Opinion No. 73-19

February 8, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Clay Buchanan, Director New Mexico Legislative Council State Capitol Building Santa Fe, New Mexico 87501

QUESTIONS

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Senate Bill 172 contains provisions which exclude the New Mexico State Police from coverage under the Public Employee Bargaining Act. Is such an exclusion constitutionally permissible?

CONCLUSION

Yes.

OPINION

*{*31}* **ANALYSIS**

The only possible constitutional objection to such exclusion would be the Equal Protection Clause of the Fourteenth Amendment. Equal protection issues are traditionally analyzed by the Supreme Court through the application of two distinct but related judicial theories -- the "rational relationship" test and the "compelling interest" or "strict scrutiny" test. See **McGowan v. Maryland,** 366 U.S. 420 (1961) and **Reynolds v. Simms,** 377 U.S. 533 (1964).

The long recognized rational-relation test involves a determination whether the purpose of the law is legitimate and whether the classifications defined by the law are reasonable in the light of this purpose. Classification must be rooted in the reason and founded upon pertinent differences. But equal protection does not require identity of treatment if there exists a reasonable ground for difference of policy. **Florida Lime and Avocado Growers, Inc. v. Paul,** 197 F Supp. 780; see **De Soto Motor Corporation v. Stewart,** 62 F.2d 914; **Davy v. McNeill,** 31 N.M. 7, 240 P. 482; **State v. Thompson,** 57 N.M. 459, 260 P.2d 370; **Gruschus v. Bureau of Revenue,** 74 N.M. 775, *{*32}* 399 P.2d 105; **Sarner v. Union Tp., Union County,** N.J. Super L., 151 A.2d 208.

The United States Supreme Court has recognized that state legislatures have been accorded wide discretion to draft laws which affect one group of citizens differently than another, as long as the distinction is rationally related to some lawful objective. In

McGowan v. Maryland, supra, the court phrased the doctrine as follows at pp. 425-426:

"The constitutional safeguard is offered only if the classification vests on grounds wholly irrelevant to the achievement of the State's objective . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The still developing compelling-interest test is applied where a fundmental right is involved. In the language of the Supreme Court:

". . . That where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." **Harper v. Board of Elections,** 383 U.S. 663, 670 (1966).

Unfortunately perhaps, the Supreme Court has never stated the standard by which one could determine what rights are "fundamental." To date the Supreme Court has recognized interests such as voting **(Harper v. Board of Elections, supra),** procreation **(Skinner v. Oklahoma ex rel. Williamson** 316 U.S. 535 (1942)), criminal procedure rights (see, e.g., **Griffin v. Illinois,** 351 U.S. 12 (1956), and travel **(Shapiro v. Thompson,** 394 U.S. 618 (1969)) as fundamental rights.

In any event it must be remembered that labor law and collective bargaining in the public sector is still in its formative stages. The patterns in the public sector are hazy. Probably the first step was the National Labor Relations Act, which specifically exempts from the term "employer" any state or political subdivision thereof. As a result, the area of state and municipal employment is subject to state and local jurisdiction. And traditionally states have unfortunately been reluctant to grant public employees the collective bargaining rights enjoyed by private employees under the National Labor Relations Act. In 1962, however, President Kennedy issued Executive Order 10988 which granted federal employees the right to join unions and engage in collective bargaining. 26 F.2d Reg. 551 (1961). While the order applied only to federal employees, it apparently served as an impetus to state employees and since that time public employee unions on both the state and federal level have grown steadily. Werne, "Collective Bargaining in the Public Sector," 22 Vand. L. Rev. 833 (1969). And President Nixon's Executive Order 11491, October 1968, updated the machinery developed under Executive Order 10988. This office likewise authorized **permissive** collective bargaining by public employees in New Mexico on April 14, 1971. Nevertheless, the passage of Senate Bill 172 is necessary to effectively reach the desired goals.

At the present time, over thirty states and the District of Columbia have enacted legislation which establishes some species of collective bargaining in the public sector. But the statutes vary widely. Some are permissive; some are mandatory. Some apply to all public employees; others apply only to employees at particular levels, e.g., counties, cities, transit authorities. Some states cover virtually all public employees, but have separate statutes for different groups -- for example, state employees, local employees

and elementary and secondary school teachers. Still others have coverage limited to particular occupational groups.

There is no doubt that historically the theory has been that somehow the employment relationship in the public sector demands greater fealty from the employee than in the private sector. And this thinking has been particularly prevalent in the case of firemen and policemen. Indeed this theory was applied to policemen as far back as 1892. Justice Oliver Wendell Holmes, in a Massachusetts case, said that no individual has a constitutional right to be a policeman, and that "a city may impose any reasonable condition upon holding offices within its control." **McAuliffe v. Mayor of the City of New Bedford,** 155 Mass. 216, 29 N.E. 517, 518 (1892). The court *{*33}* went on to hold that "reasonable conditions" included a city rule which prohibited policemen from joining labor unions.

There is little doubt that judicial thinking in this regard has changed since 1892. See, for example, **Atkins v. City of Charlotte,** 296 F. Supp. 1068 (1969). Nonetheless, by the very nature of things a policeman does occupy a unique status. In the words of Supreme Court Justice Fortas as recently as 1968:

"unlike the lawyer [the policeman] is directly, immediately, and entirely responsible to the city or state which is his employer. He owes his entire loyalty to it. He has no other 'client' or principal. He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer." **Gardner v. Broderick,** 392 U.S. at 277-278 (1968).

Unquestionably the State Police perform continuous essential services that are absolutely vital to the community health, welfare and safety and which differ in significant respects from the tasks performed by other categories of public employees. The exclusion of the State Police from the Public Employee Bargaining Act is not the only state legislation which classifies the members thereof in a manner somewhat differently from many other state employees. That Department is exempt from the State Personnel Act, Section 5-4-31, NMSA, 1953 Comp. Unlike the situation with other state employees, there is a statutory age of retirement which is mandatory. Section 39-2-6, N.M.S.A., 1953 Comp. Quite justifiably, the annuity retirement provisions for State Police members are more liberal than those for most other public employees. Sections 5-5-13 and 5-5-13.1, N.M.S.A., 1953 Comp.

Statutory provisions authorizing collective bargaining in the public sector would be a new legislative approach in this State. Accordingly, perhaps the author of "State Legislation on Collective Bargaining by Public Employees," 22 Labor Law J. 13, 22 (1971) expresses a pertinent viewpoint when he says,

"The opportunity to experiment . . ., one of the advantages of our governmental structure, should help us discover the provisions that best serve the needs of public management, public employees, and the public at large."

It would be speculative on our part to say what direction future judicial decisions will take in the area of police collective bargaining. We do feel justified, however, in stating our opinion that under the present state of the law a statute which classifies the State Police in a category of its own for purposes of collective bargaining in the public sector seems to meet the rational -- relationship test, and, in all probability, the stricter compelling -- interest test, if that test is held to be appropriate (which is subject to doubt).

At any rate the dearth of judicial precedent on the equal protection aspect of excluding police from a public employees collective bargaining act is such that we certainly do not feel warranted in advising that the exclusionary feature in Senate Bill 172 is constitutionally impermissible, although I must say, as a matter of policy, it seems inappropriate, particularly in view of the fact that under Senate Bill 172 they would not be allowed to strike.

By: Oliver E. Payne

Deputy Attorney General