In the Matter of the Interest Arbitration Between

THE CITY OF LAS CRUCES, NEW MEXICO,
("the City") Employer,
and
UNITED STEELWORKERS, LOCAL 9424,
Union.

FMCS Case
230515-06112

Hearing held on September 6, 2023, in Las Cruces, New Mexico
Before Stephen E. Alpern, Arbitrator

For the City of Las Cruces

Dina E. Holcomb, Esq.

For the United Steelworkers

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Opinion and Award

This matter arises under New Mexico Revised Statutes ("the Statute"), 10-7E-1, *et seq.* Under the Statute the City and the Union negotiated for a successor agreement to their collective bargaining agreement which expired on July 1, 2023, but was extended to the date of this Award pursuant to the Statute at 10-7E-18D. The parties were able to agree on all provisions of the successor agreement except Article 24, Pay Increase. The Union declared an impasse on April 14, 2023, and thereafter the parties entered mediation, as required by the Statute with a mediator appointed by the Federal

Mediation and Conciliation Service ("FMCS"). The mediator held five mediation sessions from May 10 through July 10, 2023. The parties still did not reach agreement and as required by the Statute, proceeded to arbitration. The undersigned was selected as the arbitrator from a panel of arbitrators submitted to the parties by the FMCS. The hearing in this matter was transcribed by a court reporter and that transcript was considered by the Arbitrator together with exhibits admitted at the hearing. The parties filed post-hearing briefs on October 26, 2023.

A. Background

Las Cruces is a city with a population of roughly 113,000. The Union represents approximately 400 City employees in eighty different job classifications. City police officers and firefighters are represented by other unions. As previously related, the parties tentatively agreed on all provisions of a new collective bargaining agreement, except Article 24, Pay Increase. The parties have agreed that the tentative agreements will be incorporated into the Agreement established by the Award in this case. As required by the Statute both parties have submitted Last Best Offers ("LBOs") to the Arbitrator. The Statute requires that the Arbitrator adopt one of the two LBOs without modification as the parties' collective bargaining agreement.

The Union's LBO provided that, upon adoption of the new Agreement, those employees who did not receive at least a $2.50 per hour increase in

December 2021 would receive an increase of at least $2.50 per hour. After this adjustment was implemented all bargaining unit employees would receive a 3% wage increase. The LBO further provided that within two weeks after the Agreement was effective the parties would meet and confer in good faith to accomplish reasonable adjustments in bargaining unit employees' classifications and compensation ("C&C") under the following terms:

a. Time spent in C&C meetings shall be during normal work hours.
b. The Parties shall have an equal number of participants in the C&C meetings, unless mutually agreed otherwise.
c. No less than 20-hours per month shall be dedicated to C&C negotiations, to be concluded by the 90th calendar day of the commencement.
d. The Union will not unreasonably refuse reasonable C&C changes, provided:
   i. The changes have been substantiated by the City with appropriate comparables and/or other similar data, and ii. The changes do not deviate from the C&C proposal provided to the Union during the 2022-2023 negotiations unless mutually agreed in writing.

   iii. Disputes as to reasonableness shall be subject to the grievance and arbitration procedure of the Agreement.

The Union's LBO provided for a 1.7% increase in employees' base wages effective the first full pay period after October 7, 2023, and at the same time the City would pick up an additional 1.3% contribution to employees' Public Employee Retirement Act ("PERA") contributions. Finally, the Union proposed that with respect to year 2 and year 3 wage increases:

> Year 2 and 3 wage rates shall be determined as follows: No earlier than one hundred twenty (120) days, nor later than sixty (60) days prior to July 1, 2024, either party may notify the other in writing of its desire to re-open the Agreement, such re-opener shall be limited to Article 24 and one (1) non-economic article. Upon such notice being given, the duly authorized representatives of the parties shall commence negotiations within two-weeks. Should the parties fail to reach agreement, on July 1st they shall simultaneously exchange last and best offers and submit the dispute to arbitration without delay utilizing New Mexico

[1] In December 2021 the City made unilateral wage adjustments following a requirement that City employees receive a $15 per hour minimum wage. The increases were not uniform across the bargaining unit, nor were they simply limited to raising wages to $15 per hour.

Statues Annotated 1978, Section 10-7E18 - Impasse Resolution, without respect to such Resolution's appropriateness in resolving the subject impasse.

The City's LBO provided that at the first pay period following adoption by the City Council and ratification by Union membership of the Agreement the City would implement its new classification and compensation study completed in 2022. Employees would receive any increases provided by that study or a 4% wage increase, whichever is greater. In addition, at the same time, the City would pick up an additional1.3% of the employee's contribution to PERA. In addition, the City proposed a 3% increase to base wages, effective the first full pay periods after July 1, 2024 and July 1, 2025, provided that the City Council appropriated sufficient funds for those pay increases in Fiscal Years 2025 and 2026, respectively. If sufficient funds were not appropriated, either party could reopen negotiations on Article 24 by giving written notice to the other party by July 15 of the appropriate year. Finally, the City's proposal would allow either party to reopen negotiations on one non-economic article by giving written notice to the other party no earlier than 120 days and no later than 60 days prior to the second anniversary date of the adoption of the Agreement.

This matter is now before the Arbitrator to choose one of the two LBOs.[2]

[2] Although the Statute requires that the Arbitrator's decision be issued no later than 30 days after the Arbitrator has been notified of his selection by the parties, the parties waived this requirement. As a practical matter this statutory requirement is unrealistic if the parties are to schedule a hearing with an arbitrator and an arbitrator it to provide the parties with a fair hearing and an opportunity to file post-hearing briefs.

B. Relevant Statutory Provisions

N.M. Stat. Ann. 10-7E-17 Scope of Bargaining. provides:

> H. ...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 arbitration decision shall not require the reappropriation of funds.

N.M. Stat. Ann. 10-7E-18. Impasse Resolution provides:

> B. The following impasse procedures shall be followed by all public employers and exclusive representatives, except the state and the state's exclusive representatives: ... (2) if the impasse continues after a 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 H of Section 10-7E-17 NMSA 1978 and the Uniform Arbitration Act no later than thirty days after the arbitrator has been notified of selection by the parties. The arbitrator's decision shall be limited to a selection of one of the two parties' complete, last, best offer. The costs of an arbitrator and the 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.

C. Positions of the Parties.

1) The Union

The Union contends that the City cannot show that the Union's LBO exceeds appropriations. The burden of proof on this issue is on the City. According to the Union, its LBO costs were less than those in the City's LBO. Because the Agreement was not ratified on July 1, the costs of its LBO should not be calculated from that date.

Because of the City's unilateral wage increases in response to the $15 per hour minimum wage requirement, there were many inequities, including instances where more senior employees received lower wages than less senior employees in the same job classification. The Union's LBO attempts to eliminate these inequities. In contrast, the City's LBO exacerbates these inequities.

The Union's LBO requires wage increases for the second and third years to be negotiated in the future, because the Union recognizes that its wage proposal is front-loaded. Thus, the second- and third-year renegotiations could adjust for this situation.

2) The City

According to the City, the Union's LBO violates the Statute in several respects. It exceeds the amount of appropriated funds. It requires retroactive increases. It requires the parties to continue negotiations in the future, contrary to the requirement that there be a final and binding arbitration award.

The Union's LBO would exceed current appropriations and thus would require reappropriation of funds contrary to the Statute. Further, the Union's proposal for lump sum increases requires retroactive payments of wages which is contrary to the Statute. The City also objects to other provisions of the Union's LBO which would, in effect, provide retroactive increases and lump sum payments both of which it asserts are gifts which violate the New Mexico Constitution.

The Union's PERA pickup proposal would be retroactive because its effective date would be prior to approval of the increase by the City Council and the Public Employees Retirement Board. The City questions whether the increase can go into effect on a date prior to approval. Further, according to the City, the flat rate increases proposed by the Union would not address the inequities which the Union claimed arose as a result of the increases in response to the $15 per hour minimum wage requirement.

The Union's costing of its LBO is incorrect because it did not include the effect of the Union's PERA pickup proposal. Finally, the Union failed to provide any market data to support its proposals.

D. Discussion

The Statute is unusual in several respects. It provides no standards for an arbitrator to consider in adopting one of the two LBO's. For example, it does not require consideration of comparability data, let alone establish benchmarks for comparability determinations.[3] Nothing in the Statute requires the Arbitrator to look at any specific factor such as comparability or cost of living increases. Instead, the Arbitrator is simply prohibited from adopting any LBO which requires the reappropriation of funds. Further, a resolution which "requires the expenditure of funds shall be contingent upon the specific appropriation of funds by the appropriate governing body and the availability of funds…. "

[3] Compare, *e.g.,* Oregon Public Employee Collective Bargaining Act, Oregon Revised Statute §§243.650 -243.806; Oklahoma Rev. Statutes 51-109.

The New Mexico Supreme Court has interpreted the Statute in a manner that where a "final and binding" award adopts provisions for which the appropriate authority has not appropriated funds, the award is contingent upon such an appropriation.[4] The Court succinctly stated its conclusion: "Under the [Statute], an arbitration award requiring a public employer other than the state to expend funds is contingent upon the appropriation and availability of funds."

Accordingly, the City's arguments that the Union's LBO exceeds the money appropriated by the City or would require future appropriations or reappropriation of funds is not well taken. Any such provisions in an award are necessarily contingent upon the City Council appropriating funds. They would not require the City Council to appropriate the funds.

The City also contends that the retroactive pay increases in the Union's LBO constitute "gifts" in contravention of the New Mexico Constitution.[5] The authorities cited by the City that retroactive payments would violate the New Mexico Constitution seem to support its argument.[6] Further the timing of the employer PEREA pickup under the Union's LBO is contrary to the requirement that the pickup cannot be implemented until it is approved by the Pension Board. Although, as pointed out by Arbitrator Ira Epstein, if an arbitrator adopts a provision in an LBO that is contrary to law, a severability

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[4] *Ntl. Assn. Of Firefighters V. City Of Carlsbad,* 2009-NMCA-097, 147 N.M. 6, 216 P.3d 256 (2009).

[5] Article IV, Section 27 of the New Mexico Constitution provides: "No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made...."

[6] New Mexico Attorney General Opinion No. 88-66 October 27, 1988; New Mexico ; Letter from New Mexico Attorney General Patricia A. Madrid to State Senator Cisco McSorley (June 4, 2004).

clause such as that contained in Article 32 of the parties' tentative agreement in this case would result in the offending provision being struck with the remaining provisions of the agreement remaining in full force and effect.[7] The problem in this case is that the alleged illegal provisions in the Union's LBO appear to be essential to its proposals. The Arbitrator must necessarily evaluate the Union's LBO in that light.

There are also other serious defects in the Union's LBO. The Union proposes that within two weeks after the Agreement is effective the parties would meet and confer in good faith to accomplish reasonable adjustments in bargaining unit employees' classifications and compensation. In addition, the Union's LBO required the parties to negotiate concerning the second- and third-year wage increases prior to July 2024 and any failure to reach agreement would be subject to the impasse procedures of the Statute. The City's objections that this is contrary to the Statute's requirement that an arbitrator's award be final and binding are well taken. At best the Union's proposal "kicks the can down the road" and is inconsistent with finality and with labor relations stability.

The City's LBO is not without its problems, largely resulting from unilateral changes in employee wages that the City adopted in December 2021 in response to the newly enacted New Mexico minimum wage of $15 per hour. Rather than simply adjust the wages of employees who earned less than $15 per hour, the City increased other employee wages to avoid wage compression. The City did discuss these changes with the Union, and

[7] *DOÑA ANA COUNTY and CWA,* FMCS Case 13-51332-1 (Epstein, Arbitrator, Aug. 27, 2013.)

according to the City's Human Resources Director the Union did not raise any objections to the increases or request bargaining over the changes. However, the Union did grieve the unilateral changes, but the record in this matter does not show whether the grievance was resolved, not pursued or whether it is still pending. The Union does assert that it decided that the upcoming contract negotiations would be the best forum to discuss these issues. The Union presented evidence that these increases resulted in some anomalies where less senior employees received greater increases than more senior employees in the same job classification.

However, the Union did not present any studies which contradicted the City's compensation and classification study of 2022. For example, the Union noted that the City's study did not control for unionization. This is a legitimate concern, but there was no evidence by the Union showing the impact of this failure. More significant, the Union's LBO simply put off consideration of the compensation and classification study issues for further resolution with its "meet and confer," requirement which had substantial problems of its own. It would undercut the finality of the arbitration process. It would also impose arguably unlawful requirements concerning the parties' representation during the "meet and confer" sessions, including the number of City participants and the pay status of Union participants.

The City's LBO would also implement its 2022 wage and classification study. The Union asserted that "the classification and compensation study compounded the problem of giving additional wage increases to some bargaining unit employees and less, or no, wage increases to others." The City's LBO would implement this study notwithstanding the Union's concerns

about it. Further, the City's LBO provides for annual percentage increases, which the Union asserts would compound the problems of pay disparities which resulted from the minimum wage increases. If the City Council does not appropriate funds to cover those increases, either party could reopen negotiations on Article 24. The City's LBO also provided for a reopener on one non-economic issue.

This is an unfortunate case where it appears that final offer arbitration did not result in the parties refining their positions to be attractive to a neutral arbitrator. The City seems to have been insistent that its wage and classification study be adopted without any modifications or refinements to reflect the Union's legitimate concerns. The City attacked the Union because its proposal was based on what was important to the Union and to its members.[8] This is to be expected in collective bargaining, just as it is expected that a local government will look after the interests of its governing body and its citizens Unfortunately, the parties' LBOs reflect no attempt to reconcile their respective interests.

The Arbitrator is left in a difficult position. Neither party's LBO presents a reasonable resolution of this dispute. The Union's LBO does not provide for finality. It contains lump sum "catch up" provisions which arguably violate the New Mexico Constitution. Similarly, its requirement for a 1.7% increase effective "the earlier of the first full pay period after October 7, 2023" appears to be missing some language, but in any event would result in retroactive payments. Its requirement for the 1.3% pickup contribution to be effective on

[8] City Post-Hearing Brief, at 14.

that same date would be contrary to the requirements of the Retirement Board that it first approve the increased pick-up. Because there is a real risk that these provisions would be ruled invalid if the City were to successfully challenge them in court, they would be severed from the Agreement as provided by Article 34. While this might save the remaining portions of an award in this case, it would largely eviscerate the economic benefits for members of the bargaining unit. Frankly, there is no adequate remedy for the concerns the Arbitrator has with each party's LBO. Instead, those concerns must be addressed by the parties in the future within the perimeters of this Award. Nevertheless, based upon the entire record in this matter, the Arbitrator determines that the City's LBO is more acceptable than the Union's.

ORDER AND AWARD

Based upon the foregoing and upon a careful consideration of the arguments of the parties and of the entire record in this matter, the Arbitrator concludes that the City's Last Best Offer is most consistent with the requirements of the Statute and should become part of the parties collective bargaining agreement, effective November 11, 2023. It is so ordered and awarded.

Dated: November 11, 2023.

Stephen E. Alpern
Arbitrator