

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

**ENDORSED
FILED IN MY OFFICE THIS**

No. CV-2003-2215

AUG 29 2005

NEW MEXICO TRANSPORTATION UNION, et al.,

Quanita M. Swan
CLERK DISTRICT COURT

Plaintiffs,

vs.

CITY OF ALBUQUERQUE, et al.,

Defendants,

**MEMORANDUM IN SUPPORT OF MOTION FOR
DEFAULT JUDGMENT PURSUANT TO RULES 1-037(B) AND 1-037(D)**

Plaintiffs, the labor union representing Albuquerque bus and van drivers, members of the bargaining unit represented by the Union, and its Chairman, present the following Memorandum in Support of their Motion for an Order to holding Defendants in Default and finding them in contempt of Court (or in the alternative, for an Order requiring Defendants to Show Cause why they should not be held in default and in contempt of Court) pursuant to Rule 1-037(B) and (D) of the New Mexico Rules of Civil Procedure.

The City Charter, the Merit System Ordinance, the City's Personnel Rules and Regulations, and Collective Bargaining Agreements establish the terms of the City's merit system of personnel management. The issues are of critical importance to City employees, whose employment is governed by the terms of the merit system. Whereas

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hiring, promotions, and disciplinary actions are supposed to be based on “merit,” “ability,” and “performance,” Plaintiffs charged the City with violating the laws and, in the absence of a merit system, making arbitrary, discriminatory, and erroneous employment decisions all to the detriment of the Plaintiffs, other City employees, and the public.

The deadline for completion of pre-trial discovery was July 1, 2005, and trial was scheduled for September 6 and September 7, 2005. Plaintiffs’ counsel delivered two sets of Interrogatories, one to the City and one to City Chief Administrative Officer James Lewis, and a set of Requests for Production to Deputy City Attorney Randy Autio on May 27, 2005. Pursuant to the Rules of Civil Procedure, Defendants’ responses to Plaintiffs’ discovery requests were due 30 days later, on or before June 27, 2005.

Inexplicably and without any excuse (or request for extension), the City Defendants failed to file any responses to Plaintiffs’ discovery requests, and on July 5, 2005, Plaintiffs filed a motion to compel and for sanctions pursuant to Rule 37(D), N.M. R. Civ. Proc. On July 12, 2005, at a hearing on another matter, the Court ordered Defendants to respond to Plaintiffs’ discovery requests no later than July 18, 2005. The written Order resulting from the July 12, 2005, hearing stated that “Plaintiffs’ motion to compel . . . is granted and defendants are compelled to provide responses to plaintiffs’ discovery requests on or before July 18, 2005.”

On July 18, Defendants submitted their discovery responses to Plaintiffs. The responses were incomplete, misleading, evasive, and untruthful. On August 3, 2005, the

Court heard Plaintiff's Motion to Compel. At that time the Court again ordered Defendants to respond fully to Plaintiffs' discovery requests no later than August 5, 2005.

Defendants' August 5, 2005, discovery supplementation added very little meaningful information and produced few additional documents responsive to Plaintiffs' discovery requests. Copies of the City's supplemented discovery responses are attached: the City's First Supplemental Answers to Plaintiffs' Interrogatories are EXHIBIT 1; James Lewis' First Supplemental Answers to Plaintiffs' Interrogatories are EXHIBIT 2; and the City's First Supplemental Answers to Plaintiffs' Requests for Production are EXHIBIT 3. None of the City's responses were verified.

Failure to Comply With Order Compelling Responses

Rule 1-037(B)(2) provides that when a party fails to comply with an order compelling answers to interrogatories and responses to requests for production:

the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

- (a) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
- (c) an order . . . rendering a judgment by default against the disobedient party;

(d) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders . . .

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Failure to Respond to Discovery Requests

Rule 1-037 (D) provides that:

If a party . . . fails (2) to serve answers or objections to interrogatories submitted under Rule 1-033 NMRA, after proper service of the interrogatories; or (3) to serve a written response to a request for inspection submitted under Rule 1-034 NMRA, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Subparagraphs (a), (b) and (c) of Subparagraph (2) of Paragraph B of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure . . .

The relief set out in Rule 1-037(D), referred to above, includes

(a) an order that the matters addressed in the interrogatories and requests for production: shall be taken to be established for the purposes of the action in accordance with the claims of the party obtaining the order;

(b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(c) an order . . . rendering a judgment in default against the disobedient party.

Defendants have violated both Rule 1-037(B) and Rule 1-037(D) by initially failing to respond to Plaintiffs' discovery requests without excuse or justification, and by twice failing to adequately respond to discovery requests when ordered to do so by the Court. Additionally, in New Mexico, misleading, evasive, and untruthful responses are considered to be the same as (or worse than) no response at all.

Examples of City "Responses"

For an example of the evasive and misleading responses by the City Defendants, the initial response of James Lewis to Interrogatory No. 1 clearly demonstrates the Defendants' reluctance and refusal to provide clear and complete responses. Interrogatory No. 1 asked Mr. Lewis to:

Please state when and how you became aware that there was any problem or concern about a) the administration of the Merit System Ordinance; b) the maintenance of an active Personnel Board; c) the requirement of referrals to the Mediation Coordinator; d) the hiring or appointment of a person to administer the merit system, or e) the provision of annual performance evaluations for City employees.

EXHIBIT 2, page 2. With respect to each issue, Plaintiffs asked Mr. Lewis to "describe fully what information you had or were made aware of . . . identify the person(s) bringing the matter(s) to your attention, if any, give the dates, state the specific concerns brought to your attention, and identify any documents, records, or communications addressing these matters."

In his response to that question, Mr. Lewis stated that: "There has not been a problem or concern about merit system ordinance, personnel board, mediation coordina-

tor, or annual performance evaluations . . . that Defendant Lewis is aware of, other than this lawsuit.” Id.

This blanket denial by Mr. Lewis is then contradicted generally in his Supplemental Responses, where he claims that the merit system ordinance “has been generally discussed;” the personnel board “has been discussed;” and “I have been made aware of some concerns about the mediation coordinator and I have referred those concerns to Ms. Watson or Mr. Autio.” The absence and avoidance of any responses to the Plaintiffs’ specific questions about dates, identification of persons, and identification of documents, records, or communications is obvious. Id.

In Interrogatory No. 2, Plaintiffs asked Mr. Lewis to:

Please state fully what knowledge or information you now have about the City’s failure to conduct annual performance evaluations. Please explain and include in your response your understanding of the seriousness and extent of the problem, the legality, illegality, or propriety of failing to conduct annual performance evaluations, your knowledge about the departments where the problem is especially extreme, and your understanding, knowledge, and recollection of prior actions and proposals for eliminating the problem by you or your predecessors.

In his initial Response, Mr. Lewis said only that “There has not been an issue about annual performance evaluations since Defendant Lewis’ appointment as Chief Administrative Officer that Defendant Lewis is aware of, except this lawsuit. In Supplemental Response, Mr. Lewis adds only, “See response to no. 1, above.” EXHIBIT 2, page 3.

Nor is the “annual performance evaluation” issue the only one on which the City refuses to disclose information and demonstrates willful neglect. In March, 2002,

Second Judicial District Judge Theresa Baca issued a Writ of Mandamus, ordering the City to comply with its mandatory, non-discretionary duties with respect to maintaining its Personnel Board. The City was ordered to “ensure that the Board members properly establish staggered terms so that the term of one mayoral appointee and one elected member, to be chosen by lot, will expire on September 1, 2002; the terms of the other three Board members will expire in September 1, 2003.”

Plaintiffs asked Mr. Lewis to “state and discuss your knowledge of the Writ of Mandamus issued on March 8, 2002, ordering the City to promptly reestablish its Personnel Board,” and asking Mr. Lewis to provide “documentary and evidentiary support for the contention that the City has ‘properly selected and appointed Personnel board members’ and Chairpersons between January 1, 1998, and the present.” Mr. Lewis’ response was that “(t)he Writ of Mandamus was issued prior to my becoming CAO and I have no knowledge of the Writ of Mandamus except for its content itself.”

EXHIBIT 2, page 12.

Mr. Lewis’ surprising Supplemental Response, now that he has spoken with the City Attorney about it, is that “I have been briefed on the issues in the Writ of Mandamus.” Id. On September 1, 2005, the terms of three Board members expire. Yet, apparently no City official knows anything about the Writ, which was designed to ensure that there would be a Personnel Board with staggered two-year terms. Securing that Writ

of Mandamus took substantial effort on the part of Plaintiffs' counsel and the Court, yet the City contemptuously ignores it.

In addition to not providing proper responses to interrogatories, the City Defendants failed to produce even a small fraction of the documents requested by Plaintiffs in their Requests for Production of Documents. Request after request was denied, improperly objected to, or evaded. For example, Plaintiffs asked for "records of referrals to the Mediation Coordinator for any Transit Department employee suspended for more than five days, demoted, or terminated . . ." The City's evasive response was "Upon a production of a list of names, the City's Mediation Program can indicate if an individual from the list was referred for mediation. . . All other information is confidential."

And for yet another example of the City's stubborn denial of its obligations under the law, Plaintiffs requested "Notes, research results, letters, memos, and legal opinions concerning performance evaluations and mediation referrals of disciplined City Transit Department employees . . ." (Request No. 8). The City's remarkable initial and supplemental response was:

Objection. Statements of opinion regarding personnel are protected from production under the Public Records Act.

Upon a production of a list of names, the City's Mediation Program can indicate if an individual from the list was referred for mediation. The ADR Division can also state whether or not mediation occurred. All other information is confidential.

After a diligent search, records to respond to this request could not be located. If any are located, this request will be supplemented.

It is impossible to know which personnel files, if any, contain this information without going through each of the approximately 500 Transit Department employees' files.

EXHIBIT 3, page 4. (Note, all pages in the City's Responses are numbered "5") Thus, in this one response the City 1) improperly "objected" after the deadline for its responses had long passed, 2) made false and evasive statements about the "Public Records Act" and "confidentiality," 3) tried to put the burden on Plaintiffs to produce "a list of names" before it would disclose any information, 4) falsely claimed to have engaged in "a diligent search," 5) untruthfully claimed it was "impossible" to find the requested documents, and 6) failed to produce even one document in response to Plaintiffs' request.

The same kind of incomplete, evasive, deceitful responses are given by the City Defendants with regard to many of the interrogatories and requests for production and to each of the subjects of this lawsuit, including referrals to mediation, make-up of the Personnel Board, appointment of Hearing Officers, performance evaluations, compliance with the Open Meetings Act, and so on and on. The City's, the Chief Administrative Officer's, and their attorneys' failures and refusals and false declarations of inability to make responsive and meaningful replies to Plaintiffs' interrogatories and discovery requests not only show their plain disregard and contempt for the discovery rules and orders of the Court, but they also demonstrate these Defendants' neglect of the merit system of personnel management which is at the heart of the Plaintiffs' contentions in this lawsuit. In other words, not only are Defendants in negligent default of their

discovery obligations, but they are also in gross default on their obligations to the Plaintiffs, other City employees, and the people of the City of Albuquerque, New Mexico.

Authorities Supporting Relief Requested

Rule 37(D) provides that “if a party . . . fails to serve answers or objections to interrogatories . . . or a written response to a request for inspection . . . the court . . . may take any action authorized under Subparagraphs (a), (b) and (c) of Subparagraph (2) of Paragraph B of this rule.” This includes the sanction of judgment against the party that ignored its discovery obligations. The rule explicitly provides that a complaint may be dismissed (or judgment granted) as a sanction for failing to serve answers or objections to interrogatories. *Bustillos v. Construction Contracting*, 116 N.M. 653; 866 P.2d 401 (Ct. App. 1993).

In *Sandoval v. Martinez*, 109 N.M. 5; 780 P.2d 1152 (Ct. App. 1989) the New Mexico appellate court considered whether the district court had properly dismissed the Plaintiff’s complaint with prejudice because she had lied in answers to interrogatories. The Court applied Rule 1-037(D), which applies to cases in which the responding party fails to respond. In *Sandoval* the Court went a step further than the rule explicitly provides, considering a false response to be “tantamount to no response.” According to the appellate court:

An interrogatory answer that falsely denies the existence of discoverable information is not exactly equivalent to no response. It is *worse* than no response. . .

Sandoval, 109 N.M. at 8-9; 780 P.2d at 1155-56.

Both the City of Albuquerque and Mr. Lewis, the City's Chief Executive officer, have each violated Rule 1-037 three times: first by failing to respond within the time allowed, then by giving false and evasive answers "deny(ing) the existence of discoverable information," and finally by failing to provide full or complete responses when given an opportunity to supplement the prior responses.

The City Defendants' have not even attempted to justify or explain their neglect and deceit. Mr. Lewis' answer, that "there has not been any problem or concern" was intended to remove himself as a source of information and documents. We would hope for more honesty, concern, and sense of ethical responsibility from the City's Chief Administrative Officer and his attorneys. If Mr. Lewis or his counsel thought they could "get away" with such misconduct, then they have displayed a remarkable contempt for the Court and counsel.

A district court can (and should) impose the sanction of judgment in favor of Plaintiffs for such violations of discovery rules and orders under SCRA 1-037(B) when the failure to comply is due to the willfulness, bad faith, or fault of the disobedient party. *Medina v. Foundation Reserve Insurance Company, Inc.*, 117 N.M. 163, 166; 870 P.2d 125, 128 (1994); *citing, United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 202;

629 P.2d 231, 278 (1980). A willful violation occurs “when there is a conscious or intentional failure to comply with the rule’s requirements,” *id.*, as opposed to “involuntary or accidental non-compliance.” *Allred v. Board of Regents of University of New Mexico*, 123 N.M. 545; 943 P.2d 579; citing, *United Nuclear*, 96 N.M. at 202; 629 P.2d at 278. A finding of willfulness may be based on either a willful, intentional, and bad faith attempt to conceal evidence or gross indifference to discovery obligations. *Id.*; also citing, *Lopez v. Wal-Mart Stores, Inc.*, 108 N.M. 259, 261; 771 P.2d 192, 194 (Ct. App. 1989)

New Mexico courts have emphasized that the most severe sanctions may be invoked “whether the deceitful party acted willfully, in bad faith, or in ‘callous disregard for its [discovery] responsibilities.’” *Reed v. Furr’s Supermarkets*, 129 N.M. 639; 11 P.3d 603; 2000 NMCA 91; quoting *Medina*, 117 N.M. at 166-67; 870 P.2d at 128-29. Here, neither the City of Albuquerque and nor its officers can contend that their discovery failures and refusals in this case were “involuntary or accidental.” Nor can they reasonably deny that their misconduct is in “callous disregard for (their) discovery responsibilities.”

When a party demonstrates flagrant bad faith and callous disregard for its responsibilities, the district court is not required to impose lesser sanctions, or even hold a hearing, before imposing the ultimate sanction of dismissal (or default judgment). *United Nuclear*, 96 N.M. at 236, 237, 239; 629 P.2d at 312, 313, 315. That notwith-

standing, Plaintiffs request that the Court continue the trial setting of September 6 and 7, 2005, so as to allow Defendants to use the time previously set aside for the trial to show cause why they should not be sanctioned, and why judgment should not be granted in favor of Plaintiffs, for the City's failures to comply with reasonable discovery requests and the rules and orders of the Court.

The New Mexico Courts have repeatedly emphasized that "when a party has displayed a willful, bad faith approach to discovery, it is not only proper, but imperative, that severe sanctions be imposed to preserve the integrity of the judicial process and the due process rights of the other litigants." *Medina*, 117 N.M. at 166; 870 P.2d at 128; quoting *United Nuclear*, 96 N.M. at 241; 629 P.2d at 317. District courts have a *duty* to enforce compliance with rules of discovery, and they should not shirk from imposition of the sanction of dismissal (or default judgment). *Sandoval*, 109 N.M. at 9; 780 P.2d at 1156.

. . . But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

Sandoval, id.; quoting *National Hockey League v. Metropolitan Hockey Club, Inc.* 427 U.S. 639 (1976).

As the New Mexico Supreme Court plainly stated in *United Nuclear*,

A party cannot approach its obligation to make good faith discovery however it chooses as to certain matters, and at the same time expect to have the case proceed in a normal fashion as to other issues. . .

. . . one whose false response conceals the existence of discoverable information may expect to evade sanctions. It is not enough to say that such a party will gain no advantage if the lie is uncovered. The sanction must be harsh enough that despite the low probability of getting caught, the risk of punishment outweighs the prospect of competitive advantage through lying. . .

96 N.M. at 241; 629 P.2d at 317.

For all the foregoing reasons, especially the willfulness of the City Defendants' misconduct and the obvious incompleteness, superficiality and falseness of the City's discovery responses, the Court should impose the severe sanctions set out in Rule 1-037(B) and (D), granting a default judgment on liability in favor of Plaintiffs and against the City. The City's discovery failures are extensive and serious; the Court's award of sanctions should be no less extensive and serious.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Motion was faxed and/or e-mailed to Assistant City Attorney Michael Garcia on August 29, 2005.

Paul Livingston