Opinion No. 71-96

August 5, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: The Honorable Turner W. Branch New Mexico State Representative Suite 1400 National Building 505 Marquette, N. W. Albuquerque, N.M. 87101

QUESTIONS

QUESTIONS

1. Would it be permissive or legal for a group of city employees to enter into a collective bargaining contract with a city in the State of New Mexico?

2. (A) Is the charge of a service fee against such employees legal?

(B) If so, could this be withheld from their pay?

3. Does the city have any liability for contribution to: (A) a service fee; or (B) a retirement fund?

4. Could a city pay the extra 5% for a city employee as a contribution for the Public Retirement Association?

CONCLUSIONS

1. Yes, but see analysis.

2. A. Yes.

B. Yes, but see analysis.

3. A. No.

B. See analysis.

4. No.

OPINION

*{*142}* **ANALYSIS**

1. The starting point in answering this question is the case of **International Bhd. of Elec. Workers, Local 611, AFL-CIO v. Town of Farmington,** 75 N.M. 393, 405 P.2d

233 (1965), in which the New Mexico Supreme Court held that a municipality had authority to enter into a collective bargaining agreement with a union representing employees so long as the municipality did not have in effect a merit system for the hiring, promotion, discharge and general regulation of municipal employees as authorized by Section 14-12-4, N.M.S.A., 1953 Comp. As a result of this decision, one must first determine whether the city referred to has a merit system or whether it is in the same position as was Farmington in the above mentioned case.

Even in the presence of a merit system covering those areas authorized by statute, it is the opinion of this office that the **International Brotherhood** case permits a municipality to enter into a collective bargaining agreement covering those areas which are not otherwise covered by the merit system.

2. In answering this question we assume that the reference made to a *{*143}* "service fee" refers to dues. We find nothing in either the New Mexico Statutes or in New Mexico case law which would prohibit such a service fee; however, we think we should caution that if the municipality in question has adopted a merit system as authorized by Section 14-12-4, **supra,** the fee could not be inconsistent with the provisions of that system.

(B) Here we assume you refer to what is commonly known in labor negotiations as "dues checkoff." A recent publication by the National Association of Attorneys General on Public Employees Labor Relations states: "There appears to be no opposition to checkoff of union dues so long as it is not mandatory." In further defining mandatory, the report went on to state that the checkoff of dues should be only upon the voluntary, written authorization of the employee and should be revocable at any time. See, National Association of Attorneys General, Committee on The Office of Attorney General, **Public Employee Labor Relations** (June 1971) at pages 18-19. We think that applying such a rule in New Mexico to public employers and employees has ample precedent in that it is generally the same rule the Legislature has provided for private employers under the provisions of Section 59-3-2, N.M.S.A., 1953 Comp. which states in pertinent part:

"Employers shall pay such wages in full, less lawful deductions . . . except such as may be specifically stated in the written contract of hiring entered into at the time of hiring."

Consequently, it is our conclusion that dues checkoff is legal and may be withheld from the employee's pay upon the voluntary, written request of the employee so long as the request is freely revocable.

3 (A). Service fee -- In the absence of any statutory or case law making a municipality liable for a service fee, it is the opinion of this office that the municipality is not liable unless it has otherwise agreed.

Further, this office is of the opinion that it would not be a violation of Article IX, Section 14 of the New Mexico Constitution for a municipality to enter into an agreement for such a fee as it could be considered a legitimate fringe benefit and not a donation.

(B). Retirement fund -- The first determination which must be made in order to answer this question is whether the city in question is an affiliated public employer as defined in Section 5-5-1 (F) and Section 5-5-5, N.M.S.A., 1953 Comp. Your request does not provide enough information to make such a determination. But suffice it to say that if the city in question is not an affiliated public employer it would not be liable for contributions to the Public Employees Retirement Act, Sections 5-5-1 through 5-5-23, N.M.S.A., 1953 Comp. On the other hand, if the city to which you refer is an affiliated public employer Section 5-5-10, **supra,** provides in pertinent part:

"Each affiliated public employer on the first day of each month **shall pay** into the employers' accumulation fund five per cent [5%] of the regular salary of each member in its employ except police members, certain municipal police members and municipal fireman members . . . . The **affiliated public employer** of a municipal police member **shall** on the first day of each month hereafter **pay** into the employers' accumulation fund seven per cent [7%] of the regular salary of each police member in its employ, and may elect by resolution duly adopted to pay into this fund either ten per cent [10%] or eleven and one-half per cent [11-1/2%] of the regular salary of each police member in its employ. **The affiliated public employer** of a municipal fireman member **shall** on the first day of each month hereafter **pay** into the employers' accumulation fund seven per cent [7%] of the regular salary of each fireman member in its employ and may elect by resolution duly adopted to pay into this fund either ten per cent [10%] or eleven and one-half per cent [11-1/2%] of the regular salary of each fireman member in its employ." (Emphasis added)

It is evident from the mandatory language that a city which is an affiliated *{*144}* public employer is liable for employers' share contributions to the retirement fund.

4. Section 5-5-9, N.M.S.A., 1953 Comp. is dispositive as to this question. It provides in pertinent part:

"Every member, except state police members, municipal police members and municipal fireman members, **shall pay** into the employees' savings fund **five per cent** [5%] **of his regular salary; every** state police member, municipal police member and municipal fireman member **shall pay** into the employees' savings fund **seven per cent [7%] of his regular salary. Such payments shall be made by deductions thereof from the salaries of members.** Each department head of each affiliated public employer is hereby directed to cause such deductions to be made on each abstract from the salary of each member, and to approve payment to the state treasurer for the aggregate amount so deducted from the salaries covered by the abstract. The said payments made by each member shall be credited to his individual account in the employees' savings fund." (Emphasis added)

It is the opinion of this office that the mandatory language of this section clearly indicates that the contributions to the employees' savings fund must come from the regular salary of the individual employee and cannot be made as a contribution by the city employer.

By: James B. Mulcock, Jr.

Assistant Attorney General