

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

ENDORSED
FILED IN MY OFFICE THIS

01 2010

Quemita M. Durand
CLERK DISTRICT COURT

9 "E-SERIES" SUPERVISORS:
SAM AGUILAR, MICHAEL E. BARRERAS,
WILLIAM E. BUSCHARDT, STEPHEN
CHACON, FRANK R. GONZALES,
JIMMY PADILLA, ARTHUR SILVA,
GENARO TAFOYA, and ABIE J. TRUJILLO,

CV 2010-13598

and

A CLASS OF SIMILARLY SITUATED
CITY EMPLOYEES,

Plaintiffs,

vs.

CITY OF ALBUQUERQUE,

and

AFSCME, LOCAL 3022, and
ANDREW PADILLA, President,

Defendants.

**COMPLAINT FOR DECLARATORY, INJUNCTIVE,
EQUITABLE, AND CLASS ACTION RELIEF**

Plaintiffs are nine present and former Solid Waste Management Department (SWMD) supervisors, and a class of similarly situated misclassified employees, who state for their Complaint and as grounds therefore:

1. When the Plaintiffs were hired, the City hired them as M-Series (management) employees.

2. Several years ago, without notice to the employees, the City re-classified each of the Plaintiffs into an “exempt” E-Series classification, leaving them without bargaining unit rights or benefits.

3. When they learned they had been reclassified into the E-Series, some of the Plaintiffs and other employees contacted AFSCME, Local 3022. The AFSCME representatives promised that Local 3022 would secure their “accretion” back into the supervisors (M-Series) bargaining unit.

4. Although Plaintiffs attended some Labor Board meetings at which the subject of their “accretion” was discussed, Plaintiffs were not allowed to participate in the discussions.

5. Agendas for Labor Board meetings and hearings on October 14, 2008, June 15, 2009, September 21, 2009, October 13, 2009, November 10, 2009, and December 8, 2009, included Labor Board cases apparently concerning Plaintiffs’ bargaining unit classification.

6. The Agenda for the June 15, 2009, City Labor Board meeting lists, under the heading “PRETRIAL MOTION/CONFERENCE:”

Consolidated Cases **LB-08-43/LB-08-03**/Clarification Petition AFSCME Local 3022 Bargaining Unit: **LB-08-43**, Clarification Petition of AFSCME Local 3022 Bargaining Unit, Article 2 of the Labor Management Relations Ordinance Section 302-8 Determination of Bargaining Units, **LB-08-03**, E-14 Supervisors Move into the Management Union (AFSCME 3022), Clarification Petition AFSCME Local 3022 Bargaining Unit.

7. Throughout the scheduling and rescheduling of the hearing, and then throughout the reaching of a purported “agreement” and subsequent contract “negotiations” with the City, no one with either the AFSCME union or the City management contacted Plaintiffs about their employment classification status.

8. After the December 8, 2009, Labor Board meeting Plaintiffs discovered that without the Supervisors' knowledge the AFSCME union had entered into an agreement whereby Plaintiffs would be restored to the M-Series bargaining unit, but without any payment of back wages and without alteration of their pay or other benefits.

9. A copy of the "Settlement Agreement and Release in Full Between Local 3022 - AFSCME Copuncil 18 and the City of Albuquerque, in the Matter Concerning Bargaining Unit Accretions AFSCME Local 3022" is attached hereto as EXHIBIT 1.

10. In the Settlement Agreement, Local 3022 purports to represent "All Solid Waste Supervisors." According to its terms the Agreement "constitutes full and final settlement of any and all claims, disputes and grievances that may be currently filed or future lawsuits regarding this matter." The settlement "will result in Local 3022 withdrawing any complaints/petitions filed with the City of Albuquerque Labor Board" and the "Parties agree that this settlement shall be final and binding upon the parties, and shall not create precedent or past practice."

11. The Agreement provides that:

All solid Waste Supervisors that have the "E" designation shall be removed from their classification and be replaced with an "M" designation, effectively accreting these employees into the Local 3022 bargaining unit.

and

The parties agree that this movement shall not create a cost to either party but merely include the individuals into the Bargaining Unit and provide them with all contractual non-economic benefits. It is understood that this will create a separate pay schedule within the current M-Series Bargaining Unit.

12. The Agreement indicates that it was "filed with (Labor) Board in open meeting, 12/8/09."

13. On August 9, 2010, the City of Albuquerque and Local 3022, AFSCME, Council 18, AFL-CIO, signed a new Collective Bargaining Agreement (CBA) covering July 3, 2010 to June 30, 2011.

14. The new CBA failed to include any provision (or pay scale) for inclusion of the E-Series Supervisors in the M-Series Collective Bargaining Unit.

15. As supervisors, Plaintiffs perform exactly the same duties as M-Series supervisors.

16. Plaintiffs do not agree to the “settlement” of their case without their knowledge so as to deny them any economic relief or recovery for their mis-classification and to continue the disparate pay scale established previously.

17. The City’s Labor-Management Relations Ordinance provides that “employees have the right to form, join and otherwise participate in the activities of an employee organization of their own choosing for the purpose of bargaining collectively with the city government.” Sec. 3-2-4, LMRO.

18. The City’s LMRO provides that it is a prohibited practice to interfere with, restrain, or coerce city employees in the exercise of their rights and to discriminate in regards to conditions of employment so as to encourage or discourage membership in a union. Sec. 3-2-9(A)(1) and (3), LMRO.

19. On September 8, 2010, Plaintiffs submitted a Complaint of Prohibited Labor Practices to the City’s Labor-Management Relations Board.

20. Plaintiffs received a response, dated September 27, 2010, from the City’s Chief Administrative Hearing Officer, Roberto Albertorio, stating that Plaintiffs’ Prohibited Practice

Complaint, Case No. LB-10-22, “will be forwarded to the Labor Relations Board for review and scheduling. You will be notified of the date and time of the hearing.”

21. The Labor Board is required to schedule a hearing within 10 days of the response to a prohibited practice complaint. The City has not responded to Plaintiffs’ Complaint, nor has the City’s Labor-Management Board scheduled a hearing.

22. In fact, the City’s Labor Board has not held any meeting or hearing since early January, 2010.

23. Under its Labor-Management Relations Ordinance, the City is required to have and maintain “an effective system of provisions that permits employees to form, join or assist any labor organization for the purpose of collective bargaining through exclusive representatives.”

24. Even before the demise of the City’s Labor-Relations Board, the Board was arbitrarily and only sporadically applying and enforcing the City’s Labor-Management Relations Ordinance.

25. In this case, the City and the supervisors’ union, AFSCME, Local 3022, collusively entered into an agreement, the terms of which have not been fully disclosed, after repeated delays of the scheduled public hearing(s), without the employees’ knowledge, and against the best interests of Plaintiffs and other similarly-situated employees.

26. The negotiation and bargaining in this case, if any, took place outside the normal course of collective bargaining, failed to represent Plaintiffs’ interests, and was not subject to oversight, scrutiny or administration by a functioning Labor Board. Nor, without a Labor Board, was there any City forum for objections to the acts, omissions, and violations of the law by the City and AFSCME, Local 3022.

27. Neither the City nor the AFSCME Defendants have publicly disclosed the fact, nature, or extent of their discussions and “negotiations” that resulted in the Contract that again excluded Plaintiffs from representation by the Union.

28. Neither the City nor the AFSCME Defendants have publicly disclosed or objected to the City’s failure to maintain a Labor Board and, to the contrary, have continued their so-called “negotiations” as if the Labor Board were presently functioning, without making any effort to restore the Labor Board.

29. As a proximate result of Defendants’ acts and omissions, Plaintiffs have been damaged and are entitled to equitable, declaratory, and injunctive relief.

CONSEQUENTLY, Plaintiffs state the following claims for relief:

COUNT 1

INJUNCTIVE RELIEF

30. Plaintiffs have attempted unsuccessfully, over an extended period of time, to secure relief from their classification as E-Series employees.

31. The City’s Labor-Management Relations Board oversees the administration of the Labor-Management Ordinance and governs collective bargaining with the city.

32. The Labor Board is comprised of three appointees – a “labor” appointee, a “management” appointee appointed by the Mayor, and a “neutral” chairperson selected by the other two Board members. Sec. 3-2-14(A)-(C). R.O..

33. Since the termination of the Labor Board Chairman and the resignations or removal of the other two Board members in early January, 2010, new “Labor” and “Management” appointees have been named, but there has not been either any meeting or any publicly disclosed activity concerning the selection of a neutral chairperson for the Labor Board.

34. Defendants have a mandatory, non-discretionary duty to comply with the provisions of the City Ordinances and Rules and Regulations requiring the City to establish and maintain a City Labor Board to oversee administration of the Labor-Management Relations Ordinance.

35. 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 labor relations system.

36. Without issuance of a writ of manamus or other injunctive order the City will continue to refuse or delay compliance with the law and will continue to operate the City government without a valid or effective Labor Board or labor-management relations system.

37. 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.

COUNT 2

DECLARATORY RELIEF

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

39. 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.

40. The State of New Mexico has a Public Employee Bargaining Act (PEBA) that provides for exemptions from the PEBA, and from regulation by the Public Employee Labor

Relations Board (PELRB), for public employers that adopted “a system of provisions and procedures” allowing employees to join and participate in unions prior to October 1, 1991.

41. To be eligible for exemption from the State labor law, the public employer must have kept its labor relations system in effect without substantial change.

42. The City of Albuquerque substantially changed its labor relations system when it amended the Ordinance to include a Guidelines Committee process and to require City Council review and approval of multi-year and over-budget collective bargaining agreements.

43. By failing to maintain an effective Labor Board, and by engaging in closed-door secret “negotiations” outside the normal course of collective bargaining, the City has violated its own Ordinance and the rights of City employees and the public.

44. AFSCME, Local 3022, is the union that represents supervisors; Local 3022 considered Plaintiffs to have been wrongly excluded from their bargaining unit and denied union representation. Nonetheless, Local 3022 wrongfully “settled” Plaintiffs’ case (and purported to dismiss their prior Labor Board Complaints) without Plaintiffs’ knowledge and without providing any benefit to the Plaintiffs.

45. The application and enforcement of the Albuquerque Labor-Management Relations Ordinance are matters of substantial concern to public employees and of concern and importance to the public; this 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 3

CLASS ACTION RELIEF

46. Each and every preceding allegation is incorporated herein.

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

48. The class that Plaintiffs seek to represent in this action consists of all classified City employees mis-classified as E-Series and for that reason or any other reason denied the classification and right to union representation enjoyed by other, non-E-Series, employees.

49. 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.

50. 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.

51. 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.

52. 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.

53. 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 4

EQUITABLE RELIEF

54. Each and every preceding allegation is incorporated herein.

55. Plaintiffs are entitled to be treated fairly, equitably, and in accordance with law; when they believe they are not being treated fairly and equitably on labor and contract issues they are entitled to an opportunity to be heard before a neutral City Labor Board in accordance with the law and the City's ordinances and rules.

56. The City and the Union have failed to comply with their fundamental obligations to allow its employees to have effective union representation in grievance and contract negotiation matters.

57. In their acts and omissions described herein, the City and the Union have failed to allow Plaintiffs to have union representation, have failed to represent Plaintiffs' interests, and have failed to treat Plaintiffs consistently with other City employees.

58. Plaintiffs are entitled to equitable relief, including reclassification into the M-Series and equal and additional pay and benefits resulting from the City's failure to properly classify Plaintiffs as M-Series employees.

59. The City is liable to Plaintiffs for damages proximately caused by the City's unfair and prohibited labor practices, denials of due process rights to be heard and to equal protection, and breach of City agreements, rules, regulations, and ordinances.

60. Local 3022 is liable to Plaintiffs for damages proximately caused by the union's failure and refusal to represent Plaintiffs' interests before the City Labor Board, and its subsequent and consequent breach of its representational duties and the employees' rights.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray they be awarded declaratory, injunctive, equitable, and class action relief, including orders requiring the Defendants to:

- A.) Reestablish and maintain an effective Labor Board to oversee the labor relations ordinance or submit to the jurisdiction of the State Public Employees Bargaining Act and the State Public Employees' Labor Relations Board over City labor disputes and determinations;
- B.) Properly classify Plaintiffs and others similarly situated to secure, absent any good reason why not, union representation and the rights of represented employees rather than unreasonable exclusion from such representation;
- C.) Restore Plaintiffs and others similarly situated to the lost wages, seniority, and other pay, benefits, and rights lost because the City and the Union arbitrarily excluded them from the supervisors' bargaining unit;
- D.) Declare the Collective Bargaining Agreement between the City and AFSCME, Local 3022, null and void; and
- E.) Award such costs, fees, and other relief as the Court deems just.

Respectfully submitted,

s/ Paul Livingston

Paul Livingston
Attorney for Plaintiffs
P.O. Box 250
Placitas, NM 87043
(505) 771-4000

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

9 “E-SERIES” SUPERVISORS, et al.,

Plaintiffs,

vs.

CITY OF ALBUQUERQUE,

and

AFSCME, LOCAL 3022, et al.,

Defendants.

6-PERSON JURY TRIAL DEMAND

Plaintiffs hereby move for a trial by a jury of six persons of all issues that may be properly tried to a jury.

Respectfully submitted,

s/ Paul Livingston

Paul Livingston
Attorney for Plaintiffs
P.O. Box 250
Placitas, NM 87043
(505) 771-4000

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

9 “E-SERIES” SUPERVISORS, et al.,

Plaintiffs,

vs.

CITY OF ALBUQUERQUE,

and

AFSCME, LOCAL 3022, et al.,

Defendants.

CERTIFICATION OF NON-ARBITRABILITY

Plaintiffs are seeking relief in addition to and other than a money judgment.

Accordingly, this case is not appropriate for referral to mandatory court-ordered arbitration.

Respectfully submitted,

s/ Paul Livingston

Paul Livingston
Attorney for Plaintiffs
P.O. Box 250
Placitas, NM 87043
(505) 771-4000