

IAFF V. CITY OF ALBUQUERQUE

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**INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS LOCAL 244, DIEGO
ARENCON, ROBERT LUJAN, KENNETH
GOODYEAR, AND AHREN GRIEGO,**

Plaintiffs-Appellants,

v.

**CITY OF ALBUQUERQUE,
ALBUQUERQUE FIRE DEPARTMENT,**

Defendants-Appellees.

No. 33,196

COURT OF APPEALS OF NEW MEXICO

December 10, 2014

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Nan G. Nash,
District Judge

COUNSEL

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Appellants

City of Albuquerque, David Tourek, City Attorney, Rebecca E. Wardlaw, Assistant City
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JUDGES

JAMES J. WECHSLER, Judge. WE CONCUR: MICHAEL D. BUSTAMANTE, Judge,
TIMOTHY L. GARCIA, Judge

AUTHOR: JAMES J. WECHSLER

MEMORANDUM OPINION

WECHSLER, Judge.

{1} Plaintiffs, International Association of Fire Fighters Local 244 (Local 244), Diego Arencon, Robert Lujan, Kenneth Goodyear, and Ahren Griego, appeal the district court's grant of summary judgment to Defendants, City of Albuquerque (the City) and Albuquerque Fire Department. Based on *Albuquerque Police Officers' Ass'n v. City of Albuquerque (APOA)*, 2013-NMCA-110, 314 P.3d 677, *cert denied*, 314 P.3d 962, decided after the district court's judgment in this case, we reverse and remand to the district court.

BACKGROUND

{2} On March 11, 2008, the City and Local 244 entered into a collective bargaining agreement (the CBA) for the three-year period beginning July 1, 2008. The CBA included annual salary increases of 5% beginning July 1, 2008 (FY09), 5% beginning July 1, 2009 (FY10), and 6% beginning July 1, 2010 (FY11). On April 7, 2008, Bruce J. Perlman, the chief administrative officer of the City, forwarded an inter-office memorandum to Brad Winter, the president of the city council, attaching a copy of the CBA and advising that the mayor had executed the multi-year CBA that included "salary compensation increases of 5% in FY09, 5% in FY10 and 6% in FY11" (the executive communication).

{3} The city council approved the executive communication on June 2, 2008. That same day, the City's FY09 budget became effective; it appropriated general revenue funds covering the salaries included in the CBA for FY09. The City's FY10 budget similarly appropriated funds covering the salaries included in the CBA for FY10. For FY11, however, the city council, in view of the economic downturn, did not appropriate funds sufficient to increase salaries in conformance with the CBA. Plaintiffs then filed this action to require the implementation of the CBA pay increase.

{4} The district court dismissed the action on the City's motion that the economic components of the CBA were dependent upon the appropriation and availability of revenue. This Court reversed the dismissal, holding that the complaint was sufficient to allege that the City appropriated or approved funds in 2008, binding the City to its obligation under the CBA. *Int'l Ass'n of Fire Fighters Local 244 v. City of Albuquerque*, No. 31,192, mem. op. (N.M. Ct. App. Aug. 28, 2012) (non-precedential).

{5} On remand, the City moved for summary judgment because "no 'special fund' was appropriated in 2008 to cover FY[11] pay costs" of the CBA. Plaintiffs responded that the City's argument was a "mischaracterization" of their position, that they did not exclusively rely on a "special fund" theory, and that the CBA was a binding and enforceable contract by virtue of the City's actions. The district court granted the City's motion for summary judgment.

{6} Plaintiffs argue on appeal that summary judgment was improper because (1) the city council's approval of the CBA established the CBA as a binding three-year contract,

(2) the City was obligated to invoke the reopening clause of the CBA rather than abrogate the CBA, and (3) there was no evidence that the City did not have sufficient funds to fulfill the CBA. The City counters that Plaintiffs should be estopped from asserting the contract theory it argues on appeal and alternatively that the undisputed material facts and governing law defeat Plaintiffs' contract theories.

ESTOPPEL

{7} We initially address the City's estoppel argument because, if estoppel applies, Plaintiffs' arguments would be precluded. In this argument, the City contends that Plaintiffs originally argued that they based their complaint on the City's having set aside general revenue funds available to appropriate in 2008 to cover the cost of the entire three years of the CBA, that this Court treated Plaintiffs' theory as a "special fund" theory and reversed the district court's dismissal, and that Plaintiffs on remand disavowed having pleaded such a theory. According to the City, Plaintiffs should not now on appeal "be allowed to avoid summary judgment by shifting to a contract theory it previously denied as being relevant to [the] complaint."

{8} "Judicial estoppel prevents a party who has successfully assumed a certain position in judicial proceedings from then assuming an inconsistent position, especially if doing so prejudices a party who had acquiesced in the former position." *Guzman v. Laguna Dev. Corp.*, 2009-NMCA-116, ¶ 12, 147 N. M. 244, 219 P.3d 12 (internal quotation marks and citation omitted). In *Guzman*, the defendants first successfully argued in a claim before the Workers' Compensation Administration that they could not be responsible for workers' compensation benefits because the plaintiffs' decedent was not acting within the course and scope of his employment. *Id.* ¶¶ 11, 13. In defending the subsequent negligence claim, the defendants argued that workers' compensation provided the exclusive remedy because of their negligence and possible reckless conduct. *Id.* ¶¶ 13-14. The positions were inconsistent because, by arguing that the decedent was not acting within the course and scope of his employment, the plaintiffs implicitly denied negligence on the part of the defendants with respect to the decedent's death. *Id.* ¶ 13. This Court noted that the plaintiffs had relied on the defendants' first position by not opposing it in mediation and applied judicial estoppel. *Id.* ¶¶ 14-15.

{9} The circumstances in this appeal are different. Although Plaintiffs appear to have relied exclusively on a "special fund" theory in the previous appeal, on remand, they additionally argued that the CBA was a binding and enforceable contract under the City's Labor Management Relations Ordinance (LMRO), Albuquerque, N.M., Code of Ordinances ch. 2, art. II, § 3-2-18 (2002), on which the City defaulted. The two theories are not inconsistent. Both require that the CBA be a binding and enforceable contract. The difference is the factual requirement for a "special fund" that the City had appropriated all funds in 2008. The City vigorously opposed that there was any enforceable contract; it did not acquiesce in any of Plaintiffs' positions. *Guzman*, 2009-NMCA-116, ¶ 12. Plaintiffs' second theory is merely an additional one, and any prejudice to the City of defending another contract theory on remand was not significant. Moreover, the district court's opinion and order went beyond any "special fund" theory.

{10} Significantly, while this appeal was pending, this Court issued an opinion in *APOA*, 2013-NMCA-110. That case involved a challenge by the Albuquerque Police Officers' Association to a collective bargaining agreement with the city of Albuquerque. The *APOA* plaintiffs had entered into a collective bargaining agreement with the city in 2008 to cover the same three years as in this case. *Id.* ¶ 2. After the city did not include raises for the third fiscal year in the budget, the plaintiffs filed an action alleging that the city council "appropriated the funding to cover the entirety of the annual wage increases through fiscal year 2011, or that sufficient funding was appropriated and available for the [city] to comply with the [collective bargaining agreement] wage increases in fiscal year 2011." *Id.* ¶ 5. The issues in *APOA* were comparable to the issues in this case on remand, further indicating the lack of significant prejudice to the City in this case. We will not apply judicial estoppel in these circumstances. See *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (stating that judicial estoppel is a discretionary doctrine).

ENFORCEABILITY OF THE CBA

{11} We thus turn to the merits of this appeal, which turn on the enforceability of the CBA. We review de novo the district court's grant of summary judgment. *APOA*, 2013-NMCA-110, ¶ 6.

{12} Because of the similarity of its facts and issues, *APOA* is integral to our analysis. In *APOA*, the district court had granted summary judgment to the city because the wage increases proposed in the collective bargaining agreement "were contingent on annual appropriations" of the city council. *Id.* ¶ 5. It determined that there was a genuine issue of material fact concerning the availability of funds but granted summary judgment because there was no such issue concerning the specific appropriation of funds. *Id.*

{13} The plaintiffs challenged this conclusion on appeal, contending that the city council acted in accordance with the LMRO in 2008 by passing "the required resolution to appropriate sufficient funds to cover the entire term of the [collective bargaining agreement] at the time it was entered into and submitted in 2008." *Id.* ¶ 10. The city argued that the city council only appropriated funds for the annual costs of the agreement in each budgeting cycle. *Id.* This Court looked to the significance of the city's actions rather than to the semantics. It held that, under the LMRO, which was referenced in the agreement, the city had adopted a resolution "appropriating funds to cover the economic components of the contract" when approving the agreement in 2008 and that such action "adopted the appropriate resolution" to "cover the economic obligation" for the three-year period. *Id.*

{14} We follow *APOA* in addressing the similar arguments in this case. As stated in *APOA*, under the Public Employee Bargaining Act (PEBA), NMSA 1978, §§ 10-7E-1 to -26 (2003, as amended through 2005), collective bargaining agreements are subject to both the specific appropriation and the availability of funds. *APOA*, 2013-NMCA-110, ¶ 9; see § 10-7E-17(E). The LMRO nevertheless permits the City to enter a collective bargaining agreement "that has fiscal implications over several years." *APOA*, 2013-

NMCA-110, ¶ 11; see Albuquerque, N.M., Ordinance § 3-2-18. In the CBA, the parties agreed that the LMRO would apply to their agreement. The LMRO provides:

Any contract between the city and an employee organization, which contains provisions that result in expenditures greater than the amount, appropriated for wages and benefits in an adopted city budget for the initial fiscal year of the contract or which contains a multi-year commitment shall require the review and approval by the City Council. In order for any contract to be approved by the City Council, the City Council must approve the economic components of the contract through an executive communication and adopt a resolution providing an appropriation or deappropriation or both to cover the cost of the contract. All such contracts shall contain re-opening language for economic items.

Albuquerque, N.M., Ordinance § 3-2-18.

{15} Thus, as contemplated by the LMRO, a multi-year collective bargaining agreement may be approved by the city council if (1) it approves the economic components of the agreement as set forth in an executive communication and (2) adopts a resolution providing an appropriation covering the cost of the agreement.

{16} Based on *APOA*, there is evidence in the summary judgment record that both requirements of the LMRO have been met in this case. As to the first, Plaintiffs attached to their complaint the executive communication that states the salary increases for the three years of the CBA as well as a City memorandum of legislative action, indicating that the executive communication was approved by the city council. This same resolution, approving the cost of the CBA for its three-year period, satisfies the second requirement as well. *APOA*, 2013-NMCA-110, ¶ 10.

{17} As to the second LMRO requirement, the City argues that the cost must be included in a formal appropriation included in the City's annual budget appropriation resolution. However, *APOA* concluded otherwise. Based on the mutual benefits of multi-year collective bargaining agreements, the *APOA* Court held that the city council's adoption of a resolution approving the economic components of the collective bargaining agreement was sufficient to cover the economic obligation of the agreement for the three-year period. *APOA*, 2013-NMCA-110, ¶ 10. The Court observed that the "re-opening" provisions of the collective bargaining agreement provided fiscal protection to the City in the event of budgetary shortfalls. *Id.* ¶ 11. The city council's resolution in this case likewise satisfied the second LMRO requirement for the CBA in this case.

{18} The City also argues in this regard that the city council's actions in 2008 could not create an enforceable contract because it specifically rejected any such commitment in its annual budget resolution. The resolution stated "Nothing herein shall be construed to constitute a ratification of any multi-year collective bargaining agreement." However, based on *APOA*, it was the city council's resolution approving the economic components of the CBA that satisfied the requirements of the LMRO. *Id.* ¶ 10. The annual budget resolution was not the operative document, and the subsequent

disclaimer language did not alter the city council's previous approval. The LMRO has no provision allowing the city council to disclaim a binding action it has already taken.

{19} The City additionally argues that *APOA* does not apply to this case because it did not address the prohibition of Article IX, Section 12 of the New Mexico Constitution that prohibits a municipality from committing payments from tax revenues beyond the current year without voter approval. See *Hamilton Test Sys., Inc. v. City of Albuquerque*, 1985-NMSC-075, ¶ 9, 103 N.M. 226, 704 P.2d 1102 (stating that “any agreement by which a municipality obligates itself to pay out of tax revenues, and commits itself beyond revenues for the current fiscal year, falls within the terms of the constitutional debt restriction”). In a related argument, it contends that Plaintiffs’ enforceable contract theory violates the Bateman Act, NMSA 1978, § 6-6-11 (1968), which prohibits a municipality from contracting debts that cannot be paid “out of the money actually collected and belonging to” the same year.

{20} *APOA* did, albeit indirectly, consider the Bateman Act. After noting that the LMRO “does not prohibit the City from adopting a contract that has fiscal implications over several years[,]” the *APOA* Court, citing the Batemen Act, pointed to the ability of the city expressed in the LMRO and the collective bargaining agreement before it that permitted the city to reopen the agreement “to address ‘economic items.’” *APOA*, 2013-NMCA-110, ¶ 11. According to the *APOA* Court, the re-opening provision provided the necessary fiscal protection to the city. See *id.* (“Thus, subject to the [c]ity’s absolute right to reopen the [agreement] for unexpected circumstances that occur, we construe the [c]ity [c]ouncil’s approval and resolution to establish a binding contractual obligation to provide the annual compensation for [the three-year period covered by the agreement].”).

{21} The same is true for Article IX, Section 12 of the New Mexico Constitution. The re-opening requirement of the LMRO, also included within the CBA, provides the City the fiscal protections that preclude the applicability of the constitutional restriction.

{22} Nor do we agree with the City that the record in this case is critically different from the record in *APOA* such that *APOA* is not applicable to this case. In *APOA*, this Court reversed the summary judgment granted to the city, holding that the plaintiffs had “presented evidence that sufficient funds were available to fund all three years of the annual salary increases outlined in the [agreement], and that the [c]ity [c]ouncil adopted the required resolution to appropriate those funds in 2008 when it adopted and approved the [agreement].” 2013-NMCA-110, ¶ 14. The summary judgment record in this case is similar. Plaintiffs provided the affidavit of Dr. Bruce J. Perlman indicating that the same process was followed for all multi-year contracts while he was the City’s chief administrative officer, including 2008 and fiscal year 2009, and the City “agreed to be bound to a three (3) year contract; knew its exact economic terms and conditions; had the money to pay the contract; and placed this contract into the same funding mechanism it places all multi-year contracts” Although the issue of the extent of the City’s approval in 2008 of the CBA may not be the same in this case, according to evidence in the summary judgment record, it nevertheless followed the same

procedures for approving the CBA as it did for the *APOA* agreement. The City's arguments do not lead to a different result.

CONCLUSION

{23} We reverse the district court's summary judgment and remand for further proceedings.

{24} **IT IS SO ORDERED.**

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

TIMOTHY L. GARCIA, Judge