IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, DISTRICT #1199, NEW MEXICO, AFL-CIO,

Plaintiff/Appellant,

vs.

No. 28,960

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO, contracting with plaintiff as University Hospital,

Defendant/Appellee.

APPELLANT'S BRIEF IN CHIEF

Appeal from the Second Judicial District
County of Bernalillo
Honorable Linda M. Vanzi

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Summary of Proceedings

1. Statement of the Nature of the Case

On February 1, 2008, Arbitrator Paul Gerhart issued an award directing the University of New Mexico Hospital (the Hospital) to implement a collective bargaining agreement proposed by the National Union of Hospital and Health Care Employees District #1199 New Mexico, AFL-CIO, CLC (the Union). (R.P. 7-56) The arbitrator's award implementing the collective bargaining agreement instituted significantly improved working conditions, including wage increases and a $500.00 bonus payment for approximately 1,300 workers at the Hospital. The Hospital refused to comply with the award ordering it to implement the agreement as directed by Arbitrator Gerhart, and the Union brought a motion under NMSA 1978 § 44-7A-1 et seq. (The Uniform Arbitration Act) to enforce the award. (R.P. 1-6)

The Union is the exclusive bargaining representative with respect to wages, hours, and other conditions of employment for a unit of approximately 1,300 support staff employees at the Hospital. The relationship between the parties is governed by the Public Employees Bargaining Act, NMSA 1978, §10-7E-1 et seq., ("PEBA"). Public sector employers may create their own labor boards, in a manner consistent with and guided by PEBA. The University of New Mexico has adopted its own ordinance, the Labor Management Relations Resolution (LMRR),

consistent with its authority under PEBA. (R.P. 57-72)

In the instant dispute, the parties' collective bargaining agreement expired on June 30, 2007, before parties could successfully negotiate a successor agreement. Parties subsequently bargained to impasse and referred the dispute to Arbitration, consistent with the LMRR and PEBA. Where parties cannot successfully negotiate a collective bargaining agreement, Section 15 of the LMRR directs parties to resolve the dispute through binding arbitration, which award is enforceable under the New Mexico Uniform Arbitration Act. (§15(C)(2)). Under the LMRR, "the arbitrator's decision shall be limited to a selection of one of the two parties' complete, last, best offer." (§15(C)(2)). Arbitrator Paul Gerhart was selected by the parties to act as the arbitrator in the matter and he held an evidentiary hearing on December 12 & 13, 2007, in which parties were allowed to offer evidence and argument supporting each of their competing offers. On January 4, 2008, Arbitrator Gerhart directed parties to submit final versions of their competing "complete, last, best offers."

On February 1, 2008, Arbitrator Gerhart issued his award and 50 page opinion, and made the following finding:

> Having carefully considered all evidence submitted by the parties concerning this matter as well as all relevant statutory criteria discussed earlier, the arbitrator adopts the last best offer total package of the Union as the one to succeed the 2005-2007 agreement between the parties.

(R.P. 56)

On June 16, 2008, the Honorable Linda M. Vanzi entered an Order denying the Union's request for confirmation of the arbitration award and issued an Order on July 31, 2008, denying reconsideration of the original Order under Rule 1-059(E) NMRA. The District Court's Order vacated the Arbitrator's Award. (R.P. 434-435, 462-463). The Court's Order denying the Union's request misinterpreted PEBA. The District Court's decision imposes non-statutory hurdles upon parties attempting to arbitrate contract impasses and unduly limits the discretion of impasse arbitrators in the public sector.

The Court's order vacating the arbitrator's decision is premised upon three findings:

1.) The arbitrator lacked jurisdiction to hear the matter because the parties were not at impasse at the time of arbitration;

2.) The arbitrator engaged in misconduct that prejudiced the rights of Defendant and exceeded his authority by acting as a coercive mediator during the arbitration;

3.) The arbitrator's award is void as against public policy because the "bonus" payment it grants violates Articles IV section 27 and IX section 14 of the New Mexico Constitution. (R.P. 434)

The Court's first basis for vacating the award (jurisdictional) improperly imposes a requirement that parties be at impasse during a period not specified in PEBA and is a requirement not contained in the language of PEBA or the LMRR.

The operative language states that, "If the impasse continues after thirty calendar days . . . the parties shall" participate in arbitration and the "arbitrator shall render a final, binding written decision resolving unresolved issues." LMRR, §15(c). The parties were at impasse for more than thirty days before the arbitration; however, shortly before the arbitration, the Union modified its offer, with the consent of the arbitrator. (R.P. 10-18) Because the Hospital did not accept the Union's modified proposal immediately prior to the arbitration, the arbitrator heard the issues remaining in dispute consistent with his responsibility of issuing, "a final, binding written decision resolving unresolved issues." All parties concede that unresolved issues existed before, during and at the conclusion of the arbitration and that the arbitrator's decision resolved the remaining issues in dispute.

The District Court's interpretation of the Public Employee Bargaining Act has a profoundly negative effect on the collective bargaining process in the State of New Mexico public sector because it requires parties to end negotiations at some indeterminate time prior to an arbitration. The Court's intervention is also inconsistent with the scope of judicial review under the New Mexico Uniform Arbitration Act. Fernandez v. Farmers Insurance Company of Arizona, 115 N.M. 622, 857 P.2d 22 (NM 1993). "In order to promote judicial economy through the use of arbitration, the finality of arbitration awards is enforced by strict limitations

on court review of those awards . . . the district court does not have the authority to review arbitration awards as to the law or the facts; if the award is fairly and honestly made and if it is within the scope of the submission, the award is a final and conclusive resolution of the parties' dispute." Fernandez, at 625, 626. A mistake of law must be "so gross as to imply misconduct, fraud, or lack of fair and impartial judgment." Fernandez, at 626.

The trial court's second basis for vacating the award (misconduct) is based upon an incomplete understanding of the practices and procedures available to impasse arbitrators in the labor setting, as discussed below. In any event, the arbitrator recommended that both parties modify their offers in an attempt to resolve issues, and the Defendant was no more prejudiced than the Plaintiff.

The trial court's third basis for vacating the award (public policy) reflects a mistake of law by the District Court. The question raised in the motion, and on appeal, is whether a bonus to Hospital employees violates the New Mexico Constitution. The final offer on the bonus, considered by the arbitrator, called for a $500.00 bonus at the "end of the year," for all bargaining unit members. (R.P. 151) The explicit language of the Union's proposal does not violate the Constitution and no Attorney General opinion suggests that such payment to current employees is illegal. There is no legal basis upon which to determine that the bonus violates public policy.

2. Statement of the Course of Proceedings, Disposition Below and Summary of Relevant Facts.

In the instant dispute, the parties' collective bargaining agreement expired on June 30, 2007, before parties could successfully negotiate a successor agreement. (R.P. 3) Parties subsequently bargained to impasse and referred the dispute to Arbitration, consistent with the LMRR and PEBA. (R.P. 3) Where parties cannot successfully negotiate a collective bargaining agreement, Section 15 of the LMRR directs parties to resolve the dispute through binding arbitration, which award is enforceable under the New Mexico Uniform Arbitration Act. (§15(C)(2)). Under the LMRR, "the arbitrator's decision shall be limited to a selection of one of the two parties' complete, last, best offer." (§15(C)(2)). Arbitrator Paul Gerhart was selected by the parties to act as the arbitrator in the matter and he held an evidentiary hearing on December 12 and 13, 2007, in which parties were allowed to offer evidence and argument supporting each of their competing offers. (R.P. 3) On January 4, 2008, Arbitrator Gerhart directed parties to submit final versions of their competing "complete, last, best offers." (R.P. 3-4)

On February 1, 2008, Arbitrator Gerhart issued his award and 50 page opinion, and made the following finding:

> Having carefully considered all evidence submitted by the parties concerning this matter as well as all relevant statutory criteria discussed earlier, the arbitrator adopts the last best offer total package of the Union as the one to succeed the 2005-2007 agreement between the parties.

(R.P. 56)

The Hospital refused to comply with the award ordering it to implement the agreement as directed by Arbitrator Gerhart and the Union brought a motion under Section 44-7A-1 et seq. (The Uniform Arbitration Act) to enforce the award. (R.P. 1-6). On June 16, 2008, the Honorable Linda M. Vanzi entered an Order denying the Union's request for confirmation of the arbitration award and issued an Order on July 31, 2008, denying reconsideration of the original Order under Rule 1-059(E) NMRA. The District Court's Order vacated the Arbitrator's Award. (R.P. 434-435, 462-463).

Argument

I. The Trial Court's Decision Denying Confirmation of the Award is Inconsistent with PEBA. The Trial Court's Finding That the Arbitrator Lacked Jurisdiction and Engaged in Misconduct That Exceeded His Authority is Contrary to the Authority Granted an Impasse Arbitrator by PEBA.

A. Standard of Review

The appellate court reviews jurisdictional issues and issues of law raised on appeal under a de novo standard of review. State v. Heinsen, 138 N.M. 441 (2005); State v. Garcia, 137 N.M. 583 (2005).

B. Argument

Arbitrator Gerhart did not exceed his authority by allowing and recommending that parties change their bargaining positions before and during the

arbitration process. Giving impasse arbitrator's this ability, when necessary, more fully and completely satisfies the goals of PEBA:

> The Resolution (LMRR) contains no time constraint for filing last, best offers and no explicit restriction on revising a last best offer. Accordingly, on this basis alone, the arbitrator was compelled to rule, at hearing, that he had no authority to restrict the introduction of such revised offers either before or after the hearing commenced. Plainly, the arbitrator is compelled to select only from the two last, best offers that are before him at the time he makes a decision.

(R.P. 15)

Arbitrator Paul Gerhart's[1] efforts to effect a compromise through the arbitration process did not exceed his authority under PEBA, or the LMRR. As indicated in Professor Gerhart's opinion, the contention that the LMRR prohibits modified offers is made without the support of statutory language and requires the trial court to write a specific prohibition into the law. Two arbitrators have issued decisions in favor of the Union and against the Hospital on this issue in 2008. Arbitrator Gerhart issued his decision, which is the subject of this action. Arbitrator Mario Bognanno ruled against the Hospital on this precise issue employing nearly identical legal analysis:

In overruling the Employer's objection (to the Union's modification of its

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[1]Professor Gerhart, has thought and written extensively on the issues raised by public sector interest arbitration and has published a study on the issue. Case W. Res. (Sept. 1980), p. 166, A Six State Study of Impasse Procedures in the Public Sector.

> last, best offer), the undersigned observed that, in his opinion, (1) collectively bargained settlements are preferred to imposed interest arbitration awards; (2) like mediators, arbitrators are loath to discourage compromise/concessionary moves by the parties, especially after impasse is reached; (3) while the LMRR, Section 15(c) does limit the arbitrator's decisional authority, requiring that the arbitrator choose either the Hospital's or the Union's 'complete, last, best offer,' it does not provide that each party's 'complete, last, best' offer is frozen as of the mediation phase of impasse resolution, as might well be the case, for example, if the LMRR had made provision for a procedure specifically designed to certify the final set of issues to be heard in interest arbitration.

(R.P. 411)

Scholarly analysis suggests that allowing parties to modify their offers during arbitration produces the best results in "final offer" arbitration because it forces parties to continually refine their offers resulting in either an agreement or the smallest final disparity in offers, thereby encouraging settlement and minimizing the harsh results often produced by "final offer arbitration." "Under the theory of final-offer arbitration, each party will make increasingly reasonable negotiating proposals in the hope of winning the award; in other words, the parties will gradually narrow the differences between their positions because of their mutual fear that the arbitrator will select the other side's last offer." J. Weitzman, Attitudes of Arbitrators toward Final-Offer Arbitration in Jersey, 35 Arb. J. 27 (1980).

1. Interest arbitration background.

Public sector interest arbitration laws developed as an alternative to granting public sector unions the right to strike. 32-MAR Mon. Law. 8 (2007). "By 1990, 35 states and the District of Columbia had adopted some form of interest arbitration as a means of resolving disputes over new contract terms for some of all of their public employees." 32-MAR Mon. Law. 8 (2007). Final-offer arbitration, a particular type of interest arbitration, is described as the process by which parties submit their last, best and final offers to an arbitrator who is either allowed to pick a package or pick positions on an issue-by-issue basis. New Mexico has explicitly adopted final-offer package arbitration.

"Final offer arbitration has as its basic objective the advancement of collective bargaining and voluntary agreement." J. Weitzman, Attitudes of Arbitrators toward Final-Offer Arbitration in Jersey, 35 Arb. J. 27 (1980). The dramatic effects of final offer arbitration are designed to encourage parties to settle. Allowing parties the opportunity to settle requires that parties be allowed to continue exchanging offers and attempt to offer compromises. The termination of the right to modify offers strips parties of the opportunity to settle. One of the troubling aspects of final offer arbitration is that it can sometimes yield awkward results – which is why many experts believe that it is counter-productive to end

parties' right to modify their offers. "The arbitrator is precluded from discarding from the package any offensive or unreasonable proposals, even if their inclusion would result in an inequitable award. Thus arbitrators may find themselves confronted with two unpalatable last 'best offers,' each of which contains one or more unreasonable proposals that, nevertheless, must be adopted as part of the package selected by the arbitrator." J. Weitzman, Attitudes of Arbitrators toward Final-Offer Arbitration in Jersey, 35 Arb. J. 27 (1980).

The most effective device to avoid such anomalous results would be to allow the arbitrator to express his opinion on various aspects of the offers and thus encourage parties to narrow the scope of disputed issues and insure that their respective last, best offers contain as few objectionable or offensive provisions as possible. This is precisely what Professor Gerhart (and Professor Bognanno) did; they forced parties to critically evaluate their own last, best offers based upon the testimony actually offered in the arbitration and encouraged modifications by both parties to increase the likelihood of a settlement short of an arbitrator's decision and to avoid the sometimes anomalous results of final-offer package arbitration.

2. The Arbitrator's exercise of authority was consistent with PEBA.

As Professor Gerhart thoughtfully discussed in his opinion, the process outlined in the LMRR implies and suggests continued attempts at settlement even

after certain events are triggered. Implying a prohibition on attempts at settlement, after impasse is declared, is according to Professor Gerhart, "a misreading of the Statute and Resolution for several reasons." (R.P. 15, (Exhibit 1, at 9)).

Impasse, under the ordinance, is viewed as a trigger which brings about certain events including mandatory mediation and then arbitration. LMRR, §15(c)(2). "If the impasse continues after thirty calendar days," parties are explicitly required to participate in an arbitration process ending in a final-offer decision. LMRR, §15(c). As parties familiar with collective bargaining know, "eleventh-hour" bargaining is an integral part of the process and often the path to resolution. The arbitrator is charged, according to the LMRR, with choosing the parties' "last, best offer," not the last offer made before impasse is declared. The Court's Order suggests that the LMRR enforces a rule which freezes negotiations in time and does not allow parties' positions to evolve after impasse has been declared. When exactly is this "statutory" ban on any new settlement offers? Is it when impasse is initially declared? Is it after the completion of mediation? Or is it after the impasse has continued for thirty days? Is it after a party has requested a list of arbitrators? In fact, no provision of either PEBA or the LMRR explicitly calls for such a freeze.

The Court's decision suggests that the New Mexico legislature intended to

preclude changes to parties' final offers at some undefined point in the impasse procedure. Obviously the legislature did not express this claimed preference -- in writing. Many other statutes do:

> Arbitration systems very in the timing and function of final offers made to the arbitrator or arbitration panel. Some systems such as that in Iowa, as well as for police officers in Montana, require written final offers sent to the arbitrator and the other party early in the arbitration step, and no change to such final offers thereafter. Other systems both allow multiple final offers and/or final offers to be submitted subsequent to the arbitration hearing itself.

32 MAR Mont. Law. 8 (2007).

Unlike the statutes identified above, the New Mexico legislature did not specify which system it preferred. Had it desired to set specific limitations on the timing of written final offers, it could have modeled the statute on Iowa's law – but it chose not to do so.

3. The arbitrator's decision most carefully considered the goals of PEBA.

"The NLRA (National Labor Relations Act) encourages the voluntary settlement of labor disputes and indicates that an agreement between the parties is the preferred means to settle grievance disputes." Correcting the Imbalance: The New Mexico Public Employee Bargaining Act and the Statutory Rights Provided to Public Employees, Barry Paisner, 37 UNM Law Review 372 (2007). The drafters of PEBA believed that this concept was important enough to include it in

the purpose of the Act: "The purpose of the PEBA is to . . . promote harmonious and cooperative relationships between public employers and public employees. . ." PEBA, §10-7E-2. These are the goals the arbitrator sought to satisfy by allowing parties to modify their offers until he issued a decision. Allowing parties to make concessions is obviously the best way to encourage and facilitate settlement. Terminating the ability of parties to make concessions cannot possibly satisfy the goal of allowing parties to reach settlement.

In fact, the contrary theory – allowing parties to continue compromising – makes the most sense: "Cutting off initiatives to reach bilateral settlement, or to close the gap between parties, would be contrary to the policy underlying the PEBA and Resolution." (R.P. 18 (Exhibit 1, at 12)).

II. The Bonus Does Not Violate Public Policy.

A. Standard of Review

The appellate court reviews jurisdictional issues and issues of law raised on appeal under a de novo standard of review. State v. Heinsen, 138 N.M. 441 (2005); State v. Garcia, 137 N.M. 583 (2005).

B. Argument

The trial court determined that the Union's proposed bonus violates the New Mexico Constitution. Article IV, Section 27 of the Constitution prohibits the

giving of extra compensation after services are rendered, "or contract made." The $500.00 bonus, on its face, does not violate the Constitution. The "contract made" calls for payment of the bonus and is clearly not "extra compensation" after the contract was made. There is, in fact, no legal support suggesting that bonuses are illegal and bonuses have long been a part of the compensation plans at the University of New Mexico.

No New Mexico decisions stand for the proposition that bonuses violate New Mexico law. N.M. Att'y Gen. Op. No. 88-66 (Oct. 27, 1988) and State ex rel. Sena v. Trujillo, 46 N.M. 361, 368 (1942) (relied upon by the Hospital), specifically relate to retirement programs and the constitutionality of applying those programs to employees no longer employed by the State. These decisions are not just distinguishable, they do not provide relevant guidance on this issue. The question decided by the Attorney General was "whether Chapter 241 is constitutional to the extent that it purports to grant COLAs to judge or justices who were not in the state's service on the date Chapter 241 became effective." (p. 1.) This is not the question presented by the Union's bonus proposal; nowhere in its offer does the Union seek compensation for former employees.

Similarly in State ex rel. Sena v. Trujillo, 46 N.M. 361, 368 (1942), the Supreme Court refused to apply a 1941 state pension law to Mr. Sena, who had

retired from the service before the Legislature passed the law. These decisions are premised on this legal notion: "the grant of public pension benefits to a public officer violates these section of the constitution unless the officer renders services while the pension statutes are in effect, so that those pension provisions may be said to be 'a part of the contemplated compensation for those services.'" (A.G. Opinion, at p. 2.) The pay schemes were declared unconstitutional only as to those employees who did not work for the state while the pension law was in effect. The Union's proposed bonus is entirely consistent with the Sena decision because the bonus is "a part of the contemplated compensation for those services."

Likewise, two other opinions cited by the Hospital are unrelated to bonuses agreed upon and contemplated in advance. In N.M. Atty' Gen. Op. No.'s 71-07 (Jan. 25, 1977) and 57-17 (Feb. 7, 1957), the Attorney General refused to allow the State to provide retroactive pay increases. These situations involved work which was contracted under specific wage provisions; after that work had been performed the State attempted to pay the employees additional money for that work performed. Those conditions are not analogous to the Union's proposal. The Union has proposed that employees be paid a $500.00 bonus as part of the contemplated and agreed upon system of compensation for employees. The Court adopted the Hospital's position suggesting that the bonus is retroactive pay.

However, the $500.00 bonus is not even remotely similar to retroactive pay. The bonus is offered to the employees as part of their compensation package – it is not offered retroactively after parties have agreed upon a complete wage package or after services have been rendered. It is also fundamentally different than a retroactive wage because it is not dependant upon the numbers of hours worked nor upon the wage paid – it is an across the board bonus just like the bonuses which the Hospital included in its own last, best offer (as outlined below). Simply put, it is not illegal because it is not retroactive.

As mentioned, the current contract, previous contracts, and the Hospital's final proposal to the arbitrator in this case contain lump sum bonuses. In reality, bonuses are regularly provided by the University of New Mexico Hospital to its employees and they are not illegal. The current CBA between the parties, and previous CBAs contain numerous bonus provisions. Specifically, Article XXVI(C)(5) provides to transcriptionists a "2.7% bonus shall be calculated on his or her gross income within their evaluation cycle dates." Article XXVI(B) provides for a "3.0% bonus shall be calculated and paid on his/her gross income within their evaluation cycle dates," for at home transcriptionists. Article XX provides a bonus for "topped out employees" as follows: they "shall receive a lump sum bonus of 3.0% on their evaluation date." (R.P. 307-308) In fact, the

Hospital's final offer for consideration in this arbitration (the contract unilaterally implemented by the Hospital) contains a bonus proposal at Article XX(C): "Employees who are at a rate above the current maximum shall receive an increase in their base wage to the new maximum with the remainder being paid as a one time lump sum bonus." (R.P. 307-308)

The Hospital also contended that the $500.00 bonus would constitute a "gift" in violation of Article IX, Section 14 of the Constitution. In support, the Hospital cited Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956), a decision in which the Supreme Court determined the validity of a statute authorizing municipalities to issue revenue bonds to acquire industrial sites. The payment of a bonus is the payment of wages for work performed and the notion of it being a gift simply makes no sense. In further support of its position, the Hospital cited N.M. Att'y Gen. Op. No. 72-44 (Sept 7, 1972), which actually portrays the payment of wages in a much less rigid fashion than suggested by the Hospital. In this opinion the Attorney General stated that the State could not pay teachers any salary before they begin teaching. "It should be noted, however, that if a teacher's salary payments are received after the commencement of his or her services, the salary payments may be deferred and spread out to cover periods when services are no longer being performed." The Hospital's suggestion that the

payment of a bonus is illegal is contrary to the Attorney General Opinion it cites: the State may choose different methods and mechanisms of payment to employees as long as they have begun working for the state. Nothing in any of the opinions or decisions cited by the University suggests that the practice of bonus payments, as part of a compensation plan, somehow violates state law.

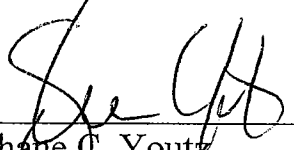
Conclusion

Petitioners respectfully request that this Court direct the District Court to take the following action:

Issue an Order confirming the arbitrator's award.

Respectfully Submitted,

YOUTZ & VALDEZ, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2009, I caused a true and correct copy of the foregoing Appellant's Brief In Chief to be mailed, via regular U.S. mail, postage pre-paid and affixed thereto, to the following:

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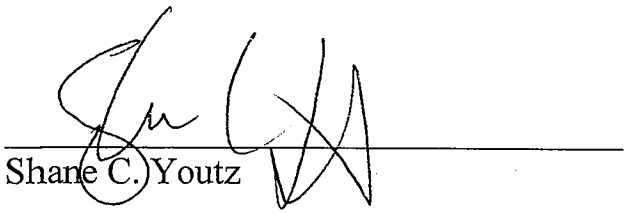

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