As the Board was publicly discussing an issue raised in the proceedings, Mr. Livingston got up from the audience and approached the Board, at which time he handed a handwritten note to Personnel Board member Jesse Lopez.
7. I called the passing of the note to the attention of the Board's Chair, Mr. Sean Olivas, and requested that the contents of the note be made public.
8. Chairman Olivas asked Mr. Lopez to disclose the contents of the note as part of the public record.
9. Mr. Lopez refused to disclose the contents of the note on the record, and also refused to permit Mr. Olivas to inspect the note.
10. Following Mr. Olivas' request for Mr. Lopez to disclose the contents of the note Mr. Livingston passed to him; Mr. Lopez put the note in his pocket, and immediately left the hearing.
11. Mr. Lopez' departure destroyed the quorum of the Board.
12. Having no quorum, the Board was forced to adjourn that hearing.
13. As a result, the Board heard no cases on that day, including the matter I was representing the City in (PB-06-17).
14. Mr. Lopez subsequently refused to disclose the contents of the note, and refused to provide a copy of the note to the Board for inclusion in the public records of the Board.

15. On October 16, 2006 Mr. Lopez resigned from the Personnel Board.
16. The Floyd Garcia matter (PB-06-17), which was originally set for hearing before the Personnel Board on September 26, 2006 was not heard by the Personnel Board until January 5, 2007.

**FURTHER AFFIANT SAITH NAUGHT.**

  
Shelley B. Mund

Subscribed and sworn to before me on this 26th Day of October, 2007 by  
Shelley B. Mund.

  
NOTARY PUBLIC

My commission expires:

6-21-2010