IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

Plaintiff-Appellant,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO,

Defendant-Appellee.

No. 28,960

Appeal from the Second Judicial District Court, Bernalillo County, New Mexico

The Honorable Linda M. Vanzi, Judge

ANSWER BRIEF

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CERTIFICATE OF COMPLIANCE

The body of the attached brief exceeds the 35-page limit set forth in Rule 12-213(F)(2) NMRA. As required by Rule 12-213(G) NMRA, we certify that this brief complies with Rule 12-213(F)(3) NMRA, in that the brief is proportionately spaced and the body of the brief contains 9,532 words. This brief was prepared and the word count determined using Corel WordPerfect X3.

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Summary of Proceedings

Nature of the Case

This litigation arose out of collective bargaining proceedings between a labor union ("Union") and the University of New Mexico Hospitals ("Hospital"). The Union and the Hospital engaged in impasse arbitration pursuant to the Public Employee Bargaining Act ("PEBA"), NMSA 1978, § 10-7E-18 (2003), and a resolution (the Labor Management Relations Resolution ("LMRR")) adopted by the University, resulting in an arbitration award which the Union sued to confirm. The district court denied the Union's motion to confirm the arbitration award and granted the Hospital's cross-motion to vacate it. The Union brought this appeal from the ensuing final order.

The appeal questions whether the district court properly vacated the arbitration award on the grounds that (1) the arbitrator exceeded his powers and jurisdiction by conducting impasse arbitration in the absence of an impasse, (2) the arbitrator exceeded his powers and engaged in misconduct by failing to follow the final offer arbitration process required by law, and (3) the arbitration award would compel the Hospital to violate the New Mexico Constitution and therefore violates public policy.

Course of Proceedings and Disposition in the Court Below

The Union commenced this action under the Uniform Arbitration Act by moving to confirm an arbitral award. (R.P. 1.) The Hospital filed a cross-motion to vacate the award. (R.P. 169.) See NMSA 1978, §§ 44-7A-23 & -24 (2001). The district court denied the Union's motion for confirmation and granted the Hospital's motion to vacate. (R.P. 434.) The Union filed a motion for reconsideration (R.P. 436; see also id. 446, 454), which was denied (id. 462), and then timely filed a notice of appeal (id. 464).

Statement of Facts

As their existing labor agreement neared expiration in April 2007, the Union and the Hospital engaged in negotiations aimed at reaching a successor agreement. (R.P. 8.) Those negotiations were conducted pursuant to the LMRR, a resolution promulgated by the University, consistent with PEBA, governing collective bargaining and labor-management relations between the Hospital and its employees. (R.P. 192, 202.) See NMSA 1978, § 10-7E-26(B) (2003). The parties arrived at an impasse and enlisted the aid of a mediator as prescribed by the LMRR, but mediation was unsuccessful and the impasse remained. (R.P. 8, 203, 209.) The Union's position at impasse was embodied in a last offer extended through the mediator on October 18, 2007. (R.P. 209, 211, 221.) The Hospital

made its last offer on November 6, 2007. (R.P. 209, 212, 282.)

When mediation fails, the LMRR provides for impasse resolution by arbitration proceedings, which may be invoked "if the impasse continues after thirty (30) calendar days." (R.P. 203.) The arbitrator "shall render a final, binding . . . written decision resolving unresolved issues" by "select[ing] . . . one of the two parties' complete, last, best offer." (R.P. 203-04.)

The parties selected arbitrator Paul F. Gerhart to conduct impasse arbitration. (R.P. 212.) An arbitration hearing was scheduled for December 12-13, 2007. (Id.) On December 11, 2007, the Union put forward a new offer which revised substantially its October 18 offer. (R.P. 212-13, 326; Tr. 5.) At the outset of the hearing, the Hospital objected that the Union's submittal of a new offer reopened negotiations, ended the impasse, and deprived the arbitrator of jurisdiction to proceed. The arbitrator overruled this objection and allowed the Union's revised offer. (R.P. 8, 213.)

The Hospital argued in the alternative that the arbitrator was confined to choosing between the parties' final pre-arbitration offers of October 18 and November 6, respectively. (R.P. 13, 214.) The arbitrator, however, not only allowed the Union's revised offer but directed the parties to submit further revised offers after the close of the hearing. Both parties submitted revised offers on

January 4, 2008, with the Hospital doing so under protest and subject to its continuing objections. (R.P. 8-9, 18, 214-16, 218; see id. 148-59 (Union's January 4 offer).) In rejecting the Hospital's objection to the consideration of modified offers, the arbitrator determined that the language of the LMRR "compelled" him to select "from the two last, best offers that are before him at the time he makes a decision." (R.P. 15.)

During the course of the hearing the arbitrator encouraged the parties to confer informally to attempt to narrow their differences. (R.P. 214.) After the hearing ended, the arbitrator met with counsel for the parties, continued to encourage settlement, expressed his views on the remaining disputed items, and commented on how he would view modified offers on some of those items. (R.P. 8, 18, 209, 214-15.) When he received the parties' revised offers of January 4, the arbitrator again encouraged the Union and the Hospital to attempt to resolve their differences and offered to share his views on the remaining disputed items. (R.P. 217-18.) He later conferred with counsel and provided his views on the outstanding items and suggested modifications that he would consider reasonable. (R.P. 9, 218.) In a conference call with counsel on January 17, 2008, the arbitrator elicited further revised offers from the parties and gave his opinion on what additional modifications he would view as reasonable. (R.P. 9, 219.)

When counsel indicated that there would be no further modifications, the arbitrator stated that he would choose between the parties' January 17 offers if the parties agreed that he could do so and that, otherwise, he would make a choice between their January 4 offers. (R.P. 219.) There was no agreement to use the January 17 offers. (R.P. 9, 219.) The arbitrator thereupon issued a written decision in which he selected the Union's January 4 offer as the more reasonable successor to the expiring labor agreement. (R.P. 56; see id. 20-55.)

The contract chosen by the arbitrator included in its wage provisions a bonus payment to all members of the bargaining unit represented by the Union:

> Upon ratification of the contract all bargaining unit members shall receive a ratification bonus in the amount of $500 to be paid by the first pay period after the ratification has taken place.

(R.P. 35 (footnote omitted); see id. 151, 158.) In his award the arbitrator construed this contract term as providing the specified bonus to each member "effective on the date of the . . . award." (R.P. 48.)

The Hospital contended during the arbitration that such a bonus was an impermissible expenditure of public funds under New Mexico law. (R.P. 37-38.) The arbitrator determined that it was more reasonable to provide additional income to bargaining unit members in the form of a bonus, while recognizing that a question regarding the legality of the bonus remained to be resolved. The

arbitrator was of the view that, if invalid, the bonus provision could be severed from the contract without affecting the remainder of the agreement. (R.P. 48-49; see id. 276.)

The Union instituted this action by moving to confirm the arbitrator's award, complaining that the Hospital had failed to implement it. (R.P. 1, 4-5.) The Hospital opposed confirmation and filed a cross-motion to vacate the award. (Id. 169.) The Hospital argued, first, that the arbitrator lacked jurisdiction to proceed with impasse arbitration because the Union's December 11, 2007, offer on the eve of the arbitration hearing brought an end to the impasse and reopened negotiations. (Id. 178-81.) Second, the Hospital argued that by allowing and encouraging modifications to the parties' pre-arbitration last offers and choosing between the modified offers, the arbitrator failed to conduct a final offer arbitration proceeding as required by the LMRR. It contended that the mediation-like process promoted by the arbitrator was inconsistent with the principles and goals of final offer arbitration. (Id. 181-85.) Finally, the Hospital argued that the bonus payments required by the arbitration award would require the Hospital to violate the New Mexico Constitution and that the award therefore should be vacated as a matter of public policy. (Id. 185-90.)

The district court held a hearing on the parties' opposing motions (Tr.

(6/9/08)), denied the Union's motion to confirm, and granted the Hospital's cross-motion to vacate the arbitration award for all the reasons advanced by the Hospital. (R.P. 434; see Tr. 28-29.) After unsuccessfully moving for reconsideration of the district court's ruling (R.P. 460), the Union brought the present appeal (id. 464).

Preservation of Issues

The issues raised on appeal were preserved by the arguments presented in connection with the Union's motion to confirm the arbitration award and the Hospital's cross-motion to vacate the award. (R.P. 1 (motion), 169 (response and cross-motion), 392 (reply on motion and response to cross-motion), 418 (reply on cross-motion); Tr. (6/9/08) (hearing).) The district court ruled on the issues when it denied the motion to confirm and granted the motion to vacate. (R.P. 434; Tr. 28-29.)

Standard of Review

Under the Uniform Arbitration Act, a district court may vacate an arbitration award if the arbitrator's actions exceeded the arbitrator's powers or if the arbitrator engaged in misconduct prejudicial to a party. NMSA 1978, § 44-7A-24(a)(2)(C), (a)(4) (2001). See also id. § 10-7E-18(B)(2) (2003) (impasse arbitration decision reviewable pursuant to Uniform Arbitration Act); LMRR

§ 15(C)(2) (R.P. 204). See infra Point I. An arbitration award may be vacated at common law if the award violates public policy. See, e.g., Lee v. El Paso County, 965 S.W.2d 668 (Tex. App. 1998). See infra Point II.

The facts are not in dispute, and this case therefore involves questions of law which are reviewed de novo. See Town of Silver City v. Garcia, 115 N.M. 628, 632, 857 P.2d 28, 32 (1993) (if there is no substantial evidence issue, in reviewing district court's decision on arbitration award "we determine . . . whether the court correctly applied the law to the facts" (citation omitted)); Edward Family Ltd. P'ship v. Brown, 2006-NMCA-083, ¶ 17, 140 N.M. 104, 140 P.3d 525 ("We review the district court's order confirming the arbitration award and denying the motion to vacate for abuse of discretion. A court abuses its discretion if it misapplies the law." (citation omitted)); State v. Ogden, 118 N.M. 234, 240, 880 P.2d 845, 851 (1994) (questions of law are subject to de novo review).

Argument

The district court vacated the arbitrator's award on the grounds that the arbitrator lacked jurisdiction to conduct impasse arbitration in the absence of an impasse, that the arbitrator exceeded his powers and engaged in misconduct by not following the final offer arbitration process required by PEBA and the LMRR, and that the arbitration award is contrary to public policy expressed in the New

Mexico Constitution. (R.P. 434.) Any one of these grounds is sufficient to sustain the district court's judgment. See supra pp. 7-8. On all of them, the court ruled correctly.

I. THE DISTRICT COURT PROPERLY VACATED THE ARBITRATION AWARD BECAUSE THE ARBITRATOR EXCEEDED HIS POWERS AND ENGAGED IN MISCONDUCT IN CONDUCTING THE IMPASSE ARBITRATION PROCEEDING.

A. The Public Employee Bargaining Act and the University's Labor Management Relations Resolution Provide for Resolving Impasses in Collective Bargaining Through Binding, Final Offer, Package Arbitration.

Two of the bases on which the district court vacated the arbitrator's award relate to the arbitrator's conduct of impasse arbitration proceedings under PEBA and the LMRR. These proceedings should be understood and the arbitrator's conduct reviewed within the broader legal landscape.

Since the 1960s, public employees in many jurisdictions have gained the right to engage in collective bargaining though they remain prohibited from striking. See Peter Feuille, Final Offer Arbitration and the Chilling Effect, 14 Industrial Relations 302, 303 (Oct. 1995) (hereinafter Chilling Effect). In private employment, when labor and management cannot agree on the terms of a collective bargaining agreement, the cost and uncertainty imposed on both parties

by a work stoppage provide the incentive for the parties to negotiate and settle their differences. See id. at 302; see also Peter Feuille, Final Offer Arbitration 4 (1975) (hereinafter Final Offer Arbitration). A substitute for the strike was needed in the public sector that would provide a similar stimulus for the parties to negotiate their way to agreement after an impasse. See Arvid Anderson & Loren A. Krause, Interest Arbitration: The Alternative to the Strike, 56 Fordham L. Rev. 153, 156 (1987); Arnold M. Zack, Final Offer Selection – Panacea or Pandora's Box?, 19 N.Y.L.F. 567, 568-69 (1974). The search for a strike substitute was of particular concern in public safety fields, where a work stoppage by, e.g., police officers or firefighters could endanger the citizenry. See Richard C. Kearney & David G. Carnevale, Labor Relations in the Public Sector 222 (3d ed. 2001) (describing "general mayhem" that ensued when Boston police went on strike).

As states began enacting public sector labor legislation, the focus initially was on mediation and fact finding as impasse resolution methods. See Final Offer Arbitration at 5-6. Over time, however, "[s]tates and localities . . . increasingly turned to compulsory . . . arbitration as a bargaining impasse resolution technique." Steven B. Rynecki & Thomas Gausden, Current Trends in Public Sector Impasse Resolution, 49 State Government 273, 274 (Autumn 1976). "The most common public sector device for resolving bargaining disputes where

mediation and fact-finding have proved unsuccessful entails the use of binding 'interest' arbitration." Charles B. Craver, The Judicial Enforcement of Public Sector Interest Arbitration, 21 B.C.L. Rev. 557, 558 (1980) (footnote omitted) (hereinafter Judicial Enforcement).

"Interest arbitration is a process in which the terms and conditions of the employment contract are established by a final and binding decision of the arbitration panel." Anderson & Krause, supra p. 10, at 153 (footnote omitted); see also Judicial Enforcement at 571 ("[A]n interest arbitrator is empowered to formulate the actual employment terms which will govern the parties' relationship during the life of the resulting agreement." (footnote omitted)). But while interest arbitration can resolve an impasse with finality, it does not necessarily foster negotiation between the parties. "Conventional arbitration has been faulted for chilling the bargaining relationship by tacitly encouraging the parties to assume extreme positions in the hope that the neutral will 'split the difference.'" Kearney & Carnevale, supra p. 10, at 283. "[T]he conventional arbitrator will issue an award which is a compromise or a split of the difference between the parties' positions, and hence each party has an incentive to maintain an extreme position in the hope of getting a more favorable split." Peter Feuille, Final-Offer Arbitration and Negotiating Incentives, 32 Arbitration Journal 203, 204 (1977) (hereinafter

Negotiating Incentives).

In an influential article published in 1966, "final offer" arbitration was proposed as a method of impasse resolution that would encourage, rather than chill, the collective bargaining process. See Carl M. Stevens, Is Compulsory Arbitration Compatible with Bargaining?, 5 Industrial Relations 38 (Feb. 1966). "Final offer arbitration differs from conventional arbitration . . . in limiting the discretion of the arbitrator to a choice between the final offers presented by the opposing parties." Charles W. Adams, Final Offer Arbitration: Time for Serious Consideration by the Courts, 66 Neb. L. Rev. 213, 214 (1987). "Final offer [arbitration] requires the arbitrator to select the last best offer of one of the parties as the final terms for settlement; no compromising is permitted." Kearney & Carnevale, supra p. 10, at 274.

Unlike conventional arbitration, which may reward a party for clinging to an extreme position, final offer arbitration provides an environment that promotes bargaining and agreement. "The theory in this area holds that, as the arbitrator must select one or the other final offer, the parties are induced to develop more reasonable positions in the hope of winning the award. Thus, bargaining in good faith is encouraged, and because the parties have been forced to cooperate, they are likely to create their own settlement." Ronald Hoh, Public Law: Interest

Arbitration: Its Effects on Collective Bargaining in Montana's Protective Services, 32 Mont. Lawyer 8, 40 (2007); see also Chilling Effect, supra p. 9, at 304-05.

Final offer arbitration involves risks, uncertainties, and costs of non-agreement that are calculated to press the parties toward compromise. "Final-offer arbitration attempts to increase the costs of not settling agreement by eliminating the arbitrator's ability to compromise issues." Joan Weitzman & John M. Stochaj, Attitudes of Arbitrators Toward Final-Offer Arbitration in New Jersey, 35 Arbitration Journal 25, 27 (March 1980). "The theory behind final-offer arbitration is that it will . . . create a climate for settlement, because the cost of disagreement is so great that [the parties] will be more likely to settle than to risk an arbitrator's award." James L. Stern et al., Final-Offer Arbitration 125 (1975). "[T]he possibility that either party may lose everything in arbitration will act as an incentive for them to seek security in their own agreement. . . . [T]he potentially severe costs of disagreement will enable [final offer arbitration] to function as a 'strikelike' mechanism which pushes the parties together in a manner that conventional arbitration does not." Chilling Effect, supra p. 9, at 305.

Final offer arbitration was first applied to a municipal labor dispute in 1971 and was adopted by statute in two states in the following year. Kearney & Carnevale, supra p. 10, at 282. It gained considerable acceptance during the

1970s, see Adams, supra p. 12, at 215, and by now has been adopted in a substantial number of states, see Hoh, supra p. 12, at 8. It has been the subject of considerable study and commentary. See, e.g., Final Offer Arbitration, supra p. 10; Paul F. Gerhart & John E. Drotning, A Six State Study of Impasse Procedures in the Public Sector (1980).

Final offer arbitration may be conducted on an issue by issue basis or a package basis. Charles B. Craver, Public Sector Impasse Resolution Procedures, 60 Chi.-Kent L. Rev. 779, 785 (1984) (hereinafter Impasse Resolution Procedures). If the arbitration is by issue, "the items under impasse are decided upon separately by the arbitrator." Kearney & Carnevale, supra p. 10, at 274. In package arbitration, "the neutral must select the last offer of one party or the other in its entirety." Id. "[E]ntire-package selection prevents arbitrators from imposing their version of desirable compromises upon the parties in multi-issue disputes, a freedom they would appear to have to at least some degree under issue-by-issue selection arbitration." Hoh, supra p. 12, at 40. The procedures through which public sector interest arbitration has been implemented through statutory schemes differ considerably from one state to another. Impasse Resolution Procedures, at 785.

In New Mexico, public employees were accorded statutory collective

bargaining rights upon enactment of the original PEBA in 1992, see NMSA 1978, §§ 10-7D-1 to -26 (repealed 1999), although collective bargaining in the public sector existed for a number of years in the state prior to its passage, see Local 2238 of the Am. Fed'n of State, County & Mun. Employees v. Stratton, 108 N.M. 163, 168, 769 P.2d 76, 81 (1989). The original PEBA included a sunset provision that took effect in 1999. In 2003 the current version of PEBA was enacted. See NMSA 1978, §§ 10-7E-1 to -26 (2003), as amended. See generally S. Barry Paisner & Michelle R. Haubert-Barela, Correcting the Imbalance: The New Mexico Public Employee Bargaining Act and the Statutory Rights Provided to Public Employees, 37 N.M. L. Rev. 357 (2007). Whereas PEBA originally provided for impasses in public-sector collective bargaining to be addressed only through mediation and advisory fact finding, NMSA 1978, § 10-7D-18(B) (repealed 1999), "the current version . . . requires binding arbitration to resolve an impasse in the negotiation of a collective bargaining agreement." City of Deming v. Deming Firefighters Local 4521, 2007-NMCA-069, ¶ 22, 141 N.M 686, 160 P.3d 595; see also Int'l Ass'n of Firefighters, Local 1687 v. City of Carlsbad, No. 28,189, slip op. ¶ 1 (N.M. Ct. App. June 23, 2009) ("PEBA . . . provides for final, binding arbitration as an impasse procedure" for public employers and employee representatives); id. ¶ 5 (legislative history).

Specifically, Section 18(B) of PEBA, which deals with impasses in collective bargaining between public employers including the Hospital and their employees, see NMSA 1978, § 10-7E-4(S) (2003), adopts what the reader will now recognize as binding, final offer, package arbitration as the required method of impasse resolution. Id. § 10-7E-18(B) (2003). The statute contemplates a three-step process for achieving a labor agreement when an impasse arises. First, the statute presupposes that negotiations between the parties have occurred, leading to impasse. See id. § 10-7E-4(K) ("'impasse' means failure of a public employer and an exclusive representative, after good-faith bargaining, to reach agreement in the course of negotiating a collective bargaining agreement").

Second, the statute calls for the involvement of a mediator to assist with negotiations to resolve the impasse. See id. § 10-7E-18(B)(1) (2003); see also id. § 10-7E-4(P). Third, if the impasse continues after a 30-day mediation period, either party may initiate arbitration. Id. § 10-7E-18(B)(2). The parties select an arbitrator, who "shall render a final, binding, written decision resolving unresolved issues . . . . The arbitrator's decision shall be limited to a selection of one of the two parties' complete, last, best offer." Id.

PEBA authorizes a public employer such as the University to adopt "by . . . resolution" its own "system of provisions and procedures" governing collective

bargaining. Id. § 10-7E-26(B) (2003). In doing so, the employer must comply with PEBA in various respects and must include certain required provisions, including "impasse resolution procedures equivalent to those set forth in Section 18" of PEBA. Id. § 10-7E-26(B)(8). Under the authority conferred by PEBA, the University adopted the LMRR. (See R.P. 192-207.)

Like PEBA, the LMRR envisions a three-step process of negotiation and impasse resolution. The first step is commencement of negotiations. LMRR § 15(B) (R.P. 202). Then, "if an impasse occurs, either party shall request mediation assistance." LMRR § 15(C)(1) (R.P. 203). Finally, "if the impasse continues after thirty (30) calendar days," either party may initiate arbitration by requesting a list of arbitrators. Once the parties have selected an arbitrator,

> [t]he arbitrator shall render a final, binding, written decision resolving unresolved issues no later than thirty (30) calendar days after the arbitrator has been notified of his or her selection by the parties. The arbitrator's decision shall be limited to a selection of one of the two parties' complete, last, best offer.

LMRR § 15(C)(2) (R.P. 203-04.)

The specific, final offer procedure prescribed for impasse arbitration under the LMRR and PEBA controls over the general Uniform Arbitration Act provision authorizing an arbitrator to "conduct an arbitration in such manner as the arbitrator considers appropriate." NMSA 1978, § 44-7A-16(A) (2001). See Marbob Energy

Corp. v. N.M. Oil Conservation Comm'n, 2009-NMSC-013, ¶¶ 14, 15, 146 N.M. 24, 206 P.3d 135 (applying rule that where two statutes may apply, the more specific statute governs). Thus the LMRR, as informed by PEBA and the policies underlying that statute, provides the law that governs this case. It is under that law that the arbitrator's manner of conducting the impasse arbitration proceedings between the Hospital and the Union must be examined.

B. The Arbitrator Exceeded His Jurisdiction and Powers by Conducting Impasse Arbitration in the Absence of an Impasse.

While the decision of an arbitrator is subject to limited review under the Uniform Arbitration Act, see NMSA 1978, § 44-7A-24(a) (2001), a court must itself determine the initial question of the arbitrator's authority to proceed. See Gonzales v. United S.W. Nat'l Bank, 93 N.M. 522, 523, 602 P.2d 619, 620 (1979) (court's responsibility to determine whether contract to arbitrate exists). "Until this threshold issue is resolved, an arbitrator has nothing to arbitrate." Id.

An arbitrator's authority, if any, most commonly arises out of an agreement by disputants to arbitrate. E.g., Gonzales. In such cases, "[a]rbitrators exceed their powers when they attempt to resolve an issue that is not arbitrable because it is outside the scope of the arbitration agreement." Town of Silver City v. Garcia, 115 N.M. 628, 632, 857 P.2d 28, 32 (1993) (internal quotation marks & citation

omitted).

In the present case, however, the arbitrator's authority derives from PEBA through the LMRR, the terms of which determine whether the collective bargaining impasse was arbitrable at the time the arbitrator conducted the hearing in December 2007. The LMRR is to be interpreted according to its clear, unambiguous language. Marbob Energy Corp. v. N.M. Oil Conservation Comm'n, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135.

Under the LMRR, a party may invoke impasse arbitration "if the impasse continues after thirty (30) calendar days." LMRR § 15(C)(2) (R.P. 203); cf. NMSA 1978, § 10-7E-18(B)(2). Accordingly, the LMRR establishes two preconditions to arbitration. First, there must be an impasse. Second, the impasse must continue for more than 30 days.

The LMRR defines "impasse" to mean failure of the parties to reach a collective bargaining agreement "after good faith bargaining." LMRR § 4(L) (R.P. 193); cf. NMSA 1978, § 10-7E-4(K). Bargaining therefore must have ended for an impasse to exist. If bargaining resumes, an impasse cannot exist, let alone continue.

In this case, before the start of the arbitration hearing the Union, on its own initiative, substantially modified the final offer it had made at the point of impasse.

See supra p. 3. It made what amounted to a counteroffer to the Hospital's prior offer of November 6, 2007, supra pp. 2-3, changing its position on issues that previously had been sticking points.

In the world of labor-management relations, "[a]n impasse can end suddenly; almost any changed condition or circumstance that renews the possibility of fruitful discussions will terminate the impasse. Thus, a party's willingness to change its previous position can end the impasse." 1 John E. Higgins, Jr., The Developing Labor Law 995 (5th ed. 2006) (footnote omitted). The Union's presentation of a new offer reopened the bargaining process. But "there must first be an impasse" before an impasse arbitrator has jurisdiction to proceed. Patent Office Prof'l Ass'n v. Fed. Labor Relations Auth., 26 F.3d 1148, 1153 (D.C. Cir. 1994) (emphasis omitted). Until impasse again was reached and continued for the requisite period, the arbitrator had no authority to proceed with the hearing.

C. The Arbitrator Exceeded His Powers and Engaged in Misconduct by Failing to Conduct the Final Offer Arbitration Process Required by Law.

As previously noted, see supra Point I(A), the LMRR, guided by PEBA, prescribes the method of impasse resolution that is to be employed in collective bargaining negotiations between the Hospital and its employees. Under PEBA as

reenacted in 2003, the legislature replaced mediation and fact finding with a process of binding, final offer, package arbitration. See supra p. 15. See State v. Shay, 2004-NMCA-077, ¶ 7, 136 N.M. 8, 94 P.3d 8 ("By deliberately changing the statute . . . , the legislature indicated its dissatisfaction with the old scheme and an intent to depart from that scheme.").

The arbitrator, interpreting the requirement that he select one or the other of the parties' "complete, last, best offer[s]," LMRR § 15(C)(2) (R.P. 203-04); see also NMSA 1978, § 10-7E-18(B)(2), believed that he was free to allow the Union to modify its position before the arbitration hearing and that he was permitted to elicit revised final offers from the parties before making his award. See supra pp. 3-5. In the arbitrator's view, the LMRR only required him to choose between "the two last, best offers that are before him at the time he makes a decision." Supra p. 4. In so doing, the arbitrator conducted a proceeding that was outside his authority under PEBA and the LMRR.

In construing a statute – in this case, in determining what the legislature meant by the PEBA requirement that the arbitrator must select one or the other party's "complete, last, best offer" – a court must "look at the objectives the legislature sought to accomplish and . . . interpret the statute to achieve" the legislative intent. Garcia v. Thong, 119 N.M. 704, 706, 895 P.2d 226, 228 (1995).

By opting for final offer, package arbitration for public-sector impasse resolution, the legislature signaled its intent to adopt the most forceful scheme for inducing the parties to reach an agreement prior to the issuance of an arbitration award. The most effective way to achieve the legislature's purpose is to require the arbitrator to choose between the parties' final offers at the time impasse is reached. The arbitrator here failed to do so.

This is not to say, as the Union contends, that the Hospital insists on "freezing" the parties' positions at impasse and prohibiting them from finding their way to a negotiated agreement even as the arbitration proceeds. (See Br. in Chief at 12.) It is a firmly accepted tenet in labor-management relations that a negotiated agreement between the parties always is preferable to terms imposed by a third party. See Harold Newman, Interest Arbitration: Impressions of a PERB Chairman, 37 Arbitration Journal 7, 8 (Dec. 1982) ("Voluntary agreements that do not involve utilization of third party neutrals are the kind of agreements that should be sought. . . . No labor neutral, no matter what his or her background, skills, education, or experience, can know as much about the parties' needs as they do."); see also Gerhart & Drotning, supra p. 14, at 39 ("From a purely game theory point of view, the expected value of the outcome submitted to the impasse procedure is lower than the outcome reached through bargaining, because neutral

arbitrators cannot have the same insight into what the respective parties value most." (footnote omitted)). (See Br. in Chief at 13-14.) The Hospital does not dispute this view. The question posed in the present case, however, is not whether the parties should be permitted, or even encouraged, to try to compromise their positions while an arbitration is ongoing. The question is what the arbitrator's alternative choices should be when the parties remain unable, at the end of the arbitration, to resolve their differences and reach agreement. In such a case, to comport with legislative intent the arbitrator's choices must be limited to the final offers of the parties at the point of impasse, prior to arbitration.

An examination of final offer arbitration principles supports this conclusion. To begin, commentators, scholars, and practitioners repeatedly emphasize that the goal of final offer arbitration is not to produce an arbitral award but to push the parties to negotiate beyond impasse to achieve their own agreement. "The overriding purpose of the final-offer procedure . . . is to induce the parties to make their own compromises by posing potentially severe costs if they do not agree. . . . [T]he final-offer mechanism is intended to promote the give-and-take of good-faith bargaining. . . rather than to serve as a mechanism by which arbitrators may exercise their discretion." Gary Long & Peter Feuille, Final-Offer Arbitration: "Sudden Death" in Eugene, 27 Indus. & Lab. Rel. Rev. 186, 202 (1973-74). See

also, e.g., Newman, supra p. 22, at 7 ("The goal of final offer arbitration is to make arbitration unnecessary."); Weitzman & Stochaj, supra p. 13, at 27 ("[F]inal offer arbitration has as its basic objective the advancement of collective bargaining and voluntary agreement."); Stern et al., supra p. 13, at 136 ("Avoidance of the end result – the choosing of one or the other final offer by an arbitrator – seems to be the prime objective of final-offer arbitration procedures.").

"[T]he parties in any bargaining relationship will reach agreement only when they perceive that the costs of remaining in disagreement exceed the costs of agreeing." Chilling Effect, supra p. 9, at 302-03. Final offer arbitration accomplishes its goal of promoting collective bargaining by confronting the parties with costs of continued impasse that are greater than the cost of settlement.

The chief cost of ongoing impasse is the risk that the opposing party's position will be selected by the arbitrator. Final offer arbitration itself involves more risk to the parties than conventional arbitration, because the arbitrator is constrained to choose between the parties' last offers and cannot adopt a middle ground. See id. at 304 ("[F]inal offer arbitration attempts to increase the costs of disagreement by eliminating arbitral discretion."); see supra p. 12. And while final offer arbitration conducted issue by issue may allow the arbitrator to fashion a labor contract with "something for each side," lessening the parties' risk, see

Long & Feuille, supra p. 23, at 203, final offer arbitration by the package method poses even greater risk because a party may see its entire package of terms rejected and may be saddled with the complete set of terms proposed by its opponent. Final offer, package arbitration with its "all or nothing" alternatives thus exerts the strongest pressure on parties to settle. Zack, supra p. 10, at 579 ("Each party must run the risk of its whole package being thrown out because of the unreasonableness or unacceptability of even one element therein. Only in that way can the greatest pressure be exerted on the parties for direct settlement."); see also Hoh, supra p. 12, at 40; Chilling Effect, supra p. 9, at 309. By selecting this method of impasse resolution, the legislature expressed an intent that the impasse resolution process be implemented so as to press the parties most firmly to settlement.

Final offer arbitration exerts the greatest pressure on parties to settle when the parties' final offers are fixed before the arbitration commences and no further movement that occurs, short of settlement, can affect the positions between which the arbitrator is required to choose. This conclusion follows once the operation of the final offer approach to enhance settlement incentives is understood, as discussed above.

Two commentators, each seeking to design a final offer procedure aimed at

maximizing the parties' incentives to negotiate, arrive at substantially similar approaches that incorporate two features germane to this appeal: early submission of the parties' final offers, which cannot be modified before the arbitrator makes a selection. See Negotiating Incentives, supra p. 11, at 216; Zack, supra p. 10, at 578. "The final offer should come at the commencement of the arbitration step, not at its conclusion. . . . Unless the final offer is made at the outset, the arbitration will be an open-ended and amorphous undertaking of little purpose." Zack, at 581 (footnote omitted). And, although allowing modification of offers could make the arbitrator's choice easier by narrowing the parties' differences, "it would be detrimental to the voluntary settlement objectives of the procedure. Once the parties prepare their final offer, they should be forced to adhere to it in arbitration. . . . The risk of keeping the case before the arbitrator is heightened by allowing only one final offer. . . . The likelihood of voluntary resolution is greater if the parties are bound by their original offers." Id. See also Negotiating Incentives at 216-17 ("A crucial requirement is that the selection decision shall be between the two final offers originally submitted and shall not be based on any movement that occurred during mediation. . . . [T]his procedure should increase each party's perceptions of the costs of remaining in disagreement beyond the impasse declaration point . . . because the parties will not be able to modify or

amend their final offers at a later date. . . . [T]his procedure is riskier . . . and hence the parties should have increased incentives to avoid impasses and negotiate their own agreements."). To repeat an earlier point, however, supra p. 22, there is no reason to prohibit the parties from negotiating an agreement to avoid an arbitral choice – which, after all, is the aim of the final offer method. "The procedure would not be adversely affected . . . if the parties remain free to settle the dispute on their own. " Zack, supra p. 10, at 581. The arbitrator simply must make a decision, if necessary, between the parties' original final offers and may not permit the final offers to be modified before the decision is made.

Another writer compares two statutory schemes that adopt final offer impasse arbitration, one of which requires fixed final offers in advance of the arbitration hearing and the other of which does not. Hoh, supra p. 12, at 40-41. The writer concludes that the former procedure better directs the parties toward settlement, promotes good faith bargaining, and avoids excessive reliance on arbitral determinations. Id. He, too, remarks that the parties "are free to continue bargaining during the arbitration proceeding" but notes that "the arbitration itself . . . does not become an extension of the bargaining proces[s]." Id. at 41.

Applying this insight to the PEBA three-step process of negotiation, mediation, and final offer impasse arbitration, see supra p. 16, it follows that the

process works most effectively to foster agreement, as the legislature intended, if the parties are bound in the arbitration hearing by their positions at impasse, prior to arbitration. If the parties may modify their "final" offers to draw closer together during arbitration, the risk of an arbitral determination if impasse continues is diminished.

This Court already has recognized that in interpreting PEBA the judicial goal is "to fulfill the intent of the Legislature in enacting the statute." Int'l Ass'n of Firefighters, slip op. ¶ 9. See W. Des Moines Educ. Ass'n v. Pub. Employment Relations Bd., 266 N.W.2d 118, 125 (Iowa 1978) (construing state's impasse arbitration statute, in light of legislature's adoption of final offer arbitration scheme, so that "the goals of final offer arbitration are more nearly fulfilled"). PEBA and the LMRR should be interpreted to promote the legislative purpose of bringing the parties to agreement by maximizing the risks of continued impasse. Accordingly, the parties' positions at impasse preceding the arbitration should define the parties' complete, best, final offers between which the arbitrator must choose. See La Crosse Professional Police Ass'n v. City of La Crosse, 568 N.W.2d 20, 24, (Wis. Ct. App. 1997) (impasse arbitrator's award properly vacated where arbitrator modified party's final offer rather than selecting between unmodified final offers as required by statute; modification exceeded arbitrator's

powers and "undermine[d] the purpose of final offer arbitration").

As the district court observed, the arbitrator here confused the arbitration hearing with an extension of mediation. (Tr. 9-10, 28.) See Weitzman & Stochaj, supra p. 13, at 28-29; Stern et al., supra p. 13, at 73 (discussing concept of "med-arb" and how mediator, by making powerful suggestions, may press parties to settlement). This may not be an uncommon failing. See Kearney & Carnevale, supra p. 10, at 288 ("It is not unusual for neutrals to exceed their statutory authority in the quest for a voluntary settlement. . . . [A]rbitrators frequently serve a mediative function even in the absence of a med-arb provision."). But it is a failing nonetheless. By extending mediation into the arbitration phase, the arbitrator adopted a process that lessened the parties' incentive to bargain in good faith during the earlier steps. See Weitzman & Stochaj, supra p. 13, at 34 (reporting on study of final offer arbitration in which arbitrators engaged in mediation; "[T]he arbitrators repeatedly noted that the parties were not engaging in meaningful bargaining prior to the initiation of arbitration."); Gerhart & Drotning, supra p. 14, at 161 ("mediation by arbitrators merely enhances the 'chilling effect'" on bargaining). More importantly, by allowing modification of the final offers before making his choice between the revised offers, the arbitrator followed a procedure that actually reduced the pressure on the parties to reach

their own agreement – a defect that manifested itself in this case, which ultimately concluded with an arbitral award rather than a voluntary settlement. The arbitrator did not achieve the goal or follow the process envisioned by the legislature in enacting PEBA.

The arbitrator's actions are not even consistent with the arbitrator's own logic in justifying them. The arbitrator ruled that he was "compelled" by the language of the LMRR to select between the last, best offers of the parties "that are before him at the time he makes a decision." (R.P. 15.) Yet the arbitrator did not do this; he based his decisions on the parties' post-hearing offers of January 4, 2008, and disregarded the modifications made in subsequent discussions. See supra p. 5.

The Union advances three arguments in defense of the arbitrator's actions: (1) the theory advanced by the Hospital and accepted by the district court would "require[ ] parties to end negotiations . . . prior to an arbitration" and "does not allow parties' positions to evolve after impasse has been declared" (Br. in Chief at 4, 12); (2) the arbitrator correctly viewed the absence of an express statutory prohibition on modification of final offers as a legislative license to permit the practice (Br. in Chief at 12-13) (see R.P. 17); and (3) allowing final offers to be modified lessens the likelihood that the arbitrator would have to choose between

two unpalatable options (Br. in Chief at 10-11).

The first of these arguments already has been addressed. It is not the Hospital's position, nor the ruling of the district court, that parties to final offer arbitration are barred from settling their differences after arbitration has been invoked in order to avoid an arbitral award. Supra p. 22. The flaw in the Union's argument is that it equates "allowing parties to modify their final offers" with "[a]llowing parties to make concessions . . . to encourage and facilitate settlement." (Br. in Chief at 14.) Under final offer theory, as previously discussed, the former is prohibited in furtherance of the latter.

Reliance on legislative silence is "at best a tenuous guide" to statutory interpretation. Swink v. Fingado, 115 N.M. 275, 283, 850 P.2d 978, 986 (1993). In this instance, the legislature likely felt no need to mire itself in detail when its intent was adequately set forth. The legislature's express adoption of final offer, package arbitration carries the clear implication that the procedure should be conducted so as best to achieve its goal of encouraging collective bargaining. Even the Union finds the statute plainly expressive of an intent to promote voluntary settlement of labor disputes. (Br. in Chief at 13-14.) See also N.M. Dep't of Health v. Compton, 2001-NMSC-032, ¶ 18, 131 N.M. 204, 34 P.3d 593 (statutory construction question unanswered due to legislative silence is resolved

"by looking to the provisions of the [statute] as a whole and by assessing the purposes of" the term at issue).

Finally, it is no objection at all that if an arbitral award must be made the result may include contract terms that are far from optimal. That is part of the design, and a source of the effectiveness, of the final offer, package method that the legislature selected. A commentator explains:

> Probably the strongest and most publicized objection to the final offer concept, especially with package selection, has focused on the difficulty . . . of fashioning an equitable award in multi-issue disputes where the arbitrator has no discretion to strike a balance between the parties' positions. . . . However, this leads to a key point, which is that the purpose of the final offer concept is to make it costly for the parties to disagree, and the discretionless arbitrator is the mechanism for imposing these costs. . . . Consequently, objections to the lack of discretion and subsequent likelihood of poor quality or inequitable arbitration awards mean that final offer procedures are functioning exactly as they were designed to function.

Chilling Effect, supra p. 9, at 309-10 (footnote omitted). See also Zack, supra p. 10, at 579 ("[I]t must be borne in mind that the sense of reasonableness on the part of the arbitrator and the achievement of the most equitable or desirable agreement, are not the primary purposes of final offer selection. Rather, the objective is independent settlement by the parties. The greater the risk to each party of submitting a final offer, the greater the likelihood of settlement.").

Upon examination, then, the arbitrator's actions cannot be justified. The

arbitrator exceeded the powers conferred on him by PEBA and the LMRR to conduct a final offer, package, impasse arbitration proceeding designed to maximize the parties' incentives to settle. The hybrid mediation-arbitration process with modified final offers conducted by the arbitrator was not authorized by the legislature and was not within his powers or the scope of his permissible conduct. See Jaycox v. Ekeson, 115 N.M. 635, 637, 857 P.2d 35, 37 (1993) ("While judicial review of arbitration awards is limited to the grounds established in the Arbitration Act, the court may review arbitration proceedings to ensure that they comport with the Act's procedural requirements." (citation omitted)); cf. Maquoketa Valley Cmty. Sch. Dist. v. Maquoketa Valley Educ. Ass'n, 279 N.W.2d 510 (Iowa 1979) (interest arbitration award invalidated where panel failed to select one of parties' final offers or fact finder's report, as a whole, as required by impasse resolution statute); McFaul v. UAW Region 2, 719 N.E.2d 632 (Ohio Ct. App. 1998) (arbitrator exceeded powers by compromising between parties' final offers rather than choosing one or other as statute required). In carrying out his responsibility to conduct an impasse arbitration proceeding consistent with PEBA, the arbitrator was not at liberty to disregard the policy choices made by the legislature.

The Union may reply with arguments as to why allowing an arbitrator to

blend elements of mediation into a final offer arbitration may lead to a better process. The arbitrator himself appears to feel that it is preferable to permit interest arbitrators to resolve an impasse by fashioning a compromise rather than by choosing between fixed final offers. See Gerhart & Drotning, supra p. 14, at 169-70. But while arguments of that nature might well be made to the legislature in debating whether PEBA should be amended, they can have no bearing on the present appeal. The arbitrator's actions were beyond his powers and outside the scope of his authorized conduct under the law as it stands.

D. The District Court Properly Vacated the Arbitrator's Award.

The arbitrator's manner of proceeding forced the Hospital to submit to impasse arbitration when the collective bargaining negotiations were not at impasse, see supra, Point I(B), and to undergo arbitration in a procedural environment that led to an arbitral award, rather than one in which the parties were motivated by strong incentives to settle, supra, Point I(C). The arbitrator's actions were prejudicial to the Hospital. The district court correctly concluded that the arbitrator's award should be vacated in these circumstances.

An arbitrator's award may be vacated if the arbitrator exceeded his or her powers. NMSA 1978, § 44-7A-24(a)(4). To be confirmed, an award must be "within the scope of the submission." Fernandez v. Farmers Ins. Co., 115 N.M.

622, 625-26, 857 P.2d 22, 25-26 (1993). When parties arbitrate by agreement, the scope of the submission which binds the arbitrator is determined by the terms of their contract giving the arbitrator authority over specified issues in particular circumstances. See Spaw-Glass Constr. Servs., Inc. v. Vista de Santa Fe, Inc., 114 N.M. 557, 559, 844 P.2d 807, 809 (1992) ("The arbitrator's powers are determined by the arbitration clause in the contract."). In this case involving statutory interest arbitration, the scope of the submission is defined by PEBA and the LMRR. Supra, Point I(A). The arbitrator exceeded that scope, and thus his jurisdiction and powers, by proceeding in the absence of an impasse and following a process other than that prescribed by the legislature.

An arbitrator's award may be vacated for misconduct if the arbitrator has made an error of law of sufficient magnitude. Fernandez, 115 N.M. at 626, 857 P.2d at 26 (equating sufficiently gross error of law with arbitral misconduct, which is ground for vacating award); NMSA 1978, § 44-7A-24(a)(2)(C). The present case does not involve an arbitrator who simply misconstrued an unsettled point of substantive law in determining the rights of the parties – an error that a reviewing court must abide to accommodate the judicial policy favoring arbitration. Cf. Fernandez. Here it is the arbitrator's very authority to proceed at all, or in the manner that he did, that is at issue. The arbitrator's mistake goes to the very

foundation of this proceeding. In addition to exceeding his powers, the arbitrator engaged in misconduct by conducting impasse arbitration in a manner not legislatively authorized.

Because multiple statutory grounds for vacating the arbitrator's award exist in this case, the district court properly declined to confirm the award and correctly set the award aside.

II. THE DISTRICT COURT PROPERLY VACATED THE ARBITRATION AWARD BECAUSE THE AWARD REQUIRES A BONUS PAYMENT THAT CONTRAVENES THE NEW MEXICO CONSTITUTION AND THEREFORE VIOLATES PUBLIC POLICY.

The Union's final contract package selected by the arbitrator includes a $500 bonus payable to each member of the bargaining unit. Supra p. 5. After the existing collective bargaining agreement between the Hospital and the Union expired in April 2007, the parties continued to be governed by the expired contract while attempting to negotiate its successor. See LMRR § 15(C)(3) (R.P. 204); NMSA 1978, § 10-7E-18(D). The arbitrator understood the bonus payment to be a rough attempt to compensate bargaining unit members retroactively because of the months of delay in implementing wage increases under a new contract. (R.P. 48.) The Union did little to disguise this fact. (R.P. 40-41.) The bonus term in fact requires members of the bargaining unit to do no work, possess no extra job

qualifications, and meet no standard of quality or longevity in order to qualify for a bonus payment. To receive a bonus, they need only be members of the unit when the new contract goes into effect.

The Hospital contended in the arbitration that it could not lawfully pay what by all rights was de facto retroactive compensation to employees. It renewed that contention in the district court as an alternative reason to vacate the arbitration award, arguing that the award could not be confirmed because it violates public policy. (R.P. 185-90.) The district court concluded that the Hospital's position was correct and that the bonus provision violates article IV, section 27 and article IX, section 14 of the New Mexico Constitution. (R.P. 434.)

Violation of public policy may serve as a common-law ground for vacating arbitration awards. See K.R. Swerdfeger Constr. Co. v. Bd. Regents Univ. of N.M., 2006-NMCA-117, ¶ 20, 140 N.M. 374, 142 P.3d 962 (noting adoption of doctrine in other jurisdictions); see also United Nuclear Corp. v. Gen. Atomic Co., 98 N.M. 633, 642-43, 651 P.2d 1277, 1286-87 (1982) (applying public policy violation as one ground for vacating arbitration panel's award). E.g., Lee v. El Paso County, 965 S.W.2d 668 (Tex. App. 1998) (arbitrator's interpretation of collective bargaining agreement that would have required county to violate state constitution properly set aside); cf. Judicial Enforcement, supra p. 11, at 574

("[C]ourts do not sustain arbitral directives which require the performance of improper acts."). Some courts reach the same result by holding that an arbitral award that would require a public employer to commit an illegal act exceeds the arbitrator's powers. See, e.g., Ridley Park Police v. Borough of Ridley Park, 524 A.2d 998 (Pa. Commw. Ct. 1987).

The principle under which courts have adopted public policy violation as a basis for refusing to enforce arbitration awards applies with special justification to interest arbitration awards in the public employment domain. That principle reflects "the public's interest in having its views represented in matters to which it is not a party but which could harm the public interest." Seymour v. Blue Cross/Blue Shield, 988 F.2d 1020, 1023 (10th Cir. 1993). Because courts will not lend their powers to the enforcement of contracts that violate clearly stated public policy, see K.R. Swerdfeger, 2006-NMCA-117, ¶¶ 22, 23, it is appropriate to deny judicial confirmation to an interest arbitrator's award of a contract that would be unenforceable even if the parties had freely negotiated it.

The K.R. Swerdfeger court declined to adopt or apply public policy as a ground for vacating an arbitration award absent citation to authority containing an "explicit statement of a fundamental public policy" that was violated by the award in question. 2006-NMCA-117, ¶ 26. In this case, as the district court properly

recognized, the New Mexico Constitution expresses a clear and fundamental policy that requires the arbitration award to be vacated.

Article IV, section 27 of the state Constitution provides: "No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made." The provision "necessarily refers to extra compensation for that which is contracted to be performed" pursuant to an existing contract. State ex rel. Sedillo v. Sargent, 24 N.M. 333, 336, 171 P. 790, 791 (1918). Article IX, section 14 of the Constitution prohibits the State, with certain exceptions not applicable here, from making "any donation to or in aid of any person." A "donation" means a "gift" – a transfer of something of value without consideration. Village of Deming v. Hosdreg Co., 62 N.M. 18, 28, 303 P.2d 920, 926 (1956).

In State ex rel. Sena v. Trujillo, 46 N.M. 361, 129 P.2d 329 (1942), the Supreme Court invalidated a statute that granted a pension to a state employee who ceased working for the state before the statute was enacted. The Court held that the statute, as applied to former employees, violated both these constitutional provisions. The Court noted that the pension could not have served as consideration to the employee during the time he worked for the State, id. at 368, 129 P.2d at 333, and, as it constituted either extra compensation for past services

or a donation, it could not be upheld. Id. at 369, 129 P.2d at 333 ("The constitution makes no distinction as between 'donations', whether they be for a good cause or a questionable one. It prohibits them all. And, likewise, [the constitution prohibits] the giving of extra compensation, 'after services are rendered.'" (quoting N.M. Const. art. IV, § 27)).

A number of Attorney General opinions conclude that the extra compensation or anti-donation clauses of the Constitution, or both, prohibit granting retroactive pay to state employees. See, e.g., N.M. Att'y Gen. Op. No. 71-07 (Jan. 25, 1977) (granting additional pay to employees of Department of Health and Human Services for services already rendered would violate art. IV, § 27); N.M. Att'y Gen. Op. No. 62-28 (Feb. 5, 1962) (art. IV, § 27 precludes "all agencies, departments or institutions of state government" from granting retroactive salary increases; retroactive payments to employees of Miners' Hospital prohibited); N.M. Att'y Gen. Op. No. 57-308 (Nov. 27, 1957) (additional payment to a state employee in November for October services "would be clearly illegal"); N.M. Att'y Gen. Op. No. 4440 (Jan. 20, 1944) (disbursing extra funds to teachers as bonuses would violate both art. IV, § 27 and art. IX, § 14).

The Union argues that because the bonus provision is included in a contract for current employees, and because the Hospital includes bonus payments in its

own compensation scheme that are "not illegal" (Br. in Chief at 17), the bonus payment in this case must be valid. The Hospital agrees that legitimate bonus payments are a lawful form of compensation. But merely labeling a payment as a bonus does not answer the question of validity as the Union appears to believe. The dispositive fact is that the bonus which the Union seeks to defend is intended as additional compensation for services already performed and compensated under the prior contract during its extension through the period of negotiation and impasse arbitration. It could be nothing else – unless it is an outright gift. Either way, the bonus provision in the arbitrator's award violates the state's public policy as expressed in the state Constitution. The district court was correct in vacating the award on public policy grounds.

The arbitrator felt that he could award the Union's proposed contract even if the bonus provision is unconstitutional because the provision, if invalid, could be severed from the resulting labor agreement. Supra pp. 5-6. Before the district court, the Union sought to defend the arbitrator's award on this ground. (See R.P. 402; Tr. 14.) The Union does not advance the severability argument in its opening appellate brief and therefore has abandoned it. City of Santa Fe v. Komis, 114 N.M. 659, 665, 845 P.2d 753, 759 (1992) (issue raised at trial but not briefed on appeal is abandoned). The Union contends only that the bonus does not violate

the state Constitution. This argument fails for the reasons above stated.

Even if considered, the Union's severability argument cannot render the arbitral award confirmable. Allowing the arbitrator to award a contract that includes an illegal provision that may be severed is tantamount to allowing the arbitrator to award only part of the Union's final offer – a result that is incompatible with the concept of final offer, package arbitration. Supra p. 14.

Because the contract awarded by the arbitrator includes a bonus provision that would require the Hospital to violate constitutional restrictions on the expenditure of public funds, the award violates public policy and could not properly be confirmed. The district court correctly vacated the award.

Conclusion

For any and all of the foregoing reasons, the judgment of the district court should be affirmed.[1]

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[1]In its prayer for relief, the Union requests that the district court be directed to confirm the arbitrator's award. (Br. in Chief at 19.) Even if this Court were inclined to reverse the order vacating the award, the Union's request goes too far. As the Court recently recognized in International Association of Firefighters, "the arbitrator's authority to render a final, binding decision . . . is contingent upon the appropriation and availability of funds when the decision requires the expenditure of funds." Id., slip op. ¶ 12; see NMSA 1978, § 10-7E-17(E) (2003); cf. LMRR § 15(C)(2) (R.P. 204). The award therefore cannot be confirmed until the district court determines that the funding contingency has been satisfied. If funds are not appropriated and available, confirmation should be denied. Int'l Ass'n of Firefighters, slip op. ¶ 25.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing pleading was served upon

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by first-class mail this 8th day of July, 2009.

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