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.

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

Defendant/Appellee.

No. 28,960

APPELLANT'S REPLY BRIEF

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

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(G) NMRA, Appellant certifies that this brief complies with the limitations of Rule 12-213(F). Although the body of the brief exceeds 15 pages, the brief was prepared using Times New Roman typeface and

the body of the brief contains 3,501 words. The word count was obtained from Microsoft Office Word 2007.

Argument

I. The Hospital's Overly Restrictive Reading of the LMRR and PEBA Thwarts the Purpose of the Law Which is to End the Impasse and Resolve those Issues that the Parties Could Not Resolve.

The Hospital argues in its Answer Brief that the Arbitrator had no authority to proceed with the arbitration because no impasse existed. (Appellee's Answer Brief, § I. B-C). The Hospital's argument, if adopted by this Court, would transform PEBA's impasse provisions into a tool for delay and manipulation and would remove important discretionary authority that the legislature, in its wisdom, granted to the arbitrator. Both sides in the instant dispute have extensively argued policy to the Court, which is an exercise probably more suited to the legislature. Ultimately, what remains is the law at issue, which provides:

> 1) if an impasse occurs, either party shall request mediation assistance. If the parties cannot agree on a mediator, either party may request the assistance of the federal mediation and conciliation service;
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> 2) if the impasse continues after thirty (30) calendar days, either party may request an unrestricted list of seven (7) arbitrators from the federal mediation and conciliation service. The parties shall choose one arbitrator by alternately striking names from such list. Which party strikes the first name shall be determined by coin toss. The arbitrator shall render a final, binding (except as limited by Section 14(F) and the following provision of this paragraph regarding an impasse resolution decision of an arbitrator that addresses economic issues or requires the expenditure of funds) written decision resolving unresolved issues no later than thirty (30) calendar days after the arbitrator has been notified of his or her selection by the parties. The arbitrator's decision shall be limited to a selection of one of the two

> parties' complete, last, best offer. However, an impasse resolution decision of an arbitrator or an agreement provision by the employer and an exclusive representative that addresses economic issue or require the expenditure of funds shall be contingent upon ratification by the governing body and a declaration by the governing body that monies are available to fund the decision. An arbitrator's decision shall not require the employer to re-appropriate or reallocate funds. The parties shall share all of the arbitrator's costs incurred pursuant to this subsection equally. Each party shall be responsible for paying any costs related to its witnesses and representation. The decision shall be subject to judicial review pursuant to the standards set forth in the Uniform Arbitration Act.
>
> 3) In the event that an impasse continues after the expiration of a contract, the existing contract will continue in full force and effect until it is replaced by a subsequent written agreement. However, this shall not require the employer to increase any employees' level, steps, or grades of compensation contained in the existing contract.

University of New Mexico, Labor Management Relations Resolution "LMRR" § 15(C).[1]

"Impasse" is defined by the LMRR as "failure of the employer and an exclusive representative, after good faith bargaining, to reach agreement in the course of negotiating a collective bargaining agreement." LMRR §4(L).

Relying on these provisions, the Hospital makes the following assertions: "Under the LMRR, a party may invoke impasse arbitration 'if the impasse continues after thirty (30) calendar days.' . . . Accordingly, the LMRR establishes two preconditions to arbitration. First, there must be an impasse. Second, the

impasse must continue for more than 30 days. The LMRR defines 'impasse' to mean failure of the parties to reach a collective bargaining agreement 'after good faith bargaining.' . . . Bargaining therefore must have ended for an impasse to exist. If bargaining resumes, an impasse cannot exist, let alone continue. . . . Until impasse again was reached and continued for the requisite period, the arbitrator had no authority to proceed with the hearing." (Answer Brief, p. 19-20).

Both parties agree that under traditional labor law, impasse is broken when either party modifies its contract offer. Consistent with the Hospital's suggested interpretation, the moment any modified offer is made by either side, impasse has ended and the arbitrator has lost his "authority to proceed with the hearing." (Answer Brief, p. 19-20). However, as the Court is well aware, the law at issue provides absolutely no deadline on modified contract offers. Under the Hospital's suggested interpretation, then, either party may modify its offer and strip the arbitrator of his authority to proceed with the hearing – *literally at any time prior to the arbitrator issuing a final decision.* The Hospital's proffered interpretation, then leads to the absurd result that any party could endlessly delay a final resolution of an impasse by merely submitting a new offer at any time during the

[1] It should be noted that the LMRR impasse provision loosely tracks the language of the impasse provision in the New Mexico Public Employees Bargaining Act, NMSA 1978 § 10-7E-18.

arbitration process. Such a construction would be contrary to the intent of the law and is not supported by any reasonable construction of PEBA or LMRR.[2] Perhaps most importantly, it strips the arbitrator of the case-by-case flexibility to effect a resolution – authority that the legislature wisely reserved for the arbitrator.

A similar argument was made in City of Manistee v. Employment Relations Commission, 168 Mich.App. 422, 425 N.W.2d 168 (1998). In *Manistee,* the Michigan Court of Appeals was interpreting a Michigan binding arbitration dispute resolution provision for police and firefighters and was faced with determining whether impasse was a prerequisite to binding interest arbitration. The Court stated: "Here, PERA does impose the duty of good faith upon both the employer and the union at the bargaining table. . . . Procedurally, however, the duty to bargain is suspended if the parties reach an impasse on one or more mandatory subjects. . . . Moreover, the express purpose of Act 312 to provide for the 'expeditious' resolution of disputes would be frustrated if MERC was required to resolve unfair labor practice charges based on alleged bad-faith bargaining as a prerequisite to allowing Act 312 arbitration. To follow the city's suggested

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[2] The absurdity of the Hospital's reasoning is even more apparent when it is extended to a reading of the entire impasse resolution provision in the LMRR. In so doing, one could argue that since an impasse must exist even prior to *mediation,* if any offer is made during either the mediation or the arbitration process, the

procedure would, in our opinion, encourage dilatory practices, cause protracted delays and appeals in resolving important public disputes, undermine the morale of affected employees and prove costly to all participants." City of Manistee, 168 Mich.App. 422, 425 N.W.2d 168, 171.

The reasoning of the Michigan Court of Appeals applies to the Hospital's reading of the LMRR. The Hospital's suggested procedure of starting the arbitration process over each time a party makes a new offer would encourage dilatory practices, cause protracted delays and appeals in resolving important public disputes, undermine the morale of affected employees and prove costly to all participants.

As more fully explained below, the more reasonable interpretation of the LMRR is that arbitration can be requested by any party once thirty days have passed and mediation has not resolved the impasse. Thereafter, the arbitration process begins and the timing of the submission of the "last, best offers" is left to the discretion of the arbitrator.

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parties are no longer in an impasse and the precondition for impasse resolution is no longer present.

II. The Hospital's Insistence That "Last, Best Offers" Must Be Submitted Prior to the Arbitration Hearing Is Not Supported by the Plain Language of the Statute.

The interpretation of a statute, ordinance or resolution is a question of law that the Court reviews de novo, using the same rules of construction that apply to statutes. *See* San Pedro Neighborhood Assn. v. Board of County Commissioners of Santa Fe County, 146 N.M. 106, 206 P.3d 1011, 2009-NMCA-045, ¶ 12 *citing* Smith v. Bernalillo County, 2005-NMSC-012, ¶ 18, 137 N.M. 280, 110 P.3d 496; Alba v. Peoples Energy Resources Corp., 2004-NMCA-084, ¶ 14, 136 N.M. 79, 94 P.3d 822.

The first rule in statutory construction is that the plain language of a statute is the primary indicator of legislative intent. Courts are to give the words used in the statute their ordinary meaning unless the legislature indicates a different intent. The court will not read into a statute or ordinance language which is not there, particularly if it makes sense as written. The second rule is to give persuasive weight to long-standing administrative constructions of statutes by the agency charged with administering them. The third rule dictates that where several sections of a statute are involved, they must be read together so that all parts are given effect. San Pedro Neighborhood Assn., 146 N.M. 106, 206 P.3d 1011, 2009-

NMCA-045, ¶ 12 *citing* High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599.

Applying these rules of statutory construction to the LMRR, it is clear that the Hospital has ignored the plain language in order to unnecessarily restrict the arbitrator's authority to resolve the impasse through binding arbitration. The Hospital ignores the plain language of the resolution when it argues that the arbitrator had no authority to entertain a "complete last, best offer" submitted thirty days before, or anytime after, the arbitration "hearing." (Answer Brief, § I (B)-(C)). A close reading of the arbitration provision reveals that it contains absolutely no reference to an arbitration "hearing" or even any point in time when mediation has ended and arbitration has begun.[3] The LMRR allows the parties to request a list of arbitrators if the impasse "continues after thirty (30) calendar days," but does not explicitly require the parties to have made their "last, best offer" before requesting the list of arbitrators.

The LMRR also provides that the arbitrator must render a final, binding written decision resolving unresolved issues "no later than thirty (30) calendar days after the arbitrator has been notified of his or her selection by the

[3] In fact, while "mediation" is defined in Section 4(P) of the LMRR, there is no definition of "arbitration." Nothing in the LMRR provides any guidance as to when arbitration commences.

parties." Again, this thirty day deadline does not refer to the submission of the "last, best offer." The words chosen by the legislature in this regard are also significant; it directs the arbitrator to issue a decision "resolving unresolved issues." The words allow for an evolving identification of issues and cannot be construed as requiring the parties to write their positions in cement at any given time – at least as directed by the legislature. The Hospital argues that the Union submitted a new "last, best, offer" after the deadline to do so but cannot point to any language of the resolution identifying a deadline. Plainly stated, the LMRR contains absolutely no deadline for the submission of a "complete, last, best offer."

In support of its argument, the Hospital relies on unsupported assumptions regarding the legislative intent in adopting "binding, final offer, package arbitration" in order to bolster its argument that the LMRR ought to require submission of the "last, best offer" *prior* to the arbitration hearing." (Answer Brief, § I). This argument ignores the plain language of the LMRR. *See* Martin Marietta Materials, Inc. v. Bank of Oklahoma, 2007 WL 3171533, p.5 (W.D. Ky. 2007)(Court rejected argument, supported by citations to law review articles describing "baseball style arbitration" or "final offer arbitration," that the arbitrator exceeded its authority by selecting an offer submitted after the hearing:

"[I]t was not the arbitrator's job to properly apply baseball style arbitration. His job was to properly apply the Agreement.")

The Hospital relies on broad policy arguments to support its claim that the "last, best offers" must be submitted *prior* to the arbitration hearing. With no authority cited, the Hospital makes the following assertion regarding the legislative intent in enacting PEBA: "By opting for final offer, package arbitration for public-sector impasse resolution, the legislature signaled its intent to adopt the most forceful scheme for inducing the parties to reach an agreement prior to the issuance of an arbitration award. The most effective way to achieve the legislature's purpose is to require the arbitrator to choose between the parties' final offers at the time impasse is reached." (Answer Brief, p. 22).[4]

The Hospital cites no authority, no transcript of debate, indeed no legislative history whatsoever, to support the claim that the legislature intended to require that the "last, best offers" be submitted prior to the hearing. To the contrary, a plain reading of the statute supports the argument that by not

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[4] Despite this seemingly forceful argument on page 22 of its Answer Brief, the Hospital, in a later discussion, acknowledges that final offer impasse arbitration can legitimately allow the fixed final offer to be submitted *after* the hearing. The Hospital states: "Another writer compares two statutory schemes that adopt final offer impasse arbitration, one of which requires fixed final offers in advance of the arbitration hearing and the other of which does not." (Answer Brief, p. 27 *citing*

specifically including a deadline for submission of the parties' "last, best offers," where other deadlines are included, the intent of the legislature was to leave open the matter of timing of the submission of "last, best offers."

Further support for this argument can be found in statutes enacted in other states. Other states have chosen to identify deadlines for submission of the parties' "last, best offer." Ohio provides for final offer settlement proceedings for public employees and includes a specific deadline five days before the hearing. *See,* R.C. 4117.14(G)("Not later than five calendar days before the hearing, each of the parties shall submit to the conciliator, to the opposing party, and to the board, a written report summarizing the unresolved issues, the party's final offer as to the issues, and the rationale for that position.").

The Public Employee Relations Act in Iowa requires submission of the final offer within four days of the request for binding arbitration. *See,* I.C.A. §20.22 *(*"If an impasse persists after the findings of fact and recommendations are made public by the fact-finder, the parties may continue to negotiate or, the board shall have the power, upon request of either party, to arrange for arbitration, which shall be binding. . . . Each party shall submit to the board within four days of request a final offer on the impasse items with proof of service of a copy upon the

other party. . . . The parties may continue to negotiate all offers until an agreement is reached or a decision rendered by the panel of arbitrators.")

Connecticut has a statute that allows for mandatory binding arbitration for municipal employees which contains a deadline for "last, best offers" *after* the hearing. *See* C.G.S.A § 7-473c ("Within ten days *after* the conclusion of the taking of testimony, the parties shall file with the secretary of the State Board of Mediation and Arbitration five copies of their statements of last best offer setting forth, in numbered paragraphs corresponding to the statement of unresolved issues contained in the arbitration statement, the final agreement provisions proposed by such party." emphasis added).

By not including a deadline in the New Mexico PEBA, and based upon a plain reading of the statute, it is clear that the legislature intended to leave open the timing of submission of the final offers and the Arbitrator did not exceed its authority in requesting the parties to submit their "last, best offer" after the hearing.

III. In Absence of a Specific Deadline in the LMRR to Submit "Last, Best Offers," the Arbitrator Fairly and Honestly Made His Award Within the Scope of Submission and the District Court Committed Error When it Vacated the Arbitration Award.

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in Montana's Protective Services, 32 Mont. Lawyer 8, 40-41(2007)).

"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 v. Farmers Insurance Company of Arizona, 115 N.M. 622, 625-26, 857 P.2d 22 (NM 1993). A mistake of law must be "so gross as to imply misconduct, fraud, or lack of fair and impartial judgment." Fernandez, at 626.

As stated above, the LMRR does not contain a specific deadline for submission of the parties' "last, best offers." Therefore, the Arbitrator did not make any mistake of law by allowing modified offers prior to the hearing and by requesting final offers after the hearing. The District Court mistakenly concluded that the Arbitrator exceeded his authority. The District Court's Order Vacating the award should be reversed and the award should be confirmed and enforced.

IV. The Hospital's Reliance on Article IV, Section 27 and Article IX, Section 14 of the New Mexico Constitution to Support the Argument that the Bonuses Are illegal Is Misplaced.

In its Answer Brief, the Hospital agrees that legitimate bonus payments are a lawful form of compensation. (Answer Brief, p. 41). In order to argue that the bonuses contained in the Arbitration award are not lawful, the Hospital claims that

they are additional compensation for services already performed and prohibited by Article IV, Section 27 of the New Mexico Constitution. (Answer Brief, p. 41). The Hospital's reliance on Article IV, Section 27 is misplaced.

Article IV, Section 27 provides:

> No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made; nor shall the compensation of any officer be increased or diminished during his term of office, except as otherwise provided in this constitution.

N.M. Const. Article IV, § 27.

This constitutional provision applies to public officials who hold office for term and does not apply to public employees who do not hold terms of office. Whitely v. New Mexico State Personnel Bd., 115 N.M. 308, 850 P.2d 1011 (1993) citing State ex rel. Gilbert v. Board of Com'rs of Sierra County, 29 N.M. 209, 222 P. 654 (1924).

Article IV, Section 27 was "designed to protect the individual elected official against legislative oppression which might flow from party rancor, personal spleen, enmity, or grudge. These could well harass and cripple the officer by reducing his compensation during his service; while, on the other hand, party feeling, blood, or business relations might be combined in such pernicious activity in the form of strong and powerful lobbying as to sway the members of the Legislature and cause the bestowal of an unmerited increase. To obviate these

conditions is the purpose of this wise constitutional provision." Gilbert, 29 N.M. 209, 222 P. 654 (1924).

The purpose behind Article IV, Section 27, as stated in *Gilbert,* has not been abandoned by the courts. In State ex rel. Haragan v. Harris, 126 N.M. 310, 968 P.2d 1173 (1998) the court stated: "We see no compelling reason to overrule Gilbert. We believe that to do so would be to ignore the presence and meaning of the rather clear language in Article IV, Section 27. We cannot say that the Gilbert Court's interpretation of this section is "no more than a remnant of an abandoned doctrine[, or that its] premises of fact have so changed as to render its central holding irrelevant or unjustifiable." Haragan, 126 N.M. at 314, 968 P.2d at 1177.

In Whitely, the court declined to rely on Article IV, Section 27 in considering whether compensation for Juvenile Probation Officers and their staff had been unlawfully diminished stating: "In State ex rel. Gilbert v. Board of Comm'rs, 29 N.M. 209, 214, 222 P. 654, 655 (1924), we held that the constitutional prohibition against diminishing an officer's compensation during his term in office does not apply to public employees who do not hold "terms of office." This precludes application of the provision to public employees such as the JPO's who are not hired for a definite term nor particular period of time, but who are removable, consistent with applicable personnel rules, at the discretion of the

appointing authority. Id. Because Gilbert is dispositive, we affirm the district court's dismissal of appellants' unlawful diminution of compensation claim." Whitely, 115 N.M. at 313, 850 P.2d at 1016.

The foregoing authorities establish that the constitutional prohibition contained in Article IV, Section 27 was not intended to apply to employees who do not hold a term of office and therefore is inapplicable to the bonuses awarded by the Arbitrator.

The Hospital also argues that the bonuses are illegal because they violate the anti-donation provision in Article IX, Section 14 of the New Mexico Constitution.

Article IX, Section 14 provides:

> Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad except as provided in Subsections A through F of this section.

N.M. Const. Article IX, § 14.

A similar argument was made in Treloar v. County of Chaves, 130 N.M. 794, 32 P.3d 803, 2001-NMCA-074, where the County argued that a severance pay package contracted by a physician with a county created hospital violated the anti-donation provision of the New Mexico Constitution. The New Mexico Court of Appeals disagreed noting that "severance pay is deemed to be in the nature of

wages that have been earned. Thus, consideration had been given for the severance obligation, and there was no gift." Id., 130 N.M at 803, 32 P.3d at 812, 2001-NMCA-074, ¶ 32.

Bonuses, like severance pay, are in the nature of wages that have been earned. Consideration has been given for the bonuses and there is no gift. Therefore, the bonuses do not violate Article IX, Section 14 and are not illegal.

Conclusion

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

Issue an Order confirming the arbitrator's award.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 2009, I caused a true and correct copy of the foregoing Appellant's Reply Brief to be mailed, via regular U.S. mail, postage pre-paid and affixed thereto, to the following:

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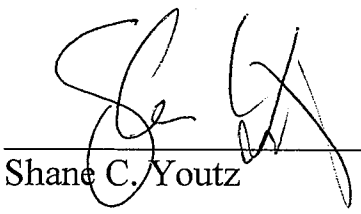

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