Sent: In the Matter of the Arbitration between

American Federation of State, County and Municipal Employees Local 3999,
Union,

and FMCS Case No. 240828-09432 (Impasse)

City of Santa Fe,
Employer.

BEFORE: Russell M. Guttshall, Arbitrator

APPEARANCES:

For the City of Santa Fe: Dina E. Holcomb, Esq.

For AFSCME Local 3999: Stephen Curtice, Esq.

Place of Hearing: Santa Fe, New Mexico

Date of Hearing: February19, 2025

Date of Award: June 22, 2025

Post-Hearing Briefs: May 22, 2025 & Reply -- June 9, 2025

I. Proceedings

The parties had a full opportunity to submit evidence, examine, and cross-examine witnesses and to argue the matter. All witnesses testified under oath. A reporter reported the proceedings for the parties and submitted a transcript of 284 pages.

This matter is an impasse arbitration. Therefore, there were no challenges to substantive or procedural arbitrability. The parties agreed that the matter was properly before the arbitrator. All parties had an opportunity to submit a post-hearing brief no later than May 22, 2025, and a reply brief no later than June 9, 2025. The Arbitrator closed the hearing on the 9th after receiving the briefs of both parties.

II. Statement of the Issues

The issue before the arbitrator is: Which of the of the Last, Best Offers (LBO) should be selected?

III. Background

The American Federation of State, County and Municipal Employees Local 3999 (the Union) represents employees of the City of Santa Fe (the City) broadly characterized as blue-collar, white collar, secretarial, clerical, technical, professional, and para-professional employees.[1] The parties previously entered a comprehensive collective bargaining agreement the term of which expired on June 20, 2020. They entered bargaining for this contract in the fall of 2019, pausing during COVID, and entering six amendments to the CBA while continuing to bargain. While bargaining, the parties were unable to reach agreement on fifteen (15) articles, as set forth in the parties' Last Best Offers (LBOs). The Union declared an impasse in 2024 and requested mediation. The parties proceeded to mediation but were unable to resolve the impasse.

This proceeding is an impasse arbitration pursuant to the Public Employee Bargaining Act (PEBA). Under the Act, an arbitrator's decision is limited to a selection of one of the two parties' complete LBO.

IV. Position of the Parties

A. The City[2]

1. **Article 26, Sections 2-4**. The Union misrepresented its wage proposal when it claimed that it consisted of 2% increases each of 3 fiscal years when, in fact, it proposes two 2% increases in July 2025, a total of 4.
2. The Union's proposal exceeds the existing City Counsel appropriation by almost $7 million and would therefore require a reappropriation prohibited by PEBA.
    a. **Article 5, Section 3.C** Union officers, the President (20 hrs.), Vice President (12 hrs., Secretary-Treasurer (4 hrs.), and 6 Stewards (5 hrs. each) are paid by the City a total of sixty-six (66) hours per week to conduct Union business rather than performing the work they were hired by the City to do. The City proposed adding an additional two (2) hours per week for the Union's Recording Secretary. The Union proposed to increase from the current 66 hours offered each week, not

[1] The description of the bargaining unit is in dispute in this arbitration.

including time at employee orientation, to 92 hours each week. The City estimates the cost of this addition to be $31,449.60.

b. **Article 18, Section 2.A.3,** The Union has proposed to increase the amount paid by the City for safety footwear from $200 to $500 per year at a cost of $97,800.00. The City of Albuquerque provides only $255.00, the City of Gallup only $300.00, and the City of Las Cruces only $225.00 for safety footwear. [3]

c. **Article 21, Section 6.** The Union has proposed to increase the amount of time away from performing their job duties to vote in an election from 2 hours to 4 hours. The City's proposal of two (2) hours of voting leave comports with state law requirements and prevailing practice. The City's CBA for police officers, the City of Albuquerque's CBA for blue collar employees, the City of Albuquerque's CBA for Clerical and Technical employees, and the City of Gallup's CBA for blue collar employees all provide for two (2) hours of voting leave. Because the Union offered no basis to deviate from the prevailing practice and the cost is $94,050.18 there is no basis to increase voting leave.

d. **Article 22, Section 3.** The current CBA allows employees to elect compensatory time in lieu of overtime pay up to 100 hours. The Union proposes to increase this to 240 hours. Compensatory time allows an employee to take paid leave equal to that time. That frequently requires the employer to pay for that leave and for a replacement employee. In addition, if the employee receives a pay increase or promotion, his compensatory time will be paid at the higher rate. The city calculated the cost for exempt employees at $427,140.76 and for nonexempt employees at $1,767,363.43.

e. **Article 22, Section 4.** The current CBA provides that if an employee is required to work 16 hours straight, the employee will receive 8 hours of administrative leave pay. The Union first proposes to increase administrative leave pay from 8 hours to 10 and to apply it on the employee's next scheduled shift rather than immediately following the 16 hour period. Second, if an employee works sixteen (16) hours for snow removal or inclement weather, the employee receives ten (10)

[3] The City offered the other cities cited for comparison purposes.

hours of paid leave after that shift. Third, the employee still gets paid for regularly scheduled work hours even if the employee is absent and receiving paid administrative leave. Fourth, the final part of the Union's proposal on administrative leave pay is that an employee will continue to receive overtime pay until the employee has received a ten (10) hour rest period. In arriving at the cost estimation of $322,940.25, the City's calculations did not consider the fact that if an employee is given ten (10) hours of paid administrative leave to be absent from their scheduled shift, this may result in another employee being required to report to work overtime nor did it include the employee receiving overtime for an undefined amount of time. Therefore, the City's calculations for this proposal are likely highly underestimated for a proposal which the Union itself admits is not prevailing practice.

f. **Article 28 Sections 1-3.** The Union proposes to increase the amount provided by the City for tools, uniforms, and non-safety footwear. The tools proposal is an increase from $400.00 to $700.00 per employee receiving such allowance.. The uniforms proposal is an increase from $500.00 to $700.00. The Union's proposes a new requirement to provide a footwear allowance to employees required to wear a uniform but not required to wear safety footwear at a cost of $300.00 per employee.. The clothing items and footwear for swim instructors and lifeguards is an increase from $600.00 and $100.00 respectively, to $800.00 and $150.00. Finally, the Union proposes a new requirement of $600.00 per employee to replace uniform items each year. The total cost of the Union proposals for increases for tools, uniforms, and footwear is $427,100.00 in excess of the appropriation. *Id.* The Union offered no response to, nor did it dispute the calculations provided by the City.

g. **Article 30.B.1-2.** The Union's proposal contains an increase to the amount of time provided for standby from 1 to 2 hours on a normal work day and from 2 to 3 hours on a regularly scheduled day off at a cost of $78,732.87 beyond the appropriation.

h. **Article 31.B. 1-2.** The Union proposal contains an increase to the shift differential for swing shift from $1.00 to $1.45 per hour and graveyard shift from $1.75 to $1.95 per hour at a cost of $110,591.91 beyond the appropriation.

i. **Article 34 Sections 1.G & 3-4.B.** The Union proposes increases for incentive pays for traffic hazards and bilingual abilities as well as a new incentive for those performing "snow, ice, or inclement-weather related activities." The incentive for employees required to work and traffic outside their vehicles would increase from $25 a month to $75 a month. The bilingual incentive would increase from $40 a month to $80 a pay period. The Union proposes a new incentive of $4.00 per hour for snow and inclement weather activities. The cost of these incentive increases is $186,399.24 beyond the appropriation.

3. The Union's LBO contains inconsistent and blatantly false language regarding its economic proposals for the current fiscal year.

   a. **Article 26 Sections 2-4 &6**. Specifically, the language states, "[t]he parties acknowledge that the ***two percent*** pay increases for the ***three years of this Agreement ... "*** are contingent upon appropriation. First, as previously explained (See issue 1) the Union's proposal is not a two percent (2%) increase each year but, rather, a compounded two percent (2%) in July 2025 followed by a second two percent (2%) also in July 2025. In addition, as previously mentioned, the parties agreed to a collective bargaining agreement through June 30, 2027, making it a two-year agreement, not a three-year agreement.

   b. **Article 26 Section 6.** The next inconsistent and ambiguous statement in the Union's proposal for this fiscal year states the following: "If the Governing Body appropriates additional monies beyond the ***seven percent (2%)*** pay increases stated in this Agreement ... ". The written word states seven percent while the numerical references two percent.

   c. **Article 26 Section 6.** The next problematic provision in this same paragraph is the language requiring the City to "submit a budget proposal for FY25 to the City's Governing Body sufficient to fund any of the increases set forth in any section of this CBA." The problem with this language is it requests the

City to perform an action that is required before the start of the Fiscal Year 2025, which commenced on July 1, 2024. As explained by the Assistant Finance Director, the budgeting process for the ensuing fiscal year begins months prior to the start of the fiscal year. Therefore, for "FY 25", the budgeting process began in February 2024 and proceeds with the Mayor presenting the "budget proposal" as referenced in the Union's LBO, to the City Council for approval. The budget is then sent to the Department of Finance and Administration for final approval. It is far too late for the City to present a budget proposal for the current fiscal year as the fiscal year is coming to an end, and the City is in the process of approving the budget for Fiscal Year 2026 which commences on July 1, 2025. Therefore, the Union's proposed language is an impossibility.

d. **Article 26 Section 6.** As the City has not made sufficient appropriations to fund the over seven million dollars contained in the Union's proposal, it appears the parties would be required to return to negotiations per the Union's proposed language: "Should the Governing Body fail to appropriate sufficient unencumbered funds for those increases, the parties will return to the table to negotiate alternatives." The Union presented, over the City's objection to relevance, a newspaper article dated November 14, 2023, regarding unanticipated revenue in Fiscal Year 2024. It is clear this newspaper article is irrelevant to the instant matter as it concerns a prior fiscal year with no relevance to either party's LBO. The Union attempted to refer to a second round of unanticipated revenue this fiscal year; however, that revenue is also irrelevant to the party's LBO. As Ms. Lotero explained, unanticipated revenue can only be used for one-time costs, not items that are recurring such as the economic proposals contained in the Union's LBO. In fact, Ms. Lotero stated the Department of Finance and Administration would not approve their budget if they attempted to use the unanticipated revenues for recurring expenses. Therefore, the Union's attempt to identify surplus to fund its LBO is prohibited. This means the parties are left, under the Union's proposal, to return to negotiations, after five (5) years of bargaining and inability to reach

an agreement, rather than have the Arbitrator resolve the impasse with a successor CBA. The Union's proposal results in perpetual bargaining. This negates PEBA's requirement in § 10-7E-18(B)(2) that the Arbitrator's decision is required to be final and resolve unresolved issues.

4. The City Presented Compelling Evidence to Support its Non-Economic Proposals
    a. **Article 3, Section 4.** Ms. Bernadette Salazar, Human Resources Director, testified that the Union's proposal to change current language regarding contracting out would require agreement from the Union for the City to do so. She testified contracting out is done where there is an overload of work that cannot be completed by bargaining unit employees due to the amount of work or the specialized equipment required for the work.. She explained the City's proposal made it clear that contractors cannot replace bargaining unit employees. It would be untenable for the City to be prohibited from contracting out work unable to be performed by bargaining unit employees simply because the Union prohibited it to the detriment of the delivery of services to the citizens.
    b. **Article 5 Section 3.c.** Concerning the City's rationale not to add additional hours to the amount of paid leave time for the Union representatives to conduct Union business, Ms. Salazar explained that adding more hours for union business takes employees away from the work they were hired to do and results in overtime for other employees to cover the absences. The Union did not present any documentation supporting a need for additional hours of leave, particularly when such leave negatively impacts services to the citizens. Ms. Jimenez also confirmed the Union did not produce any documents nor did the City find any documentation such as payroll reports on the current use of Union time to support the need for additional time for Union representatives to be absent from work.
    c. **Article 18 Section 2.C.** The City's LBO provided notice to employees that the failure to wear personal protective equipment could result in disciplinary action, including possible termination. The Union President testified it is a management right to impose discipline and, therefore, he felt this language

was not "relevant." However, to take disciplinary action, an employer must demonstrate just cause. The first element of just cause is whether the employer gave an employee notice that their actions or inactions could result in disciplinary action. Therefore, the City's proposed language provides the notice required by law for just cause.

d. **Article 30.A.** Concerning standby time, the Union President acknowledged the City's LBO is supported by prevailing practice. It sets forth requirements for being on standby and receiving standby pay such as ensuring a method of contact, reporting to work within 30 minutes, requesting longer if the employee lives more than 20 miles away, and arriving in fit condition.

5. **Article 5.B.6.** The City proposes to remove language allowing the Union to use interdepartmental mail for the delivery of union literature.. This change would bring the CBA into compliance with the law, namely the Private Express Statutes, which prohibits the Union from using an employer's interdepartmental mail services. ***Regents of the University of California*** *v.* ***Public Employment Relations Board,*** 485 U.S. 589, 108 S.Ct. 1404, 99 L.Ed 2d 664 (l 988) (holding that the employer violates the Statutes if it allows a union to use its interdepartmental mail); ***Fort Wayne Community Schools v. Fort Wayner Educ. Ass 'n. Inc.,*** 977 F.2d 358 (C.A.7 1993). The Union's insistence on the language results in an illegal provision the Arbitrator cannot award. Moreover, the Union's LBO would violate PEBA' s prohibition on illegal provisions in collective bargaining agreements which states, "[t]he obligation to bargain collectively imposed by the Public Employee Bargaining Act 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". § 10-7E-l 7(C). It would be imprudent for an arbitrator to knowingly impose language that is contrary to law.

B. The Union

1. The City’s determination that it could not afford the increases is based on an erroneous estimate of the costs.

a. **Article 22 Sections 3-5** The City projected a $2.1 million expense based on the belief that an increase in the amount of compensatory time an employee can have results in an increase in cost to the employer.
b. **Article 26 Sections 2-4.** It also costed the wage proposal on the mistaken belief that the Union sought 4 annual wage increases, not 3.
c. **Article 5 Section 3.C.** It also attributed an increase cost to "Union Time" even though there is no increase in pay to the employee for such time because union time must be during working hours.
d. In any event, the City's own witness testified in a way that shows that the City can afford the Union's proposed increase. In fiscal year 24, the City had a surplus of $20 million and had a $10 million surplus in the prior year as well.

2. **Article 3 Section 1.** The Union proposed a general definition of the bargaining unit which accurately reflects the existing unit: "blue collar, secretarial, technical, professional, and paraprofessional employees," and proposed a process for disputes regarding other classifications: "In the case of a dispute regarding inclusion, the parties will first attempt to resolve that dispute in good faith but can submit that dispute to the PELRB for resolution." The City, on the other hand, proposed listing individual classifications in an appendix that they did not include in their LBO, or in any exhibit it introduced at the hearing. Thus, if the arbitrator were to select the City's LBO, it would result in a recognition clause which did not identify in any way who was in or out of the bargaining unit. As became clear in the hearing, the only potential candidate for the Appendix that the City's proposed LBF references (Union Ex. 15) is already obsolete. Indeed, the City's Classification and Compensation Study changed some of the job titles, but that is not reflected in the already obsolete draft appendix.
3. **Article 3 Section 4.** The Union proposed limiting the circumstances when the City could erode the bargaining unit by contracting out bargaining unit work or using temporary workers to perform bargaining unit work. The Union's proposal requires that the parties come to an agreement about such contracting out, limits the period in which that contracting out can occur, and only allows the use of temporary workers if they supplement rather than replace bargaining unit employees. The City, by contrast, proposes removing existing protections by giving itself the unfettered ability to use

contract workers: "However, the Employer may choose to utilize contracted workers." This is a truly dangerous proposal offered by the City; without limitations on the use of contracted work, nothing would stop the City from eliminating bargaining unit positions under the guise of hiring "contracted workers" (who would not be represented by the Union) to perform that work. In essence, the City's proposal (which would only require notice to the union if contracting out would result in a layoff, has no limitations on the use of temporary employees, and only requires it to "meet and confer" over plans to contract out) cuts the Union completely out of any bargaining regarding the City's erosion of the bargaining unit. However, it is black-letter law that the transfer of bargaining unit work to non-bargaining unit individuals is a mandatory subject of bargaining where it has an impact on bargaining unit work. *Regal Cinemas*, 334 NLRB 304 (2001), enfd. 317 F.3d 300 (D.C. Cir. 2003); see also *Seaport Printing & Ad Specialties, Inc*.., 351 NLRB 1269, 1284 (2007). The Union's proposal came in response to a real-world event:

> Yes, the language that we have proposed in here was primarily in response to COVID. Again, this is during the early days of the COVID lockdowns. There we wanted to put in a hard cap on how long the City could use contracted labor, and we put some conditions in there for when they can use it. Our primary thought for this was during the time, this was when COVID was still new. We had these fog machines that our custodial staff would use to sanitize areas. The City wanted to contract that work out. Our custodians wanted to be the ones to do that work. So, we put in this language so we could codify in the event something like that comes up again, they understand. They use our people. If they want to use contract, they have a four-month window in which they can do it. Anything beyond that, they have to give us notice.

4. **Article 5 Section 1.** The Union proposed status quo for this section; the City, in contrast, proposed adding the following underlined sentence to the existing language (existing language not underlined): "However, nothing contained herein shall bar parties or their members from petitioning their elected political representative, or fully and actively participating in the political process. <u>This shall not include the discussion of items with elected officials or administration that are subject to collective bargaining.</u>" The City's proposal completely guts the Union's (and its members') constitutional right to petition the government. The City's second sentence

nearly negates the one immediately prior to it. If the matter is an "item[]" that is "subject to collective bargaining" neither the union nor its members can even "discuss[]" it with elected representatives. As explained at the hearing, this would even prevent the union from asking the city council to ratify a collective bargaining agreement if both sides had agreed upon one. The City is proposing an unconstitutional limitation on the Union's and its members' First Amendment right to petition their government. This right is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of America, v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). It "has a sanctity and a sanction not permitting dubious intrusions," *Thomas v. Collins*, 323 U.S. 516, 530 (1945) and is logically implicit in and fundamental to the very idea of a republican form of government. *United States v. Cruikshank*, 92 U.S. 542, 552 (1875). When expressive activity is directed toward a public employer by public employees, the right to petition government for a redress of grievances is implicated. *Woodruff v. Bd. of Trs. of Cabell Huntington Hosp.*, 319 S.E.2d 372, 377–79 (W. Va. 1984). The United States Supreme Court has long held that public employees may not "be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public [institutions] in which they work." *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968). Based in part on this constitutional right, the New Mexico Public Employee Labor Relations Board has rejected an argument that union members contacting a school board about matters relating to collective bargaining does not constitute "direct dealing" in violation of the duty to bargain in good faith. See *Gallup-McKinley County School v. MCFUSE, Local* 3313, PELRB Case No. 114-20, Letter Decision (Dec. 15, 2020). There, the employer had relied upon NLRB precedent to claim that the union contacting the school board during negotiations constituted direct dealing. The PELRB's hearing examiner noted: "Second, it must be remembered that the NLRB cases involve private employers where there is no concomitant Constitutionally protected right to 'petition the Government for a redress of grievances.' U.S. Const., amend. 1." Id. at 6. In this matter, there is a Constitutional right that requires protection because the City is a public employer.

5. **Article 5 Sections 2 & 3.** The Union sought here to increase the number of union stewards and to increase the "union time" stewards and officials could use to represent employees, meet with management to resolve disputes, enforce the contract, and investigate and resolve disputes. In contrast, the City's proposal would limit such time. As explained at the hearing,

> Any time a member calls up, one of the executive board members, question, comment, concern, it's on us to address them. That can be anything as benign as how can I use my annual leave to serious issues, my supervisor is being racist and I need to have this dealt with immediately. There's things where we would have to go on site and verify what the employee says. Otherwise like -- we basically go in and do investigative work on our part or to listen to the members and find out what's going on at their respective work sites.
>
> The more I've done this, the more I've seen this is basically a full-time job. I've seen in other CBAs where it is treated as a full-time job where the executive board, if they're called to service, they are going to be doing this job. And that is why we wanted to increase the hours. Right now, our Union President has the most hours, and it is at a part-time level. With 600 people, that just isn't a sufficient amount of time to meet the needs and concerns of everyone involved in our bargaining unit.

New Mexico Courts have recognized that Union Time serves a valuable service in promoting harmonious labor relations. In *IAFF v. City of Albuquerque*, D-202-CV-2010-06846, Final Judgment and Order (Feb. 24, 2010), the Second Judicial District Court concluded that the Union Time provision in the parties' CBA (which gave the president 40 hours a week of union time) was supported by adequate consideration as to not make it a violation of the New Mexico Constitution's Anti-Donation Clause. In paragraph 25 of the Findings of Fact and Conclusions of Law entered by the Court upon which the final judgment was based, the Court identified the following forms of consideration for paid union time:

> (1) Union harmony; (2) the lack of litigation and waste of City resources over contract issues; (3) a collaborative effort by the Union, the City and the Fire Department in resolving at the lowest possible levels all issues which arise concerning the contract; (4) a collaborative effort between the Union, the City and the Fire Department in resolving disciplinary matters; (5) a collaborative effort to resolve of many labor-management issues regarding not only the contract but any other issues such as safety and working conditions of Firefighters at the lowest possible level; (6)

> assistance with issues concerning legislative matters which benefit the City of Albuquerque; (7) and an overall approach to a collaborative unified front between the City, the Fire Department and the Union, which has saved thousands of hours work and countless thousands of dollars in attorney fees and costs in resolving issues in which in many instances has resulted in litigation between the City and various other Unions.

See also AFSCME v. City of Albuquerque, Case No. D-202-CV-2011-06910, Order Granting Preliminary and Permanent Injunction (a courtesy copy of which is attached) (determining "that the State Constitution's Anti-Donation provision does not prohibit the City's paying its employees to engage in union activity.") This is entirely consistent with the purpose of PEBA, as the legislature expressed it:

> The purpose of the Public Employee Bargaining Act is to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions." NMSA 1978, § 10-7E-2 (2003).

6. **Article 5 Section 4.** The Union proposed the status quo in Subsections B(4) and B(5). The City proposed eliminating the right of the Union to utilize city vehicles for union business when the employee was on call and assigned a city vehicle, and proposed not letting it use city equipment or supplies, even by mutual agreement of the parties. Again, the PELRB and the Courts have recognized that the union officials use of employer-provided vehicles is appropriate when on Union Business such as meeting with management. The PELRB in *AFSCME v. State,* Case No. 105-09, determined that "State employee union officials are on official state business while attending labor-management relations meetings, grievance meetings or other meetings necessary for the administration of the contract." As such, the State had engaged in discrimination by allowing management to attend those meetings using state vehicles but preventing the union from doing so.

7. **Article 12 Section D** The Union here has proposed maintaining, with modification, the participation of the Union officers in making a reasonable suspicion determination of an employee suspected of being under the influence. Under current practice, if the city official and the union official agree that there is reasonable suspicion, the employee is required to take the

test. If they do not agree, the city's risk management (a non-union position) breaks the tie. So, under current practice, the ultimate decision is still in the control of City management. The City proposes eliminating the Union's participation completely. During negotiations on this topic, the Union asked the City to provide one single example of where this provision caused a problem. The City did not:

> Louis Demella: I made it clear to the City's team if they could give me one clear example where the Union came in, made an assessment, was incorrect. An example would be, a theoretical example, if a bus driver were suspected of being drunk on the job, myself or the president would come in, assess it, and say that employee is fine. The employee went to work and ended up causing an accident, hurting themselves or anyone else in the public or just damaging equipment. If I had any example of something to that effect, I would have ceded to management's example. Theirs was a concern over risk and liability. I just asked them, we've had this policy in place for over 10 years. If there was a risk to that, surely they would have an example that they could have cited at this point.
>
> Stephen Curtice: Did they --
>
> Louis Demella: They -- they did not present one.

Tr. (2/19/25) AM, at 45:1-24.

Despite not presenting a single instance where this worker protection against arbitrary and capricious treatment has resulted in an issue, the City asks the arbitrator to end this decade's long provision.

8. **Article 18 Section 2.** The Union proposed increasing the footwear allowance to $500 from $200 which the City rejected. Instead, City proposed inserting unnecessary language that failure to comply with the requirement to wear PPE could result in discipline which the Union rejected. The need for the increase in the allowance should be apparent; the prior contract was negotiated in 2017 and $200 is simply insufficient to provide the employee with the required two pairs of safety boots:

> Louis Demella: Because the cost of safety boots has gone up quite a bit from what we've been told by multiple members who get their safety shoes on the regular. **$250 will buy you one quality safety shoe.**

Stephen Curtice: And not the two pairs that they would normally-

Louis Demella: Correct. That would not get you a full set.

Tr. (2/19/25) AM, at 46:15-25.

9. **Article 20 Sections 1-5**. Apart from minor, non-substantive changes, the major difference relating to the concept of "pay inequities." The Union proposed including a definition of "pay inequities based upon City seniority" (i.e., "an employee in the same classification having a higher hourly wage rate than other employee with greater City seniority"). The City rejected this definition and did not propose one of its own. The Union's proposal was necessary due to a dispute the Union brought to the PELRB regarding pay inequities it had identified. See AFSCME v. City of Santa Fe, PELRB Case No. 101-20, Recommended Decision (Aug. 13, 2020). In that decision, despite acknowledging that the Union had identified several pay "inequalities" the PELRB rejected the claim that such "inequalities" constituted "inequities" under the existing CBA. Id. at 16. This case identified a lack of definition as to what constituted a pay inequity under the CBA. The Union sought to remedy that by providing such a definition.
10. **Article 20 Sections 6-8.** Here the Union proposed the status quo regarding probationary period, temporary appointments, and emergency appointments. The City proposed eliminating them all, thereby removing all safeguards on the practice of hiring non-bargaining unit employees to do bargaining unit work. The elimination of the determination of the probationary period is particularly troubling for the PEBA only gives collective bargaining rights to "regular nonprobationary employee[s] of a public employer." NMSA 1978, § 10-7E-4(Q) (2020). There is no definition in the statute as to how long a probationary period is. PELRB regulations provide in part that probationary employee for employers such as the City:

> shall have the meaning set forth in any applicable ordinance, charter or resolution, or, in the absence of such a definition, in a collective bargaining agreement; provided, however, that for determining rights under the PEBA non-state employees a public employee may not be considered to be a probationary employee for more than one year after the date of hire by a public employer.

11.21.1.7(B)(12) NMAC.

Thus, the effect of the City's proposal is to potentially increase the probationary period from six months to a year, thereby depriving a number of employees of rights under PEBA and coverage under the CBA.

11. **Article 21**. There are three major substantive differences in this article. **First**, at multiple locations referring to City rules the City has added the seemingly innocuous, but quite significant phrase, **"and as amended."** This change would allow the City to unilaterally change the rule that is otherwise incorporated by reference into the CBA without negotiating it with the Union. These three words recognize that the rules can be changed. But, these items are unquestionably mandatory subjects of bargaining, in that they pertain to "wages, hours and all other terms and conditions of employment." NMSA 1978, § 10-7E-17(A)(1) (2020). Allowing the employer to negotiate a CBA with the Union that reflects an agreement on mandatory subjects of bargaining but then allowing the employer the right to unilaterally alter that agreement is not consistent with PEBA. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) ("The Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment."); *County of Los Alamos v. Martinez*, 2011-NMCA-027, ¶ 19, 150 N.M. 326, 158 P.3d 1118 (rejecting a claim that the employer could bypass the union and negotiate directly with employees about a mandatory subject of bargaining:

Accordingly, the County is left with an argument that the plain language and breadth of the management-rights provision must be given effect notwithstanding that the paramedic training contracts are subjects of mandatory bargaining. The County's argument is antithetical to the very concept of mandatory subjects of bargaining which, by its terms, means that these are subjects about which the parties must bargain.

Second, the City has proposed the wholesale elimination of a benefit that has been in place for a long time, and which has served the employees well: the sick leave bank. Louis Demella explained just how life-changing the sick leave bank was to him personally:

> That made a huge difference in my life. That made it so all I had to focus on was getting better and getting back to work, as opposed to wondering how I was going to pay my bills while I was crippled. That is a benefit that I as an employee, again, I've been with the City for 12 years, just being able to tap into that bank made it worthwhile. I mean, it's shown me the value of just being with a City employee because this isn't something I would have had access to in the private sector. It also paid for my dues, for whatever that's worth. My dues, just from what I've saved in this, have been paid through until I'm at year 17 with the City. It positively affected my life in a way that I don't think I could effectively articulate.

Tr. (2/19/25) AM, at 59:17 – 60:9.

The City's proposal makes no mention of what happens to the leave already donated to the sick leave bank. *Id.* at 61:5-15. This is a potentially devasting loss of donated leave accumulated by the bargaining unit.

Third, the City proposed eliminating language guaranteeing educational leave, instead stating that such leave is "in accordance with City policy." (Section 8). As discussed above, rules and regulations and policy are subject to unilateral change by the City, whereas the CBA is not. The City, in essence, seeks to have the Union waive its right to bargain over these terms and conditions of employment prior to any future changes in policy. The Union does not and cannot agree to waive its statutory right to bargain these items.

12. **Article 22 Section 1**. The Union proposed current contract language; the City proposed cutting back pay codes that count as "hours worked" for purposes of overtime. The City presented no evidence of why this change in long-standing practice and CBA language is required.

13. **Article 22 Section 2.** The Union proposed current contract language; the City proposed adding a sentence to Section E (underlined in the following):

> The Employer shall not arbitrarily adjust or alter an employee's work schedule just to avoid paying overtime in that pay period. Work schedules

may be changed to better serve our community in the most cost-effective manner by providing notification to the employee.

This seemingly innocuous sentence effectively guts the protections contained in the prior sentence, by letting the City claim that the alteration to the work schedule was not arbitrary and "just" to avoid paying overtime; instead, the City could claim, it was needed to "better serve our community in the most cost-effective manner." At the very least, the City has taken a clear, easy to interpret and follow provision, and made it ambiguous and hard to apply. This will no doubt lead to an increase in grievances and arbitrations. It is completely unnecessary.

14. **Article 22 Section 3.** The Union sought to increase the amount of earned compensatory time that non-exempt employees can accumulate from 100 to 240. This is consistent with the FLSA, which only caps the amount an employee can accumulate at 240 hours. *See* 29 USC § 207(o)(3)(a). As noted above, the City projected a more than $2.1 million cost to these two changes (City Exhibits 13 and 14), but this is based on a false notion: that the City could not pay its employees for hours worked and that the Union was proposing increasing the cap for exempt employees to 240. Neither is true.

15. **Article 24 Section 1** Here, the Union proposed current contract language. The City, once again, proposes giving itself the ability to unilaterally change terms and conditions of employment for the bargaining unit by allowing it to change the referenced rules. Again, it does so through the simple addition of "as amended." As noted above, this seemingly innocuous proposal would force the Union to waive its right to bargain terms and conditions of employment prior to their change by the City.

16. **Article 24 Section 3** The Union proposed current contract language. The City has proposed a sentence that makes the collection of current dues amounts from members impossible. The City proposed requiring the notification of a dues increase to be provided no "no later than November 1 of each year." As established at the hearing the dues amount set by the International is not done

until after that date and is not communicated to the local until December. Thus, under the City's proposal, any dues increase required by an increase in the amount sent to the International would be a year late. What is more disturbing is that this impossibility was explained to the City during the negotiating process and the City still maintained the impossible provision in its LBO.

This seems to indicate that the choice was deliberate—the City does not want to allow the Union to collect the current dues rate from its members. There can be no other explanation for the City maintaining an impossible provision to apply. The arbitrator should not permit such bad faith proposals to become part of the contract.

17. **Article 26.** The Union, consistent with the prior contract, proposed annual 2% wage increases. **The City, instead, proposed annual wage reopeners, meaning that the future wages would not be set by the contract or the arbitrator's decision.** New Mexico courts recognize that "Multi-year collective bargaining agreements are beneficial to both sides and provide stability and continuity for both management and public employees[]" and that existing legal frameworks do "not prohibit the City from adopting a contract that has fiscal implications over several years." *Albuquerque Police Officers' Ass'n. v. City of Albuquerque*, 2013-NMCA-110, ¶ 11, 314 P.3d 667.

    As noted above, all public sector bargaining in New Mexico is subject to the appropriation of funds by the appropriate governing body. But, just in case that was not clear, the Union proposed reopener language in Sections 5 and 6 of this article that would allow the parties to bargain in the event that the City Council does not appropriate sufficient money. This is precisely the language that is required in multi-year contracts with annual wage increases. Id. "This re-opening requirement in Section 3-2-18 ensures that the City has a mechanism to address unexpected deficit spending or budgetary shortfalls that arise during the subsequent years of multi-year collective bargaining contracts.".

As noted above, the City's own witness indicated that the City can afford these wage increases. Furthermore, the City's own classification and compensation study established that the wages of the bargaining unit are below market. "[T]he City is currently 19.7 percent below the market average minimum when considering positions with sufficient responses." Also, "Of these 116 positions with sufficient response, 113 were below market, averaging 23.1 percent below. These 113 classifications represent roughly 97 percent of the surveyed positions receiving sufficient response. Of the 113 positions below market, 20 were more than 35 percent below the average market minimum." The annual wage increases proposed by the Union are affordable, consistent with case law, and needed to keep the City from falling further behind the market.

18. **Article 28** The Union proposed increasing the clothing and tool allowances. As with the other increases to allowances in the contract, this was to keep up with inflation since the negotiation of the last contract:

> Louis Demella: Primarily just to increase the amount of money that the employees would get for the uniforms, and that is just to reflect the increasing costs for these things.
>
> Stephen Curtice: And again, the last contract expired in 2020, correct?
>
> Louis Demella: Yes.
>
> Stephen Curtice: So it was last negotiated in 2016, 2017?
>
> Louis Demella: Yes. And just during that time, a pair of quality jeans has gone up from $45 to the pair I got is $90. Another example for that, if I can, can I focus on Section 2?
>
> Stephen Curtice: Yes. Tell us what you mean.
>
> Louis Demella: That is for the tool allowance. In the existing contract right now, I believe that is $400. You can check the example there. And that has been the same for almost 10 years at this point. That is, the cost for tools have gone up quite a bit. And for the employees who buy tools, which is our facilities and people who handle our fleet division, folks who do, like, repair on heavy duty vehicles. With newer cars in particular, one of the things they've made a point to bring this up is$400, that will get you one quality torque wrench. And these are people who do have to buy their own equipment. So we do need to increase that amount

> just to reflect the costs for these tools. And then the fire trucks are probably the best example for this. They are getting more specialized, they -- for anyone who does any tinkering work, you can see that. Even with your cell phone, I suppose, would be an example. You can't just get a regular Phillips head screwdriver and take it apart. There are specialty tools that you have to get. Apple is probably the best example for that. I don't know if you use those, but that's the right. They have custom. A regular screwdriver won't work. There's a screw with a hole in it, so you need a specific type of screwdriver. It's tamper- proof. And they are starting to make vehicles that are tamper-proof. That way, too, to encourage you to go to a dealership. And so our people to circumvent that are having to buy those tools, and they are getting more and more expensive. So, we wanted to increase this amount to give them the leeway to buy more than one quality tool per fiscal year.

Tr. (2/19/25) AM, at 94:1 – 96:5.

19. **Article 30.** The Union proposed an increase in the amount of pay for standby time; the City rejected that increase and proposed numerous increased restrictions on employees on standby. The Union proposed the increase to make it more attractive for volunteers:

> And that is just to increase for employees who are on the on-call time, it is an incentive for them to actually want to take the on- call shifts instead of forcing the shifts in. It is to sweeten the pot, so to speak. And it is a way that doesn't cause undue financial burden on any of the parties involved.

Id. at 98:22 – 99:2.

The Union opposed the City's new requirements because they were onerous:

> The 10-minute window is a tad onerous. Even when an employee is on-call and ready to work, there is a reasonable bit where they can miss that 10-minute window for a perfectly understandable reason. The on-the-ground supervisor just wants to make sure that the employee is aware they've been summoned and can report to work, and even a 15-minute window would have been more manageable. 10 minutes, there's a lot of circumstances that can come into play where an employee just wasn't able to respond in time, so that window was too harsh. Then the 60 minutes, we have employees who live an hour away, and from there they're at the whims of traffic if they want to go in.
>
> Now, what the City had put in their article was with in writing to the division director where we could see that being an issue is, again, the employee snowplow driver has to come in. They've been put on-call and have been summoned to show up. They live in Albuquerque. It's going to take them 60 minutes, but it's a snowstorm. The highway could be closed.

> It could be icy conditions. It can take them longer than that. Writing to the division director, that's an undue burden in that, again, the frontline supervisor would be knowing what's going on with the employee. If the frontline supervisor considers that an issue, there are other on-call employees usually they can tap into for that.
>
> That added layer of bureaucracy doesn't serve the interests of what we're trying to do with on-call time, which is that as they pay to get the employees to show up when they are needed, and these time restraints don't really facilitate that.

Tr. 99:20 – 101:9.

20. **Article 31.** The Union proposed a modest increase in the existing shift differentials. Again, this was seen to be a needed incentive for employees based on the Union's experience:

> And again, this is to provide incentive for employees to actually take these shifts and be willing to work them. We're hitting a point now where the $1 an hour for a swing shift and $1.75 is not incentive enough for the employees to actually want to come in during these off hours. So, different managers are forced to impose a shift bid. So if we sweeten the pot we're hoping that would make more employees want to actually take the shifts and be willing to take the shifts.

Id. at 102: 4-17.

21. **Article 33** The Union proposed very close to current contact language regarding the benefits set forth in this article. In contrast, the City eliminated the prescription eyewear benefit, changed the Union participation in discussions about the retirement plan and the group insurance benefits, and eliminated employee parking benefits and other miscellaneous benefits. The City did not provide any explanation why it needed these cutbacks in employee benefits.

22. **Article 34** Although there are other self-explanatory changes, the major proposal of the Union is to increase the bilingual pay incentive in Section 4 by doubling it from $20 per pay period to $40 per pay period for part time employees and $40 per pay period to $80 per pay period for full time employees. **This change brings the AFSCME bargaining unit in line with**

other City employees. The Police CBA with the City of Santa Fe provides up to $140 a month as a bilingual pay incentive. Union Ex. 10 at 16.

23. **Article 35** The major difference between the two proposals is language relating to the obligation to meet and confer with the Union prior to making changes to HR Policies. As noted above, these policies and changes thereto can result in unilateral changes in mandatory subjects of bargaining.

V. Analysis

As Arbitrator Helburn said:

> 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.

Vista Grande Charter High School and Vista Grande Federation Of United School Employees FMCS Case No. 11-55446-1 (August 19, 2011).

In this case there are at least 35 disputed Sections and in innumerable issues. Because the parties agree that an LBO that contains an illegal provision may not be adopted by the arbitrator, it may be economical to address those contentions first.

1. The City's Contentions of Illegality

The City alleges that the Union's LBO is illegal for 3 reasons: (1) the proposed wage increases exceeded the existing appropriation of the City Council; (2) it required renewed bargaining if funds sufficient to cover the wage increases were not appropriated by the City Council; (3) it continues the current practice of permitting the use of interdepartmental mail for Union business.

In support of its first contention, the city cites a provision of the Public Employee Bargaining Act:

> 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.***

§ 10-7E-17(H)(emphasis supplied).

The primary difficulty with the City's first argument is that the Union's LBO contains no provision requiring payment of funds in Fiscal Year 24 – 25 and that is the only current appropriation identified by the parties. The relevant Union LBO proposed salary increase is in Fiscal Year 25-26 and there is no appropriation for that year. Tr. (2/19/25) PM, at 78:27 – 79:3. Thus, the Union salary proposal does not "require the reappropriation of funds."

For the second alleged violation, the City relies on the following language in Article 26 Section 6 of the Union's LBO:

> … The Employer agrees to submit a budget proposal for FY 25 [-26][4] to the City's Governing Body sufficient to fund any of the increases set forth in any section of this CBA. Should the Governing Body fail to appropriate sufficient unencumbered funds for those increases, the parties will return to the table to negotiate alternatives.

In support of its argument, the City relies on a portion of Section 10-7E-18 B(2) that provides in part: "[t]he arbitrator shall render a final, binding, written decision resolving unresolved issues pursuant to Subsection H of Section 10-7E-17 NMSA and the Uniform Arbitration Act…"

It contends that the provision in the Union's LBO requiring the parties to "return to the table to negotiate alternatives" means that the arbitrator's decision is not final and does not "resolv[e] unresolved issues" -- wage increases called for by the LBO.

However, as noted by the Union in its response, the City's own LBO contains a right to "request the opening of negotiations for the limited purpose of negotiating a salary increase." City of Santa Fe Last Best Offer Compared To Current CBA Language, Article 26 Section 2 at City Ex. 5, P. 28. More importantly, Article 38 of the CBA contains essentially the same provision as the Union LBO:

[4] Although the LBO indicates FY25, prior references to the fiscal year indicate a beginning year and ending year rather than the single year descriptor. In addition, because the proposal contains no salary increases for FY 25, the context shows that FY 25 – 26 was intended and the reference to FY 25 was a typo.

> The parties recognize that in accordance with PEBA and the Bateman Act, any provision of this Agreement that requires the expenditure of funds shall be contingent upon the specific appropriation of funds by the City's Governing Body. ***If sufficient appropriations are not made by the City's Governing Body, any Article of this Agreement which is dependent upon appropriation of funds by the Governing Body shall be subject to immediate re-negotiation*** upon written request by either party. Any subsequent agreement requiring the expenditure of funds shall be subject to specific appropriation of funds.

Union Ex. 1 at P. 31; emphasis supplied.

Here, the arbitrator's award, if in favor of the Union's LBO, would not leave issues unresolved. It would establish a wage award which is subject to an appropriation of funds by the Governing Body in accordance with New Mexico law. It is not the arbitrator's award that leaves issues unresolved. It is the Governing Body's negation of the arbitrator's award that leaves issues unresolved. The possibility of reopening wage negotiations cannot be considered "leaving issues unresolved."

In support of the City's contention that the current practice of permitting the use of interdepartmental mail for Union business violates the Public Express Statutes, the City cites *Regents of the University of California v. Public Employment Relations Board*, 485 U.S. 589 (1988) and *Fort Wayne Community Schools v. Fort Wayne Education Association, Inc. and United States Postal Service*, 977 F.2d 358 (7th Cir. 1992). Both hold that a CBA provision permitting the use of interdepartmental mail for Union business violates the Public Express Statutes and authorizes no exceptions.

The Union argues that the City offered no evidence that "intra-departmental mail" at the City of Santa Fe "…comes anywhere close to threatening the postal service's monopoly, or even utilized 'postal routes' as did the system at issue in the *Regents* case." That is true, but the Union cannot argue that intra-departmental mail delivery is limited to a single postal address. As such, it covers the same "postal routes" as an individual mailing payment for a parking ticket.

The City has established that the Union's LBO contains an illegal provision and that therefore the arbitrator may not adopt it.

1. **The Union's Contention of Illegality**

The Union alleges that the City's LBO is illegal because it's addition to Article 5 Section 1 limiting the right of members to petition elective political representatives violated those members right under the First Amendment. The relevant portion of Article 5 Section 1 follows:

> However, nothing contained herein shall bar parties or their members from petitioning their elected political representatives, or fully and actively participating in the political process. <u>This shall not include the discussion of items with elected officials or administration ***that are subject to collective bargaining***.</u>

Id, emphasis supplied.

The underlined portion of the quotation is the addition proposed by the City; the portion of that addition describing the subject matter of the limitation is in italics. The cases cited by the Union clearly establish that the First Amendment protects the public employees right to petition the Government for redress of grievances. See *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968) and its progeny. However, as the City contends, this case raises a somewhat narrower issue – may a union waive that constitutional right. It criticizes the Union's citation of *Woodruff v. Board of Trustees of Cabell Huntington Hospital,* 319 S.E.2d 372, 173 W.Va. 604 (1984) on the ground that it actually recognizes that a union may waive free-speech rights in a collective bargaining agreement. From that recognition, the City argues that the Union's reliance on *Woodruff* for the proposition that the City's proposed language is unconstitutional is "blatantly false." The City is mistaken. The most important reference in Woodruff is its conclusion that Woodruff's termination violated his first amendment rights under the Federal Constitution:

> In Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), the United States Supreme Court set forth an approach for evaluating claims of waiver of free speech rights. After noting that the right of free speech is the "`matrix, the indispensable condition, of nearly every other form of freedom,'" the Court stated, *380 "***[w]here the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling."***

Emphasis supplied.

The City supported its restriction on Union/member speech saying it is justified by the Public Employee Bargaining Act requiring "negotiations in the closed session." Tr. (2/19/25) PM, at 145: 14-19. That could well be addressed by prohibiting repetition of discussions in those sessions. Instead, it prohibits "discussion of items with elected officials or administration ***that***

are subject to collective bargaining." While that limitation might include matters that were discussed in a closed session, it also includes anything in the broad world of collective bargaining.[5] As such the waiver occurs in circumstances which fall well short of being "clear or compelling."

The Union has established that the City's LBO contains an illegal provision and that therefore the arbitrator may not adopt it.

Inasmuch as both LBO's contain illegal provisions, neither may be selected and further analysis of the parties' quoted contentions above is unnecessary.

AWARD

Because both LBO's contain illegal provisions, neither LBO is selected.

So Ordered this __ day of __, 20__

Russell M. Guttshall

[5] The City cites *Connick v. Myers,* 461 U.S. 138, 146 (1982) for the proposition that **an** employee's wages, hours, and terms and conditions of employment are matters of personal concern, not public concern and that matters that are not of public concern have no free speech protection. The reference is not applicable; the City's LBO does not limit its application to a single individual. It cites ***Belcher v. City of McAlester,*** 324 F.3d 1203, 1208 (10th Cir. 2003). for the proposition that First Amendment rights lose protection if the employer can show restriction is necessary to "prevent disruption of official functions or to insure effective performance by the employee. The City made no such showing and the discussion of "items… subject to collective bargaining submit of no such showing like those in *Belcher*.