THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CARL JACKSON,	)	
Plaintiff,	)	
v.	)	**Civ. No. 86-1252-M**
	)	*(On Remand)*
CITY OF ALBUQUERQUE,	)	
ORLANDO SEDILLO, and	)	
HENRY "KIKI" SAAVEDRA,	)	
Defendants.	)	

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S SECOND MOTION FOR ORDERS REQUIRING DEFENDANT CITY TO SHOW CAUSE WHY IT SHOULD NOT BE HELD IN CONTEMPT OF COURT

INTRODUCTION

Plaintiff requests a determination by the Court that Defendant's failure to create the MP-07 position (prior to entry of the *contempt order of June 27, 1991*) violated the provision of the original *settlement agreement order* which prohibits retaliation. In the alternative, Plaintiff requests an evidentiary hearing of approximately three hours in which the parties might offer further proof as to the *prima facie* case of retaliation and the articulated reason for not creating the MP-07 position.

Plaintiff also requests a determination by the Court that Defendant's refusal to notify and mandate compliance by its supervisors and employees in a timely manner (after entry of the Contempt Order of June 27, 1991) violated both that *contempt order of June 27, 1991*, as well as the section of the original *settlement agreement order* which prohibits retaliation. In the alternative, Plaintiff requests an evidentiary hearing of approximately three hours in which the parties might offer further proof as to the *prima facie* case of retaliation and the articulated reason for not distributing information as ordered.

For the Court's convenience, the sub-parts of this Reply correspond to the sub-parts in Defendant's Opposition. Because of the construction of certain of the Defendant's legal arguments, a perfect match was not completely possible.

I. ACTS PRIOR TO THE COURT'S ORDER OF JUNE 27, 1991

A. RETALIATION FOR FAILURE TO CREATE THE MP-07 POSITION.

To explain its *reason* for refusing to create the MP-07 position until *after* an order was entered on a finding of contempt, the City asserts two arguments--arguments intended to explain why (having already been found to be in contempt for its violation of the provision in the Court's Order relating to the creation of the MP-07 position) the City should not also be held in contempt for violation of the anti-retaliation provision of that same Order because of its reason(s) for doing that act:

1. Remedial Measures. First, the City again seeks to rely on its *subsequent* compliance with a *subsequent* contempt order--as a means to excuse its reason for the original act of contempt. The City argues, *sub voce*, that the Court should not look to *why* it was in contempt, but, rather, to its compliance after it was caught, held in contempt, and ordered to create the MP-07 position. This argument has already been rejected by this Court in the first phase of the inquiry as to this same act of contempt. At that initial hearing the City sought to argue that after *Plaintiff's First Motion as to Contempt* was filed, the City 'agreed' to create the MP-07 position. But such compliance came only after a long and steady refusal to comply with the Order, and only after the *Order to Show Cause* issued. And now, the City again attempts the same strategy with the virtually identical argument that

> [i]n precise compliance with the Court's Order of June 27, 1991, the City has created the MP-07 Planner position in Plaintiff's sub-department and interviewed candidates for the position. Interviews of finalists for the position are being conducted as this response is being prepared and a final selection is expected forthwith, all in advance of the 60 day deadline ordered by the Court. [*Emphasis added.*]

Defendants Opposition at 1. The City is merely stating that after it violated the original Court order, it began compliance--following the issuance of the resulting contempt order.

What this assertion has to do with the reason that the City originally acted in contempt--has to do with why it originally refused to create the position as ordered almost six months earlier--is difficult to fathom. How the City's compliance with subsequent, court-ordered remedial measures (the facts of these

subsequent remedial measures are not even admissible as evidence[1] as to the original non-compliance) proves that the City did not intend to retaliate against Plaintiff, is equally unclear. If the City's view were allowed, every contemnor would simply perform as required only after they had been caught in the act and held in contempt. They would then point to their sterling post-order efforts as a means to escape examination of their intent in that original contemptuous act[2]. Thus, this first argument is without merit.

2. Collateral Estoppel.

2a. 'Law of the Case' not 'Collateral Estoppel' Applies. The City next seeks to suggest that Plaintiff's request that the Court apply its own findings (from its prior Order as to contempt with regard to the City's refusal to create the MP-07 position) to the 'sub-issue' of why that refusal occurred, is improper based on the doctrine of *'collateral estoppel'*. The City argues that the Court's prior findings (as to the credibility of the City's articulated reasons for non-creation of the MP-07 position) in its June 27, 1991 Order, cannot be applied to the issue of whether that same act was done with the intent to violate another provision of original Order--cannot be applied in determining whether the City's contempt also violated the original settlement order's prohibition against retaliation.

The City seeks to re-define Plaintiff's position[3], and to reshape it based on the City's view that

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[1] Rule 407, Federal Rules of Evidence.

[2] *In Re Seaspire, Inc.*, 63 B.R. 44 (Bkrtcy. M.D.Fla. 1986) (belated compliance with court's order of sanctions does not purge contempt after non-compliance); *Lelsz v. Kavanagh, supra,* ("A party is in civil contempt if she or he is shown...to have failed 'in meaningful respects to achieve substantial and diligent compliance'...with a...court decree"); *Sizzler Family Steak House v. Western Sizzlin Steak House, Inc.*, 793 F.2d 1529, *rehearing denied* 797 F.2d 982 (11th Cir. 1986)(Remedial efforts do not effect fact of initial contempt); *NAACP, Jefferson Co. Branch v. Brock,* 619 F.Supp. 846 (D.D.C. 1985); *U.S. v. McCargo*, 783 F.2d 507 (D.C.La. 1986)(Some late attempts not enough.); *see also Morales Feliciano v. Hernandez Colon*, 697 F.Supp. 26 (D.Puerto Rico 1987).

[3] The City states that

> [i]n paragraph A, page 5, Plaintiff apparently argues the applicability of the doctrine of collateral estoppel. Plaintiff bases this argument on the **magistrate's finding** that the city's reasons for failure to create the position are not credible constitutes a finding that Defendants have failed to articulate a legitimate non-retaliatory reason for not creating the position.

The City seems to believe that the Plaintiff's argument is based on the "magistrate's finding" because some references were made to that document. This is not correct. This is the primary predicate of the City's argument, and is erroneous.

Plaintiff's request that the Court apply prior findings is not, as the City states, based on the Magistrate's Memorandum (although that memorandum was incorporated into the Court's Order based on the Court's own findings) but rather on the finding of the Court in its June 27, 1991 Order. In this Court's Order, issued following briefs and a hearing--which included the City's full "articulation of its reasons for refusing to create the MP-07 Planner position"--the Court clearly stated that

> **6. Defendant's articulated reasons for refusing to create the MP-07 Planner position are not credible.**

two separate actions[4] exist herein. The City's argument (regarding its view that collateral estoppel somehow applies) is that

> [t]his argument [Plaintiff's request that the Court apply its prior findings] does not prevail because the elements of collateral estoppel are not satisfied. The four elements of collateral estoppel are (1) the parties are the same or in privity with the parties **in the original action**, (2) the subject matter or cause of action in the **two suits** were different, (3) the ultimate facts or issues were actually litigated, and (4) the issue was necessarily decided.

Defendant's Opposition at 2. The issue of exactly which "original action" Defendant feels is being referenced is unclear. There is no "original action"--no other proceeding from which Plaintiff seeks to apply a finding. The Plaintiff seeks only the direct application of a prior finding in the same cause as to the identical act of contempt--there simply are not "two suits" here. The doctrine of collateral estoppel does not apply.

Furthermore, the *arguably related* doctrine of *direct estoppel* does not apply to issues within the same action except in two limited classes of fairly unusual cases--where a jury and non-jury trial of the same issue occurs, or where one issue was appealed and another phase of the issue was not. Certainly direct estoppel does not apply to Plaintiff's request for the application of prior findings by this same Court in the same cause as to the same parties in a mere completion of the consideration of the exact same issue (contempt in the non-creation of the MP-07 position). The only reason the Court's review was bifurcated was that the City insisted that it had not had sufficient notice, and now the City seeks to parlay its delaying tactic into an advantage. (Perhaps this doctrine would apply if, for example, Plaintiff sought to obtain relief as to an actual cause of action for retaliation, in this action or a subsequent action. instead of just a further finding as to the same act of contempt.)

LAW. Defendant also refers to "preclusion" in the same discussion. This reference is also incorrect. There are five concepts related to the use of prior findings or judgments in the same or subsequent actions between parties, Plaintiff considers four of these[5]: collateral estoppel, direct estoppel, issue preclusion (a concept related to both direct an collateral estoppel), and *the law of the case*--a

[4] Defendant seek to make similar arguments to those which the Court noted were "peculiar" in its Opposition to the Plaintiff's First Motion for Orders to Show Cause. There the Defendant argued that two wholly inapplicable citations from the incorrect section of Corpus Juris Secundum proved a 'public necessity doctrine'. In addition, Defendant sought to prove the proposition that Mr. Blumenfeld "personally" was required as a signatory on a document because he had signed another doc in his official capacity.

[5] Because the doctrine of res judicata is completely inapplicable, it is not discussed.

completely distinct theory. An analysis of the distinction between these doctrines is critical to understanding Defendant's view.

a. Issue Preclusion. This is a relatively new concept which was intended to narrow the broad and imprecise definitions of estoppel which had arisen.

> Because the term estoppel encompasses myriad definitions which cut across a number of different areas of the law, we adopt here the somewhat more particularized term of 'issue preclusion' to refer to situations where a later court is bound by a prior determination of an issue. (*Emphasis added.*)

See ex. NLRB v. Donna-Lee Sportswear Co.,, 836 F.2d 31, 33 (1st Cir. 1987). The Tenth Circuit has stated that issue preclusion

> comes into play when an issue involved in a prior decision is the same issue involved in a subsequent action; the issue is actually decided in the first action after a full and fair opportunity for litigation; it was necessary to decide the issue in disposing of the first action; the later litigation is between the same parties; and the role of the issue in the second action was foreseeable in the first action. (*Emphasis added.*)

Butler v. Pollard, 800 F.2d 223, 224-225 (10th Cir. 1986). The Tenth Circuit's decision in Butler affirmed and clarified its decision of just one year earlier, in which that Court stated that issue preclusion

> refers to the principle that "a litigant in one lawsuit may not, in a later lawsuit, assert the contrary of issues actually decided in and necessary to the judgment of the first suit."

Bulloch v. Pearson, 768 F.2d 1191, 1192 (10th Cir. 1985), *certiorari denied* 106 S.Ct. 862, 474 U.S. 1086, 88 L.Ed.2d 901.

b. Direct Estoppel, not Collateral, Arguably Applies. Traditionally it was said that,

> [i]ssue preclusion in a second action on the same claim is designated direct estoppel, while issue preclusion in a second action brought on a different claim is termed collateral estoppel.

In re Duncan, 713 F.2d 538, 541 (9th Cir. 1983). Thus, collateral estoppel need not be discussed further. *Wright and Miller* does, however, make the following observations as to direct estoppel:

> Direct estoppel also may arise from action that is designed to conclude part of a single claim on the merits, but to leave the way open for further action on the balance of the claim. Common issues that have been resolved in the first disposition are precluded in reaching the second disposition. This rule may apply across two independent actions, because the first court has expressly limited the claim preclusion effects of its judgment or because of some exception to the general rules of claim preclusion.(FN19) The most prominent cases applying direct estoppel in this setting, however, have involved questions presented during the course of a single action. Two major variations appear.
>
> [The first is where both legal and equitable claims are heard by both a judge and jury--and does not apply herein.]

* * * *

The second setting of direct estoppel within a single suit presents more troubling questions. Separation of proceedings within a single suit may lead to final rulings on issues that are common both to a concluded portion of the proceedings and to the remaining portions. Failure to appeal part of the proceeding may defeat an appeal of the remainder by issue preclusion.(FN23) This result is appropriate so long as it is clear that the appealing party has failed to preserve the common issue. Civil Rule 54(b) should provide the primary source of guidance. . . .Outside of Rule 54(b), however, preclusion is seldom appropriate.

* * * *

The most important point to remember is that so long as matters remain within the limits of a single suit, the court's power to change its mind **ordinarily is limited by the more flexible doctrine of law of the case** (FN18) rather than issue preclusion. [*Footnotes noted but omitted.*]

Wright, Miller & Cooper, Fed. Prac. & Proc., *Section 4418-- Issue Preclusion within a Single Claim: Direct Estoppel.* Thus, although there are very limited cases in which the doctrine of direct estoppel might be applied to a single action, the instant cause, involving facts related to contempt as to the act and intent in a single occurrence, is not even remotely close to these cases.

c. The Law of the Case. Because issue preclusion is rarely, if ever, appropriate within a single suit under these circumstances, it is informative to consider *Wright and Miller*'s conclusions as to the *law of the case.*

Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. These rules do not involve preclusion by final judgment; instead, they regulate judicial affairs before final judgment. Although a common label is used, at least four distinctive sets of problems are caught up in law of the case terminology. Perhaps the most distinctive problems arise from the desire of a single court to adhere to its own prior rulings without need for repeated reconsideration.

The most distinctive law of the case rules are those that **justify refusal by a trial court to reconsider matters once resolved in a continuing proceeding**, or by an appellate court to reconsider matters resolved on a prior appeal. Cases are easily found in which trial and appellate courts have thus adhered to prior rulings as the law of the case

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Although courts are often eager to avoid reconsideration of questions once decided in the same proceeding, it is clear that all federal courts retain power to reconsider if they wish. Law of the case principles in this aspect are a matter of practice that rests on good sense and the desire to **protect both court and parties against the burdens of repeated reargument by indefatigable diehards**. In one classic statement, Justice Holmes noted that law of the case doctrine "merely expresses the practice of

courts generally to refuse to reopen what has been decided, not a limit to their power."(FN4)

* * * *

Another set of questions goes to the nature of the issues involved in a prior ruling. Some issues may be particularly suitable for reconsideration, because of intrinsic importance or impact on nonparties. Such matters as subject matter jurisdiction, appellate jurisdiction, or mandatory party joinder are good examples, although even such matters as these may be protected by law of the case.(FN32) Other issues may seem particularly unsuited to reconsideration. **Questions of fact, absent significant new evidence, are primary examples**.(FN33) Finally, it may be important to know how far law of the case principles bind parties who come into the case after an initial ruling. Somewhat surprisingly, late-added parties at times have been swept into law of the case rulings.(FN34) [*Footnotes noted but omitted.*]

Wright, Miller & Cooper, Fed. Prac. & Proc., *Section 4478, Law of the Case.*

ANALYSIS. Defendant has complicated Plaintiff's request to the Court unnecessarily. Plaintiff has simply asked the Court to apply the law of the case. Application of the Court's prior factual finding that Defendant's reasons for not creating the MP-07 position are "questions of fact, absent significant new evidence," and are therefore "issues. . .particularly unsuited to reconsideration." Neither direct estoppel nor collateral estoppel theories would in any way restrain this Court from applying its June 27, 1991 findings (although the Court always retains the general power to not apply the law of the case.) The Plaintiff has maintained (repeatedly) that:

1. The Court entered an Order. (The original settlement order).

2. The Order required that the City create a position.

3. The Order required that the City not retaliate.

4. This Court found that the Order required the City to create the position, but that the City did not create the MP-07 position.

5. This Court found that non-creation of the position was, therefore, contempt. (A failure to follow the Court's Order.)

6. After the Court had issued the Show Cause Order, but prior to the April 29, 1991 hearing, the City said that the Court[6] did not *precisely* give notice to Defendant as to the fact that it would determine whether Defendant was also in contempt of the non-retaliation provision of the original (settlement) Order (as a result of the identical acts as had resulted in the first finding of contempt.)

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[6] Note that the Plaintiff had fully briefed this issue, but upon the Defendant's allegation that the Court's Show Cause Order was not specific, agreed to postpone hearing until another notice was given. This is simply a continuation of that original matter--as stated in the Court's Order of June 27, 1991.

7. For that reason only, the issue of why the City failed to create the MP-07 (and whether that reason was a violation of the non-retaliation provision of the original Order) was not heard by the Court.

8. Thus, the only matter before the Court as to the MP-07 position, is the question of why the City refused to fill the position--whether the Plaintiff has shown an adverse act, and a causal connection between his participation in the civil rights process and that act; and whether the City can articulate a legitimate, non-discriminatory reason for the act.

This second half of the inquiry as to that original contempt is now upon the City following the delay the City caused. This issue comes on before the Court now, after significant additional costs and a delay of more than three months, solely because of that last second insistence by Defendant that somehow the Court's show cause order did not provide the City with notice. Plaintiff now provides that notice however, in the form of this motion, to avoid yet another appeal. The existence of contempt was examined on April 29, 1991. The second half of the inquiry into that identical act (why that act occurred) will be heard separately only because it was put off at that time. (Defendant read Plaintiff's brief on the question, negotiated on the question, and understood that Plaintiff had subpoenaed witnesses regarding the question: Yet, Defendant never notified Plaintiff or the Court, despite a large number of pre-hearing phone calls between all three offices, that it felt it had not been properly noticed). To even *suggest* now that this artifice, this wasteful exercise in redundancy and delay, has somehow created "another action" or a sufficiently separate issue to involve direct estoppel, is either an error or perhaps part of another tactic--designed to either create an issue for another (dilatory) appeal, or seek a more favorable result from the Court by stalling until subsequent remedial measures have been taken, in the hope that sanctions can be avoided.

Assuming, *arguendo*, that the doctrine of direct estoppel was applicable, Defendant's assertions as to what it calls the "third and fourth elements" are also incorrect. Defendant seems to suggest that no prior finding as to the credibility of its reasons for undertaking the contempt should be applied now because the City was not previously heard on the specific issue of retaliation.

> The present state of these proceedings fails to satisfy the third and fourth elements. The ultimate fact in Plaintiff's claim for retaliation is whether Defendants retaliated against Plaintiff. This issue was not actually litigated and was not decided in any previous proceeding. Plaintiff has pointed out that the issue of retaliation was eliminated from the previous proceeding because Defendants did not have notice that the issue was to be heard.

> Therefore, the **Defendants have not had the opportunity to litigate the issue**. Even if the issue could have been litigated at the previous hearing, that would not satisfy the requirement of collateral estoppel, because, accepting Plaintiff's argument, the issue of the reasons for not creating the MP-07 position had previously been found not credible by the adoption of the Magistrate's report to the Court. No hearing was held on this question before the Magistrate issued his report.

Defendant's Opposition at 2 - 3. This is not correct. The Court certainly had the power to make findings as to the City's intent in not creating the position following an evidentiary hearing in which the City sought to exculpate itself from liability for contempt by placing its good faith motives for its acts before the Court. It was the City itself which placed the issue of "why" it did what it did before this Court.

Intent, while not a *necessary* sub-issue for a finding of contempt, can be raised by the contemnor to explain that its acts were not really contemptuous[7]. The City chose to do this--it was the primary defense. Now that its defense based on its "good" motives and valid reasons for acting as it did has failed (see testimony of the CAO), it seeks a "second bite of the apple" by way of its argument that the Court's detailed findings (that those specific, stated motives were not credible) are invalid as to the reason the contempt occurred. The City somehow seeks to argue that because the credibility of those motives was somehow "not actually litigated and was not decided in any previous proceeding" directly on the issue of 'retaliation', those findings cannot be applied. The present proceeding is not an examination of relief pursuant to the cause of action for retaliation--it is a request for relief from contempt--the identical subject of the hearing in which the findings were first made. The City introduced the issue on this identical point--Mr. Campbell's election of a defense based on intent and motive at hearing is dispositive.

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[7] In His Motion and Memorandum papers in this proceeding, Plaintiff noted that this issue of its intent in not creating the MP-07 position had been raised by the City, stating

> The Plaintiff stated a large number of facts in his papers relating to the contempt proceeding as to "why" Defendant refused to created that position. In response to Plaintiff's assertions, Defendant "articulated legitimate non-retaliatory reasons" for its failure to fill the position as required by contract and order. Included in those reasons were:
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> 1. The City did not realize that it had an obligation.
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> 2. The City did not know the obligation was part of a court order, and although it might have been breach, it was not contempt.
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> 3. The Chief Administrative Officer was the only official who could bind the City, and he did not sign the letter agreement which supplemented the settlement.
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> 4. The Chief Administrative Officer knew what was best for the City personnel system, and did not believe that the MP-07 position was necessary.
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> 5. The CAO received legal and other advice that he did not have to fill the position.

Just because the Court did not hear or determine the full issue of retaliation does not mean that it was not invited (by Defendant) to consider the issue of motivation and intent. The sub-issue of the City's reason(s) for refusing to fill the MP-07 position was the subject of *extensive* examination by Mr. Campbell, and full cross-examination by Plaintiff. Mr. Campbell elected to open the door to this matter, ar ` fully litigated the sub-issue of the City's reasons. Therefore, even if direct estoppel applied, Defendant is incorrect in its assertion that the Court's prior finding (as to the lack of credibility of the Defendant's stated reasons for refusal to create the MP-07 position) should not be applied in the instant contempt proceeding.

1. The record on this issue is clear, and it is fixed. The testimony cannot be changed. When asked to show cause, the Defendant asserted that it had acted with good reasons and intent. The City stated this in its briefs, and placed its Chief Administrative Officer on the witness stand to argue this issue. Plaintiff argued that these exculpatory assertions as to the City's intent were contrary to every agreement, to every one of the substantial number of letters between the parties, and to basic logic. The Court then made its (fully litigated) finding.

2. No legal principle requires further evidentiary proceedings as to the validity or credibility of the City's reasons for not filling the MP-07 position, and such a proceeding will be a waste of time, To avoid creating an appealable issue, however, Plaintiff is once again prepared to defer, and to "re-prove" the lack of credibility of the "articulated reasons" at a hearing on this motion. The reason for the existence of the *law of the case* will be evident when Plaintiff simply places the identical witnesses from the first hearing back on the stand (particularly the CAO, Mr. Blumenfeld) and asks (from the transcript) the identical questions that were asked by both parties at the first hearing. This would most probably result in the same finding by the Court. (Though Plaintiff would also ask to be allowed to provide further proof by examining the additional witnesses he had initially sought to question under subpoena).

2(b). Burdens as to retaliation. Again assuming, *arguendo*, that the doctrine of direct estoppel does apply, the City argues that the Court cannot 'jump' to the issue of the employer's reason for the retaliatory act--it must first determine that Plaintiff has met the elements of the cause of action for retaliation. (Defendant's argument assumes a legal proposition which is not apparent to Plaintiff--that the Plaintiff must prove *technical retaliation* at all[8].)

Assuming that Plaintiff must go through an entire showing of technical retaliation and not just what would be understood by a reasonable person to be retaliatory, the City states that Plaintiff has failed to make that *prima facie* showing of retaliation because of

> Plaintiff's absolute failure to put forth evidence that Defendants' failure to create the MP-07 position was motivated by or substantially based on Plaintiff's status as a successful civil rights litigant. Plaintiff having failed to make a prima facie case, Defendants are not yet required to go forward with evidence of reasons for their actions. This being true, the Court is likewise not required to examine the Defendants' reasons. (*Emphasis added.*)

Defendant's Opposition at 4. This is an incorrect statement of the law, and of the burdens--even under the technical cause of action for retaliation. Plaintiff argues that when the allocation of proof under this cause of action are understood, that there is sufficient proof of record to find that the prima facie case has been shown of record. Thus, the Court, on a finding that the prima facie case has been met, can look to its prior findings as to the lack of credibility of the employer's articulated reasons for its acts--and find retaliatory intent. Acting with such intent would be a violation of the original order, and Plaintiff would be entitled to a determination of contempt. This is presently an action for contempt--the finding of retaliation is merely a step along the path to that objective.

To make the ordinary *prima facie* showing, Plaintiff has no initial burden (as the City seeks to argue) to "put forth evidence" that "Defendants' [sic.] failure to create the MP-07 position was motivated by or substantially based on Plaintiff's status as a successful civil rights litigant." This is simply not the law. A correct statement of the 'burdens', order and allocation of proof involved in a retaliation action is:

> i. The Plaintiff adduces evidence to demonstrate: (1) His participation in proceedings related to or arising out of discrimination proceedings (2) adverse action by the employer contemporaneously or subsequent to those proceedings, and (3) a causal connection between such activity and the employer's adverse action[9];
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> ii. It is beyond argument that, as is the case in any disparate treatment action, the *burden to go forward* then shifts to the employer to "articulate a legitimate, non-retaliatory reason for the

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[8] The City's argument takes a huge leap at this point. The City assumes that to find contempt by retaliatory acts under the Court's Order, the Court must read the language of the Order to require a showing of a level of retaliation which would be required pursuant to *Title VII* or *42 U.S.C. 1981*. This would not normally be the case in interpreting an order. The Order simply states that the Defendant shouldn't retaliate and that the City had an affirmative burden to protect Plaintiff from retaliation--which has a perfectly clear English language meaning.

[9] Anderson v. Phillips Petroleum Co., 861 F2d 631 (10th Cir. 1988), rehearing denied, on remand 722 F.Supp. 668, reconsideration denied 736 F.Supp. 239; Sherpell v. Humnoke School Dist. No. 5, 874 F.2d 536 (8th Cir. 1989); EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989).

adverse act[10]."

iii. Thereupon, if such an credible articulation is made by the employer, the final burden rests upon the employee to demonstrate that the articulated reason for the employer's action is a "pretext"--a sham.

Normally, this order and allocation of proof is a fundamental of EEO law[11]. Under either the 'post-judgment claimant standard' or the ordinary cause of action, the City's assertion as to the standard of proof required from Plaintiff is inaccurate, and thus the conclusion of law it draws is equally inaccurate.

Plaintiff has demonstrated that he was a "participant" in the civil rights process, and defendant does not contradict this.

There can be no dispute that there was adverse act by the employer (where there was a violation of a contract relating to his employment, and of a Court's order related to his employment--which would have increased the number of employees he supervised.)

What the City does attempt to imply, apparently citing Price-Waterhouse, is that there is some great burden on Plaintiff to have shown a causal link to some high level of proof. This is not the case at this point in the allocation of proof (it comes later in the 'pretext' stage). If this type of Plaintiff has to demonstrate this causation at all, Courts have variously defined this very light burden in normal retaliation actions as merely the need to show that the adverse act and the participation "were not wholly unrelated[12]", the employer's actions were motivated "if only in part" by consideration of Plaintiff's participation, or that the adverse act and the participation were "in close temporal proximity" to one another[13]. The record (including Defendant's opportunity, having been given sufficient notice, to argue and submit affidavits in this motion) already contains more than sufficient evidence to allow a finding of

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10 Sumner v. U.S. Postal Service, 899 F.2d 203 (2nd Cir. 1990); See also EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989); Donellon v. Fruehauf Corp., 794 F.2d 598, rehearing denied 800 F.2d 267 (11th Cir. 1986).

11 (Although this distinction has little or no meaning in this cause) a successful plaintiff in a discrimination case is entitled to slightly more leeway in an alleged post-trial retaliation: there is no necessity for the court to make a determination of satisfaction of a *'prima facie'* case--the Court may proceed to the issue of retaliation *vel non*, directly to the issue of whether the employer intentionally discriminated against Plaintiff, which involves only a determination of which party's description of the employer's motivation is credible. Moffett v. Gene B. Glick Co., Inc., 621 F.Supp. 244 (D.C. Ind. 1985).

12 See e.g. Sowers v. Kimira, Inc., 701 F.Supp. 809 (S.D.Ga. 1988).

13 See e.g. Lu v. Woods, 717 F. Supp. 886 (D.D.C. 1989).

causation.

Therefore, even under the general definition of retaliation, this Court can already find sufficient facts of record to determine the existence of a *prima facie* showing of a causal relationship between the employer's adverse activity and the Plaintiff's status as a 'participant'[14] which is all that is needed to pass the threshold. (Unless the Defendant argues that it requires the examination of witnesses, it has already had notice and an opportunity to be heard on each of these points in the context of the initial contempt hearing. If it does require such witnesses to provide it with an opportunity to have "fully litigated" this matter--Plaintiff does not object to an evidentiary hearing for this purpose.)

The burden then shifts to the Defendant to "articulate a legitimate non-discriminatory reason" for its refusal to create the position[15]. (As Plaintiff has observed above, the Court has already found that the "articulated reasons" are "not credible" in the context of its initial findings as to contempt in this matter. It would appear, therefore, that based on the law of the case and the practical effects of the prior testimony and evidence, the Defendant *cannot* sustain such a burden. Again, however, Plaintiff does not object if Defendant asserts that it wishes to re-examine the witnesses in an evidentiary hearing, or question others to support the CAO's lengthy testimony on this point--a point that he stated on the record only he could testify about.)

Thus, Plaintiff has asked, based on the record to date, that the Court either make a finding that the parties have now had an opportunity to be heard, and the record (including Defendant's papers herein and affidavits submitted) already contains evidence of the *prima facie* showing; or allow the parties, at a hearing on this motion, to complete the record. But if Defendant's assertions as to the law or factual sufficiency of the state of the record with regard to the prima facie showing of retaliation create even the slightest possibility of another appealable issue, Plaintiff again asks the Court to allow the parties to go forward with additional examination.

Whichever course the Court selects as to the initial (*prima facie*) burden, Plaintiff asks that the Court then apply its original finding numbered "6" from its June 27, 1991 order or, following a hearing,

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[14] At the April 29, 1991, hearing on this matter, Plaintiff also sought to offer additional proof as to this matter, and had subpoenaed numerous witnesses to allow him to do so--he stands ready to do so again, if necessary, at the hearing on this motion.

[15] Sumner v. U.S. Postal Service, 899 F.2d 203 (2nd Cir. 1990); See also EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989); Donellon v. Fruehauf Corp., 794 F.2d 598, rehearing denied 800 F.2d 267 (11th Cir. 1986).

simply make a new finding to avoid the chance of a dilatory appeal by Defendant. Upon such a finding the legal conclusion must be made that the City's proffered explanation for the differential or negative treatment is 'pretextual'. Thus, a second finding of contempt must be made, this time on the basis of an intentional violation of the non-retaliation provision of the original (settlement) order. Upon this finding of calculated intent to commit retaliatory contempt, significant sanctions must be applied--of a magnitude *calculated to affect* what has been referred to as a "half-billion dollar per year corporation".

II. ACTS SUBSEQUENT TO THE COURT'S ORDER OF JUNE 27, 1991

FACTS

On July 24, 1991, during the course of a conversation on the City's non-compliance with regard to Plaintiff's PERA benefits, an Assistant City Attorney stated that the City no longer intended to discuss implementation of the June 27, 1991 Order with Plaintiff's counsel, and that the City would implement when and how it wanted to. As this position completely (and inexplicably) ignored an earlier agreement between counsel (which is detailed in the correspondence set forth below) and did not explain the ever-increasing delay in implementation, Plaintiff's counsel wrote,

> This letter will confirm the items discussed in our telephone conversation yesterday.
>
> First, I noted that I was concerned about what I understand to be the City's new position on effectuating the order of June 27, 1991. Both Paul Ruskin's notes and my own regarding the telephone conference with you of July 3, 1991 (which lasted more than one hour) reflect that:
>
> > 1. We discussed possible implementation methodologies at length--and that you would go over those thoughts with Mr. Campbell and the CAO.
> >
> > 2. We also agreed that the implementation of the order would be then be discussed with us prior to any actions on the City's part. (Issues addressed were the definition of "co-workers", the degree of dissemination of the contents of the order, as well as who within the City was the proper person or group to effectuate provisions related to high level officials.)
> >
> > 3. You were also going to get back with us regarding possible changes to the MP-07 position, and how we might complete the retaliation issue without further legal proceedings.
>
> If I now understand the City's position, it does not intend to get back with us on these items--particularly item numbered "2"--and instead **will violate our agreement** and proceed however it sees fit.
>
> If I have misunderstood the City's position, I would ask that someone from your office write to clarify the situation. I would also note that I will supplement the present motion if unilateral actions run afoul of the order--or fail to adequately fulfill its intent.
>
> We also discussed my concern that not only had the PERA situation not been addressed by the time of my motion, but that it remains an open issue now, after yet another week has passed. Please do not treat the motion as somehow tolling the

responsibility to determine the status of this matter as soon as possible. To assist the City, as we discussed, I am having Paul Ruskin make himself available to provide information or assistance. He has called your office several times, and will continue to do so. As I mentioned he was involved in the original PERA calculations with Ms. Hauser.

Finally, I mentioned how disappointed I was that the order was going unsatisfied, and that the City had once again (after starting in a attempt at cooperation) embarking on a series of closed, unilateral actions. This breaches our agreement, and to my mind, good sense.

Letter, from Hartmann to Kelley, dated July 25, 1991 (Attached hereto as Exhibit "1"). Exactly one month after the Court's Order had originally issued, Defendant's counsel sent a letter to Plaintiff's counsel. Without providing any explanation as to why the original plans agreed to by all counsel weren't implemented, or why a month had passed, the City asked for yet another proposal as to how the order should be implemented, and stated that after yet another promised 'review', the City would "get back" to Plaintiff and let him know what was thought about his 'new' proposals. Plaintiff's counsel stated, in a July 27, 1991, letter

[t]his responds to your two facsimile transmissions of July 26, 1991--the first being a letter requesting that I draft proposed language relating to the City's compliance with paragraphs C & D of the Court's order of June 27, 1991; the second being information from PERA related to my client's retirement account.

1. Obtaining the City's Compliance with the Court's Order

I note that I find the proposed method of dealing with the City's compliance to be dilatory. I once again remind you of our agreement during our telephone call of July 3, 1991. In that call, you, Paul Ruskin, and I discussed these identical issues at length, and formulated specific proposals--many of which I have merely restated below. You agreed then that you would contact the appropriate City officials, draft the exact statements which you now request from me, and get back with those proposals for our final review. All of these actions were to have taken place weeks ago. We have also discussed this earlier agreement in a subsequent telephone call (after the filing of Plaintiff motion on this issue) where I expressed my concern at the delay, and at the failure of Mr. Campbell and the CAO to respond to our agreement.

Now the City not only proposes to have me draft these items, but suggests another multi-step implementation process which further delays compliance.

I will not, however, risk further delay by debating this issue with your client. The time already lost is lost. I will, instead, draft proposed language (and methods) for implementation of these sections--noting my time and fees, which I will expect the City to pay without protest.

* * * *

A. Order to Cease and Desist

The cease and desist provision of section "C" first deals with the issue of "**who must act**"

The second component of this section relates to "**when**" the City is required to act,

> shall **immediately**

The third element involves "**the act**" which must be done,

> order

The fourth element states the target of the order, or "who" must be "immediately" "ordered" by "the City of Albuquerque, is

> the Chief Administrative Officer, the City Attorney,
> the City Police, *and all other management officials*

Fifth, and finally, the order specifies "what" they must be ordered to do,

> cease and desist any and all actions not
> in compliance with the orders of this
> Court with regard to Plaintiff

* * * *

> This order was entered on June 27, 1991. At this writing, therefore, the City is one full month late. The City must implement this provision immediately. As pointed out in Plaintiff's motion on this matter, failure to implement immediately has already allowed at least two major violations of the Order. If compliance is not forthcoming very quickly, the entire intent of the order will be lost.

Letter, Hartmann to Kelley, dated July 27, 1991 (*Exhibit "2" hereto*). Once again, Defendant failed to respond. More important, Defendant had once again used the appearance of the solicitation of opinions from Plaintiff's counsel to attempt to avoid implementing the Order. Plaintiff's letter in response was clear--he stated the opinion that the continuing requests for "direction" was a *sham* (because 99% of the items had been discussed and agreed to, and because there was no indication of which requirements were stopping implementation--or why.)

Notwithstanding his beliefs, Plaintiff, under written protest, again supplied the same analysis (of what he had *originally* discussed before he had conceded not to oppose compromises in the agreement between counsel)--and then specifically stated that Defendant should implement as much of the Order as was not causing the Defendant problems. The implementation as originally discussed by counsel was almost exactly how implementation was finally undertaken. As can be seen from the final results once the City made an effort, the entire implementation could have taken place in less than two days. In fact, because Defendant's and Plaintiff's counsel had spent more than an hour discussing and agreeing as to every point of the Order in preparation, from that point implementation could have been accomplished in just an hour or two at the most. No explanation for the weeks of delay has ever been proffered--except

the newly revealed assertion that the delay was the result of discussions with counsel. This assertion is not accurate.

By August 1, 1991, Plaintiff had heard nothing more as to implementing the order, and therefore his counsel wrote to the Defendant,

> I would also note that I have received no response to my letter in response to your request for a means of implementing the balance of the Court's order. I must say that I am perplexed as to why, in light of my pending motion for contempt, the City would go out of its way to [again] solicit my views, and to then not respond in any manner. In this vein, I would also note that no explanation has ever been forthcoming as to why the retained PERA funds were not paid in, how my client's account was fouled-up, and the City apparently never checked on the matter despite the first Court order.

Letter, Hartmann to Kelley, dated August 1, 1991 (*Exhibit "3" hereto*). Finally, on August 5, 1991, Plaintiff received a communication from the City about the Order--not as to its implementation, but instead only as to a request for additional time to respond to Plaintiff's Motion. Plaintiff's counsel responded:

> This confirms our telephone conversation of yesterday, Monday, August 5, 1991. In that conversation you made a request on behalf of the City of Albuquerque for an extension of the time limits in which to respond to Plaintiff's second motion for contempt (which time limits you noted in a prior letter to me.)
>
> I noted that my client did not wish to provide the City with an extension--as the only basis stated for the request was your personal vacation which began just three working days before the response was due. I also noted that the City Attorney has frequently noted that it is really a "half-billion dollar per year corporation", and I was unclear as to why this response could not have been done last week, or by another attorney this week.
>
> Finally, I noted that my client had no reason to impose the burden of this problem on your vacation, and thus--without any agreement or extension--I represented to you that I would not file any motion related to the City's response being out of time between the dates of August 14 and August 22, 1991. As I understood your response to this accommodation, after checking with Mr. Campbell, you assured me that the Opposition would be filed before the end of business on Thursday, August 22, 1991.
>
> If your recollection of any of these items is even slightly different from mine, I would ask that your so note my misunderstanding in a brief writing. If I do not hear from you to the contrary, I will proceed on this basis. I hope this arrangement will contribute to your having a pleasant vacation.

Letter, Hartmann to Kelley, dated August 6, 1991 (*Exhibit "4" hereto*). On that same day, August 6, 1991, Plaintiff's counsel also wrote that,

> I am appending this letter to my agreement not to file any papers related to the lateness of the City's Opposition to Plaintiff's second motion for contempt.
>
> On June 27, the City was ordered by Judge Mechem to do certain items. The City did nothing.
>
> On July 3, you, Paul Ruskin and I had a lengthy, comprehensive discussion in

which implementation of every one of the items in the Court's order was discussed. You stated you would talk to Mr. Campbell, get back to us, and then implement the order. The City did nothing.

On July 22, after attempting to obtain some sort of commitment that the City would begin implementation as agreed, I sent a notice copy of a motion--specifically stating that all the City would have to do to stop its filing was contact me regarding implementation--I even held the papers an extra day in case I had simply missed a call. The City did nothing.

On July 26, after the motion for contempt was filed, you wrote to me--with absolutely no reference to our previous talks and agreements on the subject--and stated:

In the interest of reaching an agreement regarding how the City should comply with Paragraphs C. and D. of the Court's June 27 Order, we request that you draft the required statements and in addition, specify the individuals to whom you believe the statements should be distributed. . . . .Once we have reviewed your drafts, we will contact you to let you know that they are acceptable or to propose changes.

I responded with a long, polite, well-supported letter detailing my views as to compliance with the June 27 Order. Again, the City did nothing. (It is interesting to note that not only has the City not moved to comply--but that I have not even received the promised "contact. . .to let [me] know that [my views] are acceptable or to propose changes."

* * * *

If the City seeks to demonstrate that it can exert control over this situation my acting as though it is in charge, and can choose how it will respond to the Court, it is probably accomplishing this also.

In my other letter I have made Plaintiff's point clear--implement those items as to which there has never been any dispute. Do not wait, claiming that you require more study, or that you are delaying implementation of those items pending the outcome of this contempt proceeding--the City has obtained no stay. (*Emphasis in original.*)

It is loathsome that the City so flagrantly violates this Order--it is a vulgar display of power, and sets a sad and pathetic example for the City's officials and managers. By undercutting the Court, and by failing to implement this Order, the City has destroyed the intent of the settlement, and is making it progressively more difficult for my client to function effectively. Thus, I once again call on the City to immediately inform me of its plans, and then to implement all non-contested portions on this Order before any more time passes. In the alternative, I would ask the City to seek a stay of the Order rather than simply ignoring the Order.

I do not consider the pendency of the Contempt motion as tolling any obligations, and thus, I would expect the City to move on compliance before its Opposition is due. As far as I know, there are no questions, issues or disputes as to implementation--and again, even if the City contends there are, non-contested provisions should be implemented now.

I hope to hear from you with some explanation of the entire manner in which my client's PERA was handled so oddly. I hope to hear from you (as you said I would) as to your proposals for handling the retaliation issues, but most of all I hope that I will hear from you, or from one of the City's other counsel, almost immediately, with assurances that implementation will take place, or with papers aimed at obtaining a stay.

Letter, Hartmann to Kelley, dated August 6, 1991. (*Exhibit "4" hereto.*)

The City Attorney responded to this letter with a three sentence reply which stated,

> [t]hank you for faxing me a copy of the letter sent to Judy Kelley. I am glad the PERA issue has been resolved. We are at work on the remaining issues to resolve the case, including compliance with orders of the Court. (*Emphasis added.*)

Letter, Campbell to Hartmann (*Exhibit "5" hereto*).

Four times in this case the Defendant has taken an unsupportable or illegal position, used dilatory tactics, communications, and filings; and then--when confronted by a hearing or judicial action--sought last minute settlements, used last minute arguments not appearing in its papers, and (when all else failed) implemented relief or compliance just days or hours before the Court was to act or its papers were due. Once again this has occurred.

The City has already done the damage in this newest incident--it has once again bullied the Plaintiff's co-workers both directly and indirectly. The City has sent a clear message to Plaintiff that he will never truly return unaffected. The message is simple: almost two months after the Court ordered this Defendant to take certain actions, some immediately, the City reluctantly did so--but only after those weeks had passed, and only after the City it was forced to do so by the filing of this motion. The City has, by its actions, stated that this Court's Orders are an inconvenience.

B. RETENTION OF PLAINTIFF'S FUNDS AND FAILURE TO MAKE PAYMENT TO PERA.

Defendant states that it is,

> responding to this portion of the motion [the PERA issue] (Page 5, Paragraph B), although the issue raised in this paragraph has been resolved to the satisfaction of the parties and Defendants understand that Plaintiff does not intend to pursue this issue.

Defendant's Opposition at 4. Plaintiff acknowledges that Defendant did eventually pay his PERA contributions out of his own funds (which the City was to have used for this purpose almost a year earlier) and refund the balance due to him. Despite the City's arguments, this same non-payment was the subject of the earlier contempt motion. This issue was removed from that motion on the written assurance by counsel for the City that the PERA account had been correctly funded. The City's intentional or negligent failure to comply with the Order is contempt--the assurances, worthless.

Plaintiff has certainly not suggested in any way that he would not pursue this issue because of more subsequent remedial measures--measures which were only forthcoming upon another round of requests and court papers by Plaintiff.

Because the incorrect assertion as to this point in the City's Opposition seemingly invites

engagement, and because its argument simultaneously appears designed to draw third parties into the matter (a move which would further delay these proceedings) Plaintiff, while not abandoning his motion as to this act of contempt, will not pursue this issue beyond the assertions made in his Motion and Memorandum.

Plaintiff would, however, like to note clarifications as to certain statements and omissions in the Opposition which might be misunderstood, creating an unclear record. First, Defendant states,

> Defendants began communications with the PERA Board to carry out the Court's order. On November 21, 1990, counsel for PERA requested a copy of the Court's order and indicated that PERA would then begin the necessary calculations. This order was provided to PERA on December 7, 1990. The order clearly stated that PERA allow Carl Jackson to redeposit the amount necessary to bring him to the position which he held upon his termination from employment in 1985.

This may create the impression that Plaintiff had not already paid to Defendant more than enough to fund his PERA account--which is not the case. The City had more than enough of Plaintiff's funds to properly fund this account. It also may create the impression that Plaintiff was not already informed, in writing, that his PERA account had been correctly funded, and that all refund amounts due to him had been refunded--that the City no longer had possession of any of his monies. This is not accurate. (When the account was funded as ordered, Plaintiff was still owed over four thousands dollars by the City.)

The City also stated that

> [t]he one person in the City who was fully apprised of all the facts was Defendants' counsel at the time, Paula Forney. At the time these events transpired, Ms. Forney was no longer employed by the City and, in fact, withdrew her appearance for the Defendants on January 24, 1991.

Defendant's Opposition at 5. This may create the impressions that Ms. Forney was somehow remiss in failing to complete this transaction correctly, that the City sought to retain Ms. Forney on this issue so that it could correctly complete this transaction, or that the City had even *attempted* to contact Ms. Forney on this issue at the time the City was handling this matter originally--before Plaintiff independently determined (many monthslater) that his PERA account was not funded. Plaintiff believes that this is not accurate, and that if the City asserts otherwise, the proper means to make this assertion a matter of record is to submit an affidavit. or to call Ms. Forney as a witness. The appearance in the Opposition of this statement, and its implication, is a scandal.

The final assertion by the City as to this point, that

> [u]pon discovery that a payment had been omitted, Defendants verified that in fact the payment was required and had not been made, obtained the information from PERA as to the amount of the required payment, made the payments and refunded the excess retained funds to Mr. Jackson

Defendant's Opposition at 5, is also somewhat unclear. It was Plaintiff who independently determined that the PERA contributions were incorrect, and that the City had retained his funds. The City did not respond to the Plaintiff in a timely manner, as demonstrated by correspondence between the parties. As is the case with all of the matters discussed herein, the City would not even verify that funds were due or provide any information that indicated any viable efforts, despite several written and oral requests, until *after* Plaintiff filed this motion.

C. DISTRIBUTE COPIES OF ORDERS TO CO-WORKERS AND "CREDIBLY INFORM" THEM AS TO THEIR RIGHTS AND PROTECTIONS

The Defendant's Opposition to the issue of "post-June 27th Order contempt" is twofold. First, it makes a factual representation that it was delayed by "a series of discussions" between counsel. As discussed above, this is not accurate. Second, the City states that acts of post-order retaliation which have already occurred either: (1) happened too soon after the issuance of the Court's Order to have been stopped by compliance, or (2) were not wrongful or retaliatory because the actor was 'just stating city policy'. As discussed below, neither of these arguments is accurate.

1. Compliance delayed by discussions. Defendant states that

> [i]mmediately after receipt of the Court's Order, attorneys for Plaintiff and attorneys for Defendant began a series of discussions and communications with each other to arrive at an agreement on precisely how the remaining issues in the Court's Order should be implemented. Such discussions continued both orally and in writing for several weeks. When Plaintiff's counsel felt that progress was not adequate in these discussions, he filed the present Motion.

Defendant's Opposition at 6. This is not accurate. As stated in the attached correspondence of the parties (Exhibits "1" through "5") the City engaged only in an effort to create the *appearance* of good faith discussions. Large, unexplained periods of time, the disappearance of And failure to perform pursuant to) the original agreement between counsel, and Plaintiff's repeated requests for less "discussion" and more implementation, demonstrate that this was subterfuge.

The City has again demonstrated its control of this situation. This effort to control can also be

seen in the City's attempt to "interpret" the Plaintiff's continuing, frustrated efforts to obtain implementation.

> Following Plaintiff's filing of the Motion herein, discussions on implementation of the Order continued. Finally, Defendant's counsel asked Plaintiff's counsel to draft sample copies of the required communications under Paragraphs C and D of the Court's Order, which Plaintiff's counsel did. Following more communication between Counsel, written memoranda evidencing compliance with Paragraphs C and D of the Order were produced and distributed by Defendant. The City complied with Subsection C of the Court's Order by immediately informing top management of the City of Court's Order and its requirements with respect to top management. These verbal orders were memorialized in a memorandum from the Mayor of Albuquerque, a copy of which is attached hereto as Exhibit A. Defendant has, it believes, reached final agreement with counsel for Plaintiff on the requirements of Paragraph D of the Court's Order, and has produced and distributed the required memorandum and Order as shown in Exhibit B, attached hereto.
>
> The time which elapsed between Defendants' receipt of the Court's June 27 order and the distribution of Exhibits A and B was motivated by Defendants' desire to avoid further conflict by distributing materials with which Plaintiff agreed.

Defendant's Opposition at 6-7. As can be seen from the chronology (and the referenced correspondence above) this rendition is completely inaccurate. First, On July 3, 1991, the Defendant agreed to a virtually identical implementation process which the City eventually used more than *six weeks* later. Second, Plaintiff repeatedly asked for implementation of at least the non-disputed portions pursuant to the initial agreement without any additional discussions, reservations, or conditions.. Third, Defendant did not have any permission from the Court to delay implementation because it allegedly "was seeking Plaintiff's input". Fourth, while Defendant once again states its sterling accomplishments in implementation, absolutely none its compliance came until after this motion was filed, and then, only when its Opposition was due--again, after more than six unnecessary weeks from the issuance of the unambiguous Order.

2. Post-Order acts not actionable

2(a). Compliance would not have stopped acts. On a Friday the City received an Order from this Court. That Order stated that the City was to inform upper level managers of a very short, very specific concept. The Order said that this notification was to be done "IMMEDIATELY". Days later, two clear and damaging incidents occurred which immediate dissemination of the Order might well have prevented. Although the Court had ordered

> B. That Defendant shall fill the MP-07 planner position within sixty (60) days of the entry of this Order, and shall not in any manner terminate this position or reduce or otherwise adversely effect Plaintiff's subdepartment for reasons related to the creation of

this new position, or because Plaintiff has sought performance by Defendant in the creation of this position.

C. That the City of Albuquerque shall **immediately** order the Chief Administrative Officer, the City Attorney, the City Police, and all other management officials to cease and desist any and all actions not in compliance with the orders of this Court with regard to Plaintiff, and shall act, as provided by the settlement agreement and the prior Order of this Court, in a manner calculated to protect him from non-compliance or retaliation.

The notice required by the Order was not given on Friday. The notice required by the Order was not given on Monday. The notice required by the Order was not given on Tuesday Morning. Thereupon, on Tuesday afternoon, a personnel official specifically stated to Parks and Recreation employees--some of whom were direct subordinates of Plaintiff that

> one supervisor would not be able to get an open position filled because Plaintiff had gotten the MP-07 position created, and that persons in another Planner position would possibly lose their jobs for the same reason. Worse, he concluded by stating that the MP-07 position wasn't really certain in any case--and that if someone took it, it might be shut down, and they'd lose the job soon anyway. (*Emphasis added.*)

See also *the two Memoranda* from the affected employees relating the incidents, attached as exhibits to the Motion herein[16].

Defendant maintains that what the official stated was actually just "city policy[17]" that all such positions are automatically "frozen" when vacated. While it is true that all positions are routinely "frozen" when vacated, this is definitely not what the official stated, and this is also not what occurred. The facts are as follows:

1. The official (Klingbeil), stated that something was known to him as an official with the Personnel Department--that a decision had been made that a vacant position under Mr. Chiregoes (Plaintiff's direct subordinate) would not be filled *specifically because* Plaintiff had obtained creation of the MP-07 position. (Thus, the official was not stating a general policy--but rather, that the position would remain unfilled expressly because of a decision of the employer that it was to remain that way as a direct result of the relief Plaintiff had gotten with regard to the MP-07 position! This could not be clearer.)

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16 And now this threat has mysteriously come to pass--what this official stated was being done expressly to "counter" the effect of having to add the MP-07 position has occurred, the position which this official told Plaintiff's immediate subordinate would not be filled because Plaintiff obtained creation of the MP-07 position, has not been filled.

17 See Section 2(b), below, for a discussion of this as a "City Policy".

2. When the incumbent employee left, this position like all positions now coming vacant, was "frozen"--left vacant subject to the approval of the CAO to re-fill it.

3. Contrary to the clear implication of the City's Opposition, however, positions which have been frozen are **routinely** approved for re-filling by the subjective determination of the CAO--and do not remain automatically unfilled.

4. Many other positions which were "frozen" prior to and after this position was frozen have been released for filling by the CAO, but this position has not been filled. (Six of these "frozen" positions from Parks & Recreation were considered by the CAO at the same time--the position to which the official referred being one of them. Of the six "frozen positions" all were "unfrozen" and approved for filling by the CAO--except for the position discussed by the official and a horticulturist slot (which has been not been funded for 1992.)

Thus, as the personnel official was somehow able to state with specificity well in advance, of all vacated positions the only P&R position which was supposed to be funded for fiscal 1992 but was not "unfrozen" following the CAO's decision of July 29, 1991 was this one position under Plaintiff's subordinate. (This position is a security position, whereas the filled positions were in maintenance.) The coincidence of the personnel official stating that this position would not be filled because the MP-07 position was created for Plaintiff--and that only this position, of all positions which were frozen and funded for 1992, remains unfilled--is amazing.

The City's arrogance can be observed in its incredible representation to this Court--that its failure to implement that Order "immediately" should be excused because

> The alleged statements by a City employee occurred on Tuesday, July 2. First, the employee who made the statements is not in Plaintiff's subdepartment, not in Plaintiff's department and not one of Plaintiff's coworkers. Therefore, he would not have received a copy of the order. **It is also highly unlikely** that, even if the employee in question would have been entitled to receive a copy of the order, that he would have done so on the second business day after the City received it.

Defendant's Opposition at 7. Thus, the City suggests because it is "highly unlikely" that compliance would have averted a retaliatory incident of the exact type the order was aimed at, it did not have to comply with an order of the Court in a timely manner.

First, this "logic" is self-serving and cunningly faulty--as the City well knows (but obscures by their argument) the requirement of "immediate" notice did not go to the requirement to informing

Plaintiff's co-workers, instead it went to informing **department heads**. The issue here is not whether mass information to all employees could have been prepared and distributed to a large number of employees in time, but rather whether one of less than a dozen one page memos would have reached the offending official's immediate supervisors in time. As, coincidentally, the offending official's immediate supervisors were interested enough in this case to attend the contempt hearing in person and were noticed under this provision, had they been informed *immediately* (ie. if the City had performed 'immediately' as ordered) it is just as "likely" that had these supervisors (having been informed on Friday, Monday or Tuesday) would have informed their workers (particularly this offending official, as he seemed to be highly informed and involved in this issue)--in time to avoid the official's statements on Tuesday.

Second, and much more important, is the fact that it is wrongful and dangerously presumptuous for a defendant to seek to apply what is essentially a *proximate cause* argument to its non-compliance with a court order. This is particularly true with regard to a prophylactic order in a civil rights setting which was issued because of non-compliance with a previous court order (when that non-compliance allegedly occurred under retaliatory conditions!) This assertion is simply incredible! What is the legal standard for "unlikeliness"? Does the Contemnor always get to decide when the standard is met? And why is it that once the contemnor asserts that its failure to follow the order was not the likely cause of subsequent injury, it seems that it is the injured party's burden to show that if there had been"immediate" notification as ordered, no injury would have occurred?

Plaintiff takes strenuous exception to the City's "unlikely standard", and suggests that either by intent or because of a virtually studied failure to even attempt to understand or comply with the words and spirit of the Court's Order, the City compounds the damage of the non-compliance. It is simply beyond the bounds of good sense to require Plaintiff to prove a negative--to provide any further response to the assertion that it is "unlikely" that the City's failure to immediately inform its people resulted in the acts of its official. The City has failed to comply once again. That the retaliatory statement came true after it had been protested simply compounds the offensiveness of this action, and must be examined independently, in another proceeding with adequate notice, for signs of intentional retaliation.

Finally, Plaintiff stands ready to demonstrate, at hearing if the Court so orders, that these acts had as a direct consequence, the transfer of two employees out of Plaintiff's area of authority. Thus, he was injured as to the effect on him, and as to the effect of continuous, discouraging 'warnings' on co-workers.

If the Plaintiff presses this point, or the Court appears to be interested in this incident, Plaintiff submits that within just a few weeks of the filing of this Reply, the City will most probably 'coincidentally' fill the frozen position, perhaps just prior to the hearing. The point will have been made once again, and the employees and other managers will once again have been given a good lesson as to control.

2(b). Acts were not retaliation in any case.

In its least accurate assertion of the entire Opposition, Defendant suggests that

> if the employee in fact made the statements attributed to him, he was merely stating the established city policy, i.e. freezing vacated positions, which was testified to by Chief Administrative Officer Arthur Blumenfeld in the previous hearing in this matter. Therefore, these actions do not establish contempt or retaliation.

Defendant's Opposition at 7.

If the City's official had stated, as implied by the City's Opposition, that the employee had merely "stat[ed] the established city policy, i.e. freezing vacated positions", the City's assertion **might** be correct. Only two facts interfere with this argument--this isn't even close to what the witnesses say that the official actually said, and even if the remarks did convey 'established city policy', the existence of some 'established city policy' doesn't allow violation of a federal court's order, either in that policy's normal operation or by the use of it as cover for artifice.

As to the first of these problems, the implication that the official merely stated some neutral policy, once again the City fails to submit exhibits (such as reports from the several witnesses)--or affidavits of those witnesses, all of whom are City employees and within its direct control. **Those witnesses stated, in writing, that this official said that the refusal to fill the position and the possible loss of jobs was a direct consequence of Plaintiff's obtaining creation of the MP-07 position**. This is hardly the standard policy. In addition, as stated above, Defendant's statement of this policy is grossly incorrect by omission--it fails to state that: (1) frozen positions are regularly unfrozen, (2) that it is the CAO who unfreezes them, and (3) that virtually all positions except the one in question were unfrozen by the CAO.

As to the second problem, that it is arguably a City Policy--this may be true. However, no credible writing existed as to this policy until after Plaintiff's motion as to this point, and regardless of any written "policy", all decisions at the time of this incident are ultimately subjective, non-documented

decisions of the CAO. Additionally, the offending official said it was a "decision," not a policy. No affidavits were submitted, no evidence adduced, and no policy statements or manuals were attached as exhibits hereto. Either this is a very poorly constructed sham, or the official is prescient to an amazing degree of accuracy.

D. FAILURE TO ORDER CERTAIN UPPER LEVEL PERSONNEL TO REFRAIN FROM RETALIATION.

The Court ordered Defendant to notice these officials "immediately". Never, in all of the telephone conversations and letters between counsel, did Defendant's counsel allege that there had been some sort of "oral order" to upper level management prior to the circulation of a written memorandum two days before the Opposition was filed. Nor does the Opposition exactly state when this newly revealed notice allegedly took place--certainly it is not maintained that it took place within the first weeks after the Order. Exchanges occurred on the implementation of this section where such an order was requested, but failure to do so was discussed repeatedly with absolutely no mention of such an order having been given. *Defendant has even stated that it did not give such an oral order because it did not want to act on such an order until it consulted Plaintiff's counsel*--and it did continue to consult Plaintiff's counsel (despite requests to implement instead on this very item) up to just a week before its Opposition was filed--again with no mention that such an oral notification had taken place.

Now, for the very first time in all of the many letters of the parties and the many phone conversations on this issue, with no affidavits or other evidentiary support, the Defendant asserts that

> Paragraph D of Plaintiff's motion does not allege any specific acts to which Defendants may respond. The foregoing arguments pertain to this paragraph, including the fact that the City did in fact orally notify upper level management **immediately** after the Court's order and has since distributed the order and a memorandum.

Defendant's Opposition at 7-8. The written distribution was accomplished well after the Opposition was already past due, and just a day or two before that Opposition was filed.

As for the credibility of the assertion that such an oral notification took place, Defendant has not submitted any affidavits or testimony, or allowed Plaintiff's counsel to cross-examine any witnesses--but Plaintiff is certain that the CAO is willing to so state, despite the *complete contradiction on every evidentiary point which can be found in the record.* This, like the stated 'reason' for not filling the MP-07 position, is ultimately a matter for the Court's determination based on the evidence, the testimony, and

the credibility of the witnesses. The Court must determine whether the City's statement is a fraud on this Court by implication. The question which must be put to the City's counsel is whether, as implied, the City did immediately, (orally) order Mr. Klingbeil's Department Head and others, or not? Why would the City then argue the "unlikely" probability that timely notification would have been effective? This quandary, and every shred of evidence, argues overwhelmingly that there was no such notice--and if there was, that it was certainly not immediate within the context of the Klingbeil statements.

The Contemnor asks for a *minimum* 2-3 day grace period in the Court's interpretation of the word "immediately" in which to take free shots--after that, it would notify managers as the Court ordered. For it was in that "free shot period" that Klingbeil made his statements. Plaintiff asks the Court to review and re-read the witnesses' accounts of Klingbeils's statements--in two separate incidents, both to Plaintiff's subordinates, a personnel official whose superiors happened to be at the contempt hearing made as negative and damaging a set of assertions as could possibly be anticipated by the Court's order--less than a week after the June 27, 1991 Order was entered.

CONCLUSION

Plaintiff seeks a determination by the Court, either upon his papers or in an evidentiary hearing of:

A. The issue of whether Defendant's non-creation of the MP-07 position was contempt (in violation of the anti-retaliation clause of the settlement order).

B. The issue of whether Defendant's post-Order (June 27, 1991) actions constitute contempt of that Order.

Plaintiff also argues that the Court is not estopped from applying its past orders in this cause.

DATED: September 3, 1991.

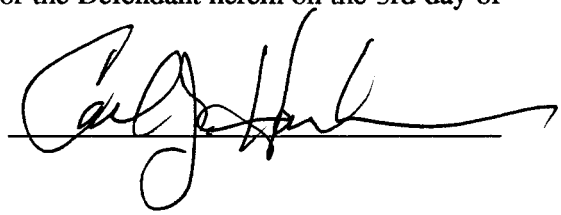
RESPECTFULLY SUBMITTED,

CARL J. HARTMANN, III

CARL J. HARTMANN, III
Attorney for the Plaintiff
201 E. 28th St., Suite 15-B
New York, NY 10016
Telephone: (212) 725-6327
Facsimile: (212) 447-6145

CERTIFICATE OF SERVICE

I, the undersigned, do hereby swear and attest that a true and accurate copy of the *Reply* above, served, as provided by stipulation of the parties, upon counsel for the Defendant herein on the 3rd day of September, 1991.



CARL J. HARTMANN, III
ATTORNEY-AT-LAW[1]

210 E. 28th Street
Suite 15-B
New York, New York 10016
Telephone: (212) 725-6327
Facsimile: (212) 447-6145

BY FACSIMILE

July 25, 1991

Ms. Judy K. Kelly, Esq.
Assistant City Attorney
City of Albuquerque
Legal Department
Albuquerque, New Mexico

RE: Jackson v. City et al. 86-1252 (On Remand)

Dear Ms. Kelly:

This letter will confirm the items discussed in our telephone conversation yesterday.

First, I noted that I was concerned about what I understand to be the City's new position on effectuating the order of June 27, 1991. Both Paul Ruskin's notes and my own regarding the telephone conference with you of July 3, 1991 (which lasted more than one hour) reflect that:

1. We discussed possible implementation methodologies at length--and that you would go over those thoughts with Mr. Campbell and the CAO.

2. We also agreed that the implementation of the order would be then be discussed with us prior to any actions on the City's part. (Issues addressed were the definition of "co-workers", the degree of dissemination of the contents of the order, as well as who within the City was the proper person or group to effectuate provisions related to high level officials.)

3. You were also going to get back with us regarding possible changes to the MP-07 position, and how we might complete the retaliation issue without further legal proceedings.

---

[1] Admitted, New Mexico, Atty. No. 1108

If I now understand the City's position, it does not intend to get back with us on these items--particularly item numbered "2"--and instead will violate our agreement and proceed however it sees fit.

If I have misunderstood the City's position, I would ask that someone from your office write to clarify the situation. I would also note that I will supplement the present motion if unilateral actions run afoul of the order--or fail to adequately fulfill its intent.

We also discussed my concern that not only had the PERA situation not been addressed at the time of my motion, but that it remains an open issue now, after yet another week has passed. Please do not treat the motion as somehow tolling the responsibility to determine the status of this matter as soon as possible. To assist the City, as we discussed, I am having Paul Ruskin make himself available to provide information or assistance. He has called your office several times, and will continue to do so. As I mentioned he was involved in the original PERA calculations with Ms. Hauser.

Finally, I mentioned how disappointed I was that the order was going unsatisfied, and that the City had once again (after starting in a attempt at cooperation) embarking on a series of closed, unilateral actions. This breaches our agreement, and to my mind, good sense.

Sincerely,

Carl J. Hartmann III

pl:CJH

CARL J. HARTMANN, III
ATTORNEY-AT-LAW[1]

210 E. 28th Street
Suite 15-B
New York, New York 10016
Telephone: (212) 725-6327
Facsimile: (212) 447-6145

BY FACSIMILE

July 27, 1991

Ms. Judy K. Kelly, Esq.
Assistant City Attorney
City of Albuquerque
Legal Department
Albuquerque, New Mexico

RE: Jackson v. City et al. 86-1252 (On Remand)

Dear Ms. Kelly:

This responds to your two facsimile transmissions of July 26, 1991--the first being a letter requesting that I draft proposed language relating to the City's compliance with paragraphs C & D of the Court's order of June 27, 1991; the second being information from PERA related to my client's retirement account.

1. Obtaining the City's Compliance with the Court's Order

I note that I find the proposed method of dealing with the City's compliance to be dilatory. I once again remind you of our agreement during our telephone call of July 3, 1991. In that call, you, Paul Ruskin, and I discussed these identical issues at length, and formulated specific proposals--many of which I have merely restated below. You agreed then that you would contact the appropriate City officials, draft the exact statements which you now request from me, and get back with those proposals for our final review. All of these actions were to have taken place weeks ago. We have also discussed this earlier agreement in a subsequent telephone call (after the filing of Plaintiff motion on this issue) where I expressed my concern at the delay, and at the failure of Mr. Campbell and the CAO to respond to our agreement.

Now the City not only proposes to have me draft these items, but suggests another multi-step implementation process which further delays compliance.

---

[1] Admitted, New Mexico, Atty. No. 1108

I will not, however, risk further delay by debating this issue with your client. The time already lost is lost. I will, instead, draft proposed language (and methods) for implementation of these sections--noting my time and fees, which I will expect the City to pay without protest.

A. Implementation of Section "C". The first relevant section of the June 27, 1991 order and the incorporated findings of April 17, 1991, designated "C", contains two major clauses. The first deals with the requirement that certain officials be ordered to cease and desist

> the City of Albuquerque shall immediately order the Chief Administrative Officer, the City Attorney, the City Police, and all other management officials to cease and desist any and all actions not in compliance with the orders of this Court with regard to Plaintiff

The second clause of section "C" deals with a requirement that the City of Albuquerque act in a manner calculated to protect my client from non-compliance and retaliation--

> act, as provided by the settlement agreement and the prior Order of this Court, in a manner calculated to protect him from non-compliance or retaliation.

A. Order to Cease and Desist

The cease and desist provision of section "C" first deals with the issue of **"who must act"**

> the City of Albuquerque

The second component of this section relates to **"when"** the City is required to act,

> shall **immediately**

The third element involves **"the act"** which must be done,

> order

The fourth element states the target of the order, or "who" must be "immediately" "ordered" by "the City of Albuquerque, is

> the Chief Administrative Officer, the City Attorney, the City Police, *and all other management officials*

Fifth, and finally, the order specifies "what" they must be ordered to do,

> cease and desist any and all actions not in compliance with the orders of this Court with regard to Plaintiff

i. Element 1, "Who" Must Act. Pursuant to our conversation as to "who" would be the appropriate official or body to "immediately **order** the Chief Administrative Officer, the City Attorney, the City Police, and all other management officials to cease and desist", I have reviewed applicable ordinances and opinions. It is my belief, based on this review, that an official cannot "order" himself to do something. If the order recited only that notice was to be given this might be different, but for an order to have effect, it must be from an individual or body with sufficient authority to effectuate that order--to enforce non-compliance with its provisions. This is not a matter of giving notice to these officials--they must be "ordered". The only person or body which has sufficient authority to "order" all of the enumerated individuals is the City Counsel. (It would be absurd for the CAO to order himself to do something: First, he might be called upon to review and discipline himself, and second, he is personally and specifically referenced in the incorporated findings in this particular order as someone who has acted, knowingly, in committing contempt, and in making representations in this matter which the Court found to be less than credible.)

The City Counsel, although not empowered to act on "personnel" matters generally, can clearly act on a matter related to compelling compliance with regard to a prohibited action or behavior if contained in a federal court order. Thus, it is my belief that, at the very least, the City Counsel must order the CAO, by appropriate legislative device as to create a mandate, to act in the manner set forth in the order. Thus, I have attached a draft of a proposed "Resolution" (Exhibit "1" hereto) which I believe would accomplish the required compliance.

ii. Element 2, "When" the City Must Act. The order is clear, it states that the City "shall immediately" implement this provision. This order was entered on June 27, 1991. At this writing, therefore, the City is one full month late. The City must implement this provision immediately. As pointed out in Plaintiff's motion on this matter, failure to implement immediately has already allowed at least two major violations of the Order. If compliance is not forthcoming very quickly, the entire intent of the order will be lost.

Therefore, I would strongly suggest that the proposed resolution be provided on Monday, July 29, 1991, to the City Counsel--with a full, written explanation of the Order, the incorporated findings, and the status of the case (with appropriate supporting documents--such as the settlement agreement and the proposed resolution).

iii. Element 3, "What" must be done. The City is required to "order" all of its management officials to do, or not do, certain things. This does not say "notify". The plain English definition of "order" is,

> to issue a specific rule, regulation, or authorative direction; command

Webster's Ninth New Collegiate Dictionary, 1990. Similarly, Black's Law Dictionary defines "order" as,

> a mandate, precept, a command or direction authoritatively given

Blacks Law Dictionary, Revised Fourth Edition (*citing* Brady v. Interstate Commerce Commission, 43 F.2d 847, 850.) The point of which is that more is required than simply a "statement" that the proscribed activity is not endorsed, or that such activity should not be undertaken.

The City must order the individuals and officials to cease and desist. This order must be in a form, and with sufficient notice and authority, that the reasonable recipient understands that s/he has been given a "a mandate, precept, or command". Such a recipient must understand this to be command which, if violated, will result in a punitive response. (See below for a discussion of exactly what it is that they must be ordered to do or not do.)

iv. Element 4, Who must be Ordered to Comply. Again, the order is very clear, "the City of Albuquerque shall immediately order the Chief Administrative Officer, the City Attorney, the City Police, and all other management officials" to act or not act.

This requirement is not only clear on its face, but the logic of the requirement has been proved by events. *If the order applied only to P&R officials, it would not have reached Mr. Klingbeil and his superiors.* Failure to so order "all other management" would clearly risk another disastrous incident.

There may be a question as to the definition of "management", but this should be fairly simple to deal with--we can use either an internal personnel definition of "manager" or the plain English meaning--any person who has supervisory authority over others.

It is very important that the City be able to verify that the materials reached these individuals--and thus, I would ask that when the "order" is provided, each recipient provide the City Attorney's Office with a signed verification that s/he has received, read and understood the order they have been given, and the effects of violating that order.

v. Element 5, What the City Must Order. The Court's order requires that the City "cease and desist any and all actions not in compliance with the orders of this Court with regard to Plaintiff". Again, the Klingbeil incidents argue that a general, vague mandate will not work. The order must give notice to the managers of what cannot be done. To this end I have attached ("Exhibit "2" hereto) a statement which summarizes what must, pursuant to the Court's orders, be done.

B. Acts Calculated to Protect Plaintiff

The second clause of "C" requires the City to

> act, as provided by the settlement agreement and the prior Order of this Court, in a manner calculated to protect him from non-compliance or retaliation.

This requirement creates an affirmative (prospective) duty on the part of City to protect Mr. Jackson from both: (a) non-compliance, and (b) retaliation. This means that the City must seek to take such measures as a reasonably prudent employer would take, under the circumstances, to anticipate and avoid non-compliance and retaliation. It is not enough

that actions by officials and employees were "unfortunate", "misdirected", or "uninformed". The City has the burden to assure that all reasonable efforts have been made to avoid the fact or appearance of non-complying acts.

To calculate a protection of Plaintiff from "non-compliance", the City must read the Settlement Agreement and the Order, determine what constitutes compliance, and then determine how to stop its officials and agents from failing in this compliance. To a large extent, ordering all management official's compliance as set forth above will address this issue, but I have attached, As Exhibit "3" hereto, a list of additional efforts which should be undertaken. Similarly, the City must calculate what efforts must be undertaken to reasonably assure that individuals or officials do not retaliate or create the appearance of retaliation.

B. Implementation of Section "D".

Section "D" is also composed of two clauses. The first requires that

> Plaintiff's co-workers are to be provided with a copy of this order

This seems clear--it requires no writing, no review, no thought--it can be accomplished in about an hour. Copies of the Order (along with the incorporated Findings of April 17, 1991) should be made and distributed to Plaintiff's co-workers. As this simple requirement is also now, inexplicably, more than a month late I would (again) propose a fast way to do this--simply choose between two distribution schedules: (a) Everyone in Parks & Recreation (which is what the order requires), or (b) if it will speed up the process I would agree to providing a copy to everyone in Plaintiff's division (ie. everyone below him on an organizational chart) and everyone else in other divisions down to the level of an Assistant Superintendent (or its equivalent in areas such as financing, etc.)

I don't care whether you take the second, faster option--but please don't consult at length about this, don't get back to me, and please don't write me another letter as to this point. This is absolutely clear in the order, it was clear in our phone call a week after the order issued (when we first both agreed to the faster distribution method above), it was clear in Plaintiff's motion for contempt, and it was clear in our telephone discussion of one week ago when I again asked that you simply verify that you were going to implement the order as per our initial agreement--an agreement reached weeks ago, and an agreement about which I

have courteously inquired on at least three occasions. In short, the City must stop using the continuing correspondence, "discussions", and consultations, to try to create the appearance that there is anything at all to "review". The order says distribute. Distribute. Now.

The second clause of section "D" requires that

> Plaintiff's coworkers are. . .to be credibly informed by management that they will not be affected by any actions directed at Plaintiff, merely because of association, or proximity to him in the work environment.

Distribution for this information should be to the same group as described for distribution of the order under the first clause of section "D". As to how it should be carried out, I propose two options which were previously discussed.

Item 1: (As originally discussed) Along with the June 27, 1991, Court order, each designated person should receive an informational package containing a copy of the City and Title VII provisions regarding their protections from prohibited acts of retaliation and a letter from the CAO and/or the City Attorney stating that "that they will not be affected by any actions directed at Plaintiff, merely because of association, or proximity to him in the work environment."

Item 2: (As originally discussed) Credible upper level officials (CAO, Walker, Campbell) should meet with designated employees and emphasize lack of hostility, and City's policy to discourage (and punish) any retaliatory acts with regard to Jackson, the MP-07 position, Jackson's division, or P&R.

Please inform me, upon your receipt of this letter, if the City will be unable or unwilling to copy and distribute the Order of June 27, 1991 and the incorporated findings of April 17, 1991, within 48 hours of that receipt. Also, please inform me of a specific schedule for completing implementation of the additional matters set forth above. Also, please inform me whether the City acknowledges that it retains funds for Plaintiff's pre-1985 PERA contributions. Also, please let me know if the City wishes to further discuss any settlement as to retaliation issue. Finally, I would appreciate your views as to whether the City will be able to provide its Opposition to my Motion within the period provided by the rules.

Drafting and research for this letter and attachments required 4.5 hours of my time, and 1.1 hours of Paul Ruskins time for editing and revision.

Sincerely,

Carl J. Hartmann, III

pl:CJH

CARL J. HARTMANN, III
ATTORNEY-AT-LAW[1]

210 E. 28th Street
Suite 15-B
New York, New York 10016
Telephone: (212) 725-6327
Facsimile: (212) 447-6145

BY FACSIMILE

August 1, 1991

Ms. Judy K. Kelly, Esq.
Assistant City Attorney
City of Albuquerque
Legal Department
Albuquerque, New Mexico

RE: Jackson v. City et al. 86-1252 (On Remand)

Dear Ms. Kelly:

This responds to your facsimile transmission to Paul Ruskin of this date. If the amount in dispute has been reduced to $287.23, in the interest of obtaining a conclusion to this matter in under a year from the date of the Order, I ask that nothing more be done. My client will waive any claims for that amount.

Please request that a check be issued in Mr. Jackson's name in the amount of the undisputed portion--which I understand is $4,541.21.

I would also note that I have received no response to my letter in response to your request for a means of implementing the balance of the Court's order. I must say that I am perplexed as to why, in light of my pending motion for contempt, the City would go out of its way to solicit my views, and to then not respond in any manner. In this vein, I would also note that no explanation has ever been forthcoming as to why the retained PERA funds were not paid

[1] Admitted, New Mexico, Atty. No. 1108

in, how my client's account was fouled-up, and the City apparently never checked on the matter despite the first Court order.

Drafting and research for PERA related issues required 2.1 hours of my time, and 3.6 hours of Paul Ruskin's time.

Sincerely,

Carl J. Hartmann, III

pl:CJH

CARL J. HARTMANN, III
ATTORNEY-AT-LAW[1]

210 E. 28th Street
Suite 15-B
New York, New York 10016
Telephone: (212) 725-6327
Facsimile: (212) 447-6145

BY FACSIMILE

August 6, 1991

Ms. Judy K. Kelly, Esq.
Assistant City Attorney
City of Albuquerque
Legal Department
Albuquerque, New Mexico

RE: Jackson v. City et al. 86-1252 (On Remand)

Dear Ms. Kelly:

This confirms our telephone conversation of yesterday, Monday, August 5, 1991. In that conversation you made a request on behalf of the City of Albuquerque for an extension of the time limits in which to respond to Plaintiff's second motion for contempt (which time limits you noted in a prior letter to me.)

I noted that my client did not wish to provide the City with an extension--as the only basis stated for the request was your personal vacation which began just three working days before the response was due. I also noted that the City Attorney had frequently noted that it is really a "half-billion dollar per year corporation", and I was unclear as to why this response could not have been done last week, or by another attorney this week.

Finally, I noted that my client had no reason to impose the burden of this problem on your vacation, and thus--without any agreement or extension--I represented to you that I would not file any motion related to the City's response being out of time between the dates of August 14 and August 22, 1991. As I understood your response to this accommodation, after checking with Mr. Campbell you assured me that the Opposition would be filed before the end of business on Thursday, August 22, 1991.

---

[1] Admitted, New Mexico, Atty. No. 1108

If your recollection of any of these items is even slightly different from mine, I would ask that your so note my misunderstanding in a brief writing. If I do not hear from you to the contrary, I will proceed on this basis. I hope this arrangement will contribute to your having a pleasant vacation.

Sincerely,

COPY

Carl J. Hartmann, III

pl:CJH

City of Albuquerque

P.O. BOX 1293 ALBUQUERQUE, NEW MEXICO 87103

LEGAL DEPARTMENT
(505) 768-4500

PLAINTIFF'S EXHIBIT 5

Blumberg No. 5113

August 8, 1991

VIA FACSIMILE

Carl J. Hartmann, III, Esq.
210 E. 28th Street
Suite 15-B
New York, NY 10016

RE: JACKSON V. CITY ET. AL.

Dear Mr. Hartmann:

Thank you for faxing me a copy of the letter sent to Judy Kelley. I am glad the PERA issue has been resolved. We are at work on the remaining issues to resolve the case, including compliance with orders of the Court.

Sincerely,

David S. Campbell
City Attorney

DSC/jla

xc: Judy K. Kelley, Assistant City Attorney

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CARL JACKSON,	)	
Plaintiff,	)	
v.	)	**Civ. No. 86-1252-M**
	)	*(On Remand)*
CITY OF ALBUQUERQUE,	)	
ORLANDO SEDILLO, and	)	
HENRY "KIKI" SAAVEDRA,	)	
Defendants.	)	

PLAINTIFF'S MOTION AND MEMORANDUM
FOR PERMISSION TO FILE REPLY OUT OF LENGTH

COMES NOW THE PLAINTIFF, by and through his counsel of record, Carl J. Hartmann, III, and seeks a minute order from this Court allowing him to file his Reply Brief of twenty-eight pages. Plaintiff, with apologies to the Court for asking it to consider a brief of this length, states the following in support of this motion:

1. Defendant's Opposition argues issues of law not raised in the Motion, which are very generalized concepts. Defendant cites little law in support of new concepts, and thus, it was necessary to discuss the legal and factual background information as to these principles.

2. Defendant's Opposition makes factual assertions which are inaccurate or confusing, requiring clarification.

3. Defendant's Opposition argues many factual issues not within the record--without support of affidavits or other exhibits. Thus, differentiation or a response to these factual assertions is required in the Reply.

4. Assertions are made as to the existence of various policies of the Defendant without exhibits or affidavits as to those policies--requiring Plaintiff to argue many points in the alternative (ie. as though the policies may or may not exist.

MEMORANDUM

As to Facts. It would be unfair to require Plaintiff to respond to assertions as to critical issues based on such unsupported assertions as "the City did in fact orally notify upper level management immediately after the Court's order." *Every single fact of record* (of which there are many as to this point) disputes this and suggests that this is inaccurate. It is impossible to leave this sort of totally unsupported assertion, baldly made without affidavits or reference to evidence of record, simply stand unanswered. Yet, because Plaintiff has absolutely no idea of the basis of this assertion, he must dispute a general proposition--and then argue in the alternative.

Defendant states that it 'understands' Plaintiff dies not intend to pursue one issue (although it cites nothing which would support this) and then goes on to recite one and a half pages of inaccurate information on the point which, by implication at least, totally distorts the facts of the matter. Plaintiff, for his own reasons, does not actively continue to dispute the City's conclusion, but is forced to clarify the factual allegations.

As to Legal Principles. Similarly, there is an attempt to interject the concept of "collateral estoppel" into this continued proceeding on an identical issue (contempt) between identical parties. This required several pages of analysis of the concepts of direct and collateral estoppel, issue preclusion, and (the only one applicable) the law of the case. There is simply no other way to approach an attempt to apply such a broad principle in broad strokes.

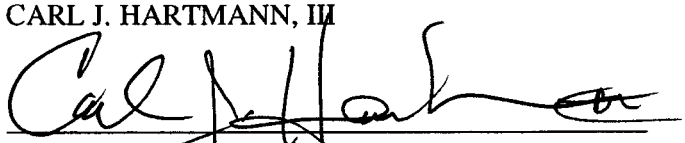
As to Exhibits Incorporated into the Reply. Finally, the Defendant argues many points to support its position which were the subject of numerous writings and documents--attaching none of them. A good deal of the Reply simply included the relevant portions of these letters rather than attaching them as exhibits.

Conclusion. Plaintiff could ask the Court to strike or disregard all "facts" not supported by reference to exhibits or affidavits in Defendant's Opposition, but this will not speed the resolution of this case--nor does Plaintiff seek to stop Defendant' from stating its position on the basis of technical requirements. Plaintiff asks only that he be allowed the opportunity to present this full reply thereto.

DATED: September 3, 1991.

RESPECTFULLY SUBMITTED,

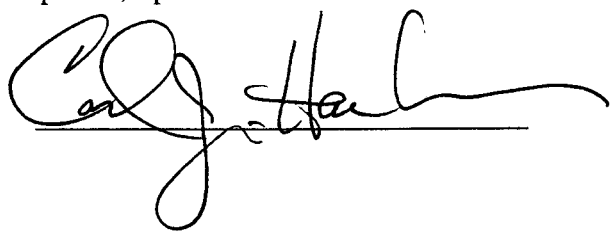
CARL J. HARTMANN, III



CARL J. HARTMANN, III
Attorney for the Plaintiff
201 E. 28th St., Suite 15-B
New York, NY 10016
Telephone: (212) 725-6327
Facsimile: (212) 447-6145

CERTIFICATE OF SERVICE

I, the undersigned, do hereby swear and attest that a true and accurate copy of the Motion and Memorandum above, served, as provided by stipulation of the parties, upon counsel for the Defendant herein on the 3rd day of September, 1991.



THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CARL JACKSON,	)
Plaintiff,	)
v.	) **Civ. No. 86-1252-M**
	) (*On Remand*)
CITY OF ALBUQUERQUE,	)
ORLANDO SEDILLO, and	)
HENRY "KIKI" SAAVEDRA,	)
Defendants.	)

MINUTE ORDER

THIS MATTER having come on before the Court, it is hereby ORDERED that Plaintiff shall be allowed to file a Reply of twenty-eight pages.

SENIOR DISTRICT COURT JUDGE

CONTINUATION

FACSIMILE TRANSMISSION

TO:

Judy Kelley, Esq.

Asst. City Attorney, City of Albuquerque, N.M.

FAX NUMBER: (505) 768-4525

NUMBER OF PAGES TRANSMITTED: ~~50~~ 22+1
INCLUDES THIS COVERSHEET

FROM:
CARL J. HARTMANN, ESQ.

RESPONSE:
(VOICE) (212) 725-6327
(FAX) (212) 447-6145

DATE:
SEPTEMBER 3, 1991

REGARDING:
JACKSON V. CITY OF ALBUQUERQUE

COMMENTS:

REPLY

NOTE: Clean Original sent by FedEx on Tuesday AM.

24 Hour per day Facsimile, Modem and Telex messaging. In the event the specified number of pages were not received, or were received with errors, please contact the "Response" number set forth above.

CARL J. HARTMANN, III
Attorney-At-Law[1]

201 E. 28th St.
Suite 15-B
New York, New York 10016
Telephone: (212) 725-6327
Facsimile: (212) 447-6145

3 September, 1991

Federal Express

Clerk (Civil Div.),
U.S. District Court - District of New Mexico
P.O. Box 689
Federal Building and United States Courthouse
Albuquerque, New Mexico 87103

RE: *Jackson v. City of Albuquerque, et al.*
Civ. No. 86-1252-M (On Remand)

Dear Sir:

Enclosed you will find one original of Plaintiff's papers for filing in the above-captioned cause, and one copy for chambers.

I thank you for your attention and assistance in this matter.

Sincerely,

Carl J. Hartmann, III

pl:CJHIII

Service on: City Attorney, Albuquerque, N.M.

Copies: Mr. Carl Jackson
Kenneth R. Wagner, Esq.
Paul J. Ruskin, Esq.

[1] Admitted, New Mexico, Atty. No. 1108