In the Matter of the Arbitration	)	
	)	OPINION AND AWARD
between	)	
	)	OF THE
VISTA GRANDE CHARTER HIGH SCHOOL	)	
Taos, New Mexico	)	ARBITRATOR
	)	
-and-	)	FMCS Case No. 11-55446-1
	)	Interest Arbitration Dispute
VISTA GRANDE FEDERATION OF UNITED SCHOOL EMPLOYEES, AFT	)	

APPEARANCES

For the School:

Dina E. Holcombe	Attorney
Elizabeth Trujillo	Finance Director
C. J. Grace	School Director
John L. Martinez	Chief Negotiator

For the Union:

Andrew Lotrich	Staff Representative
Brenda Peterson	Local President

PERTINENT PROVISIONS – PUBLIC EMPLOYEE BARGAINING ACT (JX-1)[1]

10-7E-17. Scope of bargaining. (2003)

A. Except for retirement programs pursuant to the Public Employees Retirement Act [Chapter 10, Article 11 NMSA 1978] or the Educational Retirement Act [Chapter 22, Article 11 NMSA 1978], public employees and exclusive representatives;

(1) shall bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties. However, neither the public employer nor the exclusive representative shall be required to agree to a proposal or to make a concession; and

(2) shall enter into written collective bargaining agreements covering employment relations.

[1] JX, SX and UX refer respectively to Joint, School and Union Exhibits, with each reference followed by an exhibit number. SB refers to the post-hearing brief on behalf of the School. UB1 refers to the Union's pre-hearing brief pertaining to the issues in dispute. UB2 refers to the Union's pre-hearing brief concerning the question of appropriation of funds. UB3 refers to the Union's post-hearing brief. All references to briefs are followed by a page number(s).

B. The obligation to bargain collectively imposed by the Public Employee Bargaining Act [10-7E-1 to 10-7E-26 NMSA 1978] shall not be construed as authorizing a public employer and an exclusive representative to enter into an agreement that is in conflict with the provisions of any other statute of this state and an agreement entered into by the public employer and the exclusive representative in collective bargaining, the statutes of this state shall prevail.

* * *

D. The scope of bargaining for representatives of public schools as well as educational employees in state agencies shall include, as a mandatory subject of bargaining, the impact of professional and instructional decisions made by the employer.

E. An impasse resolution or an agreement provision by the state and an exclusive representative that requires the expenditure of funds shall be contingent upon the specific appropriation of funds by the legislature and the availability of funds. An impasse resolution or an agreement provision by a public employer other than the state or the public schools and an exclusive representative that requires the expenditure of funds shall be contingent upon the specific appropriation of funds by the appropriate governing body and the availability of funds. An agreement provision by a local school board and an exclusive representative that requires the expenditure of funds shall be contingent upon ratification by the appropriate governing body. An arbitration decision shall not require the reappropriation of funds.

F. An agreement shall include a grievance procedure to be used for the settlement of disputes pertaining to employment terms and conditions and related personnel matters. The grievance procedure shall provide for a final and binding determination. The final determination shall consist of an arbitration award within the meaning of the Uniform Arbitration Act [44-7A-1 to 44-7A-32 NMSA 1978]; such award shall be subject to judicial review pursuant to the standard set forth in the Uniform Arbitration Act.. The costs of an arbitration proceeding conducted pursuant to this subsection shall be shared equally by the parties.

* * *

10-7E-18. Impasse resolution. (2003)

* * *

B. The following impasse resolution procedures shall be followed by all public employees and exclusive representatives, except the state and the state's exclusive representatives:

(1) if an impasse occurs, either party may request from the board or local board that a mediator be assigned to the negotiations unless the parties can agree on a mediator. A mediator with the federal mediation and conciliation service shall be assigned by the board or local board to assist negotiations unless the parties agree to another mediator; and

(2) if the impasse continues after the thirty-day mediation period, either party may request a list of seven arbitrators from the federal mediation and conciliation service. One arbitrator shall be chosen by the parties by alternatively

striking names from such list. Who strikes first shall be determined by coin toss. The arbitrator shall render a final, binding, written decision resolving unresolved issues pursuant to Subsection E of Section 17 [10-7E-17 NMSA 1978] of the Public Employee Bargaining Act and the Uniform Arbitration Act [44-7A-1 to 44-7A-32 NMSA 1978] no later than thirty 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 (sic). The costs of an arbitrator and an arbitrator's related costs conducted pursuant to this subsection shall be shared equally by the parties. Each party shall be responsible for bearing the cost of presenting its case. The decision shall be subject to judicial review pursuant to the standard set forth in the Uniform Arbitration Act.

* * *

BACKGROUND

On May 22, 2010 the Public Employee Labor Relations Board of the State of New Mexico certified the American Federation of Teachers—New Mexico (AFT-NM) as the exclusive bargaining representative for the certified employees of the Vista Grande High School, also know as the Vista Grande Charter High School (School or VGHS), in Taos, NM. The bargaining unit currently consists of 10 teachers and one counselor providing education to a student body of approximately 100. The School, governed by a Governing Council with a Director responsible for ongoing operations, is part of the Taos Municipal School District (TMS). The School is unique in that a wilderness experience is part of the curriculum.

Negotiations for an initial collective bargaining agreement (CBA or Agreement) took place in fall 2010. When no Agreement was achieved, mediation followed and this, too, did not result in complete agreement. On March 7, 2011 the Union presented a last, best offer. On March 23, 2011, VGHS presented its last, best offer.[2] Of a total of 47 Articles, the parties went to arbitration with agreement on the following 18: Parties to the Agreement, Recognition, Sole Agreement, Management Rights, Assignments, Vacancies, Employee Investigations, Employee Discipline, Academic Freedom, Health & Safety, FMLA, Legislative Leave, Military Leave, Professional/Educational Leave, Sabbatical Leave, Severability, Duration and Signatures. While elements of the Salary Article are in

[2] The School had presented an earlier offer, which the Union argued should be the last, best offer of record. For reasons noted below in this Opinion and Award, the Arbitrator accepted the later offer.

dispute the parties have agreed on the basic salary schedule. Items on which there is agreement are not a part of the considerations herein.

Consideration has been given to the following 29 disputed articles: Agreement Controls, Definitions, Union Rights, Employee Rights, Seniority, Employment Procedures, Licenses, Workyear/Workday, Class Size/Professional Development, Special Education, Student Discipline, Alcohol/Drug Abuse. Personnel File, Teaching Environment, Employee Evaluation, Leaves, Bereavement, Paid Leave, Leave without Pay, Civic Duty Leave, RIF, Insurance, Re-employment, Salary, Grievance and Arbitration, Negotiation Procedures, Committees, Copies of the Agreement, Waiver.

After impasse was declared, the parties selected the undersigned to conduct a hearing and "render a final, binding, written decision resolving unresolved issues pursuant to Subsection E of Section 17 [10-7E-17 NMSA 1978] of the Public Employee Bargaining Act. . ." (JX-1). The undersigned was given electronic notice of his appointment on May 9, 2011 and accepted the appointment that day. In an attempt to meet the requirements of the Act that the arbitrator's decision shall be issued no later than 30 days after notification of selection to the arbitrator, the parties agreed to a rare Saturday-Sunday, May 21-22, 2011 hearing. Because of major storms affecting operations of the Dallas-Fort Worth Airport on May 20, resulting in numerous cancelled flights, the arbitrator was unable to travel to Taos for the hearing, thus rendering the 30-day deadline impossible to meet. The matter was rescheduled for and heard on July 6, 2011 at the VGHS in Taos, NM. The parties stipulated that the dispute was properly before the arbitrator. Witnesses were affirmed before testifying and cross examined. Testimonial and documentary evidence was received. The second post-hearing brief was received on July 20, 2011, but copies of the cases cited in the Union brief were not received until on or about July 27, 2011, at which time the record was closed[3]. The Union had submitted pre-hearing briefs dealing with the issues in dispute and with the question of the flexibility, if any, in the use of already-approved funds for the coming school year.

[3] For unknown reasons, electronic versions of laws and cases could not be printed, necessitating an additional delay for hard copies.

ISSUE

The parties agree that the primary issue before the arbitrator is:

Which of the parties' last, best offers shall be selected?

There is a possible, related issue concerning the use of previously approved funds.

SCHOOL POSITION

For reasons summarized below, the School asserts that its last, best offer (LBO) should be selected because it "contains reasonable language, widely accepted and utilized, and within the appropriation of the School" while the Union's offer exceeds appropriated funds and violates constitutional and legal provisions (SB-20).

1. The Union's offer incorporates illegal provisions including "payments for services not rendered for attending legislative sessions and/or state and national conventions and for lost inclement weather days not to be made up if student contact hours still exceed the minimum. The latter payments would violate the State constitution and payments for Union business would not benefit the School. The Union's Leave without Pay provision would violate the 13th Amendment to the U.S. Constitution, which prohibits involuntary servitude.

2. The School's offer maintains the legal distinction between probationary and tenured employees, with probationary employees prohibited from appealing termination. The Union proposal gives both groups the right to appeal terminations.

3. The School's offer is consistent with law in recognizing the School Director as the employer, while the Union's offer is not legally compliant in that it would have the Governing Council administer a variety of personnel matters. The Union's request to negotiate the school calendar was unaccompanied by a specific proposal or a calendar to attach to the Agreement, while the School's proposed a calendar developed by the Director, a parent and a local Union official to be approved by the Governing Committee. Language defining an emergency is unnecessary because the PEBA contains a definition.

4. The School would allow an employee to cease dues deduction at any time; the Union would limit the withdrawal period to two weeks in December. The Union proposals have "utilized different descriptions of when Union activity can occur, thereby creating ambiguity" rather than the clarity that promotes sound labor relations (SB-9).

5. School language on employee rights recognizes both employee rights and School obligations. VCHS would reference the right to have discharges and terminations conducted in accordance with the law" and to have the employee "determine whether his/her personal information would be shared with the Union. . ." (SB-9). The Union is silent on these matters and would "limit the School's ability to have a witness present during evaluation," which would diminish "the School's ability to train other individuals or provide the required mentorship to teachers performing as administrative interns during the process of obtaining an administrator's license" (SB-9).

6. The Union misunderstood the School's willingness to pay for a license endorsement or certification beyond that required.

7. The School would discontinue the multi-mosaic schedule to better coordinate with transportation and food services; the Union did not justify continuation of the multi-mosaic schedule. As exempt employees under FLSA, teachers are not entitled to added pay for staff meetings. They should use preparation time for work assignments, not personal business. The Union proposal on preparation and collaboration time leaves open the possibility of a significant increase inconsistent with current practice.

8. The School's proposal regarding Special Education provides the possibility of a variety of ways to cover class while the teacher is in conference while the Union would require a substitute teacher.

9. "Student discipline is a permissive subject of bargaining inasmuch as it does not affect the wages, hours, and terms and conditions of the bargaining unit employees' employment" (SB-11).

10. The School has offered to continue to follow the TMS policy on Alcohol and Drug Abuse "with the understanding that appeals to the school board mean the VGHS Governing Council, not TMS's School Board" (SB-12). The Union argument that it means the latter "is absurd" (SB-12). While the Union argues that reference to the TMS school district is inappropriate, it references TMS several times in its own proposal. The Union proposal requiring "the Director to prepare an affidavit at the time of observing an employee under the influence of drugs or alcohol under reasonable suspicion testing is unduly restrictive.

11. The Union proposal on paid leave, which omits explanations as to what the "requirements" are, would change "a benefit subject to approval to an entitlement" (SB-13). The School would continue the current bereavement leave policy while the Union would allow added time away from the classroom at additional cost. The Union proposal on personal leave is unclear and could be expansive. The Union proposal allowing employees to buy back unused sick leave would cost the School additional money.

12. "(T)he Union's proposal contains contradictory language with regard to when the notice to open negotiations must occur and what the parties will be allowed to negotiate" (SB-14).

13. The School proposes handling discharges and terminations in accordance with the law. The Union would improperly wave the statutory requirement in favor of an alternative procedure so that an employee might be able to have an arbitration hearing under both the law and the contractual grievance procedure.

14. The arbitrator is required to provide a final and binding decision by selecting one of the last, best offers. The offer selected must not require funds in addition to those already appropriated. Appropriated funds for the forthcoming VGHS school year include salaries and the proposed sick leave incentive but would not cover additional costs associated with the Union's offer. The School's cost figures were not refuted by the Union. A Union argument that the School could not elect to appropriate needed funds if the Union offer were selected ignores the PEBA's final and binding requirement. Arbitrators Toedt and Spurlock have "upheld the statute's limitation on the arbitrator to choose a last, best offer that does not require the appropriation of funds" (SB-18). New Mexico court decisions add further support for the above contention.

15. Brenda Peterson testified for the Union that she received a copy of the TMS Alcohol and Drug Policy during negotiations and that the staff had been discussing a student discipline matrix outside of the bargaining process. "These two (2) issues coincide with the School's proposal" (SB-19). Testimony that a substitute is not always hired against a teacher's absence was not explained, but the Union provided no other cost figures. Because substitutes are used at times, there will be a cost factor.

16. "The Union filed two Pre-Hearing Briefs, both of which the School objected to, stating that the Union was limited to presenting factual evidence during the hearing.

The Union failed to establish the majority of the evidence it asserted in its Briefs and therefore, such alleged factual assertions in the Briefs should be excluded from consideration in this matter" (SB-20).

UNION POSITION[4]

For reasons summarized below, the Union insists that:

> the Employer's offer contains unreasonable and unacceptable language that either diminishes, reduced or eradicates employee and exclusive bargaining rights that have been established through black-letter law, or in the Public Employee Bargaining Act, to include but not limited to, Weingarten Rights, relevant and pertinent bargaining unit information, information to process and investigate grievances, Union solicitation, and Union communication (UB1-67).

Furthermore, the Union believes that the Employer's offer would change a number of existing working conditions and is contrary to the purpose of the PEBA. Thus the Union's last, best offer should prevail.

1. The PEBA and relevant case law establish mediation and arbitration as separate processes, with the arbitrator authorized only to select one of the parties' last, best offers but not to engage in mediation.

2. The Employer should be bound to the last, best offer dated January 31, 2011 and not the offer dated March 23, 2011, in which "the Employer did not make substantive changes to its offer, but simply made changes to how it referred to itself" (UB1-12).

3. The Employer's offer demonstrates "a pattern of the Employer's attempts to diminish the rights of the public employees" (UB1-13), including the "ability of the exclusive representative to negotiate the impact of instructional and professional decisions of the employees" (UB1-14). The Employer's offer also "attempts to usurp Weingarten protections" (UB1-14), reduce the rights of probationary employees and unreasonably hinders "cooperative and collaborative relationships" (UB1-15). It should be noted that the Union has agreed to a wage proposal "which is drastically less than the TMS salary schedule" (UB1-15).

[4] Parts of the post-hearing brief dealing with issues in dispute are identical restatements of material in the pre-hearing brief and need not be resummarized. Material in the pre-hearing briefs had been summarized before the post-hearing brief was received. Where post-hearing brief material has been added to the earlier summaries, the newer material is set forth in italics.

4. The interest arbitration process established in the PEBA places the burden of proving their last, best offer on both parties. The arbitrator should consider past practice, which is often incorporated into Agreements. The onset of Union representation creates no basis for the withdrawal of past practices.

5. Issue 1: Article 4, Section 5, Inclusion of Probationary Employees. Inclusion of the term "equally" insures protection of probationary employee rights, will reduce future arguments about probationary employee rights and is consistent with the language of the "Certification of Majority Support" and the requirements of the PEBA that the CBA "must treat probationary and tenured employees equally" (UB1-18). *"The School did not provide any evidence as to how it would be harmed by including the term 'equally' in the collective bargaining agreement and a reasonable person would not have rejected the Union's offer. . .to give probationary employees rights under the collective bargaining agreement"* (UB3-47).

6. Issue 2: Article 5, Section 3, Definition of Employer. The Employer's inclusion of the Director in the definition of Employer contradicts 10-&E-4S NMSA 1978 because the Director is not a "political subdivision of the state." The Director is an employee of the School Council who cannot sue or be sued and who has different enumerated powers and duties than the School Council.

7. Issue 3: Article 5, Inclusion of School Calendar as Appendix to Agreement. The Employer would exclude negotiations over the school calendar and in-service days, which are mandatory subjects of bargaining. The calendar includes professional development training and other non-institutional duties. Furthermore, so long as minimum hours requirements are met, the law allows for flexibility in the make-up of the calendar. *The School's chief negotiator acknowledged that school calendars had been negotiated or placed in CBA appendices in other New Mexico public schools. The Director noted that because of the separation of expeditionary learning excursions next year, 185 student contact days will be required rather than the 180 days contained in both offers.*

8. Issue 4: Article 5, Definition of Emergency. The Employer's failure to define "emergency" would allow "for an arbitrary interpretation or application of the term and heighten the potential for disagreement minimizing cooperative relationships" (UB1-23).

During negotiations, John Martinez acknowledged that the Union offer contained a reference to the definition; thus a reasonable person should accept the offer.

9. Issue 5: Article 6, Union Rights—Dues Deduction Form. Dues deduction is a mandatory subject of bargaining. The Employer's offer does not provide language concerning revocation of dues deduction and timely payment of dues. Management's failure to timely submit dues could harm bargaining unit members by causing the loss of Union-sponsored benefits. The Union has agreed to hold the Employer harmless for complying with the Union's language.

10. Issue 6: Article 6, Union Rights—Solicitation of Membership. The Employer's limitation of solicitation to "non-paid time" is problematic because bargaining unit members are professional employees. NLRB case law allowing solicitation during break time should be followed so that employee rights are not interfered with. *All break time is not work time. The School proposal would prohibit employees from discussing the Union at meals or in tents during wilderness trips.*

11. Issue 7: Article 6, Union Rights—Distribution of Literature During Non-Paid Time. The Employer's limitation of distribution of literature to "non-paid time" is problematic. Consistent with NLRB and New Mexico case law, bargaining unit members should be allowed to exercise Union rights by distributing literature during breaks and lunch periods.

12. Issue 8: Article 6, Union Rights—Remarks at New Employee Orientation and other Meetings. The Employer's offer would prohibit the Union from making announcements at meetings or speaking at new employee orientation and is inconsistent with 10-7E-15(A) NMSA 1978 and with the CBA between TMS and the Taos AFT exclusive representative.

13. Issue 9: Article 6, Union Rights—Union Leave Days. The Union asks for 10 professional leave days per year for the bargaining unit for attendance at legislative meetings and/or participation in national or state-wide conferences if such leave benefits both parties. This would not be considered a donation by the Employer. The TMS/TFUSE CBA grants five days without limitation in use. The Union proposal requires the provision of information about the leave so that the Employer may make "an

intelligent choice as to granting or denying the leave based on the benefit to both parties" and the appropriateness of the absence (UB1-30).

14. Issue 10: Article 8: Employee Rights—Union representation at Investigatory Meetings and Information Pertaining to Grievances. PEBA has been interpreted to apply Weingarten protection to New Mexico public employees; thus the Employer's request that such rights be excluded from the CBA is unreasonable. Nor can the Employer withhold information relevant to the Union's duty to represent bargaining unit members for grievances and other purposes. Where privacy issues are a concern, the parties can negotiate how to address privacy concerns while preserving Union rights.

15. Issue 11: Article 8, Cost of Documents in Employee Personnel File. The Union is prepared to pay for the cost of documents, but rejects the Employer's arbitrary rate of $ .25 per page.

16. Issue 12: Article 8, Termination and Discharge Decisions. "It is the Union's position that termination and discharge are 'related personnel matters' and therefore must be governed by the grievance procedure of the collective bargaining agreement" (UB1-34). PEBA supersedes the School Personnel Act; thus provisions are not in conflict. "Regular" includes probationary employees; therefore the grievance procedure should be available to all "regular" employees, not only tenured employees. "The Employer would have to prove that termination and discharge are not personnel related decisions" (UB1-36). While the Employer would exclude the School Board/Council from the grievance procedure, the Union would include this body and thus mirror the School Personnel Act.

17. Issue 13: Article 9, Definition of Seniority. Employee licenses do not include an endorsement area. Teachers are likely to have multiple endorsements and may teach in different areas from semester to semester. Under the Employer's language, a teacher having taught in an area longer than a multi-faceted teacher could be considered senior.

18. Issue 14: Article 10, Notification of Employment. The Employer's notification date of May 15 would likely violate the 14-day requirement of the New Mexico Administrative Code. This would apply only to tenured employees and then treat probationary employees differently. The Union date of May 10 also provides more time

"to resolve personnel related disputes prior to the beginning of the next school year, thus minimizing the potential impact on institutional service" (UB1-38).

19. Issue 15: Article 10, Accesses to Home Addresses and Phone Numbers. The Employer's offer that restricts provision to the Union of employees 'home address and phone numbers is inconsistent with existing federal and New Mexico case law.

20. Issue 16: Article 11, How to Obtain Additional required Endorsements. The Employer's offer "to provide training for additional certifications, licenses and/or endorsements beyond what the PED requires" could "have a devastating financial impact on the bargaining unit" (UB1-3). The Union offer would require pay only for employer-initiated endorsements.

21. Item 17: Article 12, Pay for Wilderness Experience Days. The Union asks for $50/day for up to 10 wilderness experience days for employees for a maximum of $5,500 annually. Te request is justified by the nature of the instruction and supervision provided. *The Employer did not claim an inability to pay,* but such an argument would pale in comparison to a salary level lower than comparable levels in the area and pay cuts taken last year and in the coming year. Take-home pay should be considered, as should the Employer's ability to attract and/or retain valuable staff. This would not require a re-appropriation of funds because the budget has not yet been reviewed and the school year has not begun.[5] The budget itself should be given little weight. The extra $50 acknowledges: 1) the skill and experience required; 2) the responsibility placed on wilderness experience instructors and 3) the hazardous nature of this work in potentially undesirable conditions. "*John Martinez testified that employees would be eligible for additional compensation, such as stipends, if the required work was different than their regular duties"* (UB3-26).

22. Issue 18: Article 12, First Responder Training. The Employer's offer, which does not explicitly include "Expeditionary Learning and Wilderness First Aid/First responder Training and Recertification" is inconsistent with the VGHS Charter and does not assure adequate training for the wilderness experience. *Brenda Peterson testified about the importance of such training.*

[5] The budget had not been reviewed when the Union's pre-hearing brief was written, but review and approval was noted during the hearing.

23. Issue 19: Article 12, Holidays/Breaks. Wages, hours and working conditions are mandatory subjects of bargaining and thus includes holidays and breaks. By stating that the Governing Council can make the final decision on the calendar, the Employer is refusing to bargain about these items. The Union offer replicates the holidays and breaks now observed by the Employer and TMS.

24. Issue 20: Article 12, Length of Workday. The Union seeks to maintain the current workday while the Employer seeks to extend the day without added compensation. The Employer again declines to negotiate on hours of work. Similar disputes have been resolved based on prevailing practices.

25. Issue 21: Article 12, Planning/Preparation Time. The Union would extend the current practice of four hours each week of planning and preparation time and of collaboration time. "(T)he Employer's offer is regressive in that it eliminates all reference to the length of time for planning, preparation and collaboration time" (UB1-46).

26. Issue 22: Article 13, Expeditionary Learning Training. The Union offers language providing for expeditionary learning training "based on availability of funds" (UB1-46). Without such training, teachers "could face the potential of unsuccessful evaluations for failure to meet the measurable objectives of the professional development plans" (UB1-47).

27. Issue 23: Article 16, Attendance at IEP Meetings. The Employer's language does not include safeguards conditioning teacher attendance at IEP meetings during class time on the availability of substitutes.

28. Issue 24: Article 17, Student Discipline Matrix. The Director and employees have cooperated over the past year to develop a first-ever Student Handbook. Union language provides for joint development prior to August 11, 2011, while Employer language provides for employee input individually or through the Union. Current conditions should be continued rather than reduced to meet and confer status on something that impacts terms and conditions of employment. *As John Martinez acknowledged, this is a mandatory subject of bargaining if based on the Employer's past practice, which Brenda Peterson testified included non-uniform implementation of student discipline.*

29. Issue 25: Article 20, Drug and Alcohol Testing. The Employer would continue to operate under the TMS Drug and Alcohol Policy, which means that a third-party could unilaterally change the policy and not be subject to a grievance. Employees termination under the policy would have to appeal to a third party rather than the appeal procedures in the TMS policy, thus nullifying due process practices. The Union would incorporate the TMS policy into the CBA, thus providing access to the grievance procedure.

30. Issue 26: Article 21, Signature for acknowledging Placement of Document in Personnel File. The Union would have a Union representative sign a document signifying receipt if the affected employee refused to sign, while the Employer would unreasonably make a refusal to sign grounds for additional discipline. Also, the Employer would make the employee responsible for insuring documents are time stamped and dated by the individual receiving them, but an employee cannot guarantee that this would be done.

31 Issue 27: Article 21, Evaluation Documents. In the context of the New Mexico system of annual teacher performance evaluation, the Union language that documents utilized in a negative evaluation be shared with the affected teacher is fair and consistent with the intent of the evaluation. The Employer's refusal to provide such documents is not.

32. Issue 28: Article 23, Assigning of Non-Instructional Duties. The Employer rejects Union language that would minimize non-instructional duties and guarantee that such duties not disrupt instruction. Replacement of limited instructional time with other duties could negatively impact learning and benefit nobody. This is a mandatory subject of bargaining.

33. Issue 29: Article 23, Wilderness First Aid/Wilderness First Responder Training. The Employer should provide such training as lack thereof "not only places the bargaining unit in a dangerous situation, but it also places the students in a potentially dangerous and unsafe environment" (UB1-53).

34. Issue 30: Article 25, Access to Evaluation Information. The Employer should be willing to "'provide a copy of all information to complaints from students,

parents and/or other employees'" (UB1-53) as support for "a fair, valid and legal [evaluation] decision" (UB1-54). This would be beneficial to both parties.

35. Issue 31: Article 25, Evaluation as Part of Grievance Procedure. The Employer would make non-grievable an employee evaluation "'in compliance with PED Rules and Regulations'" (UB1-54). This would remove employee rights contained in PEBA that all personnel related issues are grievable. *The evaluation is part of licensure requirements; thus a poor evaluation could impact the teacher's license. Because the evaluation covers a three-year period, both the evaluation and related documents should be a part of the grievance procedure and "any/all documents pertaining to the evaluation must be provided because the summative evaluation requires that data be collected and analyzed"* (UB3-35). *A CBA that makes clear that probationary and tenured teachers have equal protection under PEBA will reduce future conflict. "(T)ermination and discharge are 'related personnel matters' and therefore must be governed by the grievance procedure of the" CBA (UB3-37). PEBA supercedes the previously enacted School Personnel Act in requiring equal treatment for probationary and tenured employees. "(T)he Union's grievance procedure mirrors the School Personnel Act, while the Employer's grievance procedure excludes the School Board/Council, which is a fundamental right of the employees under the School Personnel Act"* (UB3-38).

36. Issue 32: Article 26, Approval of leave. The Union offers language that unauthorized leave "may be considered just cause for disciplinary action including discharge" while the Employer would use "will" instead of "may" (UB1-55). The Employer's language is inconsistent with the principle of progressive discipline agreed to in Article 19 and could provide discharge for a minor infraction. The Union argues that all leave should be subject to the Director's approval but would add the caveat that approval will be given if the employee meets the requirements for leave. This would allow tracking and monitoring of leave and eliminate the possibility of favoritism. It would not preclude the Employer's formulation of reasonable rules for documenting illness and policing a sick benefits plan. Also, the Union would add "except in extenuating circumstances" to language denoting unreported and unjustified absences of three consecutive days so that employees would be protected in situations where notice is impossible.

37. Issue 33: Article 27, Length of Bereavement leave. Unlike the Employer, the Union would continue the practice of including "domestic partner" in the definition of immediate family and would allow the use of two extra sick leave days.

38. Issue 34: Article 28, Length of Personal Leave. The Union would allow four of 10 paid leave days for personal leave; the Employer would allow two. Flexibility is necessary given the rural setting of Taos, which could necessitate travel to more metropolitan areas. The Union agrees with the inclusion of language meant to curtail abuse of sick leave.

39. Issue 35: Article 36, Sick Leave Buy Back provision. The Employer offers a year-end $1,000 bonus for perfect attendance or a $750 bonus for only two days of absence, for a respective annual cost of $11,000 or $8,250. The Union would allow bargaining unit members to sell back a maximum of 15 unused sick leave days at $50/day at the year's end, costing the Employer a maximum of $8,250. The Union proposal would save the Employer money, particularly considering the current $60-$75/day cost of substitute teachers.

40. Issue 36: Article 37, Seniority Used in RIF. The Employer offers seniority as a "primary" factor in determining RIFs; the Union offers seniority as a "factor." As teachers have multiple endorsements, the Employer's offer could result in "losing the sole teacher who could teach other subjects/endorsements if seniority was the primary factor in the determination for the steps in the RIF" (UB1-60). A RIF could result in the School's inability to meet its Charter, leading to closure.

41. Issue 37[6]: Article 38, Tax-Sheltered Annuity. The Employer's offer is silent on the current practice of allowing payroll deductions for tax-sheltered annuities and life insurance programs. Thus the zipper clause would eliminate this no-cost [to the Employer] practice and irreparably harm employees.

42. Issue 38: Article 39, Re-Employment Notification. The May 15 notification date in the Employer's offer would fall short of the 14-day notice requirement and the union's May 10 date would meet that requirement.

43. Issue 39: Article 40, Duty to Bargain Wages. The Employer's language that "the parties will meet and confer on the action taken by the Employer" as opposed to the

[6] The Union's double use of "37" has been corrected.

Union's use of "negotiate," "diminishes the employees' right to collect (sic) bargaining over wages" (UB1-61).

44. Issue 40: Article 41, Inclusion of School Council in Process. The Employer's exclusion of the School Council from the grievance procedure "would render the grievance procedure null and void because the sole individual to resolve the grievance would be the same individual to whom the grievance would be filed" (UB1-62). The inherent conflict of interest would abrogate due process protections. Immediate recourse to arbitration "is cost prohibited" (UB1-63). In addition, the Employer improperly, for reasons noted above, removes termination and discharge of probationary employees from issues subject to the grievance procedure. *There is no evidence that the Governing Council no longer wanted to be a part of the grievance procedure.*

45. Issue 41: Article 42, Month and Date v. Counting Days. The Employer's language regarding a request to bargaining is vague and the Union's language is readily understood.

46. Issue 42: Article 43, Committee Construction. The Employer's offer to continue having the Director make committee assignments would interfere with Union activity and eliminate the ability "to negotiate the impact of instructional and professional decisions by the employer" and to act for the bargaining unit as a whole (UB1-66). The Union would have the Director appoint an equal number of Union and non-Union representatives to all site committees.

47. Issue 43: Article 46, Waiver Clause. The "severely worded waiver clause" (zipper clause) offered by the Employer "prohibits the negotiating of impact decisions" (UB1-67). *The Union would allow negotiations over impact decisions.*

Because of the timing of the hearing of this matter, the issue of whether approved budgetary funds could be moved between categories arose. While the Union acknowledges that the arbitrator cannot issue an award that requires an additional appropriation of funds, the Union asserts that there is flexibility in the use of an approved budget. The pre-hearing brief in support of this position is summarized below.

48. "(T)he Employer has the burden of proof of demonstrating a school board in the state of New Mexico has the ability to appropriate or re-appropriate funds" and "of demonstrating the arbitrator's decision may only be based on whether or not the public

employer would be required to re-appropriate funds" (UB2-4). The Employer must show that Section 17(E) takes precedence over the usual arbitrator's application of the usual "objective wage criteria" (UB2-4).

49. The New Mexico legislature is the only entity that may appropriate or re-appropriate education funds. "(A) school-site budget contains a general description of how the money is to be allocated, but the school-site budget is not a fixed budget that contains the spending of money for a 'special' purpose" (UB2-5 & 6).

50. Following appropriation by the legislature, the PED allocates funds to school districts based on unit values. Local school boards than allocate "appropriate distributions. . .to individual charter schools" in their districts (UB2-7). Advisory School Councils work with administrations, advising on, among other things, "'proposed and actual budgets'" (UB2-7). The wording indicates flexibility. There is also reference to an operating budget. None of these are fixed; all can be modified or amended, "with the District having the ability to transfer funds within the operational codes of the school budget. . ." (UB2-7).

51. "Section 17(E) does not contain specific language that requires an impasse resolution to be contingent upon the re-apportionment of funds by the school district or that requires an impasse resolution to be contingent upon ratification by the appropriate governing body" (UB2-10).

52. Section 17(D) includes the impact of the Employer's instructional and professional decisions within the scope of public school bargaining. "Therefore, Section 17(E) lacks the specific reference to impasse resolution for educational employees and public schools because the legislature intended the employees to have a special right not granted to other employees in the public sector" (UB2-10).

53. The Employer's argument that an arbitrator's award requiring the expenditure of funds does not have to be implemented would make superfluous Sections 18(B)(2) and 17(D). This would, in essence, limit the arbitrator's consideration and contradict case law. The Employer could negotiate in bad faith, prolonging negotiations, and then claim that its last best offer should be implemented because a ruling for the Union would require the expenditure of funds.

54. The PEBA does not limit "the arbitrator's discretion to 'select one of the two parties' complete last best offer" (UB2-11). Case law supports the Union's position.

55. School will not have started before the arbitrator's award is issued and thus no budget transfer would be necessary. Nothing in the Union's offer requires the creation of a new occupational code.

56. The Employer was unavailable on "the initial numerous dates" submitted by the arbitrator, with a Saturday-Sunday, May 21-22 hearing scheduled. Weather prevented the arbitrator from traveling. The Union offered to forgo the hearing in favor of briefs, to allow testimony via affidavit and to waive the 30-day requirement in exchange for the Employer's dropping of any Section 17(E) defenses" (UB2-12 & 13). The Employer rejected these options and did not file a pre-hearing brief; thus at the end of the 30 days from the arbitrator's notification of appointment only the Union's first pre-hearing brief and the Employer's objection to that brief were on the record. Had the hearing commenced within the 30-day time frame and had the award been submitted within the 30-day time frame, the budget would not yet have been adopted. "Therefore, through no fault of the Union, the Employer is now attempting to raise an issue pertaining to Section 17(E) that would not have existed if the 30-day requirement had been met" (UB2-12 & 13). The Employer's position is without merit, but nevertheless should be barred and not considered.

DISCUSSION

The theory behind last, best offer (LBO) arbitration is that it will force the parties to resolve their differences or at least to narrow them significantly because of the threat of losing everything with an adverse interest arbitration award. The process has worked particularly well with major league baseball player salary disputes—single issue LBO arbitration—as the parties have settled the vast majority of these disputes without recourse to arbitration. Where the theory has not worked well, as in the case at bar, leaving 29 Articles and over 40 issues unresolved, the odds increase that the interest arbitrator cannot escape the selection of contract language that would never be selected if the law allowed selection on an item-by-item basis rather than on a complete package, LBO basis. That is the dilemma posed in this case.. For example, there is Union

language that impinges on management rights and there is School language that impinges on Union statutory rights.

Two preliminary issues can be dispensed with in short order. The Union argues that the school's first LBO be considered rather than the later LBO. The last LBO was timely and, as the Union acknowledged, not substantively different than the first LBO. While it may or may not have happened in these negotiations, there may be times where a post-mediation LBO serves to narrow the gap between the parties. While that might work to the strategic disadvantage of one party in the arbitration process, it would seem foolish not to work with the LBO that has the greatest chance of narrowing differences between the parties. The second School LBO has been considered herein.

The School objects to consideration of the Union's two pre-hearing briefs. The School could have submitted pre-hearing briefs had it elected to do so, and they would have been considered. As I noted during the hearing when this matter was discussed, the Union may have done the School a favor by putting its cards on the table, so to speak, before the School submitted its post-hearing brief. There is no reason to disregard the Union's pre-hearing briefs.

Paragraph E of Section 10-7E-17 clearly precludes the arbitrator from an award that necessitates appropriation of additional funds beyond those that have been approved. In other words, if the Union's LBO is selected and if it contains items for which there is a cost, these items must be funded within the budget, assuming that budget has been approved, as it has in this case. However, it is important to understand that a budget constitutes a guideline or roadmap of sorts and not a document that must be slavishly adhered to down to the last penny. Indeed, the School's Finance Director, Elizabeth Trujillo, testified that the budget does not look the same at the end of the year as it does at the beginning. She also acknowledged that budgeted sums may be moved between categories.

The School's approved budget for the 2011-2012 school year is $1,425,139.00. The School places the cost of Union proposals at $52,221.25, which would represent an addition of 3.7% to the existing figure. The cost is overstated. Ms. Trujillo testified that the 10 professional days were already included in the budget. Money that would be spent on cashout of annual sick leave and cashout of accumulated sick leave at time of

separation is less than the School has budgeted for under its incentive plan. If the remaining School cost figures are accepted, and those related to bereavement leave and leave for classes must be viewed as educated estimates and not definitive numbers, the cost of Union proposals would be $35,935.90 or 2.5% in addition to the approved budget. In view of the nature of budgets, including the flexibility and imprecision inherent in such documents, an award of the Union's LBO is not viewed as requiring a reappropriation of funds but rather a possible shifting of funds, depending on the accuracy of estimated expenses, within the already approved budget.

The facts of the case at bar are significantly different than those facing Arbitrator Toedt in Santa Fe County Firefighters Association, IAFF, Local 4366 and County of Santa Fe, Santa Fe, NM (FMCS Case No. 09-57861). The cost of the Union's LBO ranged between $1,517,312.97 (initial county calculation) and $444.423.00 (suggested by the Union at the hearing). While there is not enough information in the Award to allow a calculation of the cost of the Union's offer as a percent of the total budget, there is enough information to show that the sums are significantly more than those involving VGHS and there is the arbitrator's conclusion that a ruling would necessitate appropriation of additional funds. Thus Santa Fe County Firefighters can be distinguished from VGHS.

In Truth or Consequences Municipal School District and National Education Association—Truth or Consequences (FMCS Case No. 10-5609), Arbitrator Spurlock also found that selection of the Union's LBO would require an appropriation of funds. The Union did not refute the School District's calculation that $110,000 in additional funds would be needed to fund the LBO. This amounts to more than three times the amount in the case at bar.

Neither are the School's arguments about the illegality of some of the Union provisions persuasive. The TMS contract includes five professional days. The number of days is irrelevant; the fact that similar language is included in another contract is highly relevant. Furthermore, the Union's LBO includes the following language in Article 6, Section 2.5: "The Federation will be granted ten (10) Professional leave days per year during which Federation representatives or executive officers may attend legislative committee meetings or participate in national or state-wide conferences for the

betterment of both parties" (JX-2, arbitrator's emphasis). This gives the School administration the opportunity to assess requests for professional days so that such days would be granted only if participation would be "for the betterment of both parties." In Opinion No. 76-27, New Mexico Attorney General Toney Anaya concluded that a local school board could pay teachers' membership dues to a teacher/education association "if the local board determined that such payment would benefit the schools under their supervision and control." Professional days thus can be legally granted under the appropriate circumstances.

The parties have agreed that the CBA will be effective through June 30, 2012; thus it covers only the 2011-2012 school year. The parties have agreed that the VGHS year will consist of 180 instructional days—the minimum number under New Mexico law. While the Union's proposed language may indicate that days in excess of 180 cancelled due to weather or other emergencies would not have to be made up, giving the teachers a possible windfall of paid-days-not-worked, in violation of New Mexico law, the parties' agreement on the minimum ensures that this cannot happen. Cancelled days would have to be made up and there would be no time-paid-not-worked. The parties' agreement means that the Union's proposed language does not run afoul of the law.

The School's "involuntary servitude" argument is unpersuasive in that it is grounded on Bailey v. Alabama, 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191 (1911), a United States Supreme Court decision that is a century old and that arose out of a very different set of facts and a very different era. While the decision of the Court extended the meaning of "involuntary servitude" beyond slavery, it cannot be viewed as applying to a situation where a teacher would know in advance that applying for and accepting "Governing Council funding for tuition or related fees to attend classes and is granted release time" would result in a commitment to remain as a teacher for three years "following the last semester of approved release time if employment is offered" (JX-2). The additional three years would be paid at the appropriate salary rate. The acceptance of financial support and release time would be up to the teacher. This is not an involuntary situation. It is worth noting that high school graduates who acceptance appointments to one of the United States military academies and who complete their studies, graduate and receive their commissions in the appropriate branch of the United States Armed Forces

are obligated to serve for a set number of years. This arrangement has not been viewed as "involuntary servitude."

With the issues that had the potential to eliminate the Union's LBO from consideration resolved, I have considered criteria to apply to the two LBOs. The literature suggests that since interest arbitration is a legislative process, often arbitrators strive to reach conclusions about what the parties would have agreed to had they been able to overcome impasse. With the number of issues in dispute herein, that criterion has been impossible to apply. The parties evidenced no enthusiasm for the suggestion that the analysis discuss each of the impassed issues, thus no such effort has been undertaken. Neither LBO is close to optimal; the choice is between two offers that to an outside observer appear to be the result of positional rather than interest-based bargaining. After prolonged consideration, the salary and fringe benefits, the more reasonable grievance procedure and the protection of institutional rights contained in the Union's LBO outweigh the legitimate protection of management rights and the attempt to minimize the need to re-adjust within the approved budget that is contained in the School's LBO. The Award below is made with findings that it would not require a re-appropriation of funds, and does not contain illegal provisions and with the hope that the 2011-2012 CBA will be replaced in the future by CBAs that more appropriately reflect attention to the legitimate interests of both parties.

AWARD

In accordance with the provisions of the Public Employee Bargaining Act (10-7E-1 to 10-7E-26 NMSA (PEBA), the Union's last best offer of March 27, 2011 is selected.

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I. B. Helburn, Arbitrator

Austin, Texas
August 19, 2011