

1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2
3 **November 01, 2022**

4
5 **NO. S-1-SC-39586**

6
7 **ERIC MILLER,**

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9
10 Plaintiff-Petitioner,

11 v.

12
13 **CITY OF ALBUQUERQUE**
14 **PERSONNEL BOARD,**

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17 Defendant-Respondents.

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20 **ORDER**

21
22 WHEREAS, this matter came on for consideration by the Court upon
23 petition for writ of certiorari filed under Rule 12-502 NMRA, and the Court having
24 considered the foregoing and being sufficiently advised, Chief Justice C. Shannon
25 Bacon, Justice Michael E. Vigil, Justice David K. Thomson, Justice Julie J.
26 Vargas, and Justice Briana H. Zamora concurring;

27 NOW, THEREFORE, IT IS ORDERED that the petition for writ of
28 certiorari is DENIED; and

29 IT IS FURTHER ORDERED that the Court of Appeals may proceed in
30 *Miller v. City of Albuquerque Personnel Board*, Ct. App. No. A-1-CA-40469 in
31 accordance with the Rules of Appellate Procedure.

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IT IS SO ORDERED.

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WITNESS, the Honorable C. Shannon Bacon, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 1st day of November, 2022.

Elizabeth A. Garcia, Clerk of Court
Supreme Court of New Mexico

I CERTIFY AND ATTEST:

A true copy was served on all parties or their counsel of record on date filed.

Erinny Muñoz

Clerk of the Supreme Court
of the State of New Mexico

By


Deputy Clerk

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Mark Reynolds

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ERIC MILLER,

Appellant-Petitioner,

v.

CITY OF ALBUQUERQUE
PERSONNEL BOARD,

No. A-1-CA-40469
Bernalillo County
D-202-CV-2021-04615

Appellee-Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

This Court has considered Petitioner's Rule 12-505 NMRA Petition for Writ of Certiorari.

THE COURT ORDERS that the petition is **DENIED** and this matter is **CLOSED**.



J. MILES HANISEE, Chief Judge

JENNIFER L. ATTREP, Judge

JACQUELINE R. MEDINA, Judge

APPENDIX A: ORDER OF THE NEW MEXICO
COUNTY OF BERNALILLO SECOND JUDICIAL
DISTRICT, FILED MAY 19, 2022

STATE OF NEW MEXICO
SECOND JUDICIAL DISTRICT
FOR THE TENTH CIRCUIT

May 19, 2022, Filed
No. D-202-CV-2021-04615

ERIC MILLER
Plaintiff-Appellant,

v.

CITY OF ALBUQUERQUE PERSONNEL BOARD
Defendant-Appellee.

OPINION and ORDER

Appellant Eric Miller appeals from the January 7, 2021, adverse decision of Appellee City of Albuquerque Personnel Board. The request for hearing is denied. The Board's decision is affirmed.

Facts and Background

Miller worked as a Motorcoach Operator in the Albuquerque Transit Department from October 17, 2015, until his termination, on January 15, 2019.

[RP 0474] The incidents forming the basis of the termination occurred on July 27, 2018, July 10, 2018, and July 17, 2018. **[Id.]**

For Incident 1, the Department received a citizen complaint on July 27 alleging that Miller was "doing road rage" and was involved in a hit-and-run accident. **[Id.]** The Board found that Miller denied engaging in road rage, but admitted to his liability in the involvement of the accident. **[RP 0474]**

Incident 2 resulted from a July 10 citizen complaint alleging that Miller was on his cell phone, cut off a vehicle, and was generally not paying attention. **[RP 0474]** Miller denied the allegations. **[Id.]**

On July 17, the Department received two citizen complaints regarding Incident 3, alleging that Miller "honks at everything,

drives violently, and flipped off a driver." [RP 0474] He denied the allegations. [*Id.*]

Rolando Suarez, Transit Supervisor, viewed video from Miller's bus from these dates, preparing timestamped descriptions of each questionable action that might constitute a violation. [RP 0474] The Board relied on video evidence showing Miller committing the acts alleged, concluding that the acts were infractions of City and Motorcoach Operator's Manual (MCO) policies and regulations which could result in discipline, including termination. [*Id.*] On July 15, 2018, Miller was temporarily reassigned to the Department's Maintenance Division. [*Id.*]

Miller received training concerning safely driving his bus as well as traffic safety, de-escalation, the MCC), professionalism, and dealing with members of the public. [RP 0474-

75] Miller had been disciplined twice in the preceding year prior to the incidents for similar behavior, resulting in two suspensions without pay. **[RP 0475]**

Transit Director Bernard Toon stated that he did not believe it was safe for Miller to continue interacting with the public; thus, he terminated Miller January 15, 2019. **[RP 0475]** The Board found that Miller' s improper use of electronic devices while operating the bus as well as his reckless driving and cursing members of the public were aggressive and inappropriate actions, violating City policy and MCOs. **[Id.]**

The Board concluded that the City proved, by a preponderance of evidence, that Miller' s actions warranted disciplinary actions, constituting just cause for his termination. **[RP 0475]** The Board accepted the hearing

officer's recommendation to terminate Miller by a vote of three to zero. **[RP 0476]**

Discussion

This Court's standard of review is provided by Rule 1-074(R) NVIRA. The Court must determine whether the Board acted fraudulently, arbitrarily, or capriciously; whether, based upon the whole record on appeal, the Board's decision is not supported by substantial evidence; whether the Board's action was outside the scope of authority of the agency; or whether the action of the Board was otherwise not in accordance with law. *Cf. id.*

"Under whole record review, the court views the evidence in the light most favorable to the agency decision, but may not view favorable evidence with total disregard to contravening evidence." *Nat'l Council on Compensation Ins. v. N.M. State Corp. Comm'n*, 1988-NMSC-042,

¶ 7, 107 N.M. 278, 756 P.2d 558. "To conclude that an administrative decision is supported by substantial evidence in the whole record, the court must be satisfied that the evidence demonstrates the reasonableness of the decision." *Id.* ¶ 8 "The reviewing court needs to find evidence that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency." *Id.*

"The court must view the evidence in the light most favorable to the decision of the agency and must defer to the agency's factual determinations if supported by substantial evidence." *N.M. Bd. of Psychologist Exam'rs v. Land*, 2003-NMCA-034, ¶ 5, 133 N.M 362, 62 P 3d 1244. In its appellate capacity, the Court "may not substitute its judgment for that of the

agency and must evaluate whether the record supports the result reached, not whether a different result could have been reached." *Id.*

"In order to find just cause, 'the Board is required to determine not only that there was employee misconduct, but also that the agency's discipline was appropriate in light of that misconduct. *Martinez v. N.M. Slate Eng'r Office*, 2000-NMCA-074, ¶ 30, 129 N.M 413, 9 P.3d 657 (quoted authority omitted). "While the first prong focuses on the nature of the employee's conduct, the second prong focuses on the reasonableness of the agency's disciplinary action." *Id.* "Just cause occurs when an employee engages in behavior inconsistent with the employee's position and can include, among other things, misconduct, negligence, insubordination or continuous unsatisfactory performance," *Id.* ¶ 32.

"Ultimately," this Court must decide "whether substantial evidence support[s] the Board's order." *Nat'l Council*, 1998-NMSC-036, ¶ 9.

In his amended statement of appellate issues, Miller sets out thirteen points. Regarding some arguments, including his contention that the Board erred as a matter of law in submitting a purportedly illegal reassignment as a finding of fact, as well as Miller's assertions that the Board erred in submitting unrelated, misleading, and needlessly cumulative evidence, Miller has not demonstrated that these issues are relevant to his termination or would require reversal. His allegations of fraud are unsupported by the record. In his other points, Miller ultimately argues that the charged violations were not supported by substantial evidence and that the discipline was not warranted.

For Incident 1, the Department received a citizen complaint on July 27 alleging that Miller was "doing road rage," became involved in a verbal argument, made comments about other drivers, and was involved in a hit-and-run accident. **[RP 0319; City Ex. 1B]** The video supports allegations that Miller engaged and escalated a verbal argument with another driver, made inappropriate, offensive remarks, and was involved in a minor accident.

In the video of the incident, Miller remarks, "pull out in front of a bus, jackass." **[City Ex. 1B, 8:55 a.m.; RP 0320]** A few moments later, while stopped, Miller takes out his laptop, placing his right hand on the keyboard. **[Id. at 8:57-9:01, RP 0320]** Later, at 9:18 a.m., while stopped at a bus stop, Miller takes out his cell phone and opens it; he puts the phone away and departs. **[Id.]**

A vehicle travels from the center lane into the right lane, in front of the bus; Miller honks the horn for about seven seconds, then stops the bus next to the vehicle, opening the bus door. [*Id.* at 9:07, RP 0320] Miller states to the driver, "What the hell is wrong with you, retarded boy; that was really stupid, see these passengers in here." [*Id.*] The driver responds, with an expletive, and Miller states, "shut your mouth up." [*Id.*] The driver threatened to pull Miller out of the bus, and Miller states, repeatedly, for the driver to "try it," securing the bus, unfastening his seat belt, and turning sideways in the seat, facing the open door, until the driver, opening his door, asks, "you want to fight?" [*Id.*] Miller continued, twice stating, "you said you were going to pull me out, come on and pull me out;" after the driver closes his door and says "you pussy bitch," Miller

responds, "you pussy boy, just like your mama." **[Id.]** Finally, in response to another expletive from the driver, expressing that he knew where Miller works, Miller replies, "come and find me." **[Id.]**

A few minutes later, a pickup truck is in front of the bus, turning north, partially in the same lane as the bus. **[City Ex. 1B, at 9:09; RP 0320]** Miller crosses solid white lines, moving partially into the center lane, in order to drive around the pickup. **[Id.]**

While traveling on Carlisle, a gold vehicle in the right lane, crossing a solid white line, changes lanes in front of the bus; Miller honks the horn for about five seconds. **[City Ex. 1B, at 9:20; RP 0321]** When the vehicle in front of the gold car stops to turn into a gas station, Miller again honks and applies his brakes hard in order to avoid rear-ending the gold car,

stating, "see what you almost did, you pathetic piece of trash." **[Id.]**

About three minutes later, as Miller is pulling away from a bus stop while vehicles are traveling in the lane, a pickup truck makes contact with the driver's side mirror of the bus. **[City Ex. 1B, at 9:23; RP 0321]** Miller follows the truck into the left turn lane at Carlisle and Lomas, pausing and calls dispatch, describing the incident and giving the dispatcher the license plate number. **[Id.]** He drives the bus across three lanes of traffic, over solid white lines, into the right hand turning lane. **[Id.]** After stopping, Miller turns the bus on a red light, pulling into the bus stop. **[City Ex. 1B, at 9:26; RP 0321]**

Suarez, the City's transit supervisor, in his notification of predetermination hearing, described the personnel rules, administrative

instructions, and regulations at issue, including the MCO Manual. **[RP 0321-5]** These include directives for serving the public with respect and courtesy, reminders that the public's safety and well-being is a driver's first obligation, and emphasizes maintaining the highest professional standards. **[RP 0322]** The rules prohibit intimidation and verbal threats. **[Id.]** The MCO Manual directs drivers to use good customer relations skills in order to diffuse any confrontational situation with passengers and the public; drivers "shall not provoke or aggravate any situation. Situations that could lead to an altercation must not be pursued." **[RP 0324]**

With respect to driving maneuvers, the MCO Manual provides, when entering an intersection, the driver must "be prepared to make a smooth, safe stop in the event of signal

changes," and, when stopped at a red light, the vehicle "must not be put into motion until the green traffic signal is displayed." **[RP 0323]** It further provides that the driver must be prepared to make safe, smooth stops to avoid a collision and prevent passengers from falling if another motorist is turning or stopping suddenly in front of the vehicle, and to maintain safe following distances. **[RP 0323-24]** A May 27, 2009, Cell Phone Policy, as well as the Manual, prohibits cell phone use when operating a City vehicle as a safety violation and a major policy infraction; cell phone use is allowed only at a "break point or recovery time." **[RP 0324-5]**

Incident 2 resulted from a July 10, 2018, citizen complaint alleging that Miller was on his cell phone, cut off a vehicle, and was generally not paying attention. **[RP 0352; City**

Ex. 2B] Although there appears to be no evidence of cell phone use, the video shows examples of Miller' s language and driving maneuvers of concern.

Miller, after servicing a bus stop, waits for a pickup truck to pass in the left lane behind a 66 Central bus also paused at the bus stop; he begins to move into the left lane when a silver car traveling in the left lane has to brake in order to prevent a collision with his bus, which is partially in the left lane. [***Id.* at 3:58 p.m.**] As the other bus begins to depart, Miller turns back into the right-hand lane, stating, "what are you doing? You can't just pop out of the driveway and sneak up under me. You see my blinkers on. I was here first. Sneaking out of the darn parking lot." [***Id.***]

A few minutes later, a pickup truck is traveling in the right lane next to Miller. [**RP**

0353; City Ex. 2B, at 4:01] Miller attempts to adjust his speed to get either in front of, or behind, the truck, and states, "get out of the damn way, boy," as he goes behind the pickup and the vehicle honks at him. [*Id.*] He responds, "you retarded moron, shut up. Are you retarded, you were nowhere near my bus. What are you doing honking the horn? You damn mama, you four-eye, pathetic piece of trash." [*Id.*]

Continuing on, Miller remarks, "retarded pathetic idiots; I doubt you even graduated from high school." [**RP 0353 City Ex. 2B, 4:02]** He further states, "how are you going to sit there and accelerate about thirty-five with the potential of getting hit on the back side, and you make that right-hand lane-change, why? You said, 'because I love being in an

accident.' Their [sic] brain is that twisted.' ***Id.***
at 4:03]

While traveling behind a gray vehicle moving forward with its right-hand turn signal flashing, Miller moves left into the turn lane, and then further left, partially into the ART bus lane, marked with left-turn-only indications clearly visible on the lane, in order to pass and continue straight. **[RP 0353 City Ex. 2B, 4:08]** He enters the intersection as the vehicle is making a right turn, saying, "you said thirty mph; keep up with traffic." ***Id.***

Miller, traveling east-bound, comes upon a pickup truck waiting to make a left turn. **[RP 0352 City Ex. 2B, 4:10]** Miller moves right, squeezing between the pickup and the curb before continuing through the intersection. ***Id.***

Suarez, in the Notification of Predetermination Hearing, again sets out applicable rules and regulations. **[RP 0352, 354-56]** Suarez relied upon many of the rules and regulations mentioned above. **[*Id.*]** In his findings and recommendations with regard to Incident 2, Suarez explains that Miller failed to carry out his assigned duties and responsibilities to the public when he changed lanes to get around the bus without ensuring that the lane was clear of traffic, and by making derogatory remarks. **[*Id.* at 0363-4]** Suarez noted that Miller did not come to a complete stop prior to driving around a vehicle that was stopped, waiting to make a left turn, instead, he squeezed between the vehicle and curb, failed to maintain a safe following distance, made rude and insulting comments,

and caused a vehicle to hit its brakes to avoid running into the bus. [*Id* at 0364-5]

Incident 3 stemmed from two citizen complaints received on July 17, 2018, alleging that Miller started honking and revving the engine when a female senior citizen did not immediately proceed when the light turned green, flipping off the driver, and that he "honks at everyone," drives violently, makes sharp turns, and talks on the phone while driving. [RP 0381; City Ex. 3C] Although Miller does not flip off the driver, he honks, drives aggressively, and uses improper language.

While traveling eastbound on Central in the left lane, a pickup truck traveling in the right lane moves into the left lane, appearing to have its left blinker on, in front of Miller. [RP 0382;

City Ex. 3C, at 1:48] Miller honks, saying, "get your behind away from my bus, you punk; your mama, trash." [*Id.*] About ten minutes later, Miller was behind a car, which was stopped at the light with its left turn blinker on. **[RP 0382 City Ex. 3C, at 1:59]** The light changes, with the car waiting to turn left; Miller proceeds to the right of the car, between the car and the curb [*Id.*] As he approaches an intersection, on a green light, people are in the crosswalk; Miller honks, stating, "look at the light, man," proceeding through the intersection. [*Id.*] While stopped at a bus stop, Miller takes out his cell phone, tapping on the screen. **[RP 0382 City Ex. 3C, at 2:01]**

A few minutes later, as a pickup truck was partially in the travel lane, either parked or in the process of parking, Miller moves left into the ART lane across double white lines to drive

around the pickup. **[RP 0382 City Ex. 3C, at 2:08]** He honks, saying, "get the car out of the road, if you can't drive, don't drive. Stay out of the traffic lane." **[Id.]**

A green car in front of Miller pulls over to the curb **[RP 0382; City Ex. 3C, at 2:12]** Miller says, "you should know better than that," "worthless trash," and "jackass." **[Id. at 2:12-14]** About a minute later, Miller moves from the travel lane into the right-hand turn lane, proceeding forward through the intersection. **[Id. at 2: 15]** Another minute later, Miller, seeing one vehicle going around the other, honks, saying "the speed limit is thirty-five, you retarded idiot. Read the speed limit sign. Get off the road if you don't know what you're doing. No wonder the guy's mad at you." **[Id. at 2:16-17]**

Next, Miller is in the left turn lane, behind two other vehicles waiting to turn, while the light is red. **[RP 0383; City Ex. 3C, at 2:22]** When the left turn arrow turns green, Miller honks twice, saying "drive on boy, what the hell are you looking at?" **[Id.]** He does not flip off the driver, instead raising his arm three times. **[Id.]**

While waiting at a bus stop, Miller takes out his cell phone after loading the passengers. **[RP 0383; City Ex, 3C, at 2:24]** A car passes, honking; Miller responds, "yeah, you idiot." **[Id.]** After a few minutes, Miller puts his cell phone away and begins to pull out of the bus stop; a male is walking next to the bus by the midway point, appearing to be trying to catch the bus, but Miller does not appear to check the stop prior to departing. **[Id. at 2:27]** Finally, while traveling behind a car, both the car and

Miller move into the right lane, [*Id.* at 2:31]
Miller honks, saying something unintelligible,
then "boy." [*Id.*]

Suarez, in his findings and recommendations
for this incident, lists the rules, MCO Manual,
and regulations applicable to the conduct. [RP
0381; 384-9] These mirror those described
above. [*Id.*]

As noted above, Miller received training
concerning safely driving his bus as well as
traffic safety, driving laws and safety
technique, de-escalation, conflict resolution,
the MCO Manual requirements,
professionalism and drivers being held to high
standard, as well as dealing with members
of the public. [RP 0474-75; LaPlante
Testimony, Day 1 at 4:38-:39; 4:41-:44]
Miller, on the other hand, while agreeing that
he received some training by Training

Specialist LaPlante, emphasized that he did not receive "professional" de-escalation training. **[Miller Testimony, Day 1]**

Suarez testified with regard to the incidents, explaining his concerns and the violations of safety rules when Miller crossed solid white lines, how only one vehicle is allowed in a single lane, and why particular maneuvers were unsafe. **[Suarez Testimony, Day 1, at 5:21; 5:38; 5:42; 4:45-:53]** LaPlante also testified that Miller's driving conduct was unsafe and improper, noting that Miller should not have entered the crosswalk if pedestrians were present under the Manual, that he should not turn on a red light, that he should yield right of way to other drivers, that he should stay in his lane, that he should not cross solid white lines, that there is only one vehicle in a lane, and that, because large vehicles do not

stop quickly, Miller must maintain appropriate following distances. **[LaPlante Testimony, Day 1, at 4:47-:49; :53; 5:21; 5:38]** He explained the violations of rules and regulations, and why Miller's maneuvers were unsafe, for each incident. **[Id. at 5:42-:53]**

Toon testified regarding Miller's inappropriate language and his inability to control his language, expressing that he had previously not encountered such escalating comments, and recalling Miller's prior disciplinary incident in which Miller left his route to follow a driver without getting assistance. **[Toon Testimony, Day 1, at 2:58; 3:00-:01; 3:03-:04]** He stated that Miller's language showed contempt for other drivers, and could escalate, not diffuse, tense situations. **[Id. at 3:18; 3:20]** Toon testified that it was inappropriate to honk at people in

the crosswalk. **[Id at 3:20]** Toon similarly described Miller's concerning driving behavior, squeezing between a car and the curb, driving abruptly, and going into the ART bus lane. **[Id. at 3:10-:11]** Toon found Miller's behavior justified his termination because he did not believe that Miller could be rehabilitated, as the anger management class Miller attended after the earlier disciplinary incident did not help. **[Id. at 3:29-:35]**

Suarez, LaPlante and Toon discussed the cell phone policy, explaining that drivers were prohibited from using the cell phones unless at a break point or during recovery time, although the meaning of this prohibition was contested by Miller during the hearing. **[Toon Testimony, Day 1, at 2:58-:59; LaPlante Testimony, Day 1, at 4:44-:46; 5:05-:06; Suarez Testimony, Day 1, at 5:35-:36]**

Miller argues, as he did below, that the City was critically short of drivers during the period in question, noting that the City drafted drivers to work on days off, sometimes resulting in him working with less than eight hours of rest before working another shift, causing fatigue and difficulty in maintaining his tolerance. [*See, e.g., Miller Testimony, Day 1, at 1:33-:39; Amend. SAI, at 3*] While Miller conceded that he bore some responsibility for the escalating incident with the other driver in the first incident, that his driving was aggressive, but not road rage, and he acknowledged that his language was unprofessional, he points out that he served the City with professional competence, with only a few conflicts, and without historical patterns of incidents, for over two years. [*See, e.g., id. at 1:40-:42; Amend. SAI, at 3*]

The Court acknowledges the challenging conditions Miller faced as a driver generally and with respect to extra work hours. However, he was given the opportunity to present this information during the hearing, and the Board had the discretion to take this into consideration when determining the proper level of discipline for the charges. *Cf. Las Cruces Prof'l Fire Fighters & Int 'l Ass 'n of Fire Fighters, Local No. 2362 v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M 329, 940 P 2d 177 ("In accordance with the standard of review, when considering a claim of insufficiency of the evidence, the appellate court resolves all disputes of facts in favor of the successful party and indulges all reasonable inferences in support of the prevailing party."). Similarly, the Board was in the position to review both his positive work

history as well as his prior disciplinary incidents and corrective actions.

The Court recognizes that the video shows Miller treating his passengers respectfully, and that many thanked him as they exited his bus. The Court further acknowledges that Miller's behavior during the hearing below reflected his particular helpfulness and calm, respectful manner. However, the Board could determine that the troubling incidents while operating his bus outweighed his good behavior. *Cf. Nat'l Council*, 1988-NMSC-042, ¶ 8 ("To conclude that an administrative decision is supported by substantial evidence in the whole record, the court must be satisfied that the evidence demonstrates the reasonableness of the decision.").

Miller argues that the allegations made in the citizen complaints were false and

unsupported, and should have been dismissed. The Court agrees with the City that the citizen complaints triggered its investigation into the video footage, where Miller' s improper conduct was discovered and substantiated. As set out in detail above, the Court concludes that the Board's determination was supported by substantial evidence and was in accordance with law. Even if there is some dispute as to violations of the cell phone and laptop policy, Miller's use of language, escalation of a dispute with another driver, and his improper driving maneuvers support the Board's findings of fact and conclusions of law, including termination. *Cf. Martinez* 2000-NMCA-074, ¶ 32 (concluding that substantial evidence supported just cause to terminate based on misconduct, insubordination, and abusive and threatening behavior).

Conclusion

The Court AFFIRMS the determination of the Board.

IT IS SO ORDERED.

/s/ Beatrice J. Brickhouse

Beatrice J. Brickhouse
District Court Judge

This is to certify that a true and correct copy of the foregoing document was mailed/delivered/or otherwise provided to Eric Miller and the Board on this 20 day of May 2022.

D-202-CV-2021-04615

APPENDIX B: ORDER OF THE CITY OF
ALBUQUERQUE PERSONNEL BOARD,
FILED DECEMBER 9, 2020

BEFORE THE CITY OF ALBUQUERQUE
PERSONNEL BOARD

PB 19-02

IN THE MATTER OF ERIC MILLER, a
terminated employee ALBUQUERQUE
TRANSIT DEPARTMENT

ORDER

Pursuant to Chapter 3, Article I, Section 25 of the Revised Ordinances of Albuquerque ("ROA") 1994, "a nonprobationary employee who has been suspended without pay for more than five days, demoted for disciplinary reasons, or discharged may appeal the discipline to the Personnel Board within ten calendar days of the occurrence of the disciplinary decision. " Section 3-1-25 (A) ROA 1994. The City Personnel Board referred this appeal to a Personnel Hearing Officer to conduct an evidentiary hearing and the Hearing Officer prepared and submitted to the Board and the parties a report containing a summary of the

evidence taken at the hearing and proposed findings of fact, pursuant to Section 3-1-25 (C) ROA 1994.

"The Board shall render a decision that shall include findings of fact and conclusions of law consistent with the evidence. The proceedings before the Personnel Board shall be limited to consideration of the Hearing Officer's Report, any written submissions of the parties, and, at the Board's option, oral argument by the parties concerning the evidence admitted at the hearing. The Board shall not hear any testimony. A tie vote upholds the recommendation of the Hearing Officer." Section 3-1-25 (D) ROA 1994. "The Board may take one of the following actions: (1) Accept the recommendation of the Hearing Officer by accepting the Hearing Officer's Proposed Findings of Fact and entering conclusions of law consistent with the findings; (2) Reverse or modify the recommendation of the Hearing Officer by making its own Findings of Fact

consistent with the evidence and entering conclusions of law consistent with the findings; or (3) Remand the matter to a Personnel Hearing Officer for further hearing. "Section 3-1-25 (D) ROA 1994.

Following oral argument by the parties, in open session of the Personnel Board's **December 9, 2020** Regular Meeting, regarding the Hearing Officer's Recommendations for **PB 19-02 In the Matter of Eric Miller, a terminated employee of the Albuquerque Transit Department**, and upon discussion by the Board in closed session, pursuant to NMSA 1978, Section 10-15-1 (H)(2) of the Open Meeting Act, the Board makes the following findings of fact, conclusions of law and decision(s):

Findings of Fact

1. Appellant Eric Miller worked in the Albuquerque Transit Department as a Motorcoach Operator ("MCO") from October 17, 2015, to January

15, 2019. (Miller Testimony, Vol. 1, 12:1; City Exhibits 1H, 2I, 3J)

2. On June 27, 2018, the Transit Department received a Citizen Complaint alleging Appellant Miller was "doing road rage" and was involved in a hit and run accident. (Incident #1). In Mr. Miller's hearing before this Board, Miller denied the allegation of "road rage" and admitted to his liability in the involvement of the hit and run accident. (City Exhibit IA)

3. On July 10, 2018 Transit received another Citizen Complaint about Miller (Incident #2), alleging that Miller was on his cell phone, cutting off vehicle, and generally not paying attention. Again, Miller denied the allegations. (City Exhibit 2A)

4. On July 17, 2018, Transit Department received two separate Citizen Complaints alleging that Miller "honks at everything, drives violently, and flipped off

a driver. " Appellant denied these allegations.
(Incident #3) (City Exhibits 3A & 3B)

5. Transit Supervisor, Operations Division
Rolando Suarez viewed Miller's bus videos from June
27, 2018, July 10, 2018 and July 17, 2018 and
prepared timestamped descriptions of each
questionable action that might constitute a potential
PRR and Motorcoach Operator's Manual violation for
each date which he included in the Notices of
Predetermination Hearing for each Incident. (City
Exhibit 1E, 2B, and 3K)

6. Video evidence showed Miller committing the
acts complained of, and those acts were infractions of
City and MCO policies and regulations that could
result in discipline up to and including termination.

7. Mr. Suarez appropriately issued Notices of
Investigation, Notices of Predetermination Hearings;
held Predetermination Hearings and submitted his
Findings and Recommendations finding that Miller

violated all allegations set forth in the Notices of Predetermination Hearing.

8. On July 15, 2018, Miller was temporarily reassigned to the Transit Department Maintenance Division. (City Exhibit 3E)

9. On January 15, 2019, Transit Director Toon issued Notices of Final Action for Incidents #1, #2 and #3; each found there was just cause for termination. (City Exhibits 1H, 2I, 3J). Miller received and signed for the Notices of Final Action on January 15, 2019. *Id.*

10. During his tenure with Transit, Miller received training about safety driving his bus and traffic safety; de-escalation; the Motorcoach Operator's Manual and professionalism and dealing with members of the public. (LaPlante Testimony, Tr. Vol. I, 159:13-160:9; 157:23-158:15; 164:11-25)

11. Miller's improper use of electronic devices while operating the bus and his reckless driving and

cursing members of the public were aggressive and inappropriate actions and violated City RRRs, Phone Polict and MCOs. (City Exhibits 1B, 2B, & 3C; Miller Exhibit 2A) City Exhibit 18; LaPlante Testimony, Tr. Vol. I, 161:2-22; 180:2-8; Suarez Testimony, Tr. Vol. I, 212:9-14)

12. In the year prior to the incidents at issue here, Mr. Miller was twice disciplined for similar behavior, resulting in two suspensions without pay. (City Exhibits 5 & 6)

13. Transit Director Toon did not feel it was safe for Mr. Miller to continue interacting with the public and terminating his employment on January 15, 2019. (City Exhibits 1H, 2I, 3J; Toon Testimony, Tr. Vol I, 111:24-112:2)

Conclusions of Law

1. The City Personnel Board has jurisdiction of the parties and subject matter herein, pursuant to §3-1-25 et. seq., ROA 1994.

2. The hearing complied with procedural safeguards required by the Personnel Board Rules and applicable City ordinances, and the parties were given full opportunity to present evidence and cross-examine witnesses.

3. The City sufficiently complied with the disciplinary procedures required in P.R.R. 5902.2, and Appellant was accorded due process of law.

4. The burden of proof rests with the City to prove, by a preponderance of evidence, that its disciplinary actions were warranted by just cause and that the disciplinary action was reasonable under the circumstances. Rule 10 (E), Personnel Board Rules of Procedure for Appeals of Disciplinary Actions (Adopted 9/8/93, revised 11/13/13); *Martinez v. NM State Engineer Office*, 2000 NMCA 74 (NM App., 2000).

5. Just cause is any behavior significant or substantial in nature related to the employee's work

and conduct that is inconsistent with the employee's obligation to the City.

6. The City proved by a preponderance of the evidence that its disciplinary actions were warranted and that there was just cause to terminate Mr. Miller's employment.

7. The City Personnel Board does not have statutory authority to address Mr. Miller's future employment with the City, once a determination has been made that the City had just cause in terminating Mr. Miller's employment.

8. The City Personnel Board has statutory authority, pursuant to §53-1-25 (E) ROA 1994, to take one of the following actions: (1) Accept the recommendation of the Hearing Officer by accepting the Hearing Officer's Proposed Findings of Fact and entering conclusions of law consistent with the findings; (2) Reverse or modify the recommendation of the Hearing Officer by making its own Findings of

Fact consistent with the evidence and entering conclusions of law consistent with the findings; or (3) Remand the matter to a Personnel Hearing Officer for further hearing.

Decision of the Board

Based on the above stated findings of fact and conclusions of law, the Board determines that termination was warranted by just cause and was appropriate and reasonable under the circumstances. The Board further determines that it does not have statutory authority to address Mr. Miller's future employment with the City. Accordingly, the Board hereby accepts the Hearing Officer's Recommendation that "the City's termination of Eric Miller's employment as a Motorcoach operator be sustained" and does not take any action on the Hearing Officer's additional recommendations to the City regarding Mr. Miller's future employment with the City. *See* Recommendation of the Hearing Officer.

By a vote of 3 "Ayes" and 0 "Nays," the **Board**
determines that termination is the appropriate
level of discipline.

IT IS SO ORDERED.

<u>/s/ Sonja Brown</u>	<u>12/20/20</u>
Sonja Brown, Chair	

<u>/s/ John Castillo</u>	<u>1/7/21</u>
John Castillo	

<u>/s/ Zane Reeves</u>	<u>12/29/20</u>
Thomas Zane Reeves	

APPENDIX C: ORDER AND OPINION OF THE
COURT OF APPEALS FOR THE TENTH CIRCUIT,
IN RE ARMIJO, 1976-NMCA-032

**Appeal of Cora S. ARMIJO and Robert E. Fox
et al., from the Orders of the County
Evaluation Protest Board of Bernalillo
County.**

No. 2234

COURT OF APPEALS OF NEW MEXICO

1976-NMCA-032, 89 N.M. 131, 548 P.2d 93

March 16, 1976

COUNSEL

Thomas G. Cornish, Hannett, Hannett, Cornish &
Barnhart, Albuquerque, for appellants.

Sandra Grisham, Albuquerque, for appellee.

Toney Anaya, Atty. Gen., John C. Cook, Joseph T.
Sprague, Asst. Attys. Gen., Santa Fe, amicus curiae.

JUDGES

LOPEZ, J., wrote the opinion. SUTIN, J., concurs.
HERNANDEZ, J., concurs in the result only.

AUTHOR: LOPEZ

OPINION

LOPEZ, Judge.

{1} Cora Armijo and Robert Fox appeal orders of the Bernalillo County Valuation Protests Board denying their requests for change in the valuation records of the county assessor in respect to the "full value" placed on their respective properties. We reverse and remand.

{2} Cora Armijo owns about 2400 acres and Fox owns about 1755 acres in the west side of Albuquerque, New Mexico. Both taxpayers protest the amounts determined by the assessor to be the full or market value of their respective properties. Taxpayers do not protest the amount of taxes or the taxable value of the properties.

{3} The protests were authorized under § 72-31-24, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, Supp.1975). This section states in part:

"A property owner may protest the value determined by the county assessor for his property for property taxation purposes or the assessor's allocation of value of his property to a particular governmental unit by filing a petition with the assessor. Filing a petition in

accordance with this section entitles the property owner to a hearing on his protest."

{4} The taxpayers do not protest the amount of taxes nor the taxable value of the properties determined by the county assessor. Nonetheless, under § 72-31-24, supra, they have a right to protest the county assessor's determination of the "full" or "market value" of their properties.

{5} There is no issue in this appeal that the properties were properly classified as grazing lands for tax purposes pursuant to § 72-29-9, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, Supp.1975).

{6} The issue on appeal is whether the county assessor, once having classified the properties as grazing lands, pursuant to § 72-29-9, supra, should also have determined the {*132} full value in a manner consistent with that classification.

{7} Section 72-29-9(A), N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, Supp.1975) reads as follows:

"A. The value of land used primarily for agricultural purposes shall be determined on the basis of the land's capacity to produce agricultural products. The burden of demonstrating primary agricultural use is on the owner of the land, and he must produce objective evidence of bona fide agricultural use for the year preceding the year in which application is made for his land to be valued under this section. The fact that land was devoted to agricultural use in the preceding year is not of itself sufficient evidence to support a finding of bona fide primary agricultural use when there is evidence that the agricultural use was subordinate to another use or purpose of the owner, such as holding for speculative land subdivision and sale, commercial use of a nonagricultural character, recreational use or other nonagricultural purpose."

{8} At the protest hearing, the testimony of Armijo revealed that the market value of the properties was \$25.00 per acre; Fox did not introduce any evidence as to the market value of his property. The assessor introduced evidence that the **full or market value** of properties was \$200.00 per acre. The board found, consistent with the testimony of the county assessor, that the **full or market value** of the property was \$200.00 per acre. **The transcript reveals that the**

estimate produced by the county assessor's witness of \$200.00 an acre was based upon comparable sales. Our duty is to determine whether or not the board's conclusion that the assessor was right in determining the full and market value of the property at \$200.00 an acre is supported by the evidence and is in accordance with the law. **In Matter of Protest of Miller**, 88 N.M. 492, 542 P.2d 1182 (Ct. App.1975).

{9} We conclude that since the county assessor had already classified the property as grazing land, any valuation of the full or market value of the property would have to be based upon the provisions of § 72-29-9, supra.

{10} In **Matter of Protest of Miller**, supra, this Court said:

"If there is substantial evidence in the record to support a decision of a county valuation protests board, we are bound thereby. **United Veterans Org. v. New Mexico Prop. App. Dept.**, 84 N.M. 114, 500 P.2d 199 (Ct.

App.1972). In deciding if there is substantial evidence to support the decision,

'... we must view the evidence in the most favorable light to support the finding and we will reverse only if convinced that the evidence thus viewed, together with all reasonable inferences to be drawn therefrom cannot sustain the finding. Further, only favorable evidence and the inferences to be drawn therefrom, will be considered, and any evidence unfavorable to the findings will not be considered.'

"Id., 84 N.M. at 118, 500 P.2d at 203."

The evidence most favorable to the county was the testimony of the county assessor that the property had a full value of \$200.00 per acre and this testimony was based upon comparable sales. The criteria to determine the value of agricultural lands for taxation purposes such as the lands of the taxpayers is spelled out in § 72-29-9(A), supra.

{11} We conclude that the criteria to determine the full or market value of the property used by the county assessor was not correct and that the action of the

protests board was not supported by substantial evidence nor in accordance with the law.

{12} The case is reversed and the cause is remanded to the protests board to proceed in accordance with § 72-29-9, supra, and in conformity with this opinion.

{13} IT IS SO ORDERED.

SUTIN, J., concurs.

HERNANDEZ, J., concurs in the result only.

APPENDIX D: City Exhibit 1H – [RP 345]



City of Albuquerque
Transit Department

Tim Keller, Mayor

Interoffice Memorandum

January 15, 2019

To: Eric Miller, Motorcoach Operator, Employee ID # [REDACTED]
From: Rennie Toon, Director, Transit Department
Subject: NOTICE OF FINAL ACTION

A Pre-Determination Hearing was conducted on Friday, August 3, 2018 at 2:45 pm, at the Yale Transit Facility, located at 601 Yale Boulevard SE, Albuquerque, New Mexico. The purpose of this hearing was to provide you, and/or your representative, with an opportunity to respond, orally or in writing, to allegations mentioned in the Notification of Pre-Determination Hearing memorandum signed February 26, 2018. In attendance at the hearing was Rolando Suarez, Transit Supervisor/Operations, acting as the hearing officer; yourself, Mr. Eric Miller, respondent; and Paul Froomjian, as your representative.

I. DESCRIPTION OF ALLEGATIONS and PROVISIONS at ISSUE

The allegations are listed in detail on the Notification of Pre-Determination Hearing signed July 18, 2018, and on the attached Findings and Recommendations from the Hearing Officer. The hearing officer found that you acted in violation of the City's Personnel Rules and Regulations, Administrative Instructions, and City of Albuquerque Transit Department Motorcoach Operator Manual of Rules and Procedures, and that just cause exists for discipline congruent with the violations.

II. EMPLOYMENT HISTORY

In determining what action is appropriate, your employment history has been taken into consideration. A review of Mr. Miller's personnel file found the following:

- Final Action issued June 21, 2018, Mandatory De-escalation Training and an Eight (8) Day Leave Without Pay Suspension
- Final Action issued August 17, 2017, 6 day leave without pay, and Anger Management Class - Violent behavior towards passenger after being spat at on April 24, 2017
- Letter of Instruction issued August 8, 2017 – Off Route on multiple dates between May 29, 2017 - July 23, 2017

III. DISCIPLINE

I have reviewed the Findings and Recommendation from the Hearing Officer, attached hereto in full for your review; and your employment history I find there is just cause for immediate termination from employment with the City of Albuquerque.

APPENDIX E:

City Exhibit 3J – [RP 394]



Tim Keller, Mayor

City of Albuquerque
Transit Department



Interoffice Memorandum

January 15, 2019

To: Eric Miller, Motorecoach Operator, Employee ID # [REDACTED]
From: Bernie Toon, Director, Transit Department
Subject: NOTICE OF FINAL ACTION

A Pre-Determination Hearing was conducted on Monday, October 29, 2018, at 6:15 pm, at the Yale Transit Facility, located at 601 Yale Boulevard SE, Albuquerque, New Mexico. The purpose of this hearing was to provide you, and/or your representative, with an opportunity to respond, orally or in writing, to allegations mentioned in the Notification of Pre-Determination Hearing memorandum signed February 26, 2018. In attendance at the hearing was Rolando Suarez, Transit Supervisor/Operations, acting as the hearing officer; yourself, Mr. Eric Miller, respondent; and Paul Froomjian, as your representative.

I. DESCRIPTION of ALLEGATIONS and PROVISIONS at ISSUE

The allegations are listed in detail on the Notification of Pre-Determination Hearing signed October 16, 2018, and on the attached Findings and Recommendations from the Hearing Officer. The hearing officer found that you acted in violation of the City's Personnel Rules and Regulations, Administrative Instructions, and City of Albuquerque Transit Department Motorecoach Operator Manual of Rules and Procedures, and that just cause exists for discipline congruent with the violations.

II. EMPLOYMENT HISTORY

In determining what action is appropriate, your employment history has been taken into consideration. A review of Mr. Miller's personnel file found the following:

- Final Action issued January 15, 2019, Termination, Behavior on July 10, 2018
- Final Action issued January 15, 2019, Termination, Behavior on June 27, 2018
- Final Action issued June 21, 2018, Mandatory De-escalation Training and an Eight (8) Day Leave Without Pay Suspension

APPENDIX F:

City Exhibit 2I – [RP 370]



Tim Keller, Mayor

City of Albuquerque
Transit Department



Interoffice Memorandum

January 15, 2019

To: Eric Miller, Motorcoach Operator, Employee ID # [REDACTED]
From: Bernic Toon, Director, Transit Department *(BT)*
Subject: NOTICE OF FINAL ACTION

A Pre-Determination Hearing was conducted on Friday, August 3, 2018 at 2:45 pm, at the Yale Transit Facility, located at 601 Yale Boulevard SE, Albuquerque, New Mexico. The purpose of this hearing was to provide you, and/or your representative, with an opportunity to respond, orally or in writing, to allegations mentioned in the Notification of Pre-Determination Hearing memorandum signed February 26, 2018. In attendance at the hearing was Rolando Suarez, Transit Supervisor/Operations, acting as the hearing officer; yourself, Mr. Eric Miller, respondent; and Paul Froomjian, as your representative.

I. DESCRIPTION OF ALLEGATIONS and PROVISIONS at ISSUE

The allegations are listed in detail on the Notification of Pre-Determination Hearing signed October 16, 2018, and on the attached Findings and Recommendations from the Hearing Officer. The hearing officer found that you acted in violation of the City's Personnel Rules and Regulations, Administrative Instructions, and City of Albuquerque Transit Department Motorcoach Operator Manual of Rules and Procedures, and that just cause exists for discipline congruent with the violations.

II. EMPLOYMENT HISTORY

In determining what action is appropriate, your employment history has been taken into consideration. A review of Mr. Miller's personnel file found the following:

- Final Action issued January 15, 2019, Termination, Behavior on June 27, 2018
- Final Action issued June 21, 2018, Mandatory De-escalation Training and an Eight (8) Day Leave Without Pay Suspension
- Final Action issued August 17, 2017, 6 day leave without pay, and Anger Management Class - Violent behavior towards passenger after being spat at on April 24, 2017

APPENDIX G:

City Exhibit 3E – [RP 377]



Bernard Toon, Transit Director

INTRADPARTMENTAL MEMORANDUM



Date: July 18, 2018

To: Eric Miller, Motorcoach Operator (██████████)

From: Bernie Toon, Department Director of Transit

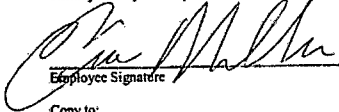
Subject: Director Order/Temporary Reassignment

The City of Albuquerque recently provided you several Notices of Investigation and is currently investigating you regarding allegations of inappropriate conduct that may constitute violations of the City's Personnel Rules and Regulations. Effective, Saturday, July 21, 2018, and during the course of the investigation you are temporarily reassigned to the Maintenance Division within the Transit Department. Your Title, Grade, and Salary will remain the same: Motorcoach Operator, Q00, \$14.26 hourly.

You are scheduled for suspension days on Saturday, Sunday and Monday, July 21, through 23, 2018. Tuesday and Wednesday, July 24, and 25, 2018 will be your days off for this week, then you are to report, Thursday, July 26, 2018, to the Yale Transit Facility, located at 601 Yale Boulevard SE, Albuquerque, New Mexico 87106, for your reassignment. You will be assigned to Vehicle Servicing Supervisor, Antonio Berumen, who will review your job assignment duties with you. Mr. Berumen's phone number is 505-764-6130. If you are unable to make it to work you must call in each day you will be absent. Your scheduled workdays and hours beginning Saturday, July 28, 2018, will be as follows: Monday through Friday, 3:30 p.m. to 12:00 a.m.

If you have any questions regarding this reassignment, please contact Victor Lovato, Senior Personnel/Labor Relations Officer, at 724-3108 or by cell at 366-7275.

Thank you for your cooperation in this matter.


Employee Signature

7-18-18
Date

Copy to:
Annette Paez, Deputy Director
Victor Lovato, Sr. Personnel/Labor Relations Officer
Mike Baca, Assistant Transit Manager, Maintenance
Stephen Meyershein, Assistant Transit Manager, Maintenance
Department File/Personnel File

APPENDIX H:

City Exhibit 6 – [RP 407]



City of Albuquerque
Transit Department

Tim Keller, Mayor

Interoffice Memorandum

June 21, 2018

To: Eric Miller, Motorcoach Operator, Employee ID [REDACTED]
From: Bernie Toon, Director, Transit Department
Subject: NOTICE OF FINAL ACTION

A Pre-Determination Hearing was conducted on Wednesday, March 7, 2018 at 2:15 pm, at the Yale Transit Facility, located at 601 Yale Boulevard SE, Albuquerque, New Mexico. The purpose of this hearing was to provide you, and/or your representative, with an opportunity to respond, orally or in writing, to allegations mentioned in the Notification of Pre-Determination Hearing memorandum signed February 26, 2018. In attendance at the hearing was Shaun R. Gibson, acting as the hearing officer, and Mr. Eric Miller, who elected to attend the hearing without a representative present.

I. DESCRIPTION of ALLEGATIONS and PROVISIONS at ISSUE

The allegations are listed in detail on the Notification of Pre-Determination Hearing signed February 26, 2018, and on the attached Findings and Recommendations from the Hearing Officer. The hearing officer found that you acted in violation of the City's Personnel Rules and Regulations, Administrative Instructions, and City of Albuquerque Transit Department Motorcoach Operator Manual of Rules and Procedures, and that just cause exists for discipline congruent with the violations.

II. EMPLOYMENT HISTORY

In determining what action is appropriate, your employment history has been taken into consideration. A review of Mr. Miller's personnel file found the following:

- Final Action issued August 17, 2017, 6 day leave without pay, and Anger Management Class - Violent behavior towards passenger after being spat at on April 24, 2017
- Letter of Instruction issued August 8, 2017 – Off Route on multiple dates between May 29, 2017 - July 23, 2017

III. DISCIPLINE

I have reviewed the Findings and Recommendation from the Hearing Officer, attached here in full for your review; and your employment history I find there is just cause for mandatory De-escalation Retraining, and an Eight (8) Day Leave Without Pay Suspension. This suspension will be served on the following days:

- Saturday, July 21, 2018
- Sunday, July 22, 2018
- Monday, July 23, 2018

APPENDIX I:

City Exhibit 5, [RP 407]

EXHIBIT
5



Richard J. Berry
Mayor

INTRADEPARTMENTAL MEMORANDUM



Eric Fischer
Director

Date: August 17, 2017
To: Eric Miller, Motor Coach Operator, Operations Division, Transit Department
From: Bruce Rizzler, Director, Transit Department *BR*
Subject: 2 REVISED NOTIFICATION OF FINAL ACTION Due to Vacation Schedule
Incident of April 24, 2017
Summary of Incident: Violent Behavior Towards Passenger After Being Spat At
Action: Six-Days Leave Without Pay and Anger Management Class

Summary Description of Allegation

An incident occurred on Monday, April 24, 2017 on bus # 721 that APD responded to. A male passenger spit at Mr. Miller and he threw the radio hand set at the male passenger and then chased him outside the bus where Mr. Miller got into a physical altercation with two males.

See attached, "Finding and Recommendation of Pre-Determination Hearing - Eric Miller Motor Coach Operator (██████████) April 24, 2017", dated June 2, 2017.

Pre-Determination Hearing Recommendation

The hearing officer after reviewing all the information and facts available to him/her in this matter, any responses provided during the pre-determination hearing, and the hearing officer's findings that you violated sections of the City Personnel Rules and Regulations, and the Department's Motor Coach Operator/Trolley Operator Manual of Rules and Procedures cited in his/her Findings, has recommended that the appropriate level of discipline be administered that is congruent with these violations.

Department Director's Determination

Having reviewed the hearing officer's Findings, information in your personnel file, including your work history, the applicable sections of the rules and regulations, policies, rules and/or procedures that you are charged with violating, I have determined that the appropriate discipline in this instance is a six (6) - day leave without pay suspension and attendance at an anger management class. The Transit Department Human Resources section will arrange for and document your attendance at an anger management class. The leave without pay suspension days will be served on the following days that reflect your new bid work schedule:

August 8, 27, and
September 18, and

APPENDIX J:

Memorandum, July 28, 2017



Richard J. Esary
Mayor

INTRADEPARTMENTAL MEMORANDUM



Date: July 28, 2017
To: Eric Miller, Motor Coach Operator, Operations Division, Transit Department
From: Bruce Rizzieri, Director, Transit Department
Subject: NOTIFICATION OF FINAL ACTION
Incident of April 24, 2017
Summary of Incident: Violent Behavior Towards Passenger After Being Spat At
Action: Six-Days Leave Without Pay and Anger Management Class

Summary Description of Allegation

An incident occurred on Monday, April 24, 2017 on bus # 721 that APD responded to. A male passenger spit at Mr. Miller and he threw the radio hand set at the male passenger and then chased him outside the bus where Mr. Miller got into a physical altercation with two males.

See attached, "Finding and Recommendation of Pre-Determination Hearing – Eric Miller Motor Coach Operator (000036996) April 24, 2017", dated June 2, 2017.

Pre-Determination Hearing Recommendation

The hearing officer after reviewing all the information and facts available to him/her in this matter, any responses provided during the pre-determination hearing, and the hearing officer's findings that you violated sections of the City Personnel Rules and Regulations, and the Department's Motor Coach Operator/Trolley Operator Manual of Rules and Procedures cited in his/her Findings, has recommended that the appropriate level of discipline be administered that is congruent with these violations.

Department Director's Determination

Having reviewed the hearing officer's Findings, information in your personnel file, including your work history, the applicable sections of the rules and regulations, policies, rules and/or procedures that you are charged with violating, I have determined that the appropriate discipline in this instance is a six (6) - day leave without pay suspension and attendance at an anger management class. The Transit Department Human Resources section will arrange for and document your attendance at an anger management class. The leave without pay suspension days will be served on:

August 8, 22, and

September 12, and

APPENDIX K:

Memorandum, April 26, 2017



Richard J. Berry
Mayor



Bruce Rizzieri
Director

INTRADEPARTMENTAL MEMORANDUM

Date: April 26, 2017
To: Eric Miller, Motor Coach Operator, Operations (000036986)
From: Bruce Rizzieri, Director *B.R.*
Subject: Direct Order/Temporary Reassignment

Effective Saturday, April 29, 2017, and until May 5, 2017, you are being temporarily reassigned to the Maintenance Division within the Transit Department. Your Title, Grade and Salary will remain the same: Motorcoach Operator, Q00, \$13.84 hourly.

The purpose of this Direct Order/Temporary Reassignment is due to a citizen complaint received alleging that you had a confrontation with a passenger on Tuesday, April 25, 2017.

You are to report Monday, May 1, 2017, at 15:30 p.m., to the Yale Maintenance Facility, located at 601 Yale Rd NW, 87106, for your reassignment to Vehicle Servicing Supervisor, Jason Black, who will review your job assignment duties with you. Your scheduled workdays and hours are scheduled as follows: Monday thru Friday, 15:30 p.m. to 24:00 a.m.

Thank you for your cooperation in this matter.

Employee Signature _____

Date _____


Copy to:

Annette Paez, Associate Director
Jim Carrillo, Maintenance Manager
Sandra Saiz, ABQ Ride Supervisor
Anthony Chavez, Transit Assistant Manager, Operations
Shaun Gibson, Transit Assistant Manager, Operations
Stephen Meyerheide, Assistant Transit Manager, Maintenance
Jason Black, Vehicle Servicing Supervisor
Victor Lovato, Sr. Personnel/Labor Relations Officer
Department File/Personnel File


APPENDIX L: Avvo

<https://www.avvo.com/legal-answers/5421149.html>
(last visited December 19, 2022)

STIPULATED ORDER FOR APPOINTMENT OF SPECIAL ADM... <https://www.avvo.com/legal-answers/authorized/5421149.html>

[Legal Advice \(free-legal-advice\)](#) [Appeals \(/search?query=Appeals\)](#)

Q&A |  Asked by you
Asked in Albuquerque, NM | December 3, 2021

STIPULATED ORDER FOR APPOINTMENT OF SPECIAL ADMINISTRATOR WITH LIMITED POWERS ?

I the Appellant on a Administrative Appeal case, already filed my appellate issues. Today in checking my case on the courts website case lookup, there's an entry for an ordered Special Administrator. I did a web search and can only find it dealing with Probating Estates.

What is the connection to my case?

More 

[Ask a lawyer - it's free! \(/ask-a-lawyer\)](#)

No attorney answers

There are no attorney answers yet. But, check back regularly—people often get a response within 12 hours.

[See more Appeals lawyers \(/appeals-lawyer.html\)](#) >

loading data...

APPENDIX M:

PERSONNEL RULES AND REGULATIONS.

INTRODUCTION

The City of Albuquerque's Merit System Ordinance establishes the framework for the administration of the City's personnel system. Pursuant to the Merit System Ordinance, these Personnel Rules and Regulations are hereby promulgated to interpret and implement the Ordinance.

These Personnel Rules and Regulations establish the policies and practices which will be followed by the City of Albuquerque in personnel administration. They define a system based on merit and the principles which govern the conditions of City employment. The Personnel Rules and Regulations shall be distributed to all departments, divisions, sections, agencies and programs of the City in order

that an official copy is accessible to all employees during working hours.

These Personnel Rules and Regulations should be interpreted as a whole rather than interpreting individual sections or sentences in isolation and out of context. Official interpretation of these Regulations shall be made by the Human Resources Department. They have the force and effect of law for the various departments, agencies and special programs of the City. The Personnel Rules and Regulations shall be the only source and compilation of official directives for personnel policies unless otherwise superceded by Administrative Instructions or Collective Bargaining Agreements.

Individual department policies, rules, regulations and procedures can be promulgated with the concurrence of the Human Resources Director and the approval of the Chief Administrative Officer to ensure they are not in conflict with the substance of

the Merit System Ordinance and the Personnel Rules and Regulations.

These Regulations do not constitute an employment contract and may be amended by the Human Resources Department, as necessary, with the approval of the Chief Administrative Officer.

APPENDIX N:

§ 3-1-1 THE MERIT SYSTEM.

In accordance with Article X of the Charter of the city, there is hereby established a merit system governing the hiring, promotion and discharge of employees and providing for the general regulation of employees. Pursuant to the Charter, the Mayor designates the Chief Administrative Officer of the city to be responsible for the administration of the merit system. The Chief Administrative Officer is authorized to establish Rules and Regulations to implement this article. If this article conflicts with any federal law, federal law will control. *See also* Article X. Merit System. App. 77a.

('74 Code, § 2-9-1) (Ord. 52-1978; Am. Ord. 29-1998)

APPENDIX O:

§ 3-1-2 RESPONSIBILITIES OF THE
CHIEF ADMINISTRATIVE OFFICER
FOR PERSONNEL FUNCTIONS.

(A) The Chief Administrative Officer shall have the following responsibilities:

(1) To exercise leadership in and encourage the development of effective personnel administration within the departments, agencies, and special programs in the city service;

(2) To recommend changes to this article for consideration by the City Council;

(3) To approve Personnel Rules and Regulations prior to their final adoption and publication by the Director of Human Resources as provided in this article;

(4) To issue administrative instructions to provide policy and guidance in furtherance of and limited by the responsibilities of the Chief

Administrative Officer specifically granted by this article;

(5) To approve a compensation plan as recommended by the Director of Human Resources for classified city employees consistent with other provisions of this article; and

(6) To designate a Deputy Chief Administrative Officer or a department head to assume the duties of the Chief Administrative Officer in the event of his or her inability to act or absence from the city.

(B) The power of appointment or promotion to a position in the classified or unclassified service of the city shall rest with the Chief Administrative Officer; provided that, in the absence of a written directive to the contrary signed by the Chief Administrative Officer, such power may be exercised

by the administrative head of a city department, agency or special program for the positions within such department, agency or special program.

(C) Pursuant to and within the authority granted by the charter and this article, the Chief Administrative Officer shall have the following authority:

- (1) To direct the work of city employees;
- (2) To hire, promote, evaluate, transfer, and assign employees;
- (3) To reprimand, suspend, demote or discharge unclassified employees and to reprimand, suspend, demote or discharge classified employees for just cause;
- (4) To determine staffing requirements;
- (5) To maintain the efficiency of the city government and ensure the carrying out of normal management functions;

(6) To take actions as may be necessary to carry out the mission of the city government in emergencies; and

(7) To manage and to exercise judgment on all matters specifically within his or her authority pursuant to the charter or this article and not prohibited by a collective bargaining agreement in effect between the city employer and an employee organization.

(D) The Chief Administrative Officer shall have no power or authority to appoint the Director of Council Services or to hire, promote, discipline or discharge the staff of the offices of the City Council, which shall be the responsibility of the Director of Council Services.

('74 Code, § 2-9-2) (Ord. 52-1978; Am. Ord. 69-1988; Am. Ord. 29-1998; Am. Ord. 7-2010)

APPENDIX P:

§ 3-1-9 PERFORMANCE EVALUATIONS.

(A) The Chief Administrative Officer shall establish a system to evaluate the work performance of city employees in the classified service. Performance evaluations or ratings shall not be the subject of a grievance.

(B) The performance evaluation system will provide for:

(1) Performance standards that will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria related to the job in question for each employee or position in the classified system;

(2) Communication with each employee as to the performance standards and critical elements of the employee's position;

(3) An opportunity during a specified period of time for the employee to demonstrate an improvement in performance; and

(4) Appropriate disciplinary action to be taken if performance is inadequate including dismissal or demotion for an employee who continues to have unacceptable performance after an opportunity to demonstrate acceptable performance.

(C) The work performance of an employee shall be officially evaluated by his or her immediate supervisor(s) at least once a year.

('74 Code, § 2-9-10) (Ord. 52-1978; Am. Ord. 30-1985; Am. Ord. 29-1998)

APPENDIX Q:

§ 3-1-23 DISCIPLINARY ACTIONS.

(A) (1) Employees may be disciplined by written reprimand, suspension, demotion or dismissal.

Just cause for discipline is any behavior significant or substantial in nature relating to the employee's work that is inconsistent with the employee's obligation to the city. Just cause shall also include prohibited retaliation as defined in the Whistleblower Ordinance and the Accountability in Government Ordinance and the filing of frivolous complaints or complaints based on false or confidential information pursuant to the Whistleblower Ordinance and the Accountability in Government Ordinance. The Chief Administrative Officer may enumerate in Personnel Rules and Regulations examples of behaviors that constitute just cause.

(2) The Chief Administrative Officer, a Deputy Chief Administrative Officer, a department director or

an acting department director may impose any discipline. Division heads may issue reprimands and suspend an employee for five days or less after informing the department head. An employee's immediate supervisor may issue a reprimand after informing the division head or department head.

(3) Prior to passage of any year-end appropriation clean-up bill, the Chief Administrative Officer shall review expenditures of each City program strategy and determine which program strategies overspent their annual appropriations in excess of five percent or \$100,000, whichever is lower, prior to Council appropriation of the amount overspent. This level of overexpenditure constitutes a violation of §§ 2-11-12 and 2-11-16 ROA 1994. Because management of program finances to conform to City ordinances is a primary responsibility of all City program directors, the Chief Administrative Officer shall place a written reprimand in the personnel file

of any program director whose program is overspent by five percent or \$100,000, whichever is lower, prior to Council appropriation. A program director who receives three reprimands for overspending his or her budget prior to the passage of any year-end appropriation clean-up bill by the Council during a five-year period demonstrates a lack of financial management skills critical to fulfilling the duties of a program director and, therefore, shall be demoted one grade and transferred to a position without financial management responsibility.

(4) As a requirement of assuming office, each department director shall execute an employment contract with the City, one of the provisions of which shall be that he or she will not allow their department to overspend their appropriated budget nor allow any program strategy to overspend its appropriated budget prior to the passage of any year-end appropriation clean-up bill by the Council.

Department directors responsible for departments that overspend their budget prior to the passage of any year-end appropriation clean-up bill in two years during a period of four years shall be terminated. The Chief Administrative Officer shall place a written reprimand in the personnel file of any department directors in the event that a program in the department under the responsibility of the director similarly overspends its budget appropriation.

(B) No person except the Chief Administrative Officer shall discipline heads of departments.

Only the Accountability in Government Committee may discipline the Director of the Office of Internal Audit and Investigations. In addition, only the Director of Council Services may discipline other employees of the Department of Council Services, and only the Director of the Office of Internal Audit and Investigations may discipline other employees of the Office of Internal Audit and Investigations.

(C) Before discipline is imposed, the employee shall be notified of the reasons for which discipline is contemplated, a summary of the evidence against the employee, and the employee's right to respond to the proposed action. After giving the employee the notice of contemplated action and before the employee makes any written or oral response, the supervisor contemplating the discipline shall request review by the City Employee Mediation Program Coordinator of the circumstances on which the contemplated action is based in an effort to avoid the discipline. Mediation shall occur if it is deemed appropriate by the Coordinator. After this review or if mediation is unsuccessful, the supervisor may continue with the contemplated disciplinary procedure by giving the employee the right to respond to the notice of contemplated action.

(D) Suspensions shall not exceed 90 calendar days for any offense. The Chief Administrative Officer or

department head has the option on a suspension of five days or less to prohibit the employee from attending the work place or to allow the employee to work through the suspension with pay. Suspensions may be held in abeyance for a stated period of no longer than six months.

(E) The Chief Administrative Officer shall promulgate rules of procedure concerning disciplinary actions.

(F) Any disciplinary action shall be noted in the employee's personnel file.

('74 Code, § 2-9-24) (Ord. 52-1978; Am. Ord. 48-1988; Am. Ord. 30-1989; Am. Ord. 55-1989; Am. Ord. 29-1998; Am. Ord. 13-2001; Am. Ord. 9-2002; Am. Ord. 2-2004; Am. Ord. 1-2005)

APPENDIX R:

§ 3-1-27 EMPLOYEE ORGANIZATION
AGREEMENTS.

(A) The provisions of this article shall apply to all city employees; provided, however, that where a collective bargaining agreement, which has been ratified and approved by the Mayor in accordance with §§ 3-2-1 et seq., Labor-Management Relations, conflicts with a provision of this article, the collective bargaining agreement shall, with respect to those employees covered by the agreement, govern over such provision of this article unless it is one establishing:

- (1) Classified and unclassified service;
- (2) Methods of service rating of unclassified employees; or
- (3) Methods of initial employment, promotion recognizing efficiency and ability as the applicable standards, and discharge of employees.

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(B) In the case of a conflict between a collective bargaining agreement and a provision establishing any of the above, this article shall govern.

('74 Code, § 2-9-26) (Ord. 52-1978; Am. Ord. 46-1995; Am. Ord. 29-1998)

APPENDIX S:

ARTICLE X. MERIT SYSTEM

Section 1. Maintenance of The Merit System.

It is necessary for the optimum functioning of the Mayor-Council form of government that the city maintain a merit system governing the hiring, promotion, discharge and general regulations of employees. The Mayor and Council shall maintain by ordinance, and the Mayor administer, a merit system which shall include as a minimum, reasonable provisions establishing:

- (a) Classified and unclassified service;
- (b) Methods of service rating of classified employees;
- (c) Methods of initial employment, continuation thereof and promotion, recognizing efficiency and ability as the applicable standards;
- (d) Appropriate grievance and appeal procedures for classified employees; and

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(e) An active personnel board composed of individuals not employed by the city.

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APPENDIX T:

804.DISMISSAL

The Chief Administrative Officer, a department director or acting department director may dismiss an employee for just cause. Refer to Section 902 of these regulations. App. 80a.

APPENDIX U:

902. DISCIPLINARY ACTIONS

Employees may be disciplined by written reprimand, suspension, demotion or dismissal. Just cause for discipline is any behavior significant or substantial in nature relating to the employee's work or conduct that is inconsistent with the employee's obligation to the City.

902.1 Reasons for Disciplinary Actions

Employees may be reprimanded, suspended, demoted or terminated for any justifiable cause including, but not limited to:

A. Violence or threats of violence on City premises or on City time. City premises includes but is not limited to work sites, property or vehicles (owned, rented or leased), parking garages and parking lots; or

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B. Commission of a felony or misdemeanor related to the position held by the employee or conviction of a crime involving moral turpitude; or

C. Incompetence, inefficiency or inadequate performance of an employee's duties; or

D. Deliberate falsification or omission of information on an employment application, resume, timecard/record or other city documents; or

E. Insubordination or uncooperative behavior; or

F. Misappropriation or personal use of city funds, property, possessions or resources or theft or fraud; or

G. Misconduct; or

H. Harassment or sexual harassment; or

I. Violation of confidentiality or the release of confidential information; or

J. Being absent from duty without proper authorization, regardless of the length of time; or

K. Violation of the Substance Abuse Policy;

or

L. Violation of the Personnel Rules and Regulations or rules promulgated pursuant to the Merit System Ordinance and/or the Conflict of Interest Ordinance; or

M. Other disciplinary reasons, including but not limited to conduct on or off-duty, which may:

1. Call into question the employee's ability to perform assigned duties or job functions; or

2. Would harm public respect for City employees or confidence in the operation of City services; or

3. Would impair the operation or efficiency of any City department.

APPENDIX V:

40.2 Entire Agreement / Changes

40.2.1 It is understood and agreed by and between the parties hereto that this Agreement is the only existing Agreement between the parties and replaced any and all previous agreements.

40.2.2 It is understood and agreed that changes in this Agreement may be made at any time upon the mutual consent of the parties signatory to this Agreement. No changes in hours, benefits, working conditions will be made without the parties meeting and conferring.

40.2.3 The parties have had the full opportunity to negotiate all mandatory subjects of bargaining prior to reaching final agreement on this Agreement. The parties have negotiated in good faith and have reached a full agreement on all issues. This Agreement shall represent the only agreement between the parties. All other agreements, written or

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verbal, shall be unenforceable. Neither party shall be required to negotiate any issue, whether contained in this Agreement or not, during the term of this the City's commitment to meet and confer in good faith with the Union on all proposed Agreement. This provision shall not be interpreted in a manner that negates changes in ordinances or policies that affect employees' terms or conditions of employment.

APPENDIX W:

CONSTITUTIONAL AND STATUTORY
PROVISIONS

Fourteenth Amendment § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Title 18 U.S.C. § 242:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or

District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Title 42 U.S.C. § 1981:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

**N.M. Const. Article II § 1.
Supreme law of the land:**

The state of New Mexico is an inseparable part of the federal union, and the constitution of the United States is the supreme law of the land.

**N.M. Const. Article II § 18.
Due process; equal protection; sex
discrimination:**

No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person.