

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

**No. CV-2003-2215**

**NEW MEXICO TRANSPORTATION UNION, et al.,**

**Plaintiffs,**

**vs.**

**CITY OF ALBUQUERQUE, et al.,**

**Defendants,**

**UNION'S REPLY TO CITY'S RESPONSE TO  
MOTION TO ENFORCE SETTLEMENT AGREEMENT  
AND COURT ORDER ON MERIT SYSTEM ISSUES**

Plaintiffs New Mexico Transportation Union (NMTU), on behalf of Transit Department bargaining unit employees, have reopened the case, asking the Court to enforce the Court's September 6, 2005, Order and the September, 2005, Settlement Agreement in this case. The City's Response admits, but vainly attempts to excuse, its violations of the Court's Order and the Settlement Agreement:

**1. The Court Order:**

In their Motion to Enforce Settlement Agreement and Court Order, Plaintiffs cited the Court's September 6, 2005, Order, requiring that

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.”

## **2. The Settlement Agreement**

In the Motion to Enforce, Plaintiffs referred to the Settlement Agreement the City agreed to just prior to a scheduled trial in 2005. In that agreement the City agreed to:

1) comply with the Merit System Ordinance’s requirement of at least annual performance evaluations for classified employees; 2) engage in mediation in good faith and subject to certain conditions; 3) maintain a Personnel Board whose members have staggered terms and select a Chairperson each September; 4) 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 5) “commit the necessary resources and personnel to ensure that the Merit System functions without compromise or violation of the applicable ordinances, rules, and policies.”

Plaintiffs’ Motion to Enforce, at p. 2.

## **3. The City’s Response to Plaintiffs’ Motion to Enforce**

Disregarding the Court Order that it has violated, the City responds that it “has not breached the Settlement Agreement regarding the Personnel Board Members and terms.” This is untrue, as both the Court Order and the Settlement Agreement require, as does the City’s Merit System Ordinance, that as of September 1, 2006, “staggered terms of Personnel Board members will be implemented as required by the Merit

System Ordinance.” The City concedes that this year an election was held on October 23, 2007, several weeks after Plaintiffs filed this Motion to Enforce the Settlement Agreement. As reasons for not holding the election prior to September 1 as required by the Ordinance and the Court’s Order, the City now cites the death of the former City Clerk, and “the reorganization and absorption of the Boards and Commissions office into Office of Administrative Hearings, claiming that the:

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.

City’s Response, at p. 2. Heaping one excuse for non-compliance with the Settlement Agreement and the Court’s Order on other excuses, the City’s woefully inadequate Response to Plaintiffs’ Motion to Enforce is that:

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. . . . 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.

City's Response, at pp. 2, 3.

The City contends that its violations of the Court's Order reflect "at worst missed deadlines" and "late" hearing officer contracts but are "intended to achieve many of the goals Plaintiffs claim to want." The City erroneously states that based on its explanation of why it is "late" or otherwise non-compliant, "Plaintiffs complaints have already become moot as to the Personnel Board, and very soon will be as to the hearing officers."

Remarkably, the City's response fails to address its other violations of the Court's Order (and the Settlement Agreement) relating to the Personnel Board, 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." In fact, as of the Board's last meeting, November 14, 2007, the Board had at least three members who have already served "two consecutive terms." One Board Member has not attended any Board meetings in at least the past four months, yet she has not been replaced. And of course, the Personnel Board did not meet in September, and has not yet met this year "to choose a fifth member who shall be the Board's chairperson."

With respect to Performance Evaluations, the City claimed that:

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.

City's Response, at p. 5. Of course, no such information has been provided to the Court or to counsel for Plaintiffs. Plaintiffs have awaited the City's information on performance evaluations, but none has been received.

Instead of responsibly (or responsively) addressing its failures to comply with the Court's Order and the Settlement Agreement, the City crudely attempts to place blame for its own misconduct on Plaintiffs' counsel, falsely accusing him of "sabotage and subversion of the very process he poses as upholding," making scandalous and untruthful allegations against him. See, City's Response, at pp. 3, 4 and Affidavit of Assistant City Attorney Shelley Mund. These allegations are untrue, misleading, insulting, and irrelevant and should be ignored and stricken.

Under the heading of "Standing," the City complains that "no individually named Plaintiff appears in the caption" of Plaintiffs' Motion and states that "the City would appreciate some clarification in this regard." Actually, not only has the name of the Chairman of the New Mexico Transportation Union changed since the case was closed in 2005, but the names of two of the Defendants have changed as well. The present Chairman of the NMTU is Fred Garcia (replacing Robert Gutierrez), the present Chief Administrative Officer is now Bruce Perlman (replacing James Lewis), and the present

Transit Department Director is Greg Payne (replacing Peter Behrman). The City's counsel is well-aware of these changes and presumably will not object to Plaintiffs' further amendment and supplementation of the Amended Complaint now that the case has been reopened to reflect these and other changes.

**4. Conclusion**

The City's response is to Plaintiffs' Motion to Enforce is inadequate and incompetent. The Court is respectfully requested to grant the relief requested by Plaintiffs so as to ensure compliance with the due process and other provisions of the law, the Court's September 6, 2005, Order, and the Settlement Agreement between the parties.

Respectfully submitted,

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I hereby certify that I faxed and/or e-mailed the foregoing Reply to Assistant City Attorneys Michael I. Garcia and Robert Kidd before 8:00 a.m. on November 15, 2007.

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Paul Livingston