BEFORE IRA S. EPSTEIN, ARBITRATOR

In the Matter of the Arbitration Between DOÑA ANA COUNTY (SHERIFF) and THE COMMUNICATION WORKERS OF AMERICA, LOCAL 7911	DECISION AND AWARD OF THE ARBITRATOR FMCS No. 13-51332-1 (Impasse Arbitration)

APPEARANCES:

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For the Union: Stanley M. Gosch, Esq.
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BACKGROUND

The Communication Workers of America, Local 7911 (the Union) is the exclusive bargaining representative with respect to wages, hours, and other conditions of employment for a unit of between 92 and 110 sworn officers employed by the Doña Ana County Sheriff's Department (the Employer). The unit consists of deputies, corporals, criminal investigators, and sergeants (Tr. 20, 178).

The Employer's first Collective Bargaining Agreement with the Union was effective from 2006 until 2008. A successor Collective Bargaining Agreement was reached and executed on January 23, 2008 (Jt. Exh. 4). This Collective Bargaining

Agreement was effective through June 30, 2010 (Jt. Exh. 4 at p. 39). The relationship between the parties is governed by the Public Employees Bargaining Act, NBSA 1978, Section 10-7E-1 et seq., (PEBA). Public sector employers may create their own labor boards in a consistent manner with and guided by PEBA. The Employer has adopted its own ordinance, Ordinance No. 215-04, consistent with its authority under PEBA (Jt. Exh. 1).

In the instant case, the parties' Collective Bargaining Agreement expired on June 30, 2010, before the parties could successfully negotiate a successor agreement. The parties engaged in a total of 19 negotiating sessions through July 2012. Section 15 (C)(3) of the County's Ordinance requires that "the existing contract will continue in full force and effect until it is replaced by a subsequent written agreement." As a result, the Officers' wages and benefits remained unchanged at the 2010 level. After a declaration of an impasse by the parties, last best offers were exchanged. (Jt. Exh. 2 and 3).[1] The parties proceeded to mediation pursuant to the Ordinance. Following mediation sessions, the Presidency of the Union changed, and the new President, Ken Roberts, requested additional bargaining sessions in an attempt to reach an agreement (Tr. 23-25). Four more sessions took place in an unsuccessful attempt to reach an agreement.

When the parties cannot successfully negotiate a Collective Bargaining Agreement, Section 15 (C)(2) of the County Ordinance directs the parties to resolve disputes through binding arbitration, which award is enforceable under the New Mexico Uniform Arbitration Act and the County Ordinance. Under the Ordinance, "The

[1] The Union's and the Employer's final offers submitted as complete collective bargaining agreements are identified and attached as Exhibit "A" and "B" respectively.

arbitrator's decision shall be limited to a selection of one of the two parties' complete, last, best offer."

Pursuant to the County Ordinance, the Arbitrator was selected by the parties from a panel submitted to them by the Federal Mediation and Conciliation Service. On June 13, 2013, an arbitration hearing was conducted on the matter in Las Cruces, New Mexico. A transcript of the hearing was made. The parties were given full opportunities to present evidence, testimony, and arguments as deemed relevant.

The parties stipulated that an impasse had been reached, and the dispute deferred to me, as sole Arbitrator, for a final and binding award, subject to the right of the Employer or the Union to seek judicial review (Tr. 6).

Following the submission of evidence and testimony at the hearing, the parties requested and were given the opportunity to submit post-hearing briefs. The hearing was held open for the submission of the briefs. The briefs were received by August 2, 2013, at which time the matter became ready for the issuance of an award. The parties waived ordinance Section 15(C)(2) that requires the Arbitrator to render a decision resolving unresolved issues no later than 30 calendar days after the Arbitrator has been notified of his selection by the parties.

CRITERIA TO BE CONSIDERED BY THE ARBITRATOR

Doña Ana County Ordinance Sections 14 and 15

SECTION 14. SCOPE OF BARGAINING

. . .

E. Any agreement or impasse resolution by the employer and an exclusive representative that requires the expenditure of funds shall be contingent upon the specific appropriation of funds by the governing body and the availability of funds to fund the agreed upon provision. An arbitrator's

decision shall not require the re-appropriation of funds.

. . .

SECTION 15. NEGOTIATIONS AND IMPASSE RESOLUTION

. . .

C. The following impasse procedure shall be followed by the employer and exclusive representative:

1) if an impasse occurs, either party shall request mediation assistance. If the parties cannot agree on a mediator, either party may request the assistance of the federal mediation and conciliation service;

2) if the impasse continues after thirty (30) calendar days, either party may request an unrestricted list of seven (7) arbitrators from the federal mediation and conciliation service. The parties shall choose one arbitrator by alternately striking names from such list. Which party strikes the first name shall be determined by coin toss. The arbitrator shall render a final, binding, written decision resolving unresolved issues no later than thirty (30) calendar days after the arbitrator has been notified of his or her selection by the parties. The arbitrator's decision shall be limited to a selection of one of the two parties' complete, last, best offer. However, an impasse resolution decision of an arbitrator or an agreement provision by the employer and an exclusive representative that requires the expenditure of funds shall be contingent upon the specific appropriation of funds by the governing body and the availability of funds. An arbitrator's decision shall not require the employer to re-appropriate funds. The parties shall share all of the arbitrator's costs incurred pursuant to this subsection equally. Each party shall be responsible for paying any costs related to its witnesses and representation. The decision shall be subject to judicial review pursuant to the standards set forth in the Uniform Arbitration Act.

3) In the event that an impasse continues after the expiration of a contract, the existing contract will continue in full force and effect until it is replaced by a subsequent written agreement. However, this

> shall not require the employer to increase any employees' levels, steps, or grades of compensation contained in the existing contract.

ISSUE

The issue to be determined is as follows: Pursuant to the requirements of Doña Ana County Ordinance No. 215-04, Section 14. E. and Section 15 (C)(2), which of the two parties' complete, last, best offers is preferable? The ordinance also requires that special consideration be given to the specific appropriation funds for costs occasioned by the parties' last, best offers.

DISCUSSION

The determination of which party's final offer is more appropriate requires consideration of the various aspects of the changes to the current Collective Bargaining Agreement advanced by the parties. Each section of the proposed contractual provisions must be considered and evaluated to arrive at a fair adjudication of the entire issue.[2]

The issues remaining for resolution were essentially 19 articles of the Collective Bargaining Agreement. The Employer has proposed numerous changes to the existing Collective Bargaining Agreement and offered additional articles as part of its last, best offer. Both parties are essentially agreed to the major substantive issues, such as wages, insurance, and step increases for years of service. As previously mentioned, bargaining unit employees have not received a pay increase since 2010. Additionally, they have not received step increases since that date. The Employer proposes bringing the unit employees up to the step they would have progressed to since March 2010 and granting backpay for the increase in wages that the progressive steps would have provided. The

[2] Baker & Co., 7 LA 350, 353 (Kirsh, 1947); City of Manitowoc, Wis. 108 LA 140, 145 (Michelstetter, 1997).

Employer estimates that this would amount to a 7% increase in wages. The time necessary to progress through the various step increases may vary depending upon the duration of the proposed Collective Bargaining Agreements.

The following major issues in dispute will be addressed herein.

DISCUSSION

A. Article 2 – Fair Share

The Employer proposes to add an indemnification clause to the Fair Share Article. It also seeks to add additional language to this article to the effect that dues from non-members "cannot be used for political or other purposes." Moreover, the Employer also seeks to require an annual audit to determine the cost of enforcing the contract for new members, as opposed to the status quo which requires a one-time audit (18 months after the signing of the contract).

The Union proposes to retain the current language in the article. It contends that there is no evidence to support the necessity of the changes the Employer has sought or any problems with the current language. It points out that the AFSCME contract (Union Exh. 1) between the Employer and the Union which represents court security personnel includes a fair share provision, but does not include any of the new language sought by the Employer.

The Employer contends that the Union's proposed language to include reference to the "association" is contrary to the exclusive bargaining representative certified by the Labor Management Relations Board. Therefore, according to the Employer, the current language does not state the legally certified collective bargaining representative and must be substituted for its proposed fair share language.

The Arbitrator finds this last argument is without merit. The term "association" refers to the Union, which is the legally certified bargaining representative of the employees. To argue that the "association" is a separate entity from the Union is a distinction without a difference. As to the language, to the effect that dues from non-members cannot be used for "political or other purposes," the addition of the term "other purposes" lends an open-ended feature to the clause which would encourage litigation. Furthermore, the indemnification clause would leave the Union liable for expenses or litigation arising out of, or as a result of, claims involving the interpretation of "other purposes." The Employer has not presented any evidence of problems encountered under the existing language. Under these circumstances, the existing language is a reasonable alternative to the Employer's proposal.

B. Article 8 – Sick Leave

The Employer has proposed to change the way sick leave is accrued, while the Union has proposed to maintain the status quo. Under the Collective Bargaining Agreement, employees who worked a 10-hour shift earned 4.5 hours of sick leave per pay period, while those working an 8-hour shift earned 3.85 hours of sick leave per pay period. The Employer's position is that the existing language grants more sick leave to employees working a 10-hour shift than to employees working an 8-hour shift. Therefore, if the total number of hours worked is the same, all employees should accrue the same amount of leave. The Union argues that 74% of the bargaining unit works a 10-hour shift, and the Employer's proposed change would result in a financial reduction to a majority of the bargaining unit members.

The Employer has also proposed language regarding the ability of employees to contact on-duty supervisors to request sick leave if the employee's immediate supervisor may not be reached. According to the Union, this change represents a more formalized method of requesting sick leave. In addition, the Employer is proposing a "sick leave bank" which the bargaining unit has never used, never requested, and never knew existed. The Union's contention is that a more formalized method of requesting sick leave would cause distress among bargaining unit members. It also contends that the Employer did not submit any evidence concerning problems encountered under the current contract language.

C. Article 9 – Sick Leave Conversion Payout

The Employer proposes to limit the payout for sick leave accrued at the time of retirement to 600 hours for a maximum cash payout of $15,000. The current Agreement allows an employee, with 15 years of service, to convert accrued sick leave into a maximum payout of $30,000. The Union moved off the status quo and proposed limiting the maximum payment to $25,000.

According to the Employer, the Union's proposal would cost an additional $35,149.64 for the accrued sick leave for four current bargaining unit employees nearing retirement. This amount would be beyond what has been appropriated to fund the Employer's last, best offer.

The Union argues that very few employees would utilize this benefit. According to the testimony of Union President Roberts, few employees stay in the bargaining unit beyond the mandatory 15 years. These employees either leave the Sheriff's Department or are promoted out of the unit (Tr. 34-35). The Union also argues that senior employees

scheduled to lose their unused sick leave would undoubtedly be more likely to utilize their earned, paid sick leave days, requiring the Employer to call in replacements. These replacements would likely be brought in on overtime, ultimately costing the Employer more money than required under the status quo (Tr. 38).

D. Article 12 – Vacation Leave Accrual

Under the current Agreement an employee is allowed to cash in his or her unused vacation time upon retirement, up to a maximum of 400 hours. The Employer has proposed to cap an employee's payout of vacation time at retirement to 300 hours. The Employer estimates the cost of the current benefit is $6,579, based on three eligible employees retiring this year. The Union argues that the savings the Employer hopes to achieve with this proposal is greatly overstated. Senior employees scheduled to lose their unused vacation time will undoubtedly use the paid time, requiring the Employer to call in replacements. It alleges that the replacements would be brought in at a higher overtime rate and result in costing the Employer more money than under the status quo.

E. Article 22 – Performance Evaluations

The Union has proposed to change Article 22 to give it the right to grieve Performance Improvement Plans to arbitration and to apply the "just cause" standard used for placing an employee on a Performance Improvement Plan. According to the Union, the existing Collective Bargaining Agreement requires the "just cause" standard to be applied to evaluate disciplinary actions. The Union argues that the Performance Improvement Plan is often used in disciplinary reviews and, therefore, is a form of disciplinary action.

The existing Collective Bargaining Agreement provides that disciplinary actions appealed to arbitration require the arbitrator to "apply just cause as the standard for discipline . . ." (Jt. Exh. 4 at p.19). The Employer asserts that the Union's proposal requiring "just cause" for placing an employee on a Performance Improvement Plan converts an issue of coaching and attempting to help an employee to correct his or her behavior into an issue of disciplinary action. It also asserts that allowing an employee to use the Union to grieve the Performance Improvement Plan would increase the costs to the Employer by $12,000 per year. This figure is based on the estimate of two arbitrations concerning the plan, per year. In fact, there have been no arbitrations since the inception of the collective bargaining relationship.

There is no language in Article 22 of the current Collective Bargaining Agreement that provides for a formal Performance Improvement Plan. This type of plan is usually put into effect when an employee has serious job performance problems. Coaching, on the other hand, is an informal method of correcting an employee. In the usual employment setting governed by a collective bargaining agreement, coaching cannot be used for disciplinary purposes. If the Performance Improvement Plan is used by the Employer to establish a pattern of misconduct requiring discipline, it is not unreasonable to apply the "just cause" standard to the Performance Improvement Plan.

F. Article 25 – Negotiating Procedures

Under the existing Collective Bargaining Agreement, the Employer pays up to four Union members at half their pay rate to attend bargaining sessions, for up to four hours per session. The Employer contends that this constitutes an illegal payment and improper use of public monies. It argues that since unit employees are public employees,

subject to the laws of the Constitution in the State of New Mexico, they may not be paid for services not rendered. According to the Employer, attending negotiations is not a service in connection with law enforcement duties. Therefore, the current provision in the Collective Bargaining Agreement allowing payment to attend negotiations constitutes an illegal payment and improper use of public monies. The Employer avers that since the Union's provision requiring the Employer to pay employees for services not rendered is an illegal issue, it prohibits the Arbitrator from selecting the Union's last, best offer.

The Union contends that, under the Anti-Donation Clause of the New Mexico Constitution (Section 30-23-2, NMSA 1978), payment for time and efforts at the bargaining table is not an illegal donation. Under the Anti-Donation Clause, "Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge credit or make any donation to or in aid of any person, association or public or private corporation . . ." id. According to the Union, the donation means a frequent gift or contribution. Here, the Employer is not making a free gift or contribution, but they are paying for the time and efforts employees are expending at the bargaining table.

It is beyond the scope of the Arbitrator's authority to determine whether the payments to employees engaged in negotiations constitutes a felony in violation of Section 30-23-2, NMSA. Article 51 (Savings Clause) of the current Collective Bargaining Agreement states as follows: "If any part of this agreement or any provision contained herein is declared invalid by any tribunal of competent jurisdiction, the validity of the remaining portion shall not be affected." The Savings Clause is present in both the Union's and the Employer's proposed Collective Bargaining Agreements. Thus, even if

this section of the proposal is illegal, it would not affect the validity of the remaining portions of either proposal. In order to ascertain the legal status of Article 25, the parties may seek an advisory opinion from the States Attorney General.

The Employer contends that the Union's proposal on dues deduction addresses the probationary period of newly hired employees. The Employer also contends that new language regarding lateral hires would also be applied to probationary employees and non-bargaining unit employees. This would expand the scope of the bargaining unit and the Union's representational rights which is contrary to law.

The Union's proposal in regard to dues deductions and the other articles stated in the Employer's position are exactly as those found in the existing Collective Bargaining Agreement. Consequently, the Union is not seeking to expand its representational rights. Article 2 of the Collective Bargaining Agreement in regard to probationary employees, when read together with Article 27, makes it clear that there is no attempt to include probationary employees in the unit. The Union opposes the Employer's proposal to lengthen the probationary period to 18 months and wishes to eliminate the probationary period for lateral hires.

G. Article 26 – Union Rights

The Employer has proposed several changes to the Union Rights Article. The Union has agreed to some of the changes but has otherwise proposed to keep the status quo.

The Employer has proposed the following changes. The Employer wants to limit the area where Union officials may meet with their members to an area "designated by the Sheriff" and limit such visits to non-working time. The Employer would have the unit

official obtain written approval for every Union visit, rather than verbal approval as stated in the current Collective Bargaining Agreement. The current language allows a Union representative to speak to an employee for up to five minutes during employee meetings "with prior approval at the sole discretion of the Sheriff . . .." The Employer desires to add language to the effect that the Sheriff's discretion is "final and not grievable and cannot be challenged." Other changes include regulation of items posted on the Union bulletin board.

The evidence produced at the hearing shows that the parties have never raised any concerns about the present Article 26 (Tr. 42-48). The reason for the changes, as advanced by the Employer, is that the Sheriff had "issues in the past with prior leadership in the union."

H. Articles 29 – 33

The Employer's proposal in regard to these articles would envision sweeping changes to the current procedures governing discipline, grievances, and arbitration. First of all, the Employer would exclude written reprimands from the grievance procedure. It would also redefine the current meaning of the term "grievance" to read, "A grievance involving disciplinary action is only with regard to the action taken, not the investigation or findings." The effect of this sentence would be to exclude challenging the fairness of the investigation and findings in an arbitration proceeding concerning discipline.

The Employer would also add new language in regard to officer misconduct. For example: an employee is subject to discipline if he or she is convicted of a felony or "has engaged in any activity" that violates State or Federal law; an employee could be

disciplined if his or her "performance does not meet expectations;" an officer could be disciplined if his or her "performance does not meet expectations."

In addition, the Employer seeks to revise the current language pertaining to the selection of arbitrators. The proposed language would require the Union to strike the first arbitrator from the list of arbitrators provided by the FMCS in each and every case. This would give the Employer the unfair advantage of having the last choice of arbitrators in every case.

For the reasons set forth later in this decision, the Employer's proposals carve grave inroads into the traditional definition of the grievance and arbitration procedure.

OPINION

As discussed previously, my authority is governed by the PEBA and Ordinance 215-06.[3] It is limited to a selection of one of the two parties' complete, last, best offer. In addition, I am limited in selecting an offer that does not exceed the specific appropriation of funds by the governing body and the availability of those funds.

According to the Employer, the total wage and benefit package for the Officers was frozen at the 2010 level at $212,833.11. As to the relative costs of the total package offered by the Employer, Ms. Lusk, Sheriff's Office Department Manager, testified that the Sheriff opted to freeze three sergeants and one lieutenant position to fund the increases contained in the Employer's proposal (Tr. 196-198; Er. Exh. 5 and 6). According to the Employer, the value of the four positions' salaries, retirement, medicare, and insurance totaled $323,975. This amount of money was sufficient to fund the increase contained in the Employer's last, best offer. This offer increased the employees'

[3]See also IAFF Local 244, et. al. v. City of Albuquerque, CV-2010-07778 (6/18/13); IAFF Local 1687 v. City of Carlsbad, 216 P.3d 256, 2009 WL 2160997 (N.M.App.), 186 L.R.R.M. (BNA) 2983, 2009-NMCA-097 (2009).

wages to $319,533.11 (Er. Exh. 6). According to the Employer, the cost of the Union's last, best offer exceeded the Employer's offer by $68,921.78. This figure includes estimated vacation pay, arbitration costs, and sick leave accrual and conversion (Er. Exh. 7).

While the budget for the employees represented by CWA Local 7911 was frozen at the 2010 level, and its members received no pay or step increases, other Sheriff Department employees were more fortunate. The AFSCME unit received a 3% pay increase. Lieutenants, captains, and the undersheriff also received pay increases. In addition, the non-represented staff and managerial employees received wage increases. It follows, then, that additional funds must have been appropriated to fund the 2013 pay raises for the AFSME Unit non-union groups and management.

If the Employer is to argue that the cost of the Union's proposal exceeds the specific appropriation by the governing body and the availability of funds, it must support that argument by a preponderance of the evidence. There was no evidence that the governing body, in this case, the Doña Ana County Commission[4], specifically limited the funds necessary to fund the wage and benefit package for this bargaining unit.

The Sheriff's Department is but one division of Doña Ana County. The evidence shows that the funds allotted to the Sheriff's Department exceeded the funds supposedly "budgeted" for this unit. The record demonstrates that the other units within the Sheriff's Department received wage increases during the period when pay rates were frozen for the employees represented by CWA Local 7911. It follows that the Doña Ana County Commission made a total appropriation of funds to the Sheriff's Department, and that Department allotted those funds to the various groupings within the Department. In fact,

[4] Ordinance No. 215-04, Section 4 (K)

funding the Union's pay and benefit package would not require a reapportioning of funds by the governing body, but a realignment of funds within the Sheriff's Department.

As to the language contained in the proposals, the Employer seeks to make numerous substantive changes to the existing Collective Bargaining Agreement. As the Union points out, the Employer has failed to demonstrate compelling justification for the changes proposed in its last, best offer.

Perhaps the most derisive and objectionable changes contained in the Employer's last, best offer are related to the principle of "just cause." The traditional definition of "just cause," as applied by arbitrators to disciplinary action, is that it "entitled an employee to due process, equal protection, and individualized consideration of specific mitigating and aggravating factors" (Theodore J. St. Antoine, Ed., National Academy of Arbitrators, *The Common Law of the Workplace,* 2nd Ed. (2005) at 171). The application of the just cause principle is further clarified by the following criteria: Did the employee have knowledge of the possible disciplinary consequences of the misconduct? Was the Employer's rule reasonably related to the orderly, efficient and safe operation of the business? Before administering the discipline to the employee, did the Employer make an effort to discover whether the employee's act violated the rule? Was the Employer investigation conducted fairly and objectively? Was there substantial evidence that the employee violated the rule? Was the degree of discipline administered by the Employer reasonably related to the seriousness of the offense? See *Enterprise Wire, Co.,* 46 LA 359 (Daugherty, 1966); *Whirlpool Corp.,* 58 LA 421 (Daugherty, 1972); see also *Coven, et. al., Just Cause: The Seven Tests (*BNA 3d Ed. 2006).

Aside from adding new offenses, such as: "performance did not meet expectations"; "conduct unbecoming an officer"; "providing false or misleading information on a grievance form"; the Employer would add a sentence in the grievance definition provision stating, "A grievance involving disciplinary action is only with regard to the action taken, not the investigation or findings." In addition, the Employer would exclude written warnings from the grievance procedure. These proposed changes would eliminate practically all of the due process protections found in the traditional definition of "just cause." The only item grievable, in a disciplinary situation, would then be the extent of the penalty imposed.

The final attack on the grievance procedure is found in the Employer's zipper clause. Actually, the zipper is at half mast. It prohibits the Union from bargaining with respect to understandings and agreements reached by the parties and permits the Employer to introduce procedures, directions, rules, and regulations not subject to the grievance procedure. This amounts to a waiver of the Union's right to demand bargaining on the introduction, and changes affecting wages, hours, and working conditions.

AWARD

Based upon a careful consideration of the entire record in these proceedings, including consideration of all the statutory criteria contained in New Mexico PEBA and Doña Ana County Ordinance No. 215-04, in addition to those particularly emphasized by the parties and elaborated upon above, the undersigned has concluded that the final offer of the Union is the more appropriate of the two final offers. This decision is clearly

indicated by the specific items discussed above and the non-economic language proffered by the Employer.

Having carefully considered all of the evidence and arguments and a review of all of the various arbitral criteria provided in the New Mexico statutes and the Doña Ana County Ordinance, it is the decision of the Arbitrator that:

1) The final offer of the Union is the more appropriate of the two final offers before the Arbitrator.
2) Accordingly, the final offer of the Union, herein attached as Exhibit A and incorporated by reference into this Award, is ordered implemented by the parties.

Dated this 27th day of August, 2013.

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Ira S. Epstein