BEFORE JOHN A. CRISWELL
Neutral Arbitrator

In the matter of an Arbitration between:

STATE OF NEW MEXICO,

Employer,

and

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 7076

Union.

ARBITRATOR'S INTERIM AWARD

An evidentiary hearing with respect to a dispute between the above parties was held before the undersigned arbitrator on May 6, 2009. At that hearing, Robert P. Tinnin, Jr. of TINNIN LAW FIRM, PC., represented the STATE OF NEW MEXICO (EMPLOYER) and Shane C. Youtz, Esq., of YOUTZ & VALDEZ, P.C., represented LOCAL 7076 (UNION). Sworn testimony was taken from four witnesses and eight joint exhibits (Jt. Ex. 1 through 3F), four UNION exhibits (Un. Ex. 1-4), and eight EMPLOYER exhibits (Ex. S-1 through S-8) were received.

At the conclusion of the submission of this evidence, the parties requested, and were granted permission, to file written post-hearing briefs. In addition, a reporter was engaged by the EMPLOYER to preserve the evidence received at the hearing and a

transcript of the testimony was prepared. The parties' post-hearing briefs were each received by the arbitrator on September 3, 2009, but the reporter's transcript, which he considered necessary for his review, was not furnished to him until September 16, 2009.

Based upon the testimony and other evidence received at the previous hearing, the arbitrator's determination as to the credibility of that evidence, his review of the arguments asserted and authorities cited in the parties' post-hearing briefs, and his own independent research of certain legal authorities, the arbitrator hereby adopts the following findings and conclusions and issues the following INTERIM AWARD:

1. The Issues Presented

At the opening of the hearing, counsel for the EMPLOYER asserted, and counsel for the UNION agreed, that the following issues were presented for resolution by the arbitrator:

1. Did the State of New Mexico violate the collective bargaining agreement between the parties by implementing the pay package for the State's fiscal year 2009 (July 1, 2008 - June 20, 2009) applicable to employees in the bargaining unit, which was adopted by the

State Personnel Board at its meeting on March 14, 2008?

2. If so, what is the appropriate remedy?

2. The Authorizing Statute

The UNION insists that this arbitrator has the authority and jurisdiction to determine whether the EMPLOYER'S actions here violated the provisions of the Public Employee Bargaining Act, Section 10-7E-2, et seq., NMSA (PEBA). The EMPLOYER asserts that I have no such authority. I determine that it is unnecessary for me to resolve this issue because my resolution of the stipulated issues does not require me to address this question.

However, my consideration of the question whether the EMPLOYER violated the collective bargaining agreement must take notice of the general purposes and procedures set forth in the PEBA. It is, after all, this statute which authorized the parties here to engage in the bargaining that led to the contract at issue.

In this respect, the New Mexico legislative has declared that one of the purposes of the PEBA is "to guarantee public employees the right to organize and bargain collectively with their employers." Sec. 10-7E-2. That this right was considered of importance is evidenced by its provision that, in the case of

any conflict with any prior law, the PEBA shall be deemed to have superseded any such laws. Sec. 10-7E-3.

Section 10-7E-5 specifically recognizes the right of all public employees, except management and confidential employees, to join a labor organization for the purpose of collective bargaining through representatives chosen by them, or conversely, to refuse to engage in such activities.

The PEBA creates a state public employee labor relations board, section 10-7E-8, and authorizes it to designate appropriate bargaining units and to establish procedures for the designation and certification of exclusive bargaining representatives. Section 10-7E-9.

Once a bargaining agent is certified, then, section 10-7E-15(A) provides that:

> [a] labor organization . . . shall be the exclusive representative of all public employees in the appropriate bargaining unit. The exclusive representative shall act for all public employees in the appropriate bargaining unit and negotiate a collective bargaining agreement covering all public employees in the appropriate bargaining unit. The exclusive representative shall represent the interests of all public employees in the appropriate bargaining unit without discrimination or regard to membership in the labor organization. (emphasis supplied)

In the event of an impasse, the PEBA provides for mediation and, ultimately, arbitration. Section 10-7E-18(B).

Finally, strikes and lockouts are prohibited, section 10-7E-21. It should be noted, however, that section 10-7E-22 specifically provides that:

> Collective bargaining agreements and other agreements between public employers and exclusive representatives shall be valid and enforceable according to their terms where entered into in accordance with the provisions of the [PEBA]. (emphasis supplied)

3. The Contract

The parties entered into a collective bargaining agreement, which was effective for a three-year period from January 21, 2006 through December 31, 2008. (Jt. Ex. 1, "Agreement"). Among the various provisions of this Agreement that are relevant upon the issues presented here are the following:

By Article 1, the EMPLOYER recognizes the UNION as the exclusive representative for those employees described in Appendix A.

Article 9 contains a grievance and arbitration procedure for resolution of "[a]llegations of violation, misapplication or misinterpretation" of the Agreement.

There are three "steps" in the grievance procedure; the first of which requires a complaining employee to reduce his or her grievance to writing, which is to contain, among other things, "[t]he Article(s) of this Agreement alleged to have been

violated."[1] If these three steps are exhausted without having the grievance resolved, the UNION may refer the dispute to arbitration. The agreement establishes the following as the arbitrator's authority:

> The decision of the arbitrator shall be based upon the facts established by the testimony and documents presented in the case. The arbitrator shall have no power to add it, subtract from, alter, or modify any of the terms of the Agreement, but may give appropriate interpretation or application to such terms and provide appropriate relief. The arbitrator shall not have authority to make an award that includes a fine or other punitive damages or award of attorney's fees. Each party shall pay one-half of the arbitrator's fees and expenses. The arbitrator's decision shall be final and binding on the parties subject only to judicial review in accordance with the New Mexico Uniform Arbitration Act.

Article 27 of the Agreement provides for salary increases for the employees covered by its terms. This provision provides for two different types of pay increase for fiscal year 2009 (July 1, 2008 through June 30, 2009). It first provides that the Governor shall recommend a "salary increase of 2% of the midpoint of an employee's pay band, effective the first full pay period following July 1, 2008, subject to satisfactory performance." (emphasis supplied) As explained in the testimony, this provision was designed to provide the same

[1] The written grievance in this case made no reference to Article 40 of the agreement. Hence, the EMPLOYER argues that I may not consider it. Because I conclude below that this provision is not applicable here, I need not

monetary increase for each employee within the same pay band. For example, with a pay band of $5.00 to $15.00, the mid-point of that band would be $10.00. Two percent of that midpoint would equal $.20, and each employee within that band would receive this amount as an increase to his or her hourly rate.

Article 27 also provides for a second type of pay increase. It provides that, "[s]ubject to legislative appropriation," "bargaining unit members shall receive band salary increases based on the following schedule subject to satisfactory performance," but this increase was not to be effective until January 1, 2009:

Compa-ratio less than 85%	3.5% salary increase
Compa-ratio of 85% - 93.99%	2.5% salary increase
Compa-ratio of 94% to 104.99%	2.0% salary increase
Compa-ratio of 105% or greater	1.0% salary increase

Under this provision, those employees at the lower end of the pay band would receive a greater increase in salary, and those in the higher end would receive a lesser increase. The testimony was that this provision was designed to bring the lower paid employees up to a higher level at a greater rate.

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decide the extent to which Article 9 requires a lay employee to refer to every possible contract provision in his or her written grievance.

Article 27 also contains a provision that contemplates the possibility that the legislature will not enact the Governor's recommendations. That provision reads as follows:

> In the event the salary increases described in Section 1 and/or Section 2 of this Article are not implemented because the legislature fails to appropriate sufficient funds in any fiscal year, the Union has the right to reopen bargaining over general salary and within band pay increase that would be effective for following the fiscal year in which the legislature fails to appropriate sufficient funds to implement this agreement.

Finally, Article 40 recognizes that either the U.S. Congress, federal agencies, or the State legislature may enact changes that "affect terms and conditions of employment . . . and that these legislative or regulatory actions" may alter the conditions established by the Agreement or "conflict with or nullify terms of this Agreement." Should that occur, the parties agree that, upon request, they "shall negotiate over the matter to the extent consistent with the law."

4. The Historical Facts

The historical events leading up to this dispute are largely undisputed, although each party places its own interpretation upon the legal effect of those facts. Nevertheless, the underlying facts disclose the following:

There are approximately 20,000 employees of the State of New Mexico who are subject to the classified system. Of those, about 51%, or about 10,000, have chosen to be represented by a labor organization, while the other 49% have apparently chosen not to do so. Three labor organizations, the American Federation of State, County and Municipal Employees (AFSCME), the UNION, and the Fraternal Order of Police (FOP), represent, collectively, all of the organized employees. AFSCME represents the great majority of these employees, the UNION represents about 3000, and the FOP represents only the few state employees that are in emergency services.

It is apparently true that the UNION and AFSCME cooperate closely together, and it has been represented that the pay provisions of the agreements of each organization are identical. And, in the legislative session of 2008, the staff representative of AFSCME, whose function was to present matters to the legislature, acted on behalf of both organizations.

It is agreed that, at this legislative session, the Governor recommended salary increases for the UNION (and apparently for all classified employees, whether organized or not) consistent with the salary increases called for by the Agreement. And, consistent with the Agreement, he asked

for an increases of 2% as of July 1, 2008, and the compa-ratio increases to be effective as of January 1, 2009.

Before this session, the UNION'S legislative representative, Joshua Anderson, sought advice from the State Personnel Board as to the amount that would be needed to fund the increases called by the Agreement, and he was informed that it would take approximately $15,500,000. This figure, of course, was an amount that would be required to provide all classified employees, whether within a bargaining unit certified by the State Public Employee Labor Relations Board or unorganized, with the same increase called for by the AFSCME and the UNION contracts. In contrast, it would have required an appropriation of only $1,951,888 to fund the increases called for by the Agreement, and only $7,931,514 to fund the increases called for by the contracts with all three labor organizations. (Ex. S-5).

Unfortunately, however, the New Mexico legislature did not follow the Governor's recommendations. Instead of calling for a 2% increase effective on July 1, 2008, and the compa-ratio increase effective on January 1, 2009, the appropriation bill adopted called for a 2.4% increase, all of which was to be effective on July 1, 2008. This bill

did not, however, call for an across-the-board increase of 2.4%. Rather, this legislation appropriated $12,833,000:

> "to provide incumbents in agencies governed by the Personnel Act . . . with an average salary increase of two and four-tenths percent [2.4%] based on employee job performance as determined by the personnel board." (emphasis supplied)(Jt. Ex. 1)

Recognizing that this figure was less than the one provided by the Personnel Board, Anderson then prevailed upon the New Mexico Senate to adopt a further bill, which also became law. This legislation provided for "an additional average salary increase of one-half percent," (emphasis supplied) as of July 1, 2008, that was to be paid for by each agency using its "cash balances, vacancy savings and other available funds." In addition, this bill allowed the Department of Finance and Administration to distribute up to $500,000 out of the appropriated contingency fund to any agency not otherwise being able to fund this increase. (Jt. Ex. 1)

However, because all such salary increases became effective July 1, 2008, rather than deferring some to January 1, 2009, these two laws meant that there was some $2,551,000 less in appropriations than would be required to pay these salary increases to all classified employees. (See Ex. S-5)

To try to deal with this problem, representatives of the Personnel Board met with representatives of the three unions

involved on two occasions, on February 29 and March 10, 2008. At each of these two meetings, the EMPLOYER representatives represented that they would recommend to the Personnel Board a pay plan that would provide a 1% mid-point raise for all employees, effective July 1, 2008 (rather than a 2% raise for the AFSCME and UNION employees, as their contracts called for), plus giving the compa-ratio raises to all employees, effective the same date. (See Ex. S-2 and S-4).

The second meeting came about because the UNION and other representatives had trouble understanding the matters portrayed on the EMPLOYER'S handout at that meeting (Ex. S-2). At the second meeting, the EMPLOYER described the same pay plan that it was going to propose to the Personnel Board as it had at the first meeting, but it explained this pay plan by use of a different handout (Ex. S-4). The UNION and representatives of the other two labor organizations asked for time to consider this proposal and perhaps suggest an alternate pay plan, but they were informed that there was not sufficient time to hold another meeting before the next scheduled Personnel Board meeting.

However, because the Governor's office informed the Personnel Director that the proposal being recommended by the her would be improper, it was recommended to the Board, and the Board adopted, a pay plan that attempted simply to adopt the pay

plan that it considered was incorporated into the two bills. Hence, the pay plan adopted by the Personnel Board provides for:

> "A salary increase of 2.4% of pay-band midpoint to incumbents in agencies governed by the Personal Act," and
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> "An additional 0.5% of pay-band midpoint salary increase for incumbent employees subject to the Personnel Act." (Jt. Ex. 2)

However, unlike the appropriation bill enacted by the legislature, or the additional bill, both of which called for "average" salary increases, this pay plan adopted by the Personnel Board called for an identical percentage "across the board" increase for all employees.

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

It was at this point that the instant grievance (Jt. Ex. 2) was filed. The UNION also filed a complaint with the State Public Employees Labor Relations Board (Un. Ex. 4), but that

board entered an order "deferring" its action on that complaint to this arbitrator. (Un. Ex.3).

5. Analysis

a. The alleged failure to bargain.

The UNION'S principal argument is that the EMPLOYER acted improperly in adopting a pay plan that did not fully pay the employees represented by it the salary increase called for by the Agreement without negotiating with it. It argues that such bargaining was required by the provisions of Article 40, which recognizes that, in the event that the "U.S. Congress . . . and the State Legislature may enact changes that affect the terms and conditions of employment" which "may alter established terms and conditions of employment or conflict with or nullify terms of this Agreement." That provision requires, in such case, that upon request by either party, "the parties shall negotiate over the matter to the extent consistent with law."

The EMPLOYER complains that the UNION'S written grievance did not refer to this contract provision, and consequently, this arbitrator cannot consider it. In addition, it calls attention to the specific provisions of Article 27 of their Agreement, which provides that, if the wage increases called for by the Agreement are not "implemented" because sufficient funds have not been appropriated for this purpose, the UNION has the right

to "reopen" negotiations over pay increases, and any negotiated increases would become effective for the next fiscal year.

I tend to agree with the UNION that this latter provision should be read as applying only to a fiscal year that is already subject to an existing collective agreement. Here, the parties were already obligated to bargain over the next fiscal year's salaries, because the Agreement was due to expire before that fiscal year began and it would be inapplicable thereafter. In such a circumstance, a contractual obligation to bargain for the next fiscal year is meaningless, because the PEBA already establishes such an obligation.

However, I conclude that neither of these contractual provisions are applicable here.

First, even if I were to consider the provisions of Article 40, I would have to conclude that nothing in the appropriation or salary laws enacted by the legislature in 2008 brought about any "changes that affect the terms and conditions" of the employees represented by the UNION, nor did those laws "conflict" with any provision of the Agreement. Hence, even if I considered this provision, I would conclude that it is inapplicable to the present dispute.

Likewise, for the reasons that I summarize below, because I conclude that the legislature did not fail "to appropriate sufficient funds" to pay the wage increase called for by

Agreement, I also conclude that the contract provision relied upon by the EMPLOYER is inapplicable to this dispute.

Hence, I conclude that, given the specific circumstances disclosed by the evidence in this case, the UNION has failed to sustain its burden of establishing that the EMPLOYER improperly failed to bargain with it.

b. The alleged failure to pay the salaries called for by the Agreement.

I do conclude, however, that the EMPLOYER improperly failed to pay the salaries called for by its Agreement with the UNION. I reach this conclusion by the application of certain rather well-established general principles.

First, the PEBA makes clear that the Agreement involved here is "valid and enforceable." Hence, it stands on the same footing as would an agreement between the State and any vendor or supplier. The fact that it is a collective bargaining agreement does not diminish in any way its status as a binding, enforceable contract.

Second, a labor organization certified by the State Public Labor Relations Board as the representative for an appropriate bargaining unit of state employees can bargain only on behalf of those employees. It cannot bargain with respect to state employees who are not within that bargaining unit, and no

provision of any collective agreement resulting from that bargaining is intended to benefit any employee outside the bargaining unit. Conversely, subject to the application of any appropriate state law or lawful regulation of the Personnel Board, the state remains free to establish the wages, hours of work, and other terms and conditions of employment of those state employees, who have not elected to be included within an appropriate bargaining unit and to be represented by a bargaining agent, on an entirely unilateral basis.

Applying these general principles to the evidence presented here, then, I must first determine what obligations with respect to the pay of the employees represented by the UNION the EMPLOYER assumed by entering into this Agreement.

The EMPLOYER, referring to Article 27's reference to the requirement for the Governor's to recommend the salary increases called for by the Agreement, argues that, once such a recommendation is made, as it was here, the state's obligation under the Agreement has been fully performed, and the Agreement does not require any payment of such salary increases. However, I reject this interpretation of this Agreement as being totally unreasonable and bordering on sophistry.

Indeed, the very provision relied upon by the EMPLOYER upon the question of its requirement to negotiate, Art. 27, Sec. 3, demonstrates that the "salary increases" set forth in that

Article will not be implemented only if "the legislature fails to appropriate sufficient funds in any fiscal year." This provision, as well as the overall context of the pay provisions, clearly establishes an obligation for the EMPLOYER to "implement" the salary increase if there are sufficient appropriated funds to pay for them.

Clearly, therefore, the Agreement created a "valid and enforceable" obligation on behalf of the EMPLOYER to implement and pay the salary increases, both the mid-band increases and the compa-ratio increases, called for by the Agreement.

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

The evidence demonstrates that it would have required an appropriation of only $1,952,588 to fund the raises called for by the Agreement, and of only $2,551,319 if the compa-ratio increase was to be made effective as of July 1, 2008, rather than on January 1, 2009. Indeed, to fund all of the salary increases called for by the three collective bargaining agreements that the EMPLOYER had negotiated with the three bargaining agents and to make all such increases effective on July 1, 2008, rather than some effective January 1, 2009, would

have required a total appropriation of only $10,633,299. Yet, the legislature appropriated a total of $12,833,000. And, this was in addition to a further 1/2% average increase that was to be paid for out of the various agencies' other appropriated funds.

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

The EMPLOYER seems to argue that it was obligated to increase the salaries of these non-represented employees because of the provisions of the appropriations bill itself. I disagree.

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

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

Suffice it to say that I find no ambiguity in these two bills. They clearly require only that the wage increases to be received by incumbents "average" a total of 2.9%. And, no evidence was presented by the EMPLOYER that it was impossible to comply with this requirement by granting the represented employees their legally required salary increase while providing a lesser increase to the unrepresented employees.

Finally, no evidence, other than the two pay bills themselves, was presented that would indicate that the EMPLOYER owed any legal obligation to pay to the unrepresented employees the same salary increases that the contacts covering the

represented employees called for. While the EMPLOYER unilaterally may elect to do so, providing it first fully satisfies the clear legal obligation it owes to the employees covered by the Agreement, it is certainly under no legal obligation to do so.

Hence, I conclude that, by failing to pay to the employees represented by the UNION the pay increases called for by the Agreement, but with both increases effective July 1, 2008, the EMPLOYER violated Article 27 of the Agreement.

In reaching this conclusion, I have reviewed the arbitration award that the UNION attached to its brief, entered by Arbitrator Alvin L. Goldman in a dispute between AFSCME and the EMPLOYER, dated June 15, 2009, which presented substantially the same issue under the AFSCME contract. In doing so, I fully recognized that that award is in no way binding upon me in resolving the issue presented here. See Elkouri and Elkouri, "How Arbitration Works," (ABA 6th Ed. 2003), pp. 588-591. I also accepted the EMPLOYER'S representation that it has commenced judicial proceedings to attempt to have that award vacated, although I have not been informed of the grounds upon which such vacation is sought. However, given New Mexico's strong policy favoring arbitration, e.g., Fernandez v. Farmers, Ins. Co., 115 N.M. 622, 857 P.2d 22 (1993), I can only presume that it is based, not upon Arbitrator Goldman's findings of fact

or conclusions of law, but upon his alleged lack of authority to provide the remedy his award called for. In any case, I should emphasize that my award in this case would have been the same even had I not been advised of that previous award.

6. The Remedy

Because I have concluded that the EMPLOYER violated the Agreement by failing to pay the salary increases called for by the pertinent agreement, those employees are entitled to be made whole for such violation. I am not certain, however, of the possible means available to achieve this. Hence, this award shall not be a final award; it shall be an interim award only, and pending the issuance by this arbitrator of a final award, the parties are specifically directed and enjoined to do the following:

First, the EMPLOYER shall provide a written accounting to the UNION, which shall set forth the names of those employees, who were represented by the UNION during the 2009 fiscal year and who would have received a salary increase had those increases called for by the Agreement been implemented. Such accounting shall also set forth the increased amount of salary that each such employee would have received if the contract increases had been paid, but with such increases both effective on July 1, 2008. Such accounting shall be provided to the UNION within 30 calendar days from the date of this award.

Second, the parties shall then confer together to attempt to agree upon a proper, legal method which could be used to have each such employee paid the increased amount that he or she would have been paid. Any such agreement may contain provisions making the execution of such an agreement to be without prejudice to either party's right to challenge the validity of this interim award through any proper legal proceedings. The parties shall, within 30 calendar days after the UNION'S receipt of the EMPLOYER'S accounting, advise the arbitrator whether any such agreement has been reached. If so, such agreement shall be incorporated into a final award of this arbitrator.

Third, if no such agreement can be reached, then on a date to be mutually agreed upon by counsel, but no later than 90 days from the date of this interim award, each party shall file with this arbitrator a supplemental statement of position, which shall outline that party's submissions with respect to the nature of the remedy that should be adopted by him. Such submission shall describe the means and methods available to a judgment creditor of the State of New Mexico to collect on his or her judgment.

This arbitrator shall retain jurisdiction to consider any agreement or further submissions of the parties and to enter a final award herein.

Done this 25th day of September, 2009.

JOHN A. CRISWELL, Arbitrator