In the Matter of
Arbitration between

STATE OF NEVADA, EXECUTIVE DEPARTMENT, Employer	)	FMCS No. 210630-08063
-and-	)	JEFFREY A. BELKIN, ARBITRATOR
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), LOCAL 4041 Union	)	

IMPASSE ARBITRATION AWARD

I. FACTS

A. Introduction

In 2019, pursuant to Senate Bill 135, the State of Nevada permitted public employees to engage in collective bargaining following the certification of a designated exclusive representative. Thereafter the Union ("AFSCME") obtained certification as the representative of four bargaining units and in late 2020, began the process of bargaining with the state, ultimately securing a Collective Bargaining Agreement ("CBA") in May, 2021.

B. Bargaining units

The four certified bargaining units consist of approximately 5000 employees, working in locations around the state, and grouped as follows:

Unit A: Labor, maintenance and custodial employees, including employees of penal and correctional institutions (other than those responsible for security).

Unit E: Professional employees who provide health care, including physical therapists and other employees in the medical and other professions related to health.

Unit F: Employees other than professional employees, who provide health care and personal care, including employees who provide care for children.

Unit I: Category III Peace Officers

C. Relevant bargaining history

Contract negotiations began late October, 2020, and were completed on March 4, 2021, at which time all articles had been tentatively agreed ("TA'd"). The process of reviewing the TAs by each party, including minor revisions, lasted almost two months before AFSCME submitted the final draft to its membership for ratification, a process that was completed on May 16. Final approval by the State Board of Examiners took place on May 25, and the CBA went into full force and effect. Various explanations for the time lapse between March 4 and the completion of ratification were offered during the hearing; but as will be discussed below, the reasons for the delay have no significant impact on the outcome of this arbitration.

D. Dispute over COLA

During the course of negotiations the parties were able to reach agreement on a three percent (3%) salary increase for all covered bargaining unit employees in FY 2023, i.e. beginning July 1, 2022. But they were unable to agree on a salary increase for FY 2022

(July 1, 2021 – June 30, 2022). Their differences were settled on March 4, 2021 when they TA'd Article X of the new CBA ("Compensation) that included the following provision:

> " If the May 2021 meeting of the Economic Forum, pursuant to NRS 353.230, projects additional State revenues, the parties agreed to a limited reopener with the express purpose of negotiating a cost-of-living increase in FY 2022. Such bargaining sessions shall be limited to two (2) eight (8) hour sessions, unless otherwise agreed upon by the parties. If no agreement is reached, the parties will use the impasse procedure outlined in NRS 288.575 to resolve the issue"

The Economic Forum, at which projections of the State's financial or fiscal status for the next biennium are discussed, met on May 4, 2021. At that meeting the report projected additional revenues for the State of more than $300 million in FY 2021 and $900 million for FY 2021 through FY 2023, which projections had the effect of triggering the limited reopener of the CBA referred to in Article X (above).

However, before any bargaining sessions could be held with respect to a COLA for FY 2022, the State Legislature adjourned sine die on May 31. Because the Legislature was not in session, when a bargaining session was ultimately held on June 23, the State took the position that "non-appropriation would apply for compensatory items if the legislature couldn't fund [the payment]."[1] That is, according to the State, any COLA settlement that might be agreed to in negotiations involving the direct expenditure of funds, would be a nullity in the absence of the Legislature being in session. The result of the June 23 meeting, therefore, was that the parties were at impasse pursuant to Article X

[1] Article XXXIII of the CBA ("Appropriations") includes the following statement:

> "The parties recognize that any provision of this Agreement that requires the expenditure of funds…shall be contingent upon specific appropriation of funds…by the legislature."

of the CBA and consequently, they agreed to binding, final offer arbitration according to the procedure set forth in NRS 288.575. This proceeding is the result.

D. Mandated arbitration procedure

The sole purpose of this arbitration is the selection of one of the final offers presented by AFSCME and the State. That selection is governed by statute, specifically NRS 288.580. Under the circumstances it is appropriate to quote the statute in its entirety:

> **NRS 288.580 Requirements and standards for decision of arbitrator; decision is final and binding**
>
> 1. For issues in dispute after arbitration proceedings are held pursuant to NRS 288.575, the arbitrator shall incorporate either the final offer of the Executive Department or the final offer of the exclusive representative into his or her decision. The decision of the arbitrator shall be limited to a selection of one of the two final offers of the parties. The arbitrator shall not revise or amend the final offer of either party on any issue.
>
> 2. To determine which final offer to incorporate into his or her decision, the arbitrator shall assess the reasonableness of:
>
> (a) The position of each party as to each issue in dispute; and
>
> (b) The contractual terms and conditions contained in each final offer.
>
> 3. In assessing reasonableness pursuant to subsection 2, the arbitrator shall:
>
> (a) Compare the wages, hours and other terms of conditions of employment for the employees within the bargaining unit with the wages, hours and other terms and conditions of employment for other employees performing similar services and for other employees generally:
>
> (1) In public employment in comparable communities; and
>
> (2) In private employment in comparable communities; and
>
> (b) Consider, without limitation:
>
> (1) The financial ability of the State to pay the costs associated with the proposed collective bargaining agreement, with due regard for the primary obligation of the State to safeguard the health, safety and welfare of the people of the State;

(2) The average price paid by consumers for goods and services in geographic location where the employees work; and

(3) Such other factors are normally or traditionally used as part of collective bargaining, mediation, arbitration or other methods of dispute resolution to determine the wages, hours, and other terms and conditions of employment for employees in public or private employment.

(4) The decision of the arbitrator is final and binding on the parties.

Thus the object of this proceeding is the determination of the "reasonableness" of each party's final offer according to the criteria set forth in the statute.

II. FINAL OFFERS OF THE PARTIES

(a) AFSCME

Final Wage Proposal
AFSCME to the State of Nevada
October 12, 2021

Effective July 1st, 2021, the salary schedules for Bargaining Units A, E, F and I will reflect an increase of three percent (3%).

This above language shall supersede the compensation reopener language in Article X Compensation of the 2021-2023 CBA between parties. Specifically, the following language shall be satisfied upon ratification and approval by the parties:

If the May 2021 meeting of the Economic Forum, pursuant to NRS 353.230 projects additional State revenues, the parties agree to a limited reopener with the express purpose of negotiating a cost-of-living increase in FY 2022. Such bargaining sessions shall be limited to two (2) eight (8) hour sessions, unless otherwise agreed upon by the parties. If no agreement is reached, the parties will use the impasse procedure outlined in NRS 288.575 to resolve the issue.

(b) State of Nevada

Last and Final Offer
State of Nevada to AFSCM
FMCS 210630-08063
October 12, 2021

The State of Nevada's Last and Final offer remains as follows:

The State lacks the authority at this time to consider any proposal for a Fiscal Year 2021-2022 COLA because there is no lawful mechanism under NRS 353 or NRS 288 by which to seek appropriation to fund any further direct compensation.

III. POSITIONS OF THE PARTIES

A. Introduction

On its face NRS 288.580 contemplates competing final offers based on economic considerations: "…wages, hours and other terms and conditions of employment…financial ability of the State to pay the costs associated with the proposed collective bargaining agreement…," etc. Here, however, unlike AFSCME, the State has opted to not present such an offer, based on its position that the adjournment sine die of the Legislature on May 31, 2021, precludes consideration of the AFSCME's final offer, because the State is effectively estopped from funding it. Prior to the arbitration both parties filed briefs that extensively set forth their respective positions on the legal issues raised by the final offer of the State. Their positons may be summarized as follows:

(1) The State

As stated in its reply to AFSCME's Pre-Hearing Brief, the State contended that the issue in this arbitration is "whether the COLA reopener at issue in the instant impasse arbitration can commit the State to pay funds for the period covering FY 2022-FY 2023 biennium, after the legislative session has ended."

In its Motion to Deem AFSCME's Proposals withdrawn Per NRS 288.575, the State raised the following arguments:

- On March 4, 2021, when the parties TA'd the reopener provision of Article X, it was "discussed and understood" that any reopener negotiations would have to take place in the window of time following (1)the Economic Forum; (2)ratification of the CBA by the union membership; (3)approval of the CBA by the State Board of Examiners; and all these prior to the close of the Legislative Session.

- Although the Legislature passed a Pay Bill on May 31, 2021, including the agreed-upon three percent (3%) COLA increase for FY 2022-2023, there was no provision in that bill for a COLA increase for FY 2021-2022, to be the subject of pending negotiations. Thus when the Legislature adjourned sine die on June 1, "the parties were left without any time to implement the reopener provision…as was contemplated and agreed to in March." -

- Under NRS 288.575 any proposal that conflicts with or is otherwise inconsistent with other state laws must be considered withdrawn from the arbitration process. Therefore, because AFSCME's final offer exceeds the amount approved by the Legislature in their Pay Bill (prior to adjournment) it is inconsistent with the controlling statues and must be withdrawn.

- The authority to grant any additional compensation "rests exclusively with the Legislature"' but because the legislative session had concluded "there is no further opportunity to submit a compensation proposal…for inclusion in the biannual budget," and so "it is impossible for any State funds to be distributed in excess of the Legislature's final appropriations."

-Furthermore, in passing SB 135 (the Nevada collective bargaining statute), the Legislature made it clear that "arbitrators cannot bind the State to the expenditure of funds."

- The statutes resulting from SB 135 establish a negotiating process, beginning in November, whereby there is sufficient time "for final recommendations related to budgetary matters to be submitted for legislative approval prior to the close of the regular session." This "Legislative Scheme" serves to limit negotiations on direct compensation to the legislative timetable; and failure to submit a proposal within that timetable ends the ability of the Legislature to consider compensation.

- The Legislature, in enacting SB 135, "retained its 'power of the purse', "placing 'guard rails in items of direct compensation' that apply exclusively to the Executive Department." And "unlike the statutory construction under which local governments arbitrate interest proposals (where the Arbitrator can bind the….employer to his or her chosen proposal)", in this situation all are bound, including AFSCME and the Arbitrator, by the terms of the Pay Bill.

(2) AFSCME

In its Pre-Hearing Brief AFSCME asserts that the issue in this arbitration is "whether the state has a duty to negotiate in good faith over a FY2022 COLA under the [negotiated] COLA reopener provision."

AFSCME's Pre-Hearing Brief raises the following arguments:

- The State is legally obligated to negotiate in good faith over a FY 2022 COLA "because direct monetary compensation is a mandatory subject of bargaining under NRS 288.150 (2)(a)."

- The parties agreed to a CBA reopener "specifically to negotiate a COLA in FY 2022," a provision that was approved by the Board of Examiners consisting of the Governor, the Attorney General and the Secretary of State.

- The only proviso to a reopener was whether the May, 2021, meeting of the Economic Forum would project additional State revenues; but once that condition was met, the requirement to negotiate over a COLA in FY 2022 was triggered.

- The COLA reopener can commit the State to pay a FY 2022 COLA, "contingent on legislative approvals and appropriation required by law that are not at issue here". (emphasis in original)

- Under applicable law the only task of the Arbitrator is limited to determining the reasonableness of the Parties' positions concerning each issue in dispute and the contractual terms and provisions contained in each final offer.

- There is no statutory deadline for concluding collective bargaining regarding compensation or any other mandatory subject of bargaining.

- The evidence will show that the Union's final offer is the most reasonable "and that the State has financial ability to pay the costs of the proposed collective bargaining agreement."

IV. EVIDENCE REALTED TO THE STATUTORY CRITERIA OF REASONABLENESS

To support its final offer AFSCME introduced evidence intended to address the statutory criteria of "reasonableness." That evidence broadly covered two subjects: the financial ability of the State to pay the proposed COLA for FY 2022; and the assertion that the proposed COLA increase would bring the State closer to parity with comparable employers. The primary consideration with respect to AFSCME's evidence is that its accuracy, validity and relevance was uncontradicted, nor questioned by the State. Therefore, in the absence of contradictory evidence, AFSCME's evidence in connection with the reasonableness of its final offer will be accepted at face value.

Regarding the financial ability of the State to pay the COLA for FY 2022 it is not possible to totally detail all the evidence on the subject, an exercise that is otherwise unnecessary due to the absence of competing data. For that reason the matter of the ability to pay will be presented in summary form. It should be noted at the outset, that AFSCME's final offer supersedes the original language of Article X of the CBA, that would only have required the parties to negotiate over terms of a COLA for FY 2022; whereas the final offer sets a specific salary increase of three percent (3%). There was no evidence that the state objected to that amount and further, its representative at the one negotiating session held on June 23, 2021, made it clear that the dispute was not over the State's financial ability to pay, but rather its ability to pay under the law. The following evidence is relevant to the financial ability of the State:

-The American Rescue Plan ("ARP") enacted by Congress provided $2.7 billion in federal funds to the State in March, 2021, to be used to make up for any shortfall of funds resulting from the COVID pandemic.

- The ARP granted the recipients (including the State) “broad latitude” for the use of funds to replace lost general revenues and to avoid cuts in other governmental services.

- The State transferred $1 billion in ARP funds to the General Fund to make up for the loss of revenue resulting from the COVID pandemic, which funds could be used for rehiring of laid off employees and payroll expenses.

- ARP funds were “intended to be stimulative for states and local governments so they could go back to where they were pre-COVID,” and should not be treated as a one-time grant.

- Other states, including New York, California, and Ohio have used ARP funs to fund payroll increases.

Along with the above considerations it is also important, in connection with the State’s ability to pay the COLA increase for FY 2022, that under Article X of the CBA, the process of negotiation could only occur if the May Economic Forum projected additional State revenues, i.e. that there would be sufficient funds for a pay increase. Moreover, the Board of Examiners, essentially the last word in approving collective bargaining agreements for the State, approved the CBA after the projections of the May Economic Forum, presumably in full knowledge that negotiations for a COLA increase would be taking place.

Regarding the matter of comparability, most of the evidence was based on the State survey of salaries and benefits completed in October, 2020. Although NRS 288.575 (quoted above) directs the arbitrator to compare the wages and other terms of employment of bargaining unit employees with those of “other employees performing similar services and for other employees generally” the fact is that attempting a meaningful “apples to apples” comparison

between the four State bargaining units at issue, that include employees working over a widespread area in many different positions, with any other employee group, is very difficult. Another factor making a meaningful comparison difficult is that AFSCME's final offer for a three percent COLA applies to all classifications in the four bargaining units irrespective of differences in current pay, qualifications, nature of the work, and any other terms and conditions of employment.

Notwithstanding these concerns it is possible to generally describe AFSCME's presentation of comparables. The areas of comparison, based on the aforesaid State survey of October, 2020, may be broken down as follows:

- Selected school districts in Nevada (salaries).
- Regional transit in Nevada (salaries).
- Other State and private sector employees (salaries).
- Percentage of employee contributions towards pension benefits.
  (i.e. Colorado, California).

The gist of AFSCME's evidence regarding comparability is that State employees generally lag behind those of the employers selected for the comparisons in terms of overall compensation. Because the State presented no contrary evidence it is determined that the statutory factor of comparability was satisfied in connection with AFSCME's final offer.

AFSCME also presented evidence that the current compensation structure of the State employees has not kept up with the rate of inflation, which was 5.3 percent as of the arbitration, according to the CP I. This factor likewise favors the reasonableness of AFSCME's final offer.

The foregoing summary of AFSCME's uncontradicted evidence in connection with the financial aspects of its final offer supports the conclusion that its final offer satisfies the statutory criteria of reasonableness in all relevant aspects.

IV. ANALYSIS OF THE PARTIES' FINAL OFFERS

Analysis of the final offers begins with these facts:

1. Any and all funding to be provided under the CBA is the sole function of the State Legislature.

2. Under NRS 288.575 an arbitrator lacks the authority to order the expenditure of funds.

3. The only jurisdiction of an arbitrator pursuant to the statute is to select between the parties' final offers according to which is the more "reasonable," and provide a rationale for that determination.

The State's position, essentially, is that AFSCME's final offer cannot be regarded as "reasonable" because it consists of a pay increase (COLA) that could not legally be funded. In support of its position the State relies on the anticipated chronological structure of contract negotiations, to wit: negotiations began in the fall of 2020 with the expectation of completion by March of 2021. Upon completion of negotiations on March 4, 2021 (the TA's), the parties only needed to review and ratify the final document: and once the report of the May Economic Forum was issued (May 4) projecting additional revenues, the parties allegedly could complete negotiations, present the final document to the Board of Examiners for approval, and finally submit it to the Legislature for funding. The problem arose, according to the State, because AFSCME delayed in getting the CBA ratified by its membership until it was too late for the Legislature to complete the funding process before it adjourned on May 31. Therefore as the State argued in a Motion to Deem

AFSCME's Proposals Withdrawn, the reopener negotiations contemplated in Article X, when they finally took place, could not legally result in an agreement on a COLA for FY 2022, thereby nullifying any outcome in this arbitration other than acceptance of its final offer.

With due respect there is a basic flaw in the position presented by the State, in that there is no express chronological connection, either statutory of in the CBA itself, between completion of negotiations and the subsequent steps described above. As of March 4, 2021, the parties having negotiated in good faith, nevertheless failed to reach an agreement regarding a salary increase for FY 2022 (described as a COLA). To resolve their disagreement they adopted an approach to continuance of negotiations via a limited reopener predicated on just one contingency, the projection of additional State revenues by the Economic Forum. And if the subsequent negotiations failed to produce agreement on a COLA for FY 2022, the resulting impasse would be presented to final offer binding arbitration according to statutory guidelines of reasonableness. Moreover, when they TA'd the Article X reopener on March 4, based on the then-unknown projection of the Economic Forum, the parties realized (according to the testimony) that there was a tight window of time with several steps necessary before a final agreement on a COLA could be presented to the Legislature for funding prior to adjournment on May 31. The process of ratification of a first contract by several widely-dispersed bargaining units consisting of over 5000 employees, in and of itself, was likely to be time-consuming; not to mention the requirement of approval by the Board of Examiners. Nevertheless, knowing that time was very limited, the parties placed no other contingencies on the limited reopening of negotiations.

The State's contention that the adjournment of the Legislature on May 31, 2021, precluded an agreement on a COLA when the parties met for negotiations on June 23, is misplaced. AFSCME was aware on June 23 that by statute, any agreement on a COLA that might be negotiated would require funding by the Legislature (also required under Article XXIII of the CBA). But AFSCME also believed that funding might be achieved by other means such as the Legislature being called into special session by the Governor, perhaps at the initiative of the Board of Examiners (a "long shot" according to the Director of the Nevada Department of Administration). In any event, however, AFSCME takes the position that completion of the negotiating process under Article X of the CBA is separate and distinct from the matter of funding, a position that is consistent with the language of that article. It is also consistent with the State's ongoing obligation to bargain in good faith. For those reasons the final offer of the State is determined not to be reasonable, and the Motion to Deem AFSCME's Proposal Withdrawn is hereby overruled.

The only question remaining for determination is whether AFSCME's final offer satisfies the criteria of reasonableness set forth in the NRS 288.580 (quoted above, pp. 4-5). Because the only evidence in connection with those criteria was presented by AFSCME, as discussed above, and that such evidence clearly appears to comply with the statutory "requirements and standards," it is determined the AFSCME's final offer is selected as being the more reasonable of

the two; and is hereby incorporated into this decision.

Respectfully submitted,

University Hts., Ohio
November 20, 2021