IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Movant/Defendant-Appellant,

v.

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

No. 30,847
Bernalillo County
CV-2009-09756
(Consolidated with
CV-2009-09933 and
CV-2009-11860)

Respondent/Plaintiff-Appellee

and

COMMUNICATIONS WORKERS of AMERICA, AFL-CIO, CLC,

Respondent-Appellee

Appeal from the Second Judicial District Court Bernalillo County,
Consolidated
Case Nos. CV-200909756, CV-200909933 and CV-200911860
Honorable Alan M. Malott

APPELLANT'S BRIEF IN CHIEF

ORAL ARGUMENT IS REQUESTED

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I.

SUMMARY OF PROCEEDINGS

A. Nature of the Case

This is an appeal, pursuant to NMSA 1978, Section 34-5-8(A) (1983), from a final order of the District Court, Second Judicial District, on cross motions to vacate and confirm arbitration awards, filed on September 23, 2010, in which the District Court confirmed separate arbitration awards by Arbitrator Alvin L. Goldman and John A. Criswell against the State of New Mexico (hereinafter "State") and in favor of the American Federation of State County and Municipal Employees, Council 18, AFL-CIO, CLC (hereinafter "AFSCME") and Communications Workers of America, AFL-CI0, CLC (hereinafter "CWA"), RP 366-69.[1]

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 action, 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

[1] "RP" followed by numbers refers to pages in the record proper.

September 4, 2009. RP 105.

On October 8, 2009, in Case No. CV-2009-11860, the State filed 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

The collective bargaining agreements (hereinafter "CBAs"), which are the subject of the disputes between the parties, contemplated two identical specific contractual pay increases for the State's fiscal year (hereinafter "FY") 2009 (July 1, 2008 through June 30, 2009). The CBAs required that "the Governor's Recommendation" include a general salary increase of two percent, effective the first full pay period following July 1, 2008. RP 10, 114; AFSCME Jt. Ex 1, 19; CWA Jt. Ex 1, 41.[2] Additionally, the CBAs required a second increase as

[2] References to "AFSCME", followed by transcript citations ("Tr") and/or citations to exhibits ("Jt. Ex.", "Er. Ex." or "U. Ex") are to the transcript of the record of proceedings or the exhibits received in evidence in American Federation of State,

follows:

> *Subject to legislative appropriation,* effective the first full pay period following January 1, 2009, bargaining unit members shall receive within band salary increases based on the following schedule subject to satisfactory performance:
>
> | | |
> |---|---|
> | Compa-ratio[3] less than 85% | 3.5% salary increase |
> | Compa-ratio of 85%-93.99% | 2.5% salary increase |
> | Compa-ratio of 94% to 104.99% | 2.0% salary increase |
> | Compa-ratio of 105% or greater | 1.0% salary increase |

RP 11, 115 (emphasis added).[4] In its appropriation for FY 2009, the Legislature appropriated funds for a general salary increase for all classified State employees ("incumbents in State agencies covered by the Personnel Act, other than

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County and Municpal Employees New Mexico Council 18 and State Personnel Office, FMCS Case No. 09-50667-8. Reference to "CWA", followed by transcript citations and/or citations to exhibits ("Jt. Ex.", "U. Ex." or "S. Ex") are to the transcript of the record of proceedings or to exhibits received in evidence in CWA Local 7076 and State of New Mexico, FMCS No. 09-50889. The transcripts and exhibits in both cases are included in the record on appeal on stipulation of the parties to correct the record, approved by this Court by Order entered January 24, 2011.

[3] A compa-ratio is an employee's pay rate stated as a percentage of the midpoint of their pay band (CWA Tr. at 70). Thus, for example, if the midpoint of an employee's pay band is $10 and their salary is $8.40, his/her compa-ratio is 84 percent. CWA Tr. at 70.

[4] The CBAs did not require a contractual general increase for FY 2009, only that "the Governor's Recommendation shall include" a mid-point increase of 2% of an employee's wage band effective the first full pay period following January 1,2008 "subject to satisfactory performance"; and called for additional pay increases based on "compa-ratios" effective the first fully pay period following July 1,2009 "subject to legislative appropriation." RP 10-11; AFSCME Jt. Ex 1, 20; CWA Jt. Ex. 1, 20.

commissioned officers of the Department of Public Safety") but did not appropriate sufficient funds for the second within band salary increases contemplated by the CBAs. RP 13-14, 116. Senate Bill 165 ("SB165"), another bill, was adopted in the 2008 legislative session and signed into law by the Governor, providing for "an additional average salary increase "of 0.5 percent for classified employees effective July 1,2008. RP 14, 116; AFSCME Tr. 124, AFSCME Er's Ex. 2; CWA Tr. 170-73, CWA Jt. Ex. at 7-8. Senate Bill 165 did not, however, appropriate money specifically to fund the additional increase it authorized. RP 14, 116. Essentially, State agencies were directed to identify the money in their own "cash balances, vacancy savings and other available funds" *Id.* The bill did "authorize" the Department of Finance and Administration ("DFA") to distribute a maximum of $500,000 from DFA's appropriation contingency fund to agencies that demonstrated to DFA that they were unable to fund the increase themselves. *Id.;* AFSCME Er. Ex. 2 (attachment); CWA Jt. Ex. 2 (attachment). The State ultimately followed the Legislature's directive and implemented the FY 2009 pay package in accordance with the language of the appropriations Legislation. RP 15-16, 118.

Both CBAs establish a specific recourse for the union in the event the Legislature should fail to appropriate sufficient funds for the contemplated pay increases in any of the covered fiscal years, as follows:

> In the event the salary increases described in Section 1 and/or Section 2 of this Article are not implemented because the legislature fails to appropriate sufficient funds in any fiscal year, the Union has the right to reopen bargaining over general salary and within band pay increases that would be effective for the fiscal year following the fiscal year in which the legislature fails to appropriate sufficient funds to implement this agreement. RP 12, 115; AFSCME Jt. Ex. 1, 20-21, CWA Jt. Ex 1, 4.

Neither AFSCME nor CWA availed themselves of the right to exercise this contractual reopener. Subsequently, both labor organizations concluded successor CBAs with the State which required no increase in salary for FY 2010. AFSCME, Tr. 217-20, AFSCME Er., Ex. 9; CWA Tr. 258-59, CWA S. Ex. 6.

In January 2008, Justin Najaka, Director of Compensation for the State Personnel Office ("SPO"), in response to a request from the Legislature, prepared a fiscal impact report ("FIR") analyzing the cost of the pay package for State employees outlined in House Bill 7 ("HB7"). AFSCME Tr. 151-154, AFSCME Er. Ex. 1; CWA Tr. 153-56, CWA S., Ex. 2. HB7 was a proposed bill that ultimately was incorporated as part of House Bill 2 ("HB2"), the General Appropriations Act. CWA Tr. 155. HB7 would have appropriated $12,833,000 from the State's general fund to provide a 2.4 percent salary increase to all classified employees effective July 1, 2008. AFSCME Tr. 105, AFSCME Er. Ex. 1, 2; CWA S. Ex. 1, 2, CWA Tr., 159-61. The calculations in the FIR assumed that the $12,833,000 was intended to fund an across-the-board pay increase for *all* eligible classified

employees, not just those represented by unions. AFSCME Tr. 98-107, AFSCME S. Ex. 1, 2-3; CWA Tr. 158-60, CWA Er. Ex. 1, 2-3.

Indeed, it was conceded by AFSCME lobbyist Joshua Anderson, CWA Union President Robin Gould and AFSCME Council 18 EVP Joel Villarael in their testimony that the proposed $12,833,000 was intended to fund a 2.4% general increase for all eligible classified employees, AFSCME, Tr. 68-70; CWA Tr. 53-55, 75-76. Anderson further acknowledged that HB2, the General Appropriations Act, grants increases to certain categories of employees who are not union represented based on "average" salary calculations, including judicial permanent employees, executive exempt employees and permanent legislative employees. CWA Tr. 40-42, CWA Er. Ex. 2. (attachment, Section 8(A)).

According to Najaka's analysis in the FIR, the $12,833,000 was sufficient to fund a 2.4 percent salary increase in July 2008, but no more. AFSCME Tr. 102-05, AFSCME Er. Ex. 1, 2-3; CWA, Tr. 160, CWA S., Ex. 1, 2. Najaka pointed out in the FIR that HB7 did not reflect the pay package the Governor had recommended pursuant to the CBA. AFSCME, Tr. p. 113, Ex. 1, AFSCME Ex. 1, 2-3; CWA S. Tr. 161-62. The FIR concluded to fund the Governor's recommended package, consisting of a 2% pay band midpoint salary increase in July, 2008, and a compa-ratio adjustment in January, would cost an additional $2,708,200 beyond

the $12,833,000 appropriation, for a total of $15,541,200[5]. AFSCME Tr. 107-09, AFSCME Er. Ex. 1, 2-3; CWA Tr. 163-64, CWA S. Ex. 1, 2-3. Najaka therefore recommended substituting language that would reflect the Governor's recommended pay package and would appropriate the additional money necessary to fund it. AFSCME Tr. 114-15, AFSCME Er. Ex. 1, 4; CWA, Tr. 167-68, CWA S. Ex. 1, 4. He also noted that the effective date for the proposed pay increase in July 2008 did not conform to the Governor's recommendation that the increases be split, with the general increase to be effective July 1, 2008 followed by a compa-ratio adjustment in January, 2009. AFSCME Er. Ex. 1, 3; CWA S. Ex. 1, 3. He recommended that the appropriation be amended to reflect the Governor's recommendation. AFSCME Er. Ex. 1, 4; CWA, S. Ex. 1, 4. The FIR was submitted to the Legislative Finance Committee, the Department of Finance and the Governor's office. AFSCME Tr. 100-03; CWA, Tr. 153.

Despite Najaka's recommendations in the FIR, HB2, the final, signed General Appropriations Act, appropriated only the original $12,833,000 to fund a 2.4 percent increase effective July 1, 2008. AFSCME, Tr. 117-18, AFSCME Er.

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[5] This projection and all other cost projections during the 2008 legislative session were based on State Staffing data as of September 1, 2007. CWA Tr. 183. Najaka later revised his projection based on an updated version of the database. CWA Tr. 207; S Ex. 5. The revised projection shows that it would have cost $15,956,000, approximately $400,000 more than Najaka originally calculated to implement the Governor's recommended package. CWA Tr. 208; CWA S. Ex. 5.

Ex 2, 4; CWA Tr. 155, 169-70, CWA Jt. Ex. 2, 4. Specifically, Section 8 of HB2 required salary increases for various categories of State employees "that shall be effective July 1, 2008." AFSCME Er. Ex. 2, 3; CWA Jt. Ex 2, 2-3. According to Najaka's unrefuted testimony, this language meant that the increases had to go into effect on July 1, 2008 and could not be put off until a later date. AFSCME Tr. 122-

25; CWA Tr. 177-78, 202. SPO Director Perez confirmed Najaka's testimony. AFSCME Tr. 211.

Apparently, the unions believed that if the $12,833,000 appropriation were increased by an additional one half percent it would be sufficient to fund a total 2.9% increase, which would be sufficient to fund the Governor's recommended increase. Hence, HB 165 was successfully lobbied and became law. AFSCME Er. Ex. 2, 1, 7-9; CWA Jt. Ex. 2, 1, 7-9. One problem, of course, is that HB 165 "authorized" the expenditure of an additional one-half percent to be expended by the agencies from "available funds" but it did not appropriate funds to cover the increase. Furthermore, it made the increase effective in July 2008, rather than January 2009. AFSCME Er. Ex. 2, 7-8; CWA Jt. Ex. 2, 7-8. Making the additional one-half percent increase effective in July rather than January increased the cost to fund the Governor's recommended pay package for all eligible classified employees from $15,956,005 to $21,051,800. AFSCME Tr. 164-70, AFSCME Er. Ex. 7; CWA Tr. 208-09, CWA S. Ex. 5. Thus, while the union

leaders thought there was sufficient appropriation to fund the Governor's recommended increase for all eligible classified employees between the general appropriation of $12,833,000 and the additional one-half percent in HB 165, there was not.

AFSCME and CWA both filed grievances under their respective CBAs protesting the State's failure to implement the full pay increases set forth in their respective CBAs. RP 1-2, 5-6, 16, 110-111, 113-14; AFSCME Jt. Ex 4; CWA Jt. Ex. 3A-F. Both arbitrators found that since the Legislature's appropriation was to fund "an average salary increase" for classified employees subject to the State Personnel Act, if non-union represented classified State employees were denied increases or given lower increases than those given to AFCME and CWA bargaining unit employees, the appropriation was sufficient to fund both increases contemplated by the CBAs for unit employees in the two bargaining units. RP 22-25, 121-22.

Both arbitrators concluded that the State violated the CBAs by failing to implement the second increase for AFSME and CWA represented employees. RP 24, 122. In concluding that there was sufficient funding, both arbitrators relied solely upon the language of the FY 2009 appropriation legislation's use of the word "average" in reference to the increases to be made in the wages of employees subject to the Personnel Act. RP 22-23, 120-22. At both arbitration hearings,

however, the State offered uncontroverted testimony that the history of the use of the phrase "average salary increase" in appropriation legislation does not permit discrimination between groups of employees. AFSCME Tr. 119-21, 205-06; CWA Tr. 204.

Arbitrator Goldman, in the AFSCME case, ordered the salaries adjusted in FY 2010, the fiscal year in which his award was entered (June 15, 2009), "[i]f legally possible" and that if it was not the adjustments in pay to reflect the contractually contemplated pay increases must be made "at the beginning of the 2011 Fiscal Year." RP 124-25. Arbitrator Criswell, on the other hand ordered the parties to attempt to agree on a "proper legal method" which would permit payment of the contemplated increases with back pay to bargaining unit employees and, absent agreement, he purported to retain jurisdiction to render an award. RP 25-26.

II.

ARGUMENT AND AUTHORITIES

A. Applicable Standard of Appellate Review

There are no disputes raised in any of the issues presented as to essential facts, all issues raised by the State being issues of law. Therefore, review by this Court of all contentions on appeal is *de novo*. *National Union of Hospital and Healthcare Employees District No.* 1199 *New Mexico* v. *Board of Regents of the*

University of New Mexico, 2010-NMCA-102, ¶ 18,____NM_____, 245 P3d 51, *cert denied,* 2010-NMCERT-2010, _____NM _____, 243 P.3d 1146; *Cooper v. Chevron USA, Inc.,* 2002-NMSC-20, ¶ 16, 132 NM 382, 49 P.2d 61; *State v. Ogden,* 118 NM 234, 240, 880 P.2d 845, 851 (1994); *Town of Silver City* v. *Garcia,* 115 NM 628, 632, 857 P.2d 28, 32 (1993).

B. Legal Argument

The District Court erred by failing to apply the proper standard for review of the arbitrators' awards by not conducting an independent review of the record to determine if the arbitrators exceeded their authority or committed gross errors of fact or law. If so, the decisions must be set aside.

Furthermore, the State submits that arbitrators' awards must be vacated for three additional separate and distinct substantive reasons. First, the awards unconstitutionally usurp the Legislature's power to appropriate public funds. Second, the arbitrators exceeded their powers and committed gross errors of fact or law in finding that the New Mexico Legislature appropriated sufficient monies to fund increases contemplated by the CBA. And, third, the awards would require payment of a retroactive pay increase to public employees in violation of the New Mexico Constitution.

1. The Trial Court Erred By Failing to Conduct an Independent Review of the Record

While the District Court in its Order on Cross Motions to Vacate and Confirm Arbitration Awards (RP 359-62), makes no explicit statement concerning the applicable standard of review, the Order recites:

> 12. While the Court may or may not have reached the same conclusions as the Arbitrators, the Court does not find the decision of the Arbitrators in these cases to have been so "palpably mistaken" or so "completely irrational" or so violative of public policy as to warrant the Court's substitution of its interpretation and conclusions for that of the duly chosen arbitrators who had the benefit of first hand review of the testimony and subject matter expertise of an experienced arbitrator. *Fernandez v. Farmers Ins. Co. of Ariz.*, 115 NM 622, 857 P.2d 22 (1993). RP 361.

The State submits that the District Court thus applied an erroneous standard of review. The District Court should have conducted an independent review of the appropriations legislation and other evidence in the record to determine whether the Arbitrators exceeded their powers or made a gross error of law or fact.[6]

In support of its "palpably mistaken/completely irrational" standard of review, the District Court cites *Fernandez* v. *Farmers Ins. Co.*, in which the New Mexico Supreme Court held that a "district court's review [of an arbitral award]...is

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[6] The State urged the District Court to vacate both arbitration awards on the grounds that the arbitrators exceeded their authority and committed gross errors of fact or law in finding that the Legislature appropriated sufficient funds for the CBA contemplated pay increases in violation of NMSA 1978, § 44-7A-24(a) (2001). RP 171-72, 175-78, 313-15. The State argued in both cases that the Court should conduct an independent review of the appropriations bills and related evidence in determining whether the arbitrators exceeded their powers and, in the alternative, asked the Court to find that the Arbitrators made a gross error of law or fact. RP 176, 313-14.

generally limited to allegations of fraud, partiality, misconduct, excess of powers, or technical problems in the execution of the award," and that a "district court's review does not have the authority to review arbitration awards for errors as to the law of the facts ...." 115 N.M. at 625, 857 P.2d at 25.[7]

The Court in *Fernandez* did not employ the phrases "palpably mistaken" or "completely irrational". More importantly, however, the *Fernandez* court did not explicitly articulate the standard of review applicable when a court reviews a challenge based on NMSA 1978, Section 44-7A-24(a)(4) (2001) that "an arbitrator exceeded the arbitrator's powers." Rather, it simply declined to adopt the broad view of Michigan courts that Section 44-7A-24(a)(4) "applies when arbitrators have made an error a law." *Fernandez,* 115 N.M. at 628, 827 P2d at 28. Indeed, it does not appear that either the New Mexico Supreme Court or the New Mexico Court of Appeals has ever explicitly determined the standard of review that a court should apply when faced with a Section 44-7A-24(a)(4) challenge to an arbitrator's decision.

The Supreme Court of Massachusetts has answered the question, though,

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[7] The *Fernandez* court also acknowledged, however, that "under appropriate circumstances" an "error so gross as to evident misconduct or fraud" would constitute a basis for the Court's vacation of an arbitrator's awards. 115 N.M. at 626, 857 P.2d at 26.

deciding that the question of whether or not an arbitrator has exceeded his authority is "jurisdictional," and that "when such...jurisdictional challenge[s] [are] made, judicial review of the award is independent." *City of Somerville v. Somerville Municipal Employees Ass'n.*, 633 N.E.2d 1047, 1050 (Mass. 1994) (quoting *Local 589, Amalgalmated Transit Union v. Massachusetts Bay Transp. Authority,* 467 N.E.2d 87 (Mass. 1984)). *See also Boston Teachers Union v. School Committee of Boston,* 350 N.E.2d 707, 716 (Mass. 1976) ("The question whether the arbitrator exceeded the scope of his powers always is open for judicial review."); *School Committee of Boston* v. *Boston Teachers Union, Local* 66, 479 N.E.2d 645, 648 (Mass. 1985) (implicitly approving the lower court's independent review of the evidence in the form of an affidavit submitted by the school superintendent - that the funds needed to support the arbitrator's award had not been appropriated).

Indeed, basic principles of statutory interpretation require that a court reviewing an arbitrator's award engage in an independent review of at least the evidence needed to determine whether an arbitrator exceeded his powers. "When engaging in statutory construction...[courts] seek to give meaning to all parts of the statute, such that no portion is rendered surplusage or meaningless." *Int'l Ass'n of Firefighters, Local* 1687 *AFL-CIO* v. *City of Carlsbad,* 2009-NMCA-97, ¶ 11, 147 N.M. 6, 216 P.3d 256 (citing *Regents of Univ. of N.M* v. *N.M Fed'n of*

Teachers, 1998-NMSC-20, ¶ 28, 125 NM 401, 962 P.2d 1236). If a reviewing court lacked the power to independently review evidence when determining if an arbitrator exceeded his powers, Section 44-7A-24(a)(4) would be effectively rendered meaningless, because if a court can't independently review evidence, it cannot determine whether or not the arbitrator exceeded his powers under the statute.

In this case, the evidence necessary for the Court to determine whether or not the arbitrator exceeded his authority coincides with the evidence necessary for the arbitrators to make their decision on the merits. This coincidence, however, did not divest the District Court of its responsibility to decide independently the jurisdictional question of whether or not the arbitrators exceeded their powers by issuing an award against the State despite the fact that insufficient funds had been appropriated by the Legislature.

Here, the District Court deferred, erroneously, to the arbitrators on the question of whether the Legislature had appropriated sufficient funds to support the Arbitrators' awards, finding that "[w]hile the Court may or may not have reached the same conclusions as the Arbitrators," the Arbitrators' decisions were not so irrational "as to warrant the Court's substitution of its interpretation and conclusions for that of the duly chosen arbitrators." RP 361. But as the matter of whether sufficient funds have been appropriated to support an arbitrator's award is

a jurisdictional question concerning whether or not the arbitrator exceeded his powers it is, of course, necessary for the Court to conduct an independent review of the evidence in order to address the issue.

2. The Arbitrators' Awards Constitute an Unconstitutional Usurpation of the Legislative Power to Appropriate Public Funds

The PEBA in Section 17(E) (NMSA 1978, § 10-7E-17(E) (2003)), specifically provides that "(a)n arbitration decision shall not require the reappropriation of funds." Furthermore, Article IV, Section 30 of the New Mexico Constitution provides that "[e]xcept interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the legislature." N.M. Const. Art. IV, § 30. The State submits that the arbitrators exceeded their powers by in effect, mandating monetary relief that would require the Legislature to appropriate funds.

In the CWA case, apparently in recognition of the fact that Section 17(E) of the Public Employee Bargaining Act ("PEBA") (NMSA 1978, § 10-7E-17(E) (2003)) prohibited him from requiring a reappropriation of funds from an already enacted budget, Arbitrator Criswell attempted to avoid the problem by ordering the State to calculate base salary adjustments and back pay and to provide this information to the union, and for the parties to then devise "a proper, legal method" which could be used to adjust salaries of bargaining unit employees and to pay

back pay as if the CBA required all increases to be effective July 1, 2008. RP 25-26 his amounts to an order that the State appropriate public funds for a specified purpose, since that would be the only way to fund the award. As noted, Arbitrator Criswell also ordered a calculation of back pay as if all increases had been effective on July 1, 2008 rather than on the first pay period following July 1, 2008 and January 1, 2009. Thus, by any analysis he awarded back pay in excess of what employees would have received if the increases had been granted according to the terms of the collective bargaining agreement. RP 25.

Arbitrator Goldman in his award in the AFSCME case recognized that under PEBA Section 17(E) (NMSA 1978, § 10-7E-17(E) (2003)), an arbitration decision may not require the reappropriation of funds. RP 124. He correctly assumed that all of the funds appropriated for salary increases for FY 2009 had been spent and that he could not order the State to reappropriate money from the FY 2009 budget to satisfy an award. RP 125. However, he found that bargaining unit employees were entitled to receive two forms of economic relief: (1) back pay for any pay deficiency they suffered as a result of the failure to implement the CBA increases in FY 2009; and (2) prospective adjustment of their base salaries to reflect the CBA increases he found should have been provided in FY 2009. *Id.* He ordered the State to make these payments and adjustments effective in FY 2010 "if permitted by the wording of the FY 2010 budget," and if not, to make them effective at the beginning of FY 2011, thus ordering the Legislature, in effect, to

appropriate the necessary funds. RP 125-26.

New Mexico follows the nondelegation doctrine, which limits, under constitutional separation of powers principles, the extent to which the powers of the Legislature may be transferred even by the Legislature itself to other departments of government. *Cobb v. State Canvassing Bd.*, 2006-NMSC-34, ¶¶ 40-41, 140 N.M. 77, 140 P.3d 498. The New Mexico Supreme Court has held that "the legislature cannot delegate its power to appropriate money unless specifically authorized by the state constitution." *State ex rel. Schwarz v. Johnson,* 120 N.M. 820, 821, 907 P.2d 1001, 1002 (1995). ("The legislature must exercise its *exclusive power* of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government." *Id.* at 825, 907 P.2d at 1006 (emphasis added).

Although this precise issue has not been addressed by a New Mexico appellate decision, the nondelegation doctrine has been applied in other jurisdictions to invalidate arbitration awards that would require a legislative body to appropriate funds to satisfy collective bargaining obligations. Thus, the Pennsylvania Supreme Court held that "[w]here an arbitration award would infringe on the legislative power of the General Assembly or of the lawmaking body of a political subdivision... as where the appropriation of funds and/or the levying of taxes is required by the award, then that award is invalid [under the

Pennsylvania Constitution] as an attempted delegation of legislative power to a non-legislative body." *Franklin County Prison Bd. v. Pa. Labor Relations Bd.*, 417 A.2d 1138, 1142-43 (Pa. 1980). Similarly, the Utah Supreme Court held that a private arbitrator's award imposing conditions of employment for municipal firefighters would be an unconstitutional delegation of the legislature's authority to decide "major questions of public policy concerning the conditions of public employment, the levels and standards of public services and the allocation of public revenues." *Salt Lake City v. Int'l Ass'n of Firefighter's, Locals* 1645, 593, 1654 and *2064, 563* P.2d 786, 789-90 (Utah 1977).

Even if this Court were to agree with the arbitrators' convoluted construction of the phrase "average salary increase" in the appropriations legislation as permitting full implementation of the CBA-contemplated salary increases at the expense of unrepresented employees, that does not change the remedies ordered by them. The Legislative appropriation of $12,833,000 in FY 2009 for "average salary increases" to incumbents in agencies governed by the Personnel Act was specifically *"for expenditure in Fiscal Year 2009* to provide salary increases to employees in budgeted positions who have completed their probationary period" and those increases were mandated by the legislation to be effective July 1, 2008. AFSCME S. Ex. 2, 3; CWA Jt. Ex. 2, 3 (emphasis added). Once the fiscal

year ended those funds were no longer available. In any event, they had been expended to provide salary increases for all eligible employees covered by the Personnel Act, as opposed to only those which were union represented. Since salary increases must be appropriated by the Legislature, neither this Court nor an arbitrator can constitutionally direct that they be paid. To do so would violate Article IV, Section 27 and Section 30 of the Constitution of the State of New Mexico. For this reason alone, the arbitration awards must be vacated.

This Court recently held that a monetary impasse arbitration award under PEBA is contingent upon the appropriation and availability of funds. *Int'l Ass 'n of Firefighters, Local 1687* v. *City of Carlsbad,* 2009-NMCA-97, ¶ 12, 147 NM 6, 216 P.3d 256. In its decision, this Court noted that while finality in the collective bargaining process is important, the declared legislative purpose of the PEBA includes ensuring the orderly operation and functioning of the State and its political subdivisions. *Id.*¶ 13. *See,* NMSA 1978 § 10-7E-2 (2003). "From the language of the PEBA, we cannot agree with the Union that the Legislature, when considering a balance of the public interests, raised the need for binding arbitration above the stability of public funds." *Id.* Although the present case involves grievance arbitration as opposed to interest arbitration, the same public policy considerations apply. The arbitrators' gross error and abuse of authority in misinterpreting the appropriations legislation would require remedial orders that

violate the New Mexico Constitution and threaten the stability of the State's funds and the orderly functioning of its agencies. Accordingly, the awards should be vacated in their entirety.

3. The Arbitrators Exceeded Their Powers and Committed a Gross Error of Fact or Law in Finding That the Legislature Appropriated Sufficient Funds for the Collective Bargaining Agreement Pay Increases

In deciding that the phrase "average salary increase" permitted the State to implement the full collective bargaining agreement-contemplated increases at the expense of unrepresented employees, the arbitrators ignored uncontradicted testimony offered by the State that consistent with established administrative interpretation of which the Legislature is presumed to be aware, the phrase "average salary increase" does not permit the exclusion of any category of employees within the group and calculations during the legislative process as to the impact of the proposed legislation were based on the assumption that the increase would be distributed equally among eligible classified employees. Furthermore, both arbitrators buttressed their conclusions by faulty calculations regarding the impact of fully funding the CBA – contemplated increases. Finally, both arbitrators ignored the limiting language of the CBAs as well as the specificity requirements of the PEBA.

a. The arbitrators ignored established administrative interpretations of which the Legislature is presumed to have been aware

In the CWA case, Arbitrator Criswell explicitly rejected testimony by State witnesses establishing the historical application of the language used in the appropriations legislation by SPO, the agency charged with implementation of legislative appropriations to classified employees.

In his award, the arbitrator states:

> I reject the testimony that "average" as used in these bills was intended to refer only to an average within the same wage band.[8] I reject this testimony not only because I find it incredible and not supported by anything in the record, but also because it is incompetent to establish the legislature's intent in such a way. Indeed, I find it ironic that during the UNION'S presentation of the testimony of Joshua Anderson, who was intimately involved in the lobbying efforts that resulted in these two bills, I sustained the EMPLOYER'S objection to his testimony about legislative intent, but the EMPLOYER proceeded to present testimony of the same ilk in its case. Then, in its post-hearing brief, the EMPLOYER contends that its evidence upon the point was unrebutted! RP 23.

The arbitrator correctly sustained the State's objection to testimony by union lobbyist Joshua Anderson as to his understanding of the Legislature's intent in the appropriations legislation CWA Tr. 49-50. However, he failed to recognize the distinction between direct testimony as to legislative intent and testimony relating to the historical application of language commonly employed in legislation by agencies charged with implementation of the legislation as evidencing legislative

[8] The State did not and does not in this proceeding contend that the legislative use of "average" was intended to refer to an average within the same wage band.

intent.

SPO Director of Compensation, Justin Najaka, and State Personnel Director, Sandra Perez, both testified that the phrase "average salary increase" found in both HB2 and SB 165 is commonly used in appropriation bills. AFSCME Tr. 39-40, 119-20, 205-06; CWA Tr. 54-55, 204, 263-64. They explained that this language allows for flexibility in the administration of pay plans, since different agencies have different compensation systems.[9] AFSCME Tr. 120-21, 205-06; CWA Tr. 54-55, 204, 263-64. Both witnesses testified that the term "average" does not permit the State to exclude one group of classified employees from a salary increase that is granted to another group of classified employees. RP 116-17; AFSCME Tr. 121-22, 206; CWA Tr. 204. Neither CWA nor AFSCME presented evidence to support a contrary interpretation.

Under New Mexico law, the Legislature is presumed to be aware of longstanding administrative interpretations of statutes, and failure to overturn such interpretations strongly indicates legislative approval and intent to maintain them. New Mexico courts have consistently applied the "presumption that the Legislature is aware of an administrative construction of a statute," particularly where "the

[9] AFSCME lobbyist, Joshua Anderson conceded that the modifier "average" is commonly used in appropriations legislation where it is intended that money is be distributed in accordance with a pay plan. AFSCME, Tr. 39-40.

agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it." *State ex rel. Shell Western E&P* v. *Chavez,* 2002-NMCA-005, ¶11, 131 N.M. 445, 38 P.3d 886 (quoting *Alexander* v. *Anderson,* 1999-NMCA-021, ¶17, 126 N.M. 632, 973 P.2d 884); *State ex rel. Stratton* v. *Roswell Indep. Sch.,* 111 N.M. 495, 503, 806 P.2d 1085, 1093 (Ct. App. 1991), *cert. denied,* 131 *NM* 564, 40 *P.3d 1008 (2002)* ("Persuasive weight is given to long-standing interpretations of a doubtful or uncertain statute by the administrative agency charged with administering the statute. The more long-standing the agency's interpretation of the statute without amendment by the legislature, the more likely that the agency's interpretation reflects the legislature's intent.") (citations omitted).

Other jurisdictions have also held that "[t]he legislature is presumed to know of the construction adopted [by an administrative agency], and the long continuance of the interpretation without any sign of legislative disapproval warrants the adoption of that construction by the courts." *Southern Message Service, Inc. v. Louisiana Public Service Com,* 554 So.2d 47, 54 (La. 1989). *See also Boaden* v. *Department of Law Enforcement,* 664 N.E.2d 61, 67 (Ill. 1996) ("A reasonable construction of an ambiguous statute by the governmental officers or departments charged with its enforcement, if contemporaneous, consistent, long-continued, and in concurrence with legislative acquiescence, creates a presumption

of correctness which is only slightly less persuasive than a judicial construction of the same act.") (citations omitted).

Although there are no New Mexico cases directly on point, California courts view long-standing practices of administrative agencies as "interpretations" of which the legislature is presumed to be aware. *Yamaha Corp. v. State Bd. of Equalization,* 960 P.2d 1031, 1043 (Cal. 1998) (Mosk, J, concurring) ("[L]awmakers are presumed to be aware of long-standing administrative practice and, thus, the reenactment of a provision, or the failure to substantially modify a provision, is a strong indication [that] the administrative practice was consistent with underlying legislative intent."); *Elk County Water Dist.* v. *Dep 't of Forestry & Fire Prot.,* 61 Cal. Rptr. 2d 536 (Cal. App. 1997) ("The Legislature is presumed to be aware of long-standing administrative practice, and its failure to modify the Act... indicates acquiescence in that practice as consistent with legislative intent.").

In adopting the appropriations legislation in this case, it must be presumed that the New Mexico legislature was aware of SPO's practice of interpreting the term "average" in a way that did not exclude any categories within the group receiving an appropriated salary increase. Surely, the continued and consistent application of the term across agencies constitutes exactly the kind of interpretation that "is of such longstanding duration that the Legislature may be presumed to know of it." *State ex rel. Shell Western,* 2002-NMCA-005, ¶11. Indeed, the

Legislature's continued use of the term "average" in its appropriations legislation, year after year, and without modification, must clearly evince the Legislature's intention that the term be used consistently with its historical application.

Perhaps more importantly, the Legislature not only must be presumed to be aware of the standard usage of the word "average" by the agencies implementing its appropriation legislation, it can be presumed to have been specifically aware of the impending conflict between the amount appropriated for all eligible employees subject to the Personnel Act and the appropriation necessary to fulfill the requirements of the collective bargaining contract. That conflict was well explained in the SPO's Agency Bill Analysis. AFSCME Er's Ex. 2, 2-4; CWA Ex. 1, 2-4. The SPO's interpretation of the term "average" formed the basis for that conflict, and the Legislature's failure to modify the definition of "average" indicates an intent that the term should continue to be applied as it always had been in the past. Nonetheless, ignoring the testimony by Personnel Director Perez and Compensation Director Najaka, the Arbitrators found no evidence, other than the two pay bills themselves, presented by the State that would indicate that the State owed any legal obligation to pay to the unrepresented employees the same salary increases that the contracts covering the represented employees called for. RP 23-24, 121.

The arbitrators also ignore the fact that the legislative appropriation was

clearly intended to fund an increase for all classified employees and SPO calculations as to the cost to fund the increases were based on that assumption, as conceded by union officials in their testimony. Yet, there is no evidence that the unions or anyone representing the unions contended that union represented employees were entitled to CBA contemplated increases at the expenses of un-represented classified employees until it became clear that because all increases were to be effective July 1, 2008, there clearly was not a sufficient appropriation to fund increases for all classified employees, thus leading to the grievances being filed. AFSCME Tr. 35-39, 68-69; CWA Tr. 53-57, 74-79, 81-82.

b. The arbitrators relied upon their own faulty calculations in assessing the impact of fully funding the collective bargaining agreement - contemplated increases

In support of his conclusion, Arbitrator Criswell asserts that the Legislature did, indeed, appropriate sufficient monies to fund the collective bargaining agreement increases for all represented employees, including those in the CWA unit, reasoning that:

> Both the initial appropriations bill and the supplemental bill merely provided that the appropriated funds were "to provide incumbents... with an average salary increase ...." This provision is clear -- it does not require every "incumbent" to receive an increase in salary, so long as all of the salary increases average the percentage prescribed. RP 22.

Thus, he asserts, it would have required an appropriation of only $2,551,319 to fully fund the CWA collective bargaining agreement increases for FY 2009

effective as of July 1, 2008 for the CWA bargaining unit and an appropriation of $10,633,299 to fund the collective bargaining agreement increases for all represented employees effective July 1, 2008, while the Legislature appropriated a total of $12,833,000.
RP 21-22.

Similarly, Arbitrator Goldman states that under the SPO estimate, a total of $15,541,200[10] was required to fund the increases if they were given to all eligible classified employees and he observes that since about half of those employees were not covered by collective bargaining agreements, approximately $8 million would be required to fund the increase for bargaining unit employees. RP 121. He concludes, therefore, that the "allocated $12.5 million was more than enough to meet this obligation and still permit smaller increases for non bargaining unit personnel." *Id.* Arbitrator Goldman's assertion that the State had $8 million to provide the CBA increase to represented employees and $4.8 million to provide reduced increases to unrepresented employees is patently incorrect. His calculation was based on SPO's estimate of the cost of the CBA increases with implementation of the compa-ratio increase on January 1, 2009. In fact, as Arbitrator Goldman recognized, the legislation required the State to implement all

[10] This figure representing the cost of the CBA-contemplated increases, if granted 2% in July and compa-ratio increases in January, was subsequently recalculated on March 23, 2009 to $15,956,500. CWA Tr. 207-08, CWA S. Ex. 5.

increases on July 1, 2008, which would have required an appropriation of $21,051,800. to provide them to all eligible employees, both represented and non-represented. CWA Tr. 208, CWA S. Ex. 5.

SPO's Director of Compensation testified that the phrases "shall be effective July 1, 2008" and "authorized on July 1, 2008" in HB2 and SB 165 meant that both increases were required to go into effect no later than July 1,2008. AFSCME Tr. 122-23, 125; CWA Tr. 177-78. Arbitrator Goldman accepted the unrebutted testimony by Compensation Director Najaka that under the language of both HB2 and SB 165, all increases adopted by the Legislature had to be placed in effect on July 1, 2008, finding that another of the "constraints in the adopted bills" was that "the effective date of the salary increases [i.e., both the midpoint increase and the compa-ratio increases] was to be July 1, 2008." RP 121.

SPO's Director of Compensation presented uncontroverted evidence that it would have required $21,051,800 to provide both wage increases contemplated by the CBA to all classified employees effective July 1,2008. AFSCME Tr. 166-67, AFSCME Er's Ex. 7; CWA Tr. 207-09; CWA S. Ex. 5. Both Arbitrators ignore this fact, however. If the collective bargaining agreement increases were fully funded ($10,633,299) this would have left approximately $2.2 million, just one-sixth of the total $12.8 million appropriation for increases for half of the State's classified employees. *Id.* The State submits it is not remotely reasonable or

rationale to conclude that the Legislature intended by employing the phrase "average salary increase" to give represented employees an increase five times greater than that given to unrepresented employees. AFSCME Tr. 164-68, AFSCME Er. Ex 7; CWA Tr. 207-09; CWA S. Ex. 5.

In sum, there was no rational basis in fact or law for the arbitrators' finding that the appropriations legislation authorized SPO to fund the full CBA increases for represented employees at the expense of 10,000 unrepresented classified employees. The arbitrators' unsupported interpretation of the appropriations legislation effectively rewrote the law and substituted their judgment for that of the citizens' elected representatives. Thus, by finding that the Legislature appropriated sufficient funds for the CBA – contemplated increase, the arbitrators exceeded their powers

and committed a gross error of fact or law.[11] Since that flawed finding was the predicate for their conclusion that the State breached the CBA, this Court must vacate the award in its entirety.

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[11] In *Int'l Ass'n of Firefighters, Local 1687 v. City of Carlsbad,* 2009-NMCA-97, 147 NM 6, 216 P.3d 256, the New Mexico Court of Appeals distinguished authority from another jurisdiction suggesting that a municipality had the duty to shift funds or cut expenses to accommodate an arbitration award. *Id.* at ¶ 20. The Court noted that in New Mexico, PEBA Section 17(E) specifically provides that arbitration decisions involving public employees requiring the expenditure of funds are contingent upon the availability and appropriation of funds. *Id.* (citing NMSA 1978, §10-7E-17(E) (2003)).

c. The arbitrators ignored the limiting language of the collective bargaining agreements as well as the specificity requirements of the PEBA

As noted, the CBAs made the compa-ratio increase in January 2009 "subject to specific appropriation." Even accepting the arbitrators' contorted construction of "average" in the appropriations language as satisfying this requirement, they still conspicuously avoid even the slightest reference to the actual language of the FY 2009 appropriations legislation, which provides no support for the awards. The language of HB2 and SB 165 contained nothing remotely resembling the required "specific appropriation of funds" for compa-ratio increases for union-represented employees effective January 1, 2009, which is required by PEBA. NMSA 1978, § 10-7E-17(E) (2003). The Legislature undoubtedly had a reason to use the restrictive term "specific" in PEBA to describe the required appropriation, and that term must be given its ordinary meaning. *See State v. Doe,* 90 N.M. 776, 777, 568 P.2d 612, 613 (Ct. App. 1977). "Specific" is defined as "[p]recisely formulated or restricted; definite, explicit; of an exact or particular nature." Black's Law Dictionary 1398 (6th ed. 1990).

The ultimate goal in statutory construction is to "ascertain and give effect to the intent of the Legislature." *State v. Trujillo,* 2009-NMSC-12, ¶21, 146 N.M.14, 206 P.3d 125 (2009). Interpretation of a statute must comport with common sense and the statute's "obvious spirit or reason." *Id.* Even if the

statutory language appears to have a plain meaning, a formalistic or mechanical interpretation must be rejected if the results would be "absurd, unreasonable, or contrary to the spirit of the statute." *Id.* Here, nothing in the language of the appropriations legislation supports an inference that the Legislature intended to divide the State's classified workforce in half, giving the unionized half a much higher increase than the unorganized half. Without any indication that this was the Legislature's intent, the arbitrators' extreme interpretation of the term "average" as requiring such an unequal apportionment of the pay increase leads to an absurd and unreasonable result that must be rejected.

4. The Arbitrators' Awards Would Require an Unconstitutional Retroactive Pay Increase

Finally, the arbitrators' awards are also unconstitutional insofar as they would require the State to appropriate funds to compensate bargaining unit employees for alleged pay deficiencies suffered in FY 2009 as a result of the failure to implement the CBA increases they found should have been granted in that year. Article IV, Section 27 of the New Mexico Constitution provides that "[n]o law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made." N.M. Const. Art. IV, § 27. The Attorney General has repeatedly opined that this section of the Constitution prohibits the Legislature and State agencies from granting retroactive pay increases to public employees. N.M. Att'y Gen. Op. No. 71-7

(1971) (Art. IV, § 27 prohibits State agency from giving retroactive pay increases to employees); N.M. Att'y Gen. Op. No. 62-28 (1962) (retroactive pay increases for State hospital employees prohibited); N.M. Att'y Gen. Op. No. 57-17 (1957) (Legislature has no power to appropriate funds for retroactive pay increases for State employees after services already rendered).

Given that FY 2009 has ended, State employees in the AFSCME and CWA bargaining units necessarily have completed the performance of all services rendered during that fiscal year. Paying those employees additional compensation for services performed in FY 2009 and FY 2010, as the arbitrators' awards purport to require, would constitute extra compensation for services rendered in the past. The Constitution expressly forbids the Legislature from appropriating funds or enacting any law that would grant such a retroactive pay increase. The arbitrators had no authority to order the State to implement an unconstitutional salary increase, and their awards should be vacated to the extent they direct the payment of "back pay" for FYs 2009 and 2010.[12]

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[12] Both the Article IV, Section 27 and the Article IV, Section 30 issues could have been avoided had the arbitrators ordered the parties to avail themselves of the collective bargained remedy for failure by the Legislature to appropriate funds sufficient for the CBA contemplated pay increases, i.e., to reopen bargaining over general salary and within band pay increases that would be effective for the fiscal year following the fiscal year in which the Legislature failure to appropriate sufficient funds to implement this agreement" AFSCME Jt. Ex. 1, 20-21 (Art. 12 § 3); CWA Jt. Ex. 1, 42 (Art. 27 § 3); CWA Jt. Ex. Er. 42. The State and the unions, in fact, reopened bargaining regarding pay increases for the following fiscal year,

III.

CONCLUSION

For all of the foregoing reasons, Appellant submits that this Court should rule that the District Court erred in confirming the awards of Arbitrators Criswell and Goldman and that they should be set aside because the District Court employed an incorrect standard in reviewing the awards. The awards, because they would, in effect, require the Legislature to appropriate funds, constitute an unconstitutional assumption of the Legislature's power to appropriate public funds. Moreover the arbitrators exceeded their powers and committed gross errors of fact or law in finding that the Legislature appropriated sufficient funds for CBA-contemplated increases in FY 2009. Finally, the enforcement of the awards would require an unconstitutional retroactive pay increase.

IV.

REASONS WHY ORAL ARGUMENT WOULD BE HELPFUL TO A RESOLUTION OF THE ISSIES

FY 2010, and reached an agreement on that subject. CWA Tr. 258-59; CWA S. Ex. 6. Thus, the unions have already exercised their right to reopen wage bargaining following an insufficient legislative appropriation and there is no further remedy that an arbitrator could order. However, because of their faulty analysis of the appropriations legislation as having funded the increases, the arbitrators both dismissed that proposition outright. RP 17-18, 123.

This cause presents complex issues of common law, statutory construction and application of the Constitution of the State of New Mexico. Oral argument may be helpful to the Court in focusing on specific matters or clarifying issues and written argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served by first class mail upon the following this 25th day of April 2011.

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_____
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