

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

No. CV-2003-2215

**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,

PLAINTIFFS' PROPOSED STIPULATIONS

Plaintiffs propose the following stipulations of fact:

1. The City Charter requires the establishment and maintenance of a “merit system governing the hiring, promotion and discharge of employees and providing for the general regulation of employees.” The Charter and Merit System Ordinance establish “efficiency and ability as the applicable standards” for City employees.
2. The City Charter states that it is the duty of the City Council to “preserve a merit system by ordinance.” It is the duty of the Mayor to “(b)e responsible for the administration and protection of the merit system.”

3. It is the duty and responsibility of the Mayor, the Chief Administrative Officer, and other high City officials to "comply with all laws, ordinances, regulations and resolutions of the City and all laws of the State of New Mexico."

4. Chief Administrative Officer James Lewis has served as City Operations Manager since _____ and as Chief Administrative Officer since _____.

5. Since he became Chief Administrative Officer and until August 3, 2005, James Lewis has not been aware of 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.

6. Other than audit report no. 01-125, Defendant James Lewis does not know about any audit or other report or other memoranda, correspondence, communications, or other records concerning the City's Merit System and the validity, integrity, or effectiveness of the City's personnel management processes.

7. Defendant Lewis has reviewed the operations of the City's Personnel Board, the City's Personnel Hearing Officers, and the City's Human Resources Department with respect to the administration and management of the City's system of personnel

management and the Merit System Ordinance and has found that they all appeared to be in compliance. He is not aware of anyone else who has reviewed those matters.

8. Defendant Lewis is not aware of any document, record, memo, correspondence, e-mail, or other communication between, among, to, or from him or anyone in his office or to or from the Mayor or anyone in the Mayor's office concerning the City's Personnel Board, the Merit System Ordinance, or the handling of employee grievances of disciplinary matters since January 1, 1998, except for certain findings of the Personnel Board.

9. James Lewis has not had any contact or communication with Mayor Chavez about problems or concerns over management and operation of the Personnel Board or the City's personnel grievance hearing process.

10. Defendant James Lewis is not aware of any ordinances, rules, regulations, policies, guidelines, instructions or practices concerning the City's Merit System that are being violated, not adhered to, or ignored.

11. Neither James Lewis nor any other City official outside of the Legal Department was aware of the initial Complaint or the filing of the First Amended Complaint in this case seeking "relief for failure to maintain a 'merit system.'"

12. Up to this time, no attempt or inquiry was made nor was any action taken to alleviate any of the problems or concerns addressed in the Complaint and the Amended Complaint in this lawsuit.

Personnel Board

13. The City must establish and maintain “appropriate grievance and appeal procedures for classified employees,” and must provide and maintain “an active personnel board.”

14. The Merit System Ordinance provides for the City Personnel Board to consist of five members, with two members being elected by the employees, two members being appointed by the Mayor, and a fifth member to be selected by the other four. The Personnel Board’s duties include giving advice concerning “the improvement of personnel standards . . . (and) problems concerning personnel administration.”

15. The City’s Merit System Ordinance, Section 3-1-4 provides that:

(A) There shall be a Personnel Board composed of five members. Two members shall be appointed by the Mayor; they shall have significant management or personnel experience. Two members shall be selected by the employees by election and then appointed by the Mayor. The remaining member shall be selected by the other four members. . . . Board members shall serve two-year terms which expire September 1. The terms of the members who are serving when Ordinance 29-1998 was passed shall expire as follows: the term of one mayoral appointee and one elected member, chosen by lot, shall expire September 1, 2000. The terms of the remaining three members shall expire September 1, 2001.

16. None of the Personnel Board members were replaced or reappointed on September 1, 2000; there was no drawing “by lot” to see whose term expired.

17. The terms of the remaining three Personnel Board members expired on September 1, 2001. The Personnel Board membership issue was not resolved in 2001.

18. On March 8, 2002, Second Judicial District Judge Theresa Baca issued a Permanent Writ of Mandamus, ordering the City to promptly reestablish its Personnel Board.

19. The Personnel Board membership issue was not resolved in 2002 or 2003.

20. The “fifth” member of the Personnel Board, Angela Cornell, was selected by only three members of the Personnel Board in an “executive session” of the Board which was not open to the public or concerned employees or their representatives.

21. The Personnel Board has operated, at least up until March, 2005, with fewer than five members.

22. The Personnel Board has operated, at least until May, 2005, without a permanent Chairperson. Instead, at each meeting of the Board, an “interim” Chairperson was selected.

23. The City has established a policy allowing Personnel Board members to “serve until replaced.”

24. James Lewis is not aware of any instance in which the time frame for appointment and replacement of Personnel Board members was not followed.

25. James Lewis has no knowledge of the Writ of Mandamus issued on March 8, 2002, ordering the City to promptly reestablish its Personnel Board.

26. Neither James Lewis nor anyone else is aware of any actions, records, or communications concerning the Writ of Mandamus issued on March 8, 2002.

27. The City has conducted the employee elections for Personnel Board members without regard for an ample field of candidates. On at least three occasions elections were held with the number of candidates being the same as the number of positions available; in other words, one “candidate” “ran” for one position, or two “candidates” were elected to two positions.

28. There is no money set aside in the City’s budget to fund the operations of the City’s Personnel Board.

29. The City Personnel Board is staffed by City employees who work in the City’s Boards and Commissions office.

30. The City Personnel Board is represented by an Assistant City Attorney who is assigned to the Board by the City Attorney. The City Personnel Board does not have an independent attorney.

31. The City Personnel Board is a public body subject to the provisions of the New Mexico Open Meetings Act.

32. The City Personnel Board sometimes addresses and decides matters that are not on the Board’s agenda, thereby denying the public the right to notice and to participate in matters addressed by the Personnel Board.

33. The City has no records or information concerning the Personnel Board’s meetings in closed or “executive” sessions and no City official has considered or

determined whether any such meetings are in violation of the New Mexico Open Meetings Act or the City's Open Meetings Ordinance.

34. On November 20, 2002, Robert Gutierrez and an attorney representing the NMTU advised the Personnel Board and City attorneys of the NMTU's intent to file a lawsuit "enjoining all further disciplinary proceedings at Transit as well as seeking to overturn any discipline that has been imposed in the past year for which there has been no appeal..." if the Union's concerns over the Personnel Board's membership and the Hearing Officers were not acknowledged or resolved.

35. Neither James Lewis nor any other City official was aware that the NMTU's representatives had discussed issues concerning the Merit System with the Personnel Board on November 20, 2002, and no effort or attempt was made, nor was any action taken to correct any of the problems brought to the Personnel Board's attention.

36. By law and pursuant to the March, 2002, writ of mandamus, the Personnel Board members' terms are required to be staggered terms.

37. The terms of three Personnel Board members will expire on September 1, 2005.

38. No plans have been made and no action has been taken to select or re-appoint one Personnel Board member selected by the City administration when that member's term expires on September 1, 2005.

39. No plans have been made and no action has been taken to hold an election to provide for the selection or reappointment of a Personnel Board member to replace or continue the term of the member of the Personnel Board elected by City employees when that member's term expires on September 1, 2005.

40. No plans have been made and no action has been taken to secure a fifth member of the Personnel Board when the present fifth member's term expires on September 1, 2005.

Personnel Hearing Officers

41. The Merit System Ordinance, Section 3-1-26, requires the City to select and contract for a term not to exceed two years with Hearing Officers to hear employee grievances of demotions, suspensions, and terminations. A Hearing Officer may be appointed by the Personnel Board or selected by the parties only when "the city does not have a contract with any Hearing Officer."

42. In the past, the City has not widely advertised or solicited candidates for the Personnel Hearing Officer positions.

43. The City has selected Personnel Hearing Officers from a very small pool of applicants, most of whom have previously served as Personnel Hearing Officers.

44. The City has utilized its purchasing policies, rules, and practices when selecting Personnel Hearing Officers.

45. The Selection Committee that recommends Personnel Hearing Officer candidates to the Chief Administrative Officer meets in closed meetings that are not open to the public or others concerned with the selection of Hearing Officers.

46. Without knowledge of or input from the Plaintiffs, on several occasions the City Attorneys Office has selected a Hearing Officer, Nicole Werkmeister, to hear Transit Department cases even though there were outstanding contracts with Personnel Hearing Officers.

47. Other than what it says in the Merit System Ordinance, Section 3-1-6, Defendant Lewis has no knowledge or information about the City's selection, appointment, and contracting with Personnel Hearing Officers since January 1, 1995. No City official or attorney has expressed any opinion regarding the legality and propriety of the selection process.

48. The Chief Administrative Officer has not been personally involved in the selection process for selecting Personnel Hearing Officers.

49. The hiring of Personnel Hearing Officers is governed under the City's Purchasing Ordinance, Sec. 5-5-10E(c). Under those procedures, the meetings to discuss selection of hearing officers are confidential.

An Officer to Administer the Merit System

50. The City Charter requires that the Mayor shall “with the advice and consent of the Council, hire or appoint the City Attorney, *an officer to administer the merit system*, and all other senior administrative or cabinet level officers”

51. No officer or other person been hired or appointed to administer and oversee the Merit System.

52. The City Charter expressly requires the Mayor to appoint or hire an officer to administer the Merit System.

53. Instead of appointing or hiring a person to administer the Merit System, the Mayor has delegated the responsibility for administering and overseeing the Merit System to the Chief Administrative Officer, James Lewis.

54. Neither James Lewis nor any other City official is aware of any effort to hire or appoint another officer to administer the Merit System.

55. James Lewis does not have the time or resources reasonably necessary to oversee and administer the City's Merit System.

56. The person to whom actual responsibility for administering and overseeing the Merit System is Pat Miller, the Director of Human Resources.

57. Pat Miller does not have the time or resources reasonably necessary to oversee and administer the City's Merit System.

Performance Evaluations

58. The City's Merit System Ordinance, Section 3-1-9 (A) requires the City to establish and maintain "a system to evaluate the work performance of city employees." The performance evaluation system must, pursuant to Section 3-1-9 (B) "to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective

criteria related to the job in question for each employee or position . . .” provide for “(c)ommunication with each employee as to the performance standards and critical elements of the employee’s position;” and give “(a)n opportunity during a specified period of time for the employee to demonstrate an improvement in performance.”

59. The Merit System Ordinance, Section 3-1-9 (C) requires that “(t)he work performance of (every) employee shall be officially evaluated by his or her immediate supervisor(s) at least once a year.”

60. The Transit Department halted systematic annual performance evaluations of employees more than ten years ago.

61. Until August 3, 2005, Defendant James Lewis was not aware of any issue or concern about annual performance evaluations.

62. The City has no records or information about any efforts to reinstate annual individual performance evaluations since January 1, 1995.

63. Although Mr. Lewis is not aware of any violation of the City’s Merit System Ordinance, many other City officials and City attorneys are aware that the City’s failure to provide at least annual performance evaluations to all classified City employees is in direct violation of a provision of the City’s Merit System Ordinance, section 3-1-9 (C).

Mediation Referrals

64. For employees being charged with major disciplinary infractions, the City’s Merit System Ordinance, Section 3-1-23 (C) and Personnel Rules and Regulations, Section 902.2, require “review by the City Employee Mediation Program Coordinator of the

circumstances on which the contemplated action is based in an effort to avoid the discipline.” The consideration of mediation must occur before management can proceed with any contemplated disciplinary action.

65. Section 30-1-23 (C) of the Merit System Ordinance and Rule 902.2 of the City’s Rules and Regulations provide that a supervisor contemplating discipline must refer the matter to the Mediation Program Coordinator prior to compelling the employee to respond to charges at a pre-determination hearing.

66. Section 30-1-23 (C) of the Merit System Ordinance and Rule 902.2 of the City’s Rules and Regulations provide that the disciplinary process may only proceed *after* review and consideration of the matter by the Employee Mediation Program Coordinator.

67. The Transit Department has repeatedly “declined” or refused mediation with employees.

68. Defendant James Lewis has no knowledge or information about City departments or supervisors referring disciplinary cases to the City’s Mediation Coordinator but declining to proceed with mediation.

69. Neither James Lewis nor any other City administrative official was aware of the policies and practices described in the e-mail communication between the Mediation Coordinator and the Transit Department on June 9, 2003.

70. Until now, the City has had a policy that requires that both the supervisor and the employee must agree to mediation before mediation will proceed and the City’s

Mediation Coordinator will only take further steps in a mediation review when the supervisor contemplating the disciplinary action agrees to participate in mediation.

71. The City's Mediation Coordinator and former Deputy City Attorney Judy Kelley formulated the policy of not proceeding with mediation without the agreement of the supervisor or the department contemplating the disciplinary action against an employee.

72. The City's policy concerning refusal to proceed to mediation unless the supervisor or department approve the mediation is an unwritten policy which was never communicated to the City employees or their representatives.

73. The City also has a policy that mediation will not be considered when there is a violence in the workplace issue or a positive drug test. That policy is also unwritten and also was never communicated to City employees or their representatives.

74. For many years, City departments and supervisors ignored the provision in the Merit System Ordinance, section 3-1-23 (C) and the Personnel Rules and Regulations, Section 902.2, requiring "review by the City Employee Mediation Program Coordinator of the circumstances on which the contemplated action is based in an effort to avoid the discipline," and no referrals were made to the Employee Mediation Program Coordinator.

75. After Plaintiffs and their representatives repeatedly brought the provision of the Merit System Ordinance and the Personnel Rules and Regulations requiring review by the Mediation Coordinator to the attention of the Personnel Board, a policy evolved that required the referral but also required the supervisor or department to first "approve" or "agree" to the mediation.

76. Requiring the supervisor's or department's approval or agreement to mediate as a pre-requisite to mediation effectively emasculates the mediation referral requirement in the Merit System Ordinance and the Personnel Rules and Regulations by enabling the person recommending discipline to refuse to mediate.

77. James Lewis took no action and gave no consideration to the Personnel Board's February 16, 2005, letter to him concerning "Review of Grievances by City Employee Mediation Program."

78. The Personnel Board's February 16, 2005, letter to James Lewis asked Mr. Lewis to "remind department directors of . . . procedures for discipline and grievances and encourage them and their employees to follow processes outlined in the Merit System Ordinance, the Personnel Rules and Regulations and Administrative Instruction No. 1-11."

79. Neither James Lewis nor any other City official responded or acknowledged the Personnel Board's February 16, 2005, letter to Mr. Lewis, and neither he nor any other City official took any action concerning the matters addressed to him by the Personnel Board.

Respectfully submitted,

Paul Livingston
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I hereby certify that I faxed and/or e-mailed
a copy of the Plaintiffs' Proposed Stipulations
of fact to Assistant City Attorney Mike Garcia,
on August 10, 2005.

Paul Livingston