IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

THE STATE OF NEW MEXICO,

Movant/Defendant-Appellant,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 18, AFL-CIO, CLC,

Respondent/Plaintiff-Appellee,

and

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, CLC,

Respondent/Plaintiff-Appellee.

No. 30,847

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COURT OF APPEALS OF NEW MEXICO
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APPELLEES' ANSWER BRIEF

Appeal from the Second Judicial District Court, Bernalillo County
Consolidated
Case Nos. CV-2009-09756, CV-2009-09933, CV-200911860
Honorable Alan M. Malott

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I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

Appellees, the American Federation of State, County and Municipal Employees ("AFSCME") and the Communications Workers of America ("CWA") (collectively, the "Unions"), are the exclusive bargaining representatives for certain State of New Mexico employees with respect to wages, hours, and other conditions of employment. The State of New Mexico entered into a series of collective bargaining agreements with the Unions in which parties have agreed to resolve disputes through binding arbitration. The instant dispute, involving the Unions, results from two arbitration awards finding a violation of the agreements by the State's failure to implement full pay increases set forth in their respective collective bargaining agreements. The State admits that it did not comply with either agreement, but contends it was excused from compliance because the Legislature did not appropriate funds necessary to comply – a claim independently rejected by both arbitrators.

Although the particular facts of the arbitrations, which concern specific pay increases, are occasionally tedious and complicated, the legal premise upon which two professional labor arbitrators based their decisions is simple: The State of New Mexico signed written agreements to provide wage increases to its employees but failed to honor those agreements. The State's refusal to honor its agreements is

also premised upon a single simple argument: it claims that the New Mexico Legislature did not appropriate sufficient funds to allow the State to comply with the agreements –a factual contention explicitly rebutted by the State's own evidence offered at the arbitration. Specifically, the Legislature appropriated $12,833,000.00 in the appropriation bill, and other funds in HB 165, to total approximately $15,541,000.00 for classified pay increases. AFSCME Tr. 33:2-34:6.[1] The cumulative cost to the State to comply with both agreements was less: Using the State's own actuarial analysis, it determined the cost of compliance would have been $7,931,514.00. CWA Er. Ex. 5.

B. Course of Proceedings and Disposition in the Court Below

On August 19, 2009, in Case No. CV-2009-09756, the State of New Mexico (hereinafter "State") filed a motion in the District Court, Second Judicial District, to vacate the arbitration award by Arbitrator Goldman. RP 110-12. Thereafter, on August 21, 2009, in a separate case, Case No. CV-2009-09933, AFSCME filed a Petition and Motion for Order Confirming Arbitration Award by Arbitrator Goldman. RP 61-68. These cases were consolidated by Order entered September 4, 2009. RP 105. On October 8, 2009, in Case No. CV-2009-11860, the State filed

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1 For the Court's convenience, Appellees adopt the same reference style as identified in Appellant's Brief in Chief, Footnote 2, which outlines supplements to the record.

a motion to vacate the arbitration award by Arbitrator John A. Creswell. RP 1-4. On January 12, 2010, the District Court entered an Order for Consolidation under Rule 42, ordering that all three cases be consolidated into one action under Rule 42 of the New Mexico Rules of Civil Procedure. RP 58-60. Finally, on September 23, 2010, the District Court entered its Order on Cross Motions to Vacate and Confirm Arbitration Awards in which it confirmed the arbitration awards by Arbitrators Goldman and Criswell and denied the State's motions to vacate the awards. RP 359-62.

C. Summary of Facts Relevant to the Issues Presented for Review

In 2008, the State of New Mexico employed 19,783 classified employees. CWA Tr. 62:19-22. Of those employees, approximately one-half are organized or unionized workers under the authority of the Public Employees Bargaining Act (PEBA) and work for the State, subject to the terms of a collective bargaining agreement. CWA Tr. 63:3-20. The dispute herein, the collective bargaining agreements, and the arbitrators' awards affect only one-half of the classified employees, those who work for the State of New Mexico under the terms of a collective bargaining agreement, pursuant to PEBA. CWA Tr. 63:3-20. The arbitrators' decisions do not pertain in any way to the other half of non-union classified employees.

The collective bargaining agreements between the Unions and the State obligated the State to provide salary increases to represented employees, "subject to legislative appropriation." RP 11, 71. Ultimately, the cost of these wage increases can be expressed as a single dollar figure for purposes of funding by the legislature. In that regard, the Unions were told by the State Personnel Board Director, Sandra Perez that funding in the amount of $15,541,000.00 was necessary to fund the Union raises for all classified employees. RP 13.[2] This dollar amount was necessary to fund the raises not just for the Union employees, but rather for all State of New Mexico classified employees, which includes approximately 19,783 employees. RP 13. The dollar amount necessary to obtain funding for the Union raises would be less; $7,931,514.00. CWA Er. Ex. 5.

The Legislature drafted language in HB2, and subsequently in SB 165, which appeared to allow for the full funding to all classified employees covered under the Personnel Act for the fiscal year 2009 (both Union and non-union). AFSCME Tr. 33:2-34:6. On March 14, 2008, claiming that the appropriation was insufficient to fund the agreed upon wage increases, the State Personnel Board met

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2 It is not disputed that the Union wage increases, if extended to all classified employees, would have exceeded the Legislature's appropriation. However, the State offered no evidence establishing that it had any legal or contractual obligation to extend the Union wage increases to non-union employees. RP 22. Finally, it is undisputed that the cost to the State to honor its contractual obligations was less

and decided to implement a 2.4% raise effective July 1, 2008, and an additional .5%, based on the midpoint, also effective July 1, 2008, for all classified employees – union and non-union. RP 15-16. The wage increases implemented by the State provided smaller wage increases than as stipulated in the agreements and:

> contrary to the contract with the Union, both raises provided for an equal percentage raise for all employees covered by the Agreement. This raise, therefore, not only did not further the purpose of the compa-ratio raises called for by the Agreement, which was to have the wages of the lower paid employees increased substantially more than the higher paid employees in the same wage band, it deteriorated those lower wages and made the wage spread between the two groups even greater.

RP 16.

The Unions separately arbitrated the State's unilaterally implemented wage increases which breached the contractual wage provisions. Both arbitrators independently rejected the State's contention that insufficient funds were appropriated to comply with the contract.[3] On June 15, 2009, Arbitrator Alvin Goldman issued an award in favor of AFSCME finding that "the State violated its

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than the amount appropriated. CWA Er. Ex. 5.

3 Arbitrator Alvin Goldman is recognized as an expert in labor law. He is a Professor of Law at the University of Kentucky, College of Law. He was Professor-in Residence at the National Labor Relations Board (1967-68), Scholar-in-Resident at the Institute of Labor Law, Leuven University, Belgium (1973), and author of several significant labor law texts. (RP 214) Arbitrator Criswell is also recognized as an authority in the field of labor law, having authored several appellate opinions in the labor and employment fields as a Judge on the Colorado Court of Appeals. (RP 240).

contractual obligation to give bargaining unit personnel the compa-ratio raises required by Article 12 of the collective agreement. RP 80. Rather than provide the contractually agreed-upon compa-ratio salary increases, the State Personnel Office ("SPO") unilaterally implemented smaller salary increases, even though the Legislature allocated to SPO "more than enough [money] to meet this obligation." RP 77. The New Mexico Legislature allocated $12,833,000.00 for the purposes of salary increases for the 2009 Fiscal Year. AFSCME Tr. 33:2-34:6. The cost of complying with the collective bargaining agreements between the State and AFSCME, CWA and all other unions was $7,836,831.00, which falls well within the amount allocated by the Legislature for wage increases. RP 77.

Based upon the finding that the State refused to provide pay increases it was contractually obligated to provide, Arbitrator Goldman directed the Employer to take three actions:

1) The SPO was ordered to calculate "what the salary levels would have been for bargaining unit employees … had they been given the additional increases based on the compa-ratio percentages set forth in Article 12, Section 2(c) of the collective agreement." RP 81.

2) The SPO was ordered to permanently adjust the salary of the employees to an amount consistent with the pay increases identified in the collective bargaining

agreement. RP 81.

3) Bargaining unit employees were to be paid the difference between what they should have been paid under the agreement and what they were actually paid by the state, i.e., back pay. RP 81.

Separately, in the case involving CWA, Arbitrator Criswell ruled on September 25, 2009, in favor of the Union and found that the Legislature had appropriated sufficient funds in the same legislation to pay CWA the same wage increases based on identical language in its separate collective bargaining agreement. RP 25. Arbitrator Criswell independently reached the same factual conclusion as Arbitrator Goldman, ruling:

> The EMPLOYER argues, however, that it was prevented from instituting these salary increases because the legislature failed to appropriate sufficient funds for this purpose. However, the undisputed evidence demonstrates that there was a sufficient appropriation for this purpose.

RP 21. Arbitrator Criswell also concluded that the State of New Mexico had violated its agreement with the Union by refusing to pay the agreed-upon wage increases. RP 21. The SPO, rather than provide the contractually agreed-upon compa-ration salary increases, unilaterally implemented smaller salary increases – even though the Legislature allocated to SPO more than enough money to meet this obligation. RP 22.

II. LEGAL ARGUMENT

The State argues that the Second Judicial District Court erred by failing to conduct an independent review of the arbitral records when it upheld two arbitration decisions in favor of the Unions confirming the State's obligation to apply adequate funds appropriated by the New Mexico Legislature to pay raises for all represented workers in the state. The State further argues that the awards of Arbitrators Goldman and Criswell contain identical errors which are "so gross as to imply misconduct, fraud or lack of fair or impartial judgment." *Fernandez v. Farmers Insurance Company of Arizona,* 115 N.M. 622, 625, 857 P.2d 22, 25 (1993). To the contrary, the Arbitrators' decisions reflect a reasoned approach to resolving a dispute between parties in which one party has refused to comply with the terms of an explicit agreement. Ultimately, both arbitrators concluded that the State's refusal to comply with the terms of its agreements was neither legally nor logically sound.

A careful evaluation of the State's arguments reveals a concerted effort to draw the Court into a *de novo* analysis of the arbitrators' decisions, which is not consistent with the Uniform Arbitration Act: "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. The State has clothed its argument in phrases suggesting jurisdictional defects, but the legal claims argued by the State are a simple rearguing of the issues already entertained by the arbitrators, which were clearly within the scope of their jurisdiction. The State's artful redressing of legal argument should not obfuscate the simplicity of the issue: The State of New Mexico agreed, in writing, to provide pay increases, the Legislature appropriated sufficient money to allow the State to honor its agreement, and the State is obligated to provide those wage increases.

A. The Trial Court conducted the proper standard review and was correct in upholding the ruling of the Arbitrators.

The New Mexico Supreme Court has stated clearly that a reviewing court "exercises extreme caution" when deciding whether to vacate a decision of an arbitrator. *Town of Silver City v. Silver City Police Officers Ass'n,* 115 N.M. 628, 632, 857 P.2d 28, 32 (1993). The review is for error of fact or law, "so gross as to imply misconduct, fraud or lack of fair or impartial judgment." *Fernandez v. Farmers Insurance Company of Arizona,* 115 N.M. 622, 625, 857 P.2d 22, 25 (NM

1993).[4]

Appellant argues that this Court should adopt a new standard of arbitral review, requiring an independent review of the record. Appellant essentially contends that because it has raised jurisdictional questions, that this Court should review all facts and law considered by the arbitrator. The State in its argument, presumes too much; even if this Court were to adopt the standard it advocates, it would not apply in this instance because the jurisdictional issues raised by Appellant relate only to the timing of the payment of back wages ordered by the arbitrator and do not require a retrial of the factual and legal issues supporting the merits of the awards.

Specifically, the State claims that the necessary funds were not appropriated to comply with the contract. Every argument made by the State, in its brief, depends upon the conclusion that the Legislature did not appropriate sufficient money to fund the collective bargaining agreement—but this is not a jurisdictional issue. The arbitrator's jurisdictional authority is defined in the collective bargaining agreement as the authority to "give appropriate interpretation or application to such terms (of the agreement) and provide appropriate relief."

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4 Appellant makes much of the District Court's use of phrases in dicta of "palpably mistaken" or "completely irrational." In fact, the trial court explicitly adopted the Supreme Court's standards, identified in *Fernandez*. No suggestion exists that the

AFSCME Jt. Ex. 1, p. 29. The arbitrators issued decisions explicitly within their jurisdiction. They found that the contracts were clearly violated and rejected a statutory defense raised by the State. The statutory defense (insufficient appropriation) did not raise a jurisdictional defense, but rather involved a statutory interpretation made at the State's request, not a subject for judicial review, and certainly not jurisdictional.

"The Arbitration Act neither empowers the district court to review an arbitration award on the merits of the controversy, nor grants the district court the authority to review an award for errors of law or fact." *Id.*, at 632. Once an arbitration award is entered, the finality of arbitration weighs heavily in its favor and cannot be upset except under exceptional circumstances. *Melton v. Lyon,* 108 N.M. 420, 422, 773 P.2d 732 (1989). "An arbitrator's incorrect interpretation of a statute is not sufficient to show that enforcement of the arbitration award would violate public policy." *K.R. Swerdfeger Constr., Inc. v. Bd. of Regents of Univ. of N.M.,* 2006-NMCA-117, ¶ 26, 140 N.M. 374, 382, 142 P.3d 962, 970.

The State identifies two Massachusetts decisions which, it contends, stand for the legal proposition that jurisdictional issues are raised where an arbitrator exceeds his authority when he awards damages where no funds have been

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trial court was attempting to suggest a new standard of review.

appropriated. The rule of law actually supports the unions' position in this instance. In *City of Somerville v. Somerville Municipal Employees Association,* 418 Mass. 21, 633 N.E. 2d 1047 (1994), the Court determined that the City had not appropriated the funds and predicated its decision on this fact. A lack of appropriation, however, is not present in the case before this Court. The court in *City of Somerville* stated: "The Board included the full amount of the salary increases in their recommended budget reductions. The union argues that, by labeling the reductions 'recommended,' the board did not specifically reject the increases. That interpretation is refuted, however, by a resolution passed by the board on the same evening as it passed the budget reductions. Therein the board specifically stated that they had refused to fund the salary increases." *City of Somerville,* at 1050. Compare this set of facts with the appropriation legislation, set out above. The instant set of facts establishes, incontrovertibly, that the New Mexico Legislature appropriated the necessary funds.

The State also relies on *School Comm. of Boston v. Boston Teachers Union, Local 66,* 395 Mass. 232, 235, 479 N.E. 2d 645, 648 (1985), which states that an arbitrator "acts in excess of his authority if damages are awarded for the breach of a provision in a collective bargaining agreement when, *at the time of the breach*, no funds had been appropriated to implement that provision." Here, it cannot be

reasonably argued by the State that at the time of the breach (July 1, 2008) the State had not appropriated at least the $7,836,831.00 it needed to comply, not just with the AFSCME and CWA contracts, but with all collective bargaining agreements to which the State is a party. The Massachusetts decisions do not direct this Court to alter its standard of review or to vacate the award; the decisions support the notion that the award should be enforced.

In the instant case, neither the Arbitrators nor the District Court abused their authority or acted unreasonably in rendering decisions that enforced the parties' collective bargaining agreements requiring the State to increase wages in an amount specified in the contracts (which featured identical wage provisions) and for which the Legislature had appropriated adequate funding. The Arbitrators ruled that the SPO was equipped with the necessary administrative authority and appropriate legislative funding to comply with the agreement but simply chose not to. The District Court reached the same conclusion, based on findings of fact and law. The State's protest that the decisions exceed the arbitrators' authority is not supported by the Public Employees Bargaining Act ("PEBA"); to the contrary, PEBA requires that the arbitrator be given final and binding authority on matters presented in this arbitration. PEBA requires that any collective bargaining agreement covering public employees include:

a grievance procedure to be used for the settlement of disputes pertaining to employment terms and conditions and related personnel matters. The grievance procedure shall provide for a final and binding determination. The final determination shall constitute an arbitration award within the meaning of the Uniform Arbitration Act. NMSA 1978 § 10-7E-17(F) (2003)

The Arbitrators acted within their authority and concluded that the State had adequate appropriations from the Legislature to fulfill its contractual obligation to provide full raises for all represented personnel. Because the District Court found that the Arbitrators acted within the scope of their authority, based their decisions on substantial evidence and did not act unreasonably, it upheld those decisions. And because the District Court used the proper standard of review, it was correct in upholding the decisions of the Arbitrators.

B. The Arbitrators did not commit gross errors of fact or law in finding that the Legislature appropriated sufficient funds for pay increases.

The State contends that the arbitrators committed gross error of fact or law in finding that the Legislature appropriated sufficient money to fund a contractual wage increase. While unstated, the State concedes that if sufficient money had been appropriated, the State had a legal obligation to honor the pay increases under the agreements. Arbitrator Goldman determined that the Legislature adopted legislation appropriating sufficient funds:

Accordingly, somewhere in the vicinity of $8 million was required to fully fund the increases to those (AFSCME) who had a contractual right receive them under the collective agreements. The allocated $12.5 million was more

than enough to meet this obligation and still permit small increases for non-bargaining unit personnel.

RP 77.

Arbitrator Criswell made the same determination:

> The evidence demonstrates that it would have required an appropriation of only $1,952,588 to fund the raises called for by the agreement . . . Indeed, to fund all of the salary increases called for by the three collective bargaining agreements that the EMPLOYER had negotiated with the three bargaining agents and to make all such increases effective on July 1, 2008, rather than some effective January 1, 2009, would have required a total appropriation of only $10,633,299. Yet the legislature appropriated a total of $12,833,000. And, this was in addition to a further ½% average increase that was to be paid for out of the various agencies' other appropriated funds.

RP 21-22.

1. Neither Arbitrator's conclusion on appropriation constitutes a gross error of fact.

It is beyond reasonable dispute that the legislation called for an appropriation in excess of the amount needed to comply with the collective bargaining agreements. The Legislature appropriated sufficient money to "provide incumbents in agencies governed by the Personnel Act … with an average salary increase of two and four-tenths percent (2.4%)." CWA Jt. Ex. 2. The amount of money appropriated by the Legislature to cover salary increases for state employees was, without question, sufficient to fund the contracts at issue.

2. Neither Arbitrator's conclusion on appropriation constitutes a gross error of law.

Instead of claiming a gross error of fact, the State focuses its argument on the contention that the Legislature intended that all state employees receive the same increase, and that by finding that the State must fund the contracts (thereby giving nonrepresented employees smaller increases), the arbitrators' decisions constituted gross error of law. This argument is predicated on the premise that the arbitrators grossly misinterpreted the plain language of the Legislature's appropriation. Arbitrator Goldman's decision on this point of law was as follows:

> Thus, the plain meaning of the allocation legislation permitted the Board to adopt a pay plan complying with the State's contractual obligation to bargaining unit employees and there is no evidence in the record to show that the legislative intent or any other existing legislation was at variance with or altered that plain meaning of the adopted bills.

RP 77.

Arbitrator Criswell's decision on this point of law was as follows:

> No evidence, other than the two pay bills themselves, was presented that would indicated that the EMPLOYER owed any *legal obligation* to pay to the unrepresented employees the same salary increases that the contracts covering the represented employees called for. While the EMPLOYER unilaterally may elect to do so, providing it first fully satisfies the clear legal obligation it owes to the employees covered by the Agreement, it is certainly under no legal obligation to do so.

RP 23-24.

Even assuming that the appropriation legislation was intended to give identical increases rather than the "average" stated in the law, legal mistakes do not

constitute an abuse of power sufficient to vacate an award. *Town of Silver City v. Garcia*, 115 N.M. 628, 857 P.2d 28 (1993). The proper legal question is whether the arbitrators' interpretation of the appropriation legislation is so gross as to imply misconduct, fraud or lack of fair or impartial judgment.

Reduced to its essence, the State argues that the Legislature intended, by use of the phrase "*average* salary increase of two and four tenths percent," a rigid, uniform, and precise 2.4% increase for *every* classified employee. The State, in effect, argues that the Legislature put in writing the polar opposite of its intentions – that by giving the Personnel Board discretion to implement an "average" 2.4% increase – it really meant that the Personnel Board was authorized to provide only a uniform salary increase. The State supports its argument through the testimony of its own employees, who purport to provide legislative history.

The State's attempt to use testimony to deflect the plain meaning of the legislation is, of course, an inappropriate method to rebut the plain meaning of a statute under New Mexico law. As the Court is well aware, statutory interpretation begins with a look at the plain meaning of the statute. Interpretation occurs only where an ambiguity exists. *State ex rel. Helman v. Gallegos,* 117 N.M. 346, 352, 871 P.2d 1352, 1358 (1994). Here is precisely where the State's dilemma lies in its statutory construction argument. The State argues for construction of the

legislation contrary to its plain meaning, in effect, that the word "average" as used in the legislation precludes variation. However, to make this argument, the State by necessity must argue that the legislation is ambiguous – but if the language is ambiguous, susceptible to more than one meaning, then the Arbitrator's decision is not subject to review, because his interpretation cannot be defined as "completely irrational." Either way the State loses its statutory interpretation argument in the context of arbitral review.

The State contends that because New Mexico courts presume that the Legislature is aware of administrative construction, then it may be presumed to know it. (State's Brief, at 24). In this regard the State cites *State ex rel. Shell Western E&P v. Chavez,* 2002-NMCA-005, 131 N.M. 445, 338 P.3d 886. While the Court in *Shell* acknowledged the legal premise advanced by the State in this action, it declined to follow it. The Court in *Shell* also noted that "we look primarily to the language of the act and the meaning of the words, and when they are free from ambiguity, we will not resort to any other means of interpretation." The State also identifies, for support, *State ex rel. Stratton v. Roswell Indep. Sch.,* 111 N.M. 495, 806 P.2d 1085 (Ct. App. 1991). As suggested, this decision notes that the Legislature is assumed to have knowledge of administrative construction. But the Court also notes that "the legislature is also presumed to have known New

Mexico case law." *Stratton,* at 503. This, again, is precisely where the State's logic fails. The State contends that as a consequence of the spartan language of the appropriation legislation, the Legislature intended that its appropriation be considered insufficient to fund a contract for which the State was legally bound to honor.

In any event, the State's claimed administrative interpretation is not contrary to the Arbitrators' interpretation. The State's witnesses claimed that the word "average" allows for flexibility in the administration of pay plans – which is precisely what the arbitrator ordered – flexibility on the compa-ratio as required by the State's agreements with the Unions. In fact, the State's contention that the appropriation administrative interpretation allows for no salary variation was rebutted by its own administrative expert. The State's witness, State Personnel Director Sandra Perez, admitted that, based upon similar language contained in the FY 2007 appropriation legislation (the Legislature directed an average five percent salary increase) that she had previously executed the compa-ratio increases identified in the collective bargaining agreement, which provided for variation in salary increases, according to the contract from 3.5% to 6.5%. AFSCME Tr. 226-228. Specifically, in FY 2007, the Legislature appropriated money for an "average" five percent increase. AFSCME U. Ex. 1. Contrary to the State's

representation on administrative interpretation that an "average" increase is a rigid requirement, the State provided raises in the range of 3.5% to 6.5% – which resulted in an average 5% salary increase, as appropriated by the Legislature. So, in FY 2007, the State Personnel Board did precisely what it now claims is contrary to its "administrative interpretation" of the word "average."

The Legislature chose to use a word ("average") that must be viewed as implying discretion and variation; the State suggests that the Legislature intended to use the word for precisely the opposite purpose – to remove discretion and variation. Average, by its very definition, implies variation. "Average," as defined by Merriam-Webster is: "a single value (as a mean, mode, or median) that summarizes or represents the general significance of a *set of unequal numbers*." *Merriam-Webster,* http://www.merriam-webster.com/dictionary/average, Definition 1. Average is thus the summary of a set of unequal numbers.

While it certainly may be argued that some part of the Legislature may have had an interest in uniform salary increases, it cannot be argued that the Legislature intentionally chose words to mandate uniform salary increases. The appropriation legislation clearly indicates that where the Legislature wanted uniform increases among a group of employees it made that desire explicit. Specifically in Section 8(a)(3,8) of HB 2, the Legislature appropriates not an "average" increase but rather

a uniform increase for certain employees: "$43,400 to provide the district attorneys a salary increase of two and four-tenths percent... $162,500 to provide teachers... with a salary increase of two and four-tenths percent." CWA Jt. Ex. 2.

The Legislature, then, employed the word "average" in appropriating certain wage increases and omitted it in appropriating wage increases for others. The Unions would agree that the language referring to district attorneys, chosen by the Legislature, clearly and unambiguously calls for a uniform increase. If that is the case, then what is the Legislature's purpose in inserting the word "average" in selected salary increase appropriations? The State urges this Court to interpret the word "average" as utterly meaningless. The State contends that the provisions using the word "average salary increase" must be interpreted in the same way as those provisions where the word "average" is omitted – rendering meaningless the Legislature's use of the word "average."

The State's suggested reading of the appropriation legislation also ignores the fact that the Legislature is also presumed to be aware of the other laws of the State of New Mexico. Arbitrator Goldman's decision provides specific explanation of the law which one must assume that the Legislature knew:

> The Board's contention that it had to give non bargaining unit employees the same increases as those in the bargaining units ignored a second basic principle, adopted by N.M.Stat., section 10-7E-15(A), which is the

requirement that a labor organization negotiate on behalf of all employees in the appropriate bargaining unit. . .The Legislature did not give labor organization authority to negotiate on behalf of employees not in the represented bargaining units. Yet, that would be the effect of accepting the Board's contention that wage increases for all employees must be the same regardless of whether they are in a represented bargaining unit. To the contrary, the language that establishes the right to collective representation in the negotiation of wages for bargaining unit employees, by specifying that the negotiated agreement is to cover those in the appropriate bargaining unit, clearly anticipates that the resulting wages for bargaining unit employees will not necessarily be identical to those of unrepresented employees. Accordingly, the Board's insistence on across-the-board adjustments ignores the significance of recognizing collective bargaining rights on behalf of the appropriate bargaining units.

RP 78.

Arbitrator Criswell's decision supports Arbitrator Goldman on this point of law:

> These funds were not used to satisfy the EMPLOYER'S legal obligation owed to the employees represented by the UNION, however. Instead, the EMPLOYER used these funds to increase the salaries of employees to whom it owed no such legal obligation, i.e., those employees of agencies who had not elected to be represented by a bargaining agent and who, consequently, were not the subject of any valid and enforceable agreement, as were the employees represented by the UNION.

RP 22.

C. The Arbitrators' decisions do not abrogate the Legislature's power to appropriate funds.

Like the rest of the State's arguments in its motion to vacate the arbitrator's award, the State's Article IV argument depends upon establishing that the Legislature did not appropriate the funds awarded by the arbitrator. If this Court

concludes that the arbitrators' decisions regarding the appropriation legislation is either not reviewable or is not reversible, then no issue exists as to the arguable violation of Article IV, Section 30.

As previously stated, the relationship between the parties is governed by the New Mexico Public Employees Bargaining Act. (NMSA 1978, § 10-7E-1 *et seq.*) PEBA requires that any collective bargaining agreement covering public employees include,

> a grievance procedure to be used for the settlement of disputes pertaining to employment terms and conditions and related personnel matters. The grievance procedure shall provide for a final and binding determination. The final determination shall constitute an arbitration award within the meaning of the Uniform Arbitration Act. NMSA 1978 § 10-7E-17(f) (2003).

Although the State makes no distinction in its argument as regards the two types of public sector arbitration (grievance arbitration and impasse arbitration), the law does. Section 17(e) identifies specific requirements and limitations for impasse arbitration. Section 17(f) relates to contract arbitration, or arbitration that occurs between parties when they do not agree upon the interpretation of an existing agreement. The re-appropriation limitation, identified by the Legislature applies only in impasse arbitrations. The Legislature did not include such a limitation on contract arbitration, and the State is legally required to immediately comply with the Arbitrator's award, as directed in Section 17(f), as enforced by the Uniform

Arbitration Act.

In addition, as the arbitrators note, a refusal to order the State to comply with the agreement would violate the New Mexico Constitution's prohibition on impairment of contracts (Art. II, Section 19), which prohibits application of a law to impair the obligation of a contract entered into by the State. In this instance, non-enforcement of the arbitrator's decision would clearly violate the Constitution – especially where no question exists regarding the Legislature's appropriation of funds necessary to comply with the agreement.

In support of its argument, the State identifies two decisions which it claims supports its position that an arbitrator may not issue an award requiring the payment of wages. The first is a Utah Supreme Court Decision which held that the State's public bargaining act violated that State's constitution and found the entire act unconstitutional. *Salt Lake City v. IAFF,* 563 P.2d 786 (1977). That decision was based upon both statutory language and constitutional language not before this Court and provides little guidance on the question presented by the Arbitrators' decisions. The second opinion from an outside jurisdiction identified by the State highlights the distinction between impasse arbitration and grievance arbitration – and provides support for the Union's argument that grievance arbitration has long been supported as a final and binding option between the parties. *Franklin County*

Prison Board v. Pennsylvania Labor Relations Board, 417 A.2d 1138, 1142 (1980). The *Franklin County* Court was asked to interpret an impasse arbitration provision, rather than a grievance arbitration provision. In discussing the difference, the *Franklin County* Court emphasized the binding nature of grievance arbitration:

> One of the procedures providing for the protection of the public at large, the public employer and the public employee is arbitration, both interest (impasse) arbitration and grievance arbitration. The importance of arbitration was recently stressed by this Court in *Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh,* 391 A.2d 1318, 1321 (1978), wherein we stated, 'Arbitration of disputes or grievances arising out of the interpretation of the provisions of a collective bargaining agreement is mandatory . . . The final step (of the grievance procedure) shall provide for a binding decision by an arbitrator. *Franklin County,* at 1142.

The *Franklin County* Court's decision requiring appropriation was predicated upon two factors not present here: 1) The money had not arguably been appropriated by the employer; 2) The Court was interpreting a provision relating to impasse arbitration as opposed to grievance arbitration.

The State's discussion of other states' legal authority misses the vital premise of those decisions – if the Legislature has appropriated the funds, the State must honor its contract:

> We held that collective bargaining agreements entered on behalf of public employees are subject to the appropriations power of the legislature. Therefore, the legislature was not bound to fund a program simply because

> the agreement called for it. On the other hand, we also held that where the legislature provides enough money to implement the benefit as negotiated but attempts to unilaterally change the benefit, the change will not be upheld and the negotiated benefit will be enforced.

State of Florida v. Florida Police Benevolent Association, 688 So.2d 326, 327 (Fla. 1997). This conclusion – a valid appropriation by the legislative body is enforceable by the Union – is invariably contained in the decisions addressing arbitration issues and appropriations. (*See Alliance AFSCME/SEIU AFL-CIO v. Secretary of Administration,* 413 Mass. 377, 382, 597 N.E.2d 1012, 1017 (1992) (recovery by the Union is conditioned upon establishing a valid appropriation by the Legislature to fund the cost items of the agreements); *Town of Milton v. Commonwealth,* 416 Mass. 471, 473, 623 N.E.2d 482, 484 (1993) (the Union's argument for funding cannot prevail without establishing the appropriation)).

In a Washington case which rings familiar to the State's present situation, the Washington Supreme Court refused to allow the State of Washington to impair a collective bargaining agreement to avoid a budget crisis where the Legislature had previously appropriated the necessary funds. *Carlstrom v. State,* 103 Wash. 2d 391, 694 P.2d 201 (1985). *Carlstrom* strikes at the heart of the situation before this Court, and fairly summarizes the myriad cases among the various states addressing this issue: If the Legislature has appropriated the funds and an arbitrator orders that

the funds be paid, the State must pay the wages.

D. The Arbitrator's Award does not require an unconstitutional retroactive pay increase.

The State also asserts that the Arbitrators' awards constitute a retroactive pay increase, in violation of Article IV, Section 27 of the New Mexico Constitution. The opinions cited by the State do not apply in this situation. In N.M. Att'y Gen. Op. Nos. 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 that was contracted under specific wage provisions; after that work had been performed, the State voluntarily attempted to pay the employees additional money for that work performed.

The situation before this Court is fundamentally different. This case involves a breach of contract. The Unions allege (and the arbitrators confirmed) that a contract was made to perform services at a specific wage rate, but that the State refused to pay the contracted for wage rate. The arbitrators concluded that the employees were paid by the State at a wage rate lower than the contracted rate. The decisions do not provide retroactive wage increases for work already performed – they honor agreements that the State abrogated.

The State's argument suggests that if the State does not honor an employment agreement, any subsequent decision directing it to comply with that

agreement violates the Constitution. This is not a fair or reasoned interpretation of the New Mexico Constitution. As Arbitrator Criswell suggested of other arguments made by the State, it is "totally unreasonable and bordering on sophistry." RP 20.

III. CONCLUSION

The most simple and direct remedy which harmonizes the remedies ordered by the arbitrators would be as follows:

1. The State of New Mexico should be required to provide back pay for its employees from July 1, 2008, to the present, for any wages not paid pursuant to the collective bargaining agreements, plus statutory interest.

2. The State of New Mexico should be required to immediately adjust its employees' salary rates to comply with the 2008 salary increases.

The State has refused to comply with the arbitrations awards, which were affirmed by the District Court. Because neither the District Court nor the Arbitrators in each case abused their discretion; acted fraudulently, arbitrarily or capriciously; failed to support their orders with substantial evidence; or acted outside the scope of its authority, the ruling of the District Court should be affirmed.

Dated: June 8, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was mailed via regular US mail, postage pre-paid and affixed thereto to the following counsel of record this 8th day of June, 2011:

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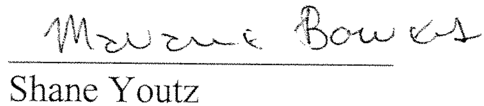

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