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 REPLY BRIEF

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ARGUMENT AND AUTHORITIES

American Federation of State, County and Municipal Employees Counsel 18, AFL-CIO, CLC and Communications Workers of America, AFL-CIO, CLC, Appellees herein (hereinafter collectively referred to as the "Unions"), in efforts in their answer brief to counter arguments advanced by the State of New Mexico (hereinafter "State") in its brief in chief have adopted two separate tacks.

First, the Unions mischaracterize the State's arguments, falsely constructing them and then tearing them down. Second, the Unions lodge specific attacks on sub-points in the brief in chief, none of which have any merit whatsoever. This brief will first address the Unions' mischaracterization of the State's major points of argument and then focus on analysis of the arguments directed at specific sub-points in the order in which the points discussed are raised in the brief in chief.

A. Mischaracterization of the State Arguments

1. The State does not "admit" it failed to comply with the collective bargaining agreements by failing to fully fund the within band increases contemplated for FY 2009.

In the opening paragraph of their answer brief, the Unions assert that "[t]he 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...." Ans. Br. 1.[1] This is misstatement of the State's position.

The State argues throughout its brief in chief that it fully complied with the wage increase provisions for FY 2009, which were specifically made "[s]ubject to legislative appropriation" by the collective bargaining agreements (hereinafter "CBAs") themselves as well as by PEBA Section 17(E) (NMSA 1978, § 10-7E-17(E) (2003)), which conditions any "agreement provision which requires the expenditure of funds...upon the specific appropriation of funds by the legislature and the availability of funds." The State contends that the Legislature did not appropriate sufficient funds for the increases contemplated by the CBAs and they could not, therefore, be implemented. Br. in Ch. 16-31.[2]

2. Whether or not the Legislature appropriated funding for collective bargaining agreement contemplated wage

[1] "Ans. Br." Refers to the Unions' answer brief filed in this proceeding.
[2] Reference to "Br. in Ch." are to the Brief in Chief filed by the State in this proceeding.

increases in FY 2009 is not the sole basis for the State's appeals in these cases

This argument also mischaracterizes the State's position. Other arguments are offered by the State in support of its position in this appeal, including its argument that the District Court erred by failing to conduct an independent review of the record. Br. in Ch. 11-16. Indeed, among other points the Unions fail to mention, much less respond to, in their answer brief, is the State's argument that the arbitrators' awards constituted an unconstitutional usurpation of the legislative power to appropriate public funds. Br. in Ch. 16-21. Assuming, *arguendo*, that the Unions' position is wholly meritorious and that State erred by failing to implement in full the wage increases contemplated by the CBAs, there is no monetary remedy which can constitutionally be imposed by any court. *Id.*

Article IV, Section 30 of the New Mexico Constitution provides quite clearly 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.*" (Emphasis added) Furthermore, the PEBA in Section 17(E) (NMSA 1978 § 10-7E-17(E) (2003)) prohibits an arbitration decision from requiring the reappropriation of funds. In this instance the legislative appropriation for FY 2009 to fund increases to incumbents in agencies

covered the Personnel Act, which would include members of the bargaining units in question, was specifically designated *"for expenditure in Fiscal Year 2009...."* RP 11, 115. Thus, once the fiscal year ended those funds were no longer available. Since the salary increases must be appropriated by the Legislature, it would violate Article IV, Section 30 of the New Mexico Constitution for a court to direct the Legislature to reappropriate them. This reservation of the power of appropriation to the Legislature by the New Mexico Constitution thus distinguishes the claims against the State in this case from an ordinary claim of breach of contract.

3. The State does not contend that the collective bargaining agreements required that the same increase be paid to all employees subject to the legislative appropriation

Throughout its answer brief the Unions contend that the State urges that the Legislature intended that all employees subject to the legislative appropriation for FY 2009 receive the same identical percentage wage increase. *See e.g.*, Ans. Br. 16, 17, 19-21. Again, this is a complete mischaracterization of the State's position.

The State's position, as is more fully articulated in its brief in chief (Br. in Ch. 21-27), is that by mandating "average" increases of 2.4% and .5% respectively in HB2 and SB 165, the Legislature intended to grant each

employee group included within the appropriation category "incumbents in agencies covered by the Personnel Act" the specified average increase, subject to distribution of the percentage increase among members of each group in accordance with a pay plan to be adopted by the affected agency. Br. in Ch. 23. The State's interpretation is consistent with long standing historical application of the language as applied by the State Personnel Office. *Id.*

Thus, in its brief in chief the State urges that "in adopting the appropriation legislation in this case, it must be presumed that the New Mexico Legislature was aware of SPOs practice that when interpreting the term 'average' in a way that did not exclude any category within the group receiving an appropriated salary increase." Br. in Ch. 25. Indeed, that the appropriation would be distributed in this manner was assumed in SPO's agency bill analysis of the original appropriation spill. Br. in Ch. 26.

In their answer brief, the Unions argue the State's position is belied by testimony from State Personnel Director Sandra Perez to the effect that based upon language similar to the language contained in the FY 2009 appropriation, in FY 2007 she had implemented compa-ratio increases which provided for variation of salary increases according to the contract, ranging from 3.5% to 6.5%, because the Legislature appropriated money for

an "average" 5% increase. Ans. Br. 19.[3] Contrary to the Unions' position, SPO's previous action is fully consistent with the testimony at the arbitration hearings by both SPO Director of Compensation, Justin Najaka, and State Personnel Director, Sandra Perez that the use by the Legislature of the term "average salary increase" allows for flexibility in the administration of pay plans, since different agencies have different compensation systems, but that use of the term 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. Br. in Ch. 23.

Uncontradicted testimony by State witnesses was to the effect that the accepted historical application of the term "average" in appropriations legislation requires that an appropriation be applied by a governmental entity in accordance with individual pay systems. Where the term "average" is not used in an appropriation that is indicative of another type of pay system

[3] The State and the Unions held discussions following the legislative session but prior to the State's adoption of a pay increase mirroring the language of the appropriation legislation in efforts to agree on a distribution of the appropriation which would most clearly reflect the compa-ratio increases contemplated by the CBAs. RP 14-15, 117-18. However, the State ultimately adopted the language of the appropriation legislation because it was concluded that the compa-ratio increases may violate the prohibition in the State Personnel Act (NMSA 1978, § 10-9-7 (1984)) against spending an appropriation for "plans which have significant financial impact...without prior legislative approval." RP 15-16, 118, which would have been the result

inconsistent with the use of the term "average", such as lock step increases. AFSCME Tr. 118-22. CWA Tr. 174-78, 263-64.[4]

B. Response to Arguments Addressed to Specific Sub-Points

1. Since whether an appropriation was made by the Legislature to fund the CBA-contemplated increase is jurisdictional, the district court erred in failing to conduct an independent review of the record (Br. in Ch. 11-16)

At page 3 of their answer brief, under the heading *"Summary of Facts Relevant to the Issues Presented for Review"*, the Unions assert that "collective bargaining agreements, and the arbitrators' awards affect only one half of the classified employees who work for the State of New Mexico under the terms of the collective bargaining agreement (sic), pursuant to

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in this instance because of the budgetary shortfall, not because of the use of the term "average" in the appropriation legislation. Br. in Ch. 7-8.

[4] 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, County and Municipal 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.

PEBA." Ans. Br. 3. This statement is only partially true. The Unions correctly state that since the disputes subject of this appeal were raised under collective bargaining agreements with the Unions which cover only some of the classified employees of the State, the terms of the arbitrators' decisions themselves do not directly apply to the non-union classified employees. This is correct, but the arbitration decisions, if upheld, would have a significant adverse impact on the unrepresented classified employees, who, under the Legislation, would share the appropriation with the represented employees.

Uncontroverted evidence established that it would require $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 Employers Ex. 7, CWA Tr. 207-09, CWA S. Ex. 5. *See* Br. in Ch. 8-10. If the collective bargaining increases had been fully funded, which would require an appropriation of $10,633,299, this would have left only $2.2 million dollars, one sixth of the total $2.8 million dollar appropriation, for increases for half of the State classified employees. *Id.*

The State submits that this result alone establishes that it is neither reasonable nor rationale for the arbitrators to have concluded 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 Employer Ex. 7, CWA Tr. 207-209, CWA S. Ex. 5. This is particularly so where the PEBA itself requires that there be a "specific" appropriation to support wage increases in a CBA. NMSA 1978, § 10-7E-17(E) (2003). This result provides irrefutable support for the State's position that 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.

2. While the arbitrators' decisions are directly applicable only to employees in the two bargaining units, their rulings that non-bargaining unit employees could be excluded altogether from the appropriated increase are central to the issue of whether the arbitrators exceeded their powers or committed a gross error of fact or law

(Br. in Ch. 16-31)

In their answer brief the Unions argue that while the State may be correct in asserting that where a jurisdictional issue is involved a court is required to review the record of an arbitration decision independently, the

principle is not applicable in this case because there exists no issue as to the adequacy of the appropriation in this case. Ans. Br. 9-14.

Thus, the Unions attempt to distinguish both *City of Sommerville v. Sommerville Municipal Employees Ass'n.*, 633 N.E.2d 1047 (Mass. 1994) and *School Committee of Boston v. Boston Teachers Union, Local 66*, 479 N.E.2d 645 (Mass. 1985), on the ground that in both cases there was no appropriation to support the award by the governing body. Ans. Br. 11-13. Here, there is no issue what the amount of the appropriation was and that if it were allocated to bargaining unit members only there would be more than sufficient funding for the entire increase contemplated by the CBAs. The Unions' argument, of course, assumes the answer to the question whether or not sufficient funds were appropriated by assuming non-bargaining unit employees could be excluded. This issue, in turn, is dependent upon the intent of the Legislature in utilizing the term "average increase." The State argues that the term "average" has been historically applied so as to require an increase which would average the appropriated amount within all of the subgroups which formed the larger group consisting of "all incumbents in agencies subject to the Personnel Act."

3. The State does not contend that an arbitrator may not issue an award requiring the payment of wages (Br. in Ch. 18-19)

Contrary to the Unions' assertion, the State has not adopted the position that an arbitrator may not issue an award requiring the payment of wages. Ans. Br. 24. Rather, the cases discussed by the Unions were cited by the State in its brief in chief for the proposition that arbitration awards may not require a legislative body to appropriate funds to satisfy bargaining obligations. Br. in Chief 18-19. Both *Salt Lake City v. IAFF*, Locals 1645, 593, 1654 and 2064, 523 P.2d 786 (Utah 1977) and *Franklin County Prison Board v. Pennsylvania Labor Relations Board*, 417 A.2d 1138 (Pa. 1980) clearly support this proposition.

The Unions cite three cases *Florida v. Florida Police Benevolent Assoc.*, 688 So.2d 326 (Fla. 1997), *Town of Milton v. Commonwealth*, 623 N.E.2d 482, 484 (Mass. 1993) and *Carlstrom v. State,* 694 P.2d 201 (Wash. 1985) for the proposition that when an arbitrator's award of wages is supported by a legislative appropriation, it can be enforced. Ans. Br. 26. The State does not disagree. However, the legislative appropriation in these cases for wages was "for expenditure in Fiscal Year 2009." RP 11, 115. The appropriation, thus, expired at the end of the fiscal year. None of the cases cited involve an appropriation for a limited duration. For this same reason an arbitrator's award requiring payment of wages after the appropriation for those wages has expired would violate Article IV § 27 of

the New Mexico Constitution, contrary to the Unions contention. Ans. Br. 27-28. The Unions' only argument, without offering any supporting authority, is that "this is not a fair or reasoned interpretation of the New Mexico Constitution".

4. The Unions fail to distinguish authorities cited by the State in support of the proposition that the Legislature is presumed to be aware of long-standing historical administrative interpretations of legislative actions and they fail to provide contrary authority (Br. in Ch. 21-27)

The Unions acknowledge that New Mexico Supreme Court accepted the legal proposition advanced by the State in *State ex rel. Shell Western E&P v. Chavez,* 2002 NMCA 005 ¶11, 113 NM 445, 38 P.3d 886, that the Legislature is presumed to be aware of long standing interpretations by administrative agencies but the assert that the court in that case declined to follow the rule. That is not true. The court in *Shell* merely found that the legal proposition was not applicable to the facts presented. 2002 NMCA 005, ¶16. Ans. Br. 18-19.

The Unions also would distinguish *State ex rel. Stratton v. Roswell Independent Schools District*, 111 NM 495, 806 P.2d 1085 (Ct. App. 1991), *cert. denied,* 131 NM 564, 40 P.3d 1008 (2002). Ans. Br. 19. Although

they concede, again, that the court in that case recognized the proposition that the Legislature is assumed to have knowledge of administrative construction, they add that the court noted that the "the Legislature is also presumed to have known New Mexico case law" and that this "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 State was legally bound to honor." Ans. Br. 18-19. This argument ignores the fact that not only did the collective bargaining contract make the State's obligation subject to legislative appropriation, the PEBA also requires that legislative salary appropriations be "specific". NMSA 1978, 10-7E-17(E) (2003).

Finally, the Unions contend that the Legislature's use of the word "average" must be viewed as implying discretion in variation of wage increases, again a principle with which the State has no quarrel. Ans. Br. 19. Indeed, as stated, it is the State's contention that in accordance with long standing administrative interpretation the term "average" is used historically by the Legislature to permit discretion in allocating a wage appropriation among a group of employees subject to the appropriation in accordance with a pay plan adopted by the agency, but that the term does not permit the State

to omit any group of employees subject to the appropriation or to grant them an increase insufficient to provide the statutory "average" appropriation to that group of employees.

5. PEBA Section 17(E) is applicable to grievance arbitrations as well as to interest arbitrations (Br. in Ch. 31-32)

In their answer brief the Unions argue that the "specific appropriations" language of Section 17(E) of PEBA is applicable only to interest arbitrations Ans. Br. 23. There is no support for this argument in the language of the statute. Indeed, the statutory provision explicitly states that "an impasse resolution *or* an agreement provision by the State and an exclusive representative that requires the expenditure of fund shall be contingent upon the specific appropriation of funds by the legislature and the availability of funds...An arbitration decision shall not require appropriation of funds." (Emphasis added). Ans. Br. 28.

II.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the State's brief in chief, the State submits that the arbitrators' awards should be set aside, and requests that this Court should grant this and such other and further relief as it may deem just.

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 28th day of June 2011.

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