Opinion No. 87-41

August 10, 1987

OPINION OF: HAL STRATTON, Attorney General

BY: James O. Browning, Deputy Attorney General

TO: Boyd Scott, Chairman, State Personnel Board, 130 S. Capitol, Santa Fe, N.M. 87503

QUESTIONS

1. Is it legal for state agencies to engage in collective bargaining with their employees?

2. Are the Rules for Labor-Management Relations which the State Personnel Board promulgated in the past authorized under New Mexico law?

CONCLUSIONS

1. See analysis.

2. No.

ANALYSIS

You requested our opinion on these two questions before two public employee unions filed suit against the New Mexico State Personnel Board ("Board") and the Attorney General. See **State of New Mexico ex rel. American Federation of State, County and Municipal Employees, AFL-CIO v. Attorney General,** No. 17,177 (S. Ct. filed on June 29, 1987). The unions requested the Supreme Court to order the Board to reinstate a collective bargaining agreement that had terminated and to order the Attorney General to concur in two proposed collective bargaining agreements that he had refused to sign. We halted our research for the opinion pending litigation. The Court denied all requested relief in an Order on July 8, 1987, but without issuing a formal opinion. Since the litigation terminated, our Office has reviewed most carefully whether collective bargaining between state employees, and state agencies and commissions, is permissible in New Mexico and whether the Rules for Labor-Management Relations ("RLMR") are consistent with New Mexico Law.

1. Whether Collective Bargaining With State Employees is Permissible.

To answer the first question, we conducted a thorough review of the law in each of the fifty American states. That survey revealed that the great majority of states have adhered to the common law rule, which is that "absent express statutory authority public officials do not have authority to enter exclusive collective bargaining agreements with

public employees." **AFSCME, Council No. 95 v. Olson,** 388 N.W.2d 97, 100 (N.D. 1983). The survey also revealed that, because of the important policy considerations involved, decision making in this area is understood to be especially within the legislature's province. Finally, the survey showed that the state legislatures have been fully capable of modifying the common-law rule to meet their particular needs.

A. The Legal Standard Applicable to Public Sector Collective Bargaining.

The rule is clear throughout the United States that, unless a specific statute exists, a state has no obligation to bargain with a union and may choose as a matter of public policy not to enter into a collective bargaining agreement. As the Supreme Court of the United States stated in **Smith v. Arkansas State Highway Employees,** 441 U.S. 463, 465 (1979): "The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. But the First Amendment does not impose any obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it." (citations omitted). See also **Local Union No. 370, International Union of Operating Engineers v. Detrick,** 592 F.2d 1045, 1046 (9th Cir. 1979) (counties have no duty to bargain with a union in the absence of a statute). States clearly may prohibit public employees from engaging in collective bargaining with their employers. See **Winston-Salem-Forsyth County Unit of the North Carolina Association of Educators v. Phillips,** 381 F. Supp. 644, 646 (D.N.C. 1974) (statute prohibiting public sector collective bargaining is constitutional). As a policy matter, New Mexico certainly could choose under the current law not to enter into collective bargaining agreements. Most jurisdictions, including New Mexico, however, have not expressly prohibited collective bargaining, and the question is whether in those jurisdictions state agencies are free to engage in collective bargaining.

1. The Legal Standard Outside of New Mexico.

Many jurisdictions have stated that, in the absence of statutory authority to engage in collective bargaining, a state or local entity has no power to bargain collectively or to enter into a collective bargaining agreement. This position appears to represent the current trend and majority rule. A survey of New Mexico's sister states reveals that only one state, Illinois, has rejected the common law rule in its entirety. See **Chicago Div. of Ill. Ed. Ass'n v. Board of Educ.,** 76 Ill. App.2d 456, 222 N.E.2d 243 (Ill. App. 1966); **Bd. of Educ. of Plainfield v. Ill. Educ. Lab. Rel. Bd.,** 143 Ill. App. 3d 898, 493 N.E.2d 1130 (Ill. App. 1986). This extreme Minority position is in contrast to thirty-two states, which follow the common law rule.[1] An additional two states have accepted the rule with an exception where a governmental unit is acting in a proprietary capacity.[2] Another seven states -- Arizona, Arkansas, Colorado, Connecticut, Indiana, Louisiana, and West Virginia ----have modified the common-law rule to require less specific legislative authority before collective bargaining will be permitted.[3] In the remaining seven states ---- Michigan, Mississippi, Nevada, Oklahoma, Oregon, Vermont, and Wisconsin ---- there is insufficient evidence to determine the law on this point.

2. The Determination of the Acceptability of Public Sector Collective Bargaining is Entrusted to the Legislature.

There are good reasons that most courts have left this important policy question to state legislatures rather than to the state agencies. Many courts and commentators have noted the inconsistencies between representative government and sovereignty, and public sector bargaining. See, e.g., Petro, "Public Sovereignty and Compulsory Public Sector Bargaining," 10 Wake Forest L. Rev. 25, 110-11 (1974) ("[T]he necessary consequence of according public employee unions exclusive bargaining status is to encourage among government employees a tendency to repose their loyalties primarily in the unions which they have been induced to believe are their protagonists."). As Professor Robert S. Summers of Cornell Law School has noted, "the conflict between democratic processes and public employee collective bargaining is inherent and diminishes democratic decision making, for it requires the sharing of public authority with private bodies (unions)." Summers, Collective Bargaining and Public Benefit Conferral: A Jurisprudential Critique at 4 (1976).

Government provides essential services, which often are monopolies. This fact enables public employees to hold the public hostage during bargaining. As President Franklin D. Roosevelt stated in 1937:

All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of government take it impossible for administrative officials to represent fully or to bind the employer in mutual discussion with government employee organizations.... Accordingly, administrative officials and employees alike are governed and guided, and in many cases restricted, by laws which establish policies, procedures or rules in personnel matters.

Rosenman, "The Public Papers and addresses of Franklin D. Roosevelt," 1937 Vol. 1 at 325 (1941).

Only duly elected representatives of the people may share in the delegated powers of government. Collective bargaining excludes major sections of the electorate from decisions affecting budget allocations and policy development. One private interest group, unaccountable to the pubic, realizes enhanced power over budget development and the determination of state and local policy to the detriment of other legitimate interest groups. See **Winston-Salem-Forsyth County Unit of the North Carolina Association of Educators v. Phillips,** 381 F. Supp. at 647-48 ("[T]o the extent that public employees gain power through recognition and collective bargaining, other interest groups with a right to a voice in the running of the government may be left out of vital political decisions."). (Citing Summers, "Public Employee Bargaining: A Political Perspective," 83 Yale L.J. 1156 (1974); Petro, 10 Wake Forest L. Rev. 25).

Several courts have taken explicit notice of these substantial issues and serious concerns, and declared that it is wholly inappropriate for the judiciary to make the decisions which will bind the polity on this issue. One of the most forceful explications of this principle appears in **Board of Regents v. United Packing House Wkrs.,** 175 N.W.2d 110, at 113 (Iowa 1970):

[I]f the legislature desires to give public employees the advantages of collective bargaining in the full sense as it is used in private industry, it should do so by specific legislation to that effect. We cannot imply authority under these general powers to agree to exclusive representation, depriving other employees of the right to be represented by a group of their choosing or an individual the right to represent himself. **Dole,** in 54 Iowa L.Rev. 539, presents many sound reasons why collective bargaining, with limitations, should be authorized for public employees. But the limitations, provisos and exceptions which the author suggests should be imposed by the court in implying the power to bargain collectively are persuasive arguments for holding it is a matter for the legislature, not the courts.

See also **AFSCME v. Olson,** 338 N.W.2d at 101 ("We agree with the Iowa Supreme Court's rationale that creation of the right to enter exclusive collective bargaining agreements should be left to the discretion of the Legislature rather than be imposed by the courts as an implied power incident to an expressed authority of a public official to deal with employer-employee relations...."). The Supreme Court of Virginia eloquently expressed the underlying principle in **Commonwealth v. County Bd. of Arlington,** 232 S.E.2d at 44:

For this court to declare that the boards have the power to bargain collectively, when even the wisdom of incorporating the concept into the general law of the Commonwealth is the subject of controversial public and political debate, would constitute judicial legislation, with all the adverse connotations that term generates. Conscious of the respective roles of the General Assembly and the judiciary, we decline to intrude upon what the Attorney General succinctly describes as a "singularly political question."

Other cases setting forth this principle include **Zderick v. Silver Bow County,** 154 Mont. 118, 460 P.2d 749, 751 (Mont. 1969); **Minneapolis Fed. of Teachers, Local 59 v. Obermeyer,** 275 Minn. 347, 147 N.W.2d 358, 367; and **Nutter v. City of Santa Monica,** 168 P.2d 741, 746-7 (Cal. App. 1946). Compare **Anchorage Educ. Ass'n v. Anchorage School District,** 648 P.2d 993, 996 (Alaska 1982) ("Either refusing teachers the right to strike or finding such a right in Alaska common law would be an action by this court tipping the social balance in this state's labor relations. This social balance is more properly set by the legislature. Thus, as a matter of common law in the area of labor relations, we will defer to what we believe the legislature intended by its silence.") (citation omitted). As the following section reveals, the state legislatures have proved fully capable of meeting this challenge when the elected representatives of the people found that circumstances in their state warranted a change from the common law standard.

3. The Legislative Response to Changing Circumstances:

When the early cases, such as **Clouse, Mugford** and **Nutter,** appeared and described the common law rule, no state had statutory authorization for public sector collective bargaining. In 1959, Wisconsin passed the first legislation authorizing such bargaining. See H. Edwards, R. Clark and C. Craver, Labor Relations Law in the Public Sector 279 (3d ed. 1985). Since that time numerous states have enacted legislation which permits at least some public employees to engage in collective bargaining.[4] Two states have enacted laws prohibiting collective bargaining by public employees, N.C. Gen. Stat. § 95-97 (Repl. 1985); Tex. Stat. Ann. art. 5154(c) (1987), and in a third, Virginia, the state legislature has passed a resolution which declares the public policy of the state to be opposed to public sector collective bargaining. See **County Bd. of Arlington,** 232 S.E.2d at 34-35.

B. The Legal Standard in New Mexico.

1. There is no legislative authority in New Mexico to permit state agencies to engage in collective bargaining.

In New Mexico, there is no legislative authority that requires or permits state agencies to engage in collective bargaining. Beginning in 1963, at least seventeen bills have been introduced in the New Mexico Legislature to empower state agencies to enter into collective bargaining with employee representatives.[5] Although the Legislature fully considered and debated the collective bargaining issue, it chose not to enact any of those bills into law. In **County Bd. of Arlington,** 232 S.E.2d at 35, and in **AFSCME v. Olson,** 338 N.W. 2d at 102, the Supreme Courts of Virginia and North Dakota, respectively, stated that the failure of the state legislature to enact legislation authorizing public employee collective bargaining demonstrated that the legislative intent was opposed to collective bargaining.

It is worth noting that in 1965, the Legislature acted to permit municipalities to bargain with municipal transit workers. Laws 1965, Chap. 274, §§ 1 to 3. This action was in response to the Urban Mass Transit Act, 49 U.S.C. §§ 1601 to 1618 (1964), which requires that states allow mass transit workers to engage in collective bargaining with cities as a precondition to qualifying for federal mass transit funds. Thus, the Legislature passed Sections 3-52-14 to 3-52-16 NMSA 1978, which authorize cities to engage in collective bargaining with city transit employees. In that same legislative session, however, the legislature failed to approve House Bill 181, which would have permitted all public employees to engage in collective bargaining.

This review of New Mexico's legislative history reveals a legislative accord with the common law rule that statutory authority is needed before public entities can engage lawfully in collective bargaining with their employees. Furthermore, because it authorized expressly one public entity, municipalities, to engage in collective bargaining with one type of employee, mass transit workers, it may be inferred that the legislature specifically rejected collective bargaining for all others. The well established rule of

statutory construction, expressio unius est exclusio alterius (the expression of one thing is the exclusion of another), is applicable here. Applying this rule to New Mexico's legislative history indicates that, because the legislature granted authority to cities to engage in collective bargaining with transit workers, it intended to deny collective bargaining to other public entities and employees. See 2A C. Sands, Sutherland on Statutory Construction, § 47.23 (4th ed. 1973). Thus, Sections 3-52-14 to 3-52-16 NMSA 1978 create a presumption that the legislature meant to preclude the general practice of collective bargaining by state entities and employees.

The only other reference to public sector collective bargaining in New Mexico's statutory law is in the Open Meetings Act at Section 10-15-1(E)(3) NMSA 1978. That provision allows closed meetings for "the discussion of bargaining strategy preliminary to collective bargaining negotiations between the policy making body and a bargaining unit representing the employees of that policy making body and collective bargaining sessions at which the policy-making body and the representatives of the collective bargaining unit are present...." The Open Meetings Act applies to almost all "public bodies," including municipalities. Section 10-15-1(A). Thus, the open meeting requirements do not apply to discussions of collective bargaining strategy or collective bargaining sessions between cites and their transit workers pursuant to Section 3-52-15 NMSA 1978. It would be incorrect to infer, however, that by including this provision in the Open Meetings Act that the legislature recognized the general right of public sector collective bargaining. To the contrary, because the legislature specifically had authorized cities to bargain collectively with transit workers, the legislature reasonably included the reference to collective bargaining in the Open Meetings Act, first enacted in 1974. Laws 1974, ch. 91, § 1. Moreover, the subject of every bill must be expressed clearly in its title. See N.M. Const. IV, § 116. The title of Chapter 91 indicates no intent to ratify collective bargaining. Therefore, language in the Open Meetings Act that harmonized it with Section 3-52-15 cannot be boot-strapped to support the notion that the legislature thereby recognized collective bargaining between other governmental agencies and their employees.

The New Mexico legislature never has acted to permit collective bargaining by state employees. It is a well established rule of statutory construction that laws in derogation of sovereignty and of common law must be clearly and plainly expressed and are to be strictly construed in favor of the state. **State ex rel. Miera v. Chavez,** 70 N.M. 289, 373 P.2d 533 (N.M. 1962); **State v. Bryant,** 99 N.M. 149, 655 P.2d 161 (N.M. App. 1982). See also **Checkrite Petroleum v. Amoco Oil,** 678 F.2d 51 (2nd Cir. 1982); **United States v. Bellard,** 674 F.2d 330 (5th Cir. 1982) (changes in or abrogation of the common law must be clearly and plainly expressed by the legislature). Further, the legal rights and duties that the common law rules bestow on the sovereign cannot be circumvented by an administrative agency's promulgation of rules. See, e.g., **Ickles v. Brimhall,** 42 N.M. 412, 79 P.2d 942 (1938); Section 38-1-3 ("In all the courts in this state the common law as recognized in the United States of America, shall be the rule of practice and decision."). When an agency goes beyond its statutory authority in promulgating rules, the rules will be treated as a nullity. **Family Dental Center v. Board of Dentistry,** 97 N.M. 464, 467, 641 P.2d 495 (1982); **State v. Heffernan,** 41 N.M. at

235; **Rivas v. Board of Cosmetologists,** 101 N.M. 592, 594, 686 P.2d 934 (Stowers, J., dissenting).

Thus, in light of the common law rule, the legislature need not act to prohibit state agency collective bargaining. For example, although Delaware's legislature passed a law permitting collective bargaining, its Supreme Court noted that "if the legislature had intended that State agencies would not be bound by collective bargaining agreements, it would simply have left the status quo." **State v. AFSCME,** 298 A.2d 362, 367 (Del. Ch. 1982) (emphasis added). The fact that the New Mexico Legislature chose to reject seventeen bills permitting state agency collective bargaining is persuasive authority that it intended to deny state agencies the authority to bargain collectively. **IBEW v. Hastings,** 179 Neb. 455, 138 N.W. 2d 822, 825 (Neb. 1965). See also **Green River Community College v. Higher Education Personnel Board,** 25 Wash. App. 379, 640 P.2d 530, 533 (Wash. Ct. App. 1979); **California Toll Bridge Authority v. Kuchel,** 40 Cal.2d 43, 251 P.2d 4 (Cal. 1952); **San Diego Union v. City of San Diego,** 196 Cal. Rptr. 45, 146 Cal. App. 3d 947 (Ct. App. 1983).

2. New Mexico Judicial Decisions and Attorney General Opinions

a. Pre- **Farmington** Attorney General Opinions.

Until Attorney General David Norvell's opinion in his April 14, 1971 letter, discussed infra, this Office consistently followed the common law rule in opinions issued to state officials. In 1955, for example, the New Mexico State Hospital asked the Attorney General whether the employees of the New Mexico Insane Asylum may organize themselves into a labor union. In Attorney General Opinion No. 6207 (June 27, 1955), Attorney General Richard H. Robinson stated that it is "extremely doubtful" that the employees could organize because the facility belongs to the State and no specific legislation authorized them to organize. This Office noted that the courts take the view that public employees owe an undivided allegiance to the public employer and that continued operation of public employment is indispensable in the public interest:

In view of this, public employees are certainly not entitled to the right to strike or to bargain collectively concerning the matters of their employment. The right to organize the public employees should be a matter of consideration for the Legislature, and since the New Mexico Legislature has not seen fit to grant this right, it is our opinion, under the present state of the law, that such right to organization is not available to public employees. Particularly, such organizations could not be recognized by the State of New Mexico.

This Office confirmed that this rule applied to all employees of the State and its various subdivisions in Opinion No. 6308 (Nov. 1, 1955):

Any organization of public employees, which might organize as a labor union, would not have to be recognized by the employer or governing body without legislation requiring said employer or governing body to do so. In fact, it is the general rule that if

membership in such organization is contrary to orders or ordinances prohibiting the same, such may be insubordination and grounds for dismissal.

In Opinion No. 59-90 (July 31, 1959), this Office recognized the right of public employees to join labor unions or associations, but not the right to engage in collective bargaining.

In Attorney General Opinion 63-52 (May 10, 1963), this Office stated that, unlike the right of labor in the private sector, public employees do not possess the right to demand collective bargaining. Because this opinion preceded **IBEW, Local Union No. 611 v. Town of Farmington,** 75 N.M. 393, 405 P.2d 233 (1965), and because the Supreme Court cited the same cases and secondary sources, and used similar analysis and language, it is helpful in construing **Town of Farmington:**

In the absence of specific legislation authorizing the public employer to enter into collective bargaining contracts, the rule is stated as follows in 31 ALR 2d 1170:

"Public employers cannot abdicate or bargain their **continuing** legislative discretion and are therefore **not authorized** to enter into collective bargaining agreements with public employees labor unions." (Emphasis in original.)

In the case of **Springfield v. Clouse,** 356 Mo. 1239, 206 S.W.2d 539, the court said any rule other than that stated above would, as applied to public employment, mean government by private agreement. Accord: **Mugford v. Mayor & City Council of Baltimore,** 185 Md. 266, 44 A.2d 745; **State v. Brotherhood of Railway Trainmen,** 37 Cal.2d 412, 232 P.2d 857; **Miami Water Works Local No. 654 v. Miami,** 157 Fla. 445, 26 So.2d 194.

In the absence of legislative authorization, public employers simply cannot negotiate employment contracts which involve the surrender of any of the agency's continuing discretion in such matters. And a formal contract for a definite time period would be such a surrender. State statutes regulating labor relations in private industry, such as Section 59-13-1, et seq., N.M.S.A. 1953 Compilation, are not applicable to public employer-employee relations. 31 ALR 2d 1149.

It must also be remembered that the manner in which public authorities are to determine wages, hours, working conditions and tenure of public employees is generally governed by the constitution, statutes, municipal charters, municipal ordinances and resolutions. The State Personnel Act, for example, is such a law.

So long as there is no legislative restriction, a public employer can consult with, negotiate with, and listen to an employee union in regard to the promulgation of rules and regulations governing public employment. But the public employer must retain its authority to change such personnel regulations if it seems fit to do so.

Thus, before **Town of Farmington** this Office clearly concluded that public employers cannot bargain collectively with employees, because: (i) there is no legislative authorization; and (ii) the State Personnel Act governs labor issues for state employees. We do not read **Town of Farmington** to reject either conclusion, but it did modify the common law under narrow facts.

b. **IBEW Local Union No. 611 v. Town of Farmington.**

The leading New Mexico case on public employee collective bargaining is **IBEW Local Union No. 611 v. Town of Farmington,** 75 N.M. 393, 405 P.2d 233 (1965). The **Town of Farmington** had acquired an electric utility from a private entity that had a collective bargaining agreement with its employees. Without these peculiar facts of private employees ---- who clearly could bargain collectively under federal law and who had an existing collective bargaining agreement covering public employees because of an acquisition ---- we doubt that the Supreme Court would have done anything but straight-forwardly applied the common law rule.

In deciding whether the town had the authority to enter into an extension of the agreement, the Supreme Court recognized the general rule that such agreements are invalid in the absence of express legislative authority:

We recognize that, absent legislative authority, the courts of other jurisdictions have generally viewed as invalid any agreements between government management and public employees consummated through a process of collective bargaining. See the Annotation, 31 A.L.R. 2d 1142, § 9, "Collective Bargaining," p. 1155, where it is said:

"Up to the present time, public employees are generally not entitled to collective bargaining in the sense that private industrial employees are."

There follow, pp. 1155, 1159, cases which deny or qualify the right to [sic] public employees to collective bargaining with their employers in relation to wages, hours, and working conditions.

75 N.M. at 394, 405 P.2d at 234-35. The Court then stated the reasons for the general rule:

The courts principally advance as reasons for denying the right of public employees to engage in union activities and particularly in collective bargaining, the sovereignty of the public employer; the fact that government is established and operated for all the people and not for the benefit of any person or group; that it is not operated for profit; that public employees owe undivided allegiance to the public employer; and, that continued and uninterrupted operation of public employment is indispensable in the public interest.

Id. at 394-95, 405 P.2d at 235.

The narrow issue in **IBEW v. Town of Farmington,** however, was whether the municipality, when acting in a corporate or proprietary capacity, may engage in collective bargaining with the employees of its newly acquired electric utility. The Supreme Court observed, without holding, that one court had noted that there could be no difference between city employees acting in a governmental capacity and those acting in a proprietary capacity. See **City of Springfield v. Clouse,** 356 Mo. 1239, 206 S.W.2d 539, 546 (Mo. 1947) (also ruling that public employees may organize for the purpose of discussing grievances, but they may not demand the right to bargain collectively). The Court specifically noted that Missouri had a state law for personnel systems in its municipalities with which collective bargaining would directly conflict. 75 N.M. at 395, 405 P.2d at 235. The Court concluded that the Missouri rule is that employees of a publicly owned utility may not demand collective bargaining absent authority to do so conferred upon the municipality by law. See id.

The Court also discussed **Local 266 v. Salt River Project Agr. Imp. & P. Dist.,** 78 Ariz. 30, 275 P.2d 393 (Ariz. 1954), in which the Arizona Supreme Court found that the statutory provision creating quasi-municipal corporations was not meant to deny the district the power to enter into collective bargaining agreements with its employees. The Arizona court said that, while the district was not specifically given the power to make employment contracts, the authorization to do business in itself implies the necessity of hiring labor. See **Christie v. Port of Olympia,** 27 Wash.2d 534, 179 P.2d 294 (Wash. 1947). See also **Nutter v. City of Santa Monica,** 74 Cal. App. 2d 292, 168 P.2d 741, 745-46 (Cal. App. 1946) (denying the right to require recognition of the union as a collective bargaining agent because collective bargaining would be inconsistent with law because the city had adopted a personnel system under legislative authority).

After evaluating the law in these other jurisdictions, the Court said:

We agree that any agreement which conflicts with the regulatory power of the municipality under a civil service or merit system would constitute bargaining away of legislative discretion, and be prohibited....

It is certainly true that any statutory regulation of employment negates the view that there could be contractual negotiations between the governmental employer and the employees. If a merit system provides for these matters usually contained in a collective bargaining agreement, both could not exist concurrently, and the inconsistency must be resolved in favor of the statute or municipal ordinance and the authority to enter into a legally binding collective bargaining agreement should properly be denied.

75 N.M. at 396, 405 P.2d at 236. The Court then examined the statutes to determine whether any are inconsistent with the right to contract through collective bargaining. It noted that the legislature had empowered municipalities to establish by ordinance a merit system for the hiring, promotion, discharge, and general regulation of its employees. See 75 N.M. at 396-97, 405 P.2d at 236. The Court said that, while collective bargaining contracts are not specifically mentioned in the statute, such agreements certainly would be within the language. It thus is apparent that, if the

employment contracts are between municipalities and its employees, they must not "conflict," "negate," or "exist concurrently" with a personnel system.

The statute in **Town of Farmington** did not itself, however, provide a merit system for municipalities, but instead only authorized municipalities to do so by ordinance. See 75 N.M. at 396, 405 P.2d at 236. **Farmington** had not selected a personnel board, nor had any board ever adopted any rules establishing the merit system. Accordingly, the Court noted that, unlike **Mugford, Nutter,** and the Missouri cases, there was no civil service or merit system covering those matters normally the subject of collective bargaining agreements that would prevent collective bargaining. 75 N.M. at 397, 405 P.2d at 236-237.

The Court emphasized throughout its opinion that "[t]he question presented to us by the appeal is a narrow one," namely a case involving a municipality engaged in a proprietary function. See, e.g., 75 N.M. at 396, 405 P.2d at 237; 75 N.M. at 395, 405 P.2d at 235 ("The authorities are divided on the question whether employees of a municipality in connection with its corporate or proprietary capacity may have collective bargaining."). The proprietary functions in which a municipality may engage in running an electric company bear scant resemblance to the state's sovereign activities. There is no indication in the Court's holding that, absent legislative authority, employees working in a governmental position in New Mexico could enter into collective bargaining agreements with government management. 75 N.M. at 394-95, 405 P.2d at 234-235.

In Attorney General Opinion 69-73 (July 7, 1969), this Office interpreted **IBEW v. Town of Farmington** expansively: "In effect the Court held that there is implied legislative authority for a municipality to enter into a collective bargaining agreement with its employees." Although we recognize that the Court's language in **Farmington** is ambiguous when it discussed the phrase "contract of employment" in the referenced statute, see 75 N.M. at 396-97, 405 P.2d at 236-37, we understand the Court to be saying the exact opposite: because the personnel system recognized employment contracts, collective bargaining and resultant agreements would be precluded. In any case, there is no statute in New Mexico mentioning contracts of employment or collective bargaining for state, as opposed to municipal employees. In other words, collective bargaining does not come within the language of the state merit system legislation. Of particular importance of the issue here, Opinion 69-73 correctly said that, "[i]f a municipality has enacted an effective ordinance establishing a merit system it cannot abdicate its continuing legislative discretion by entering into a collective bargaining agreement covering its employees." There thus can be no collective bargaining agreement on matters covered within the merit system's scope.

c. **State ex rel. AFSCME v. Attorney General.**

On June 29, 1987, two public employee unions filed suit in the New Mexico Supreme court to require the Board to reinstate a collective bargaining agreement that had terminated. **State ex rel. AFSCME v. Attorney General,** No. 17,777 (N.M.S. Ct. 1987). They also sought a writ of mandamus directing the Attorney General to sign two

proposed collective bargaining agreements between the state and the unions. The Attorney General gave several specific reasons for not signing the agreements, including that no legislative authority exists to permit state agencies to engage in collective bargaining. See Response of the Attorney General to Petition for Extraordinary Writ at p.11. The Supreme Court of New Mexico's July 8. 1987 Order stated, without explanation or cited authority:

IT IS THE OPINION AND DECISION OF THIS COURT, Chief Justice Scarborough, Senior Justice Sosa, and Justice Walters concurring, that collective bargaining is legal in New Mexico even in the absence of a statute addressing the subject;

IT IS THE FURTHER OPINION AND DECISION OF THE COURT, UNDER the particular set of facts presented to us, that mandamus shall not lie with respect to other issues that have been raised by petitioners, on the grounds that their claims are premature and the Attorney General has no clear duty to sign the contract in this case.

We are somewhat reluctant to discuss or cite the contents of the Court's Order in this opinion. The provisions of N.M. Rule of Appellate Procedure 12-405 precludes the Court's Order from being cited as precedent:

12-405. Opinions.

A. Necessity. It is unnecessary for the appellate court to write formal opinions in every case. Disposition by order, decision or memorandum opinion does not mean that the case is considered unimportant. It does mean that no new points of law, making the decision of value as a precedent, are involved.

B. Disposition by order, decision or memorandum opinion. When the appellate court determines that one or more of the following circumstances exists and is dispositive of the case, it may dispose of the case by order, decision or memorandum opinion:

(1) The issues presented have been previously decided by the supreme court or court of appeals;

(2) The presence or absence of substantial evidence disposes of the issues;

(3) The issues are answered by statute or rules of court;

(4) The asserted error is not prejudicial to the complaining party;

(5) The issues presented are manifestly without merit.

C. Publication of opinions. All formal opinions shall be published in the New Mexico Reports. **An order, decision or memorandum opinion, because it is unreported and not uniformly available to all parties, shall not be published nor shall it be cited as precedent in any court.**

(Emphasis added).

The Supreme Court cited no authority for its Order and has not stated the principle upon which it was decided. To our knowledge, the Order is not intended for publication. Therefore, under Rule 12-405(C), it may not be used as precedent.

We stress that the public employee unions did not argue in the Supreme Court that express legislative authority is not required for state agencies to engage in collective bargaining. Rather, the Attorney General argued, without dispute from the unions, that they had conceded, unless statutory authority exists, a state agency has no obligation to bargain collectively with a union and may not enter into a contract. Only a brief from unidentified amici curiae, which was filed without the Court's express permission as required by Court rule and two days before argument and order, asserted that public employee collective bargaining without explicit statutory authorization is the law of New Mexico. The parties to the case did not have an opportunity to respond to the brief.

Several points should be stressed about this Order. First, the Court did not elaborate or explain the rationale for its statement "that collective bargaining is legal in New Mexico." Second, because the court denied all requested relief and it was unnecessary to reach the issue to make a determination in the case, its statement on collective bargaining is dicta. Third, the issue whether collective bargaining with a state agency is legal was not before the Court. Because the unions had conceded that they needed statutory authority by arguing that they had it, the parties had not briefed fully this issue. Fourth, because the issue was not before the Court, and had not been briefed, it is unclear whether it was referring solely to employees in the private sector, to those in the public sector, or both. If the Court was saying that collective bargaining is not per se illegal in New Mexico just because there are no statutes specifically addressing the subject, this Office has never argued or opined otherwise. If on the other hand, the Court was saying that public sector collective bargaining is permissible when the public employer is acting in a proprietary capacity, then the Court merely reaffirmed **Town of Farmington.** In any case, it is not clear, from the Order alone, upon what the Court based its statement. Finally, if the Court was addressing the legality of public sector collective bargaining, it should be noted that the Court had been presented with a brief from unidentified "amici" which purported to offer to the court the "results" of an "ongoing" "survey of all fifty states on this issue." Brief of Amici Curiae at 23 n.8. That "survey" purported to have found only four states that had held public employees cannot bargain with unions without express constitutional or statutory authority to do so. Id.

Appendix A, Part IV, at A-3. As the cases cited in this opinion demonstrate, that "survey" is grossly inaccurate.

The Order may be important more for what it does not say than for what it says. The Court did not decide that collective bargaining is required by the state or federal constitution. The Court did not decide that there is a constitutional right for a state employee to enter into a collective bargaining agreement with his employer. The Court did not hold that the legislature has authorized collective bargaining or that the

Personnel Act permits it. It did not hold that the Board could adopt rules allowing collective bargaining or that the RLMR are "legal" or proper. The opinion is not based upon specific findings that the Personnel Act addresses collective bargaining or that it contains any delegation of authority to the Board to issue the RLMR. The Order's last paragraph clearly indicates that the Court did not decide the issues presented by the parties other than the general legality of collective bargaining in the absence of statutes addressing the subject.

Under Rule 12-405, we must assume that in making its Order the Supreme Court found it previously had decided the issues presented and no new points of law were involved. We thus believe that we must read **State ex rel. AFSCME v. Attorney General** consistently with **IBEW v. Town of Farmington.** This requires us to construe **Farmington** as best we can. We believe the fairest reading of the holding and dicta is that New Mexico follows the common-law rule, but has accepted the rule with an exception where a governmental unit is acting in a proprietary capacity. Other having read **Farmington** similarly. See **State Board of Regents v. United Packing House Food and Allied Workers, Local No. 1258,** 175 N.W.2d at 116 ("Most of the cases cited by defendants for the proposition that power to engage in collective bargaining in the industrial sense may be implied involve employees working for the government in its corporate or proprietary capacity.") (citing **IBEW v. Town of Farmington)**; **Zderick v. Silver Bow County,** 460 P.2d at 750 ("The case differentiates between employees working in a governmental position and employees of a municipality in connection with its corporate or proprietary capacity. The case held that the town had authority to enter into collective bargaining agreements in connection with its proprietary electric unit."). We note, however, that another Court, this Office, and the union in **State ex rel. AFSCME v. Attorney General** have read **Farmington** as modifying the common law rule to require less specific legislative authority before collective bargaining will be permitted. See **AFSCME, Council No. 95 v. Olson,** 338 N.W.2d 97, 100 (N.D. 1983) ("However, some courts have recognized an implied power of a public body to enter collective bargaining agreements."); Attorney General Opinion No. 69-73 (July 7, 1969). And finally, the three Justices in **State ex rel. AFSCME v. Attorney General** apparently read **Farmington** as saying that collective bargaining is legal without a statute addressing the subject.

Fortunately, one aspect of **Farmington** is clearer. Where the legislature has undertaken to act to regulate employment, such action preempts the authority of the state agency to engage in collective bargaining. **Farmington** noted that the purpose of the Personnel Act is inconsistent with the idea of collective bargaining. The purpose of the Personnel Act is to establish a merit system. Section 10-9-2 NMSA 1978 ("a system of personnel administration based solely on qualification and ability"); Attorney General Opinion No. 65-78A. Farmington clearly holds that collective bargaining is inconsistent with a merit system of personnel administration. 75 N.M. at 396, 405 P.2d at 236. The scope of the merit system created by the Personnel Act covers all the issues normally contained in collective bargaining agreements: a classification plan, a pay plan, hiring, promotion, demotion, dismissal, hours of work, holidays, leaves, and an appeal system. Sections 10-9-13 and 10-9-18 NMSA 1978. Under **Farmington** there is no authority for State

agencies covered by the Personnel Act to enter into collective bargaining agreements. See Note, "Public Labor Disputes -- A Suggested Approach for New Mexico," 1 N.M.L. Rev. 281, 286 (1971) ("However, the Court indicated that if a personnel board is appointed under an ordinance establishing a merit system and the board adopts rules and regulations providing for matters usually contained in a collective bargaining agreement, the authority of the municipality to enter such an agreement with its employees should be denied because the agreement would conflict with the regulatory power of the municipality and constitute bargaining away legislative discretion.").

We realize that this construction of Farmington, while the same as that of Attorney General James A. Maloney in 1969, conflicts with that of Attorney General Norvell in 1971. See Attorney General Opinion No. 71-96 ("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.") On the other hand, Attorney General Norvell's opinions and letters do not cite to any sentence or passage in **Town of Farmington,** or to any other case or authority that supports its position that collective bargaining and a merit system can coexist. Given the **Town of Farmington's** strong language when discussing the Personnel Act, we decline to follow Attorney General Norvell's unreasoned reading of the 1965 opinion. To the extent these opinions and letters are inconsistent herewith, they are expressly overruled and withdrawn.

In conclusion, the Court has said that, in the absence of legislation precluding or conflicting with collective bargaining, at least some public entities may enter into collective bargaining agreements. The Court also has said, however, that personnel systems directly conflict with public sector collective bargaining. The Personnel Act, just as the municipal merit system statute in **Farmington,** is "inconsistent with the right to contract through collective bargaining," as would have been the collective bargaining agreement in **Farmington** after "rules and regulations have been adopted by its personnel board." 75 N.M. at 396-97, 405 P.2d at 236-37. See also Attorney General Opinion 69-73. We therefore conclude that State agencies covered by a Personnel Act or merit system cannot engage in collective bargaining with their employees. We are obligated to follow that conclusion until the Supreme Court tells us otherwise by formal opinion overruling **Town of Farmington.**

II. Whether the RLMR Are Authorized Under New Mexico Law.

You second question asks whether the Rules for Labor-Management Relations ("RLMR") are authorized under New Mexico law. In its July 8, 1987, Order, the Supreme Court did not mention the RLMR, and there is no reason for this Office to assume the Court considered their validity. Because the Court found that the Attorney General and the Board did not have clear duties that they were not performing, the issue of statutory authorization was not properly before the Court.

We have concluded that the RLMR are inconsistent with state and constitutional law in New Mexico, and thus are void. First, under **IBEW v. Town of Farmington,** the existence of collective bargaining is inconsistent with a merit system. Second, the RLMR violate and thus directly conflict with certain provisions in the Personnel Act, Sections 10-9-1 to 10-9-25 NMSA 1978. Third, under New Mexico law, the separation-of-powers doctrine and the limitations on delegation of legislative power preclude finding that the phrase "among other things" in Section 10-9-13 NMSA 1978 of the Personnel Act is a lawful delegation of express authority for the RLMR. In sum, there is no authority for the Board to issue the RLMR, and they should be rescinded.

A. History of the RLMR.

To appreciate fully the problem with the Board promulgating the RLMR, it is necessary to review their history before discussing the substantive legal issues. In 1971, the New Mexico District Council of Carpenters and Joiners, AFL-CIO, sought to bargain collectively with the management of Fort Bayard Hospital. The Department of Hospitals and Institutions sought guidance from this Office. In a letter dated April 12, 1971, Deputy Attorney General Oliver E. Payne responded:

The proposed Public Employees' Collective Bargaining Act (CS/HB 230) failed to receive the necessary vote for passage in the 1971 legislative session. Consequently no legislative authority exists for state agencies to bargain collectively with organizations seeking to represent state employees. The state has a legislatively authorized personnel system on matters of state employee hiring, firing, promotion, demotion, salary schedules, annual leave, sick leave etc., administered by the State Personnel Board. In the absence of legislative authorization for state employee collective bargaining, state agencies cannot so bargain on these or any other matters covered by the State Personnel Act and duly promulgated State Personnel Board rules and regulations.

The Office also forwarded to the Department a copy of Attorney General Opinion No. 69-73. Two days later, Attorney General David L. Norvell "supplemen[ted]" Mr. Payne's opinion:

With regard to your inquiry concerning whether or not a state agency may enter into collective bargaining with a labor union, please be advised that even in the absence of a Public Employees Collective Bargaining Act, a state agency may enter into collective bargaining negotiations with a representative of an appropriate bargaining unit and may enter into an appropriate collective bargaining agreement with such representative providing the terms of such agreement do not exceed the maximum limitation rules or regulations of the personnel board.

The informal letter opinion that Attorney General Norvell issued provided no legal authority for the claimed reversal of long recognized law. Two years later, however, in Opinion No. 73-19, Attorney General Norvell, after first observing that "states traditionally have unfortunately been reluctant to grant public employees the collective

bargaining rights enjoyed by private employees...," described the Executive Orders that Presidents Kennedy and Nixon issued to permit collective bargaining by federal employees. He then explained the basis of his earlier position: "This office likewise authorized **permissive** collective bargaining by public employees in New Mexico on April 14, 1971." (Emphasis in original). The Attorney General of New Mexico, however, unlike the President of the United States, possesses no authority to issue Executive Orders.

Shortly after Attorney General Norvell issued his letter opinion of April 14, 1971, the Board began to review and approve guidelines for the conduct of employee-management relations with state employees. See Board Minutes at 1 (June 30 -- July 1, 1971) (remarks of Chairman Ray B. Powell). In the introduction to the first regulations, the Board noted that state agencies are not required to engage in collective bargaining, but may enter into collective bargaining negotiations. The Board noted that a state agency has three choices in dealing with its employees: (i) establish no formal relationship with an employee organization; (ii) establish a consultation relationship with an employee organization; and (iii) allow a representation election which could lead to a collective bargaining relationship with an employee organization.

The Board stated the purpose and nature of the regulations as follows:

Agency Heads should be aware that the thirtieth legislature (1971) defeated a comprehensive public employees collective bargaining act. Accordingly, these regulations are not intended in any way to second-guess or usurp the authority or responsibility of the legislature, but rather to provide a framework within which the Attorney General Opinions can effectively be implemented rather than waiting to cope with problems after they reach the crisis stage. Accordingly, the specific purposes of these regulations are (1) to provide a uniform frame-work within which the various state agencies can conduct their relationship with groups of their employees and full-time probationers; (2) to provide advice and assistance to departments and agencies on employee-management relations; (3) to encourage sound employee management relations in the state service; (4) to provide greater economy and efficiency in the management of state affairs; (5) to assure the continuity and efficiency of vital government operations; and (6) to protect the public interest in the improvement of personnel administration.

The regulations were revised in December 1971, see Board Minutes at 2 (Nov. 2, 1971); in 1972; see Board Minutes at 7 (May 8-9, 1972); in 1976, see Board Minutes at 4-5 (May 3-4, 1976); in 1978, Board Minutes 6-7 (Jan. 19, 1978); and in 1983, see Board Minutes at 2-8 (Sept. 29, 1983). Thus, the Board did not base its regulations on the interpretation of any statute, but rather in response to Attorney General Norvell's April 12 and 14 letters, which were attached to the first set of regulations as Exhibits A and B.

B. Legal Problems with the RLMR.

The RLMR are inconsistent with state law in three regards. First, because the state has established a fully functioning civil service merit system, the RLMR violate the Court's analysis of the Personnel Act in **Town of Farmington.** This point was analyzed fully in response to your first question. That discussion will not be repeated here. Second, the current RLMR were promulgated in violation of Section 10-9-7 NMSA 1978 (1986 Cum. Supp.). Third, the RLMR violate the doctrines of separation-of-powers and delegation of authority in several ways. We now turn to discussion of the latter two points.

1. Financial Impact under Section 10-9-7.

Section 10-9-7 NMSA 1978 (1986 Cum. Supp.) provides that "the state personnel office shall not spend any of its appropriation for the promulgating or filing of rules, policies or plans which have significant financial impact, or which would require significant future appropriations to maintain, without prior, specific legislative approval." This section first became effective on July 1, 1976, so there is no need to address whether the RLMR of May 4, 1976 would have had a significant financial impact. What is important is that the current RLMR, promulgated in 1983, contain numerous provisions that have, or are likely to have, a significant financial impact.

Some RLMR provisions that have had a significant financial impact include the following:

1. Section 5 requires that the personnel director shall appoint a hearing officer who must hold a hearing and take testimony from employees and representatives of an agency when the Director has received a petition seeking exclusive representation rights for the purpose of collective bargaining on behalf of that agency's employees;

2. Section 6 requires that, upon a showing of sufficient interest among affected employees, the director must appoint an election judge to administer an election. The election shall be conducted during working hours, using secret ballots. During the election, the agency involved may post observers. The Board must conduct a hearing on any complaint which it receives concerning the conduct of an election;

3. Section 7 requires that when a labor organization is certified as an exclusive representation of an agency's employees, that agency and the exclusive representative must meet and negotiate in good faith; and

4. Section 12 requires that whenever a complaint is filed charging that a prohibited practice (as defined in Section 11) has occurred, the Director shall appoint a hearing officer. The hearing officer must provide notice to all interested parties and hold a hearing to gather evidence about the alleged commission of the prohibited practice. The hearing officer also has authority to hold settlement conferences and may grant request for the appearance of witnesses or production of documents. The Board must make a decision upon all issues following the hearing officer's submission of a report to the Board.

These are merely some of the RLMR's major provisions that, on their face, will have a significant financial impact. In practice, state agencies have informed us, and the existing and proposed collective bargaining agreements show, that the rules have resulted in union representatives using state cars, photocopying equipment, postage, and office space. Memorandum of law submitted to the State Personnel Board by the Human Services Department at 7 (June 5, 1987). Union representatives also have been paid a full salary and benefits with state funds for conducting union business. A particularly obvious example of "significant financial impact" arose out of the events related in **Local 2238, AFSCME v. New Mexico State Highway Department,** 93 N.M. 195, 598 P.2d 1155 (1979). That case reveals that, as a result of an agency error during the negotiation of a collective bargaining agreement, the Highway Department was ordered to pay $343,174.60 to fulfill an arbitration award. Further, the award does not include the cost of the initial arbitration or the cost of litigating the appeal of the arbitrator's award. Because no specific, prior legislative approval was given for the promulgation of the RLMR, their promulgation was in direct violation of Section 10-9-7 NMSA 1978 (1986 Cum. Supp.).

New Mexico courts uniformly have held that, when there is a conflict or inconsistency between a statute and rules promulgated by an agency, the statute prevails and the rules are void. **Rivas v. Board of Cosmetologists,** 101 N.M. 592, 686 P.2d 934 (1984); **Jones v. Employment Services Division of Human Services Dept.,** 95 N.M. 97, 619 P.2d 542 (1980). See also **State ex rel. McCulloch v. Ashby,** 73 N.M. 267, 387 P.2d 588 (1963). Thus, the RLMR are not authorized under New Mexico law and are illegal.

2. The Promulgation and Administration of the RLMR are in Violation of the Doctrines of Separation of Powers and Delegation of Authority, Making Them Invalid.

a. The New Mexico Constitution Commits Legislative Powers to the Legislature.

It also is our opinion that the legislature has not delegated to the Board authority to create collective bargaining rules. In **State ex rel. AFSCME v. Attorney General,** supra, the public employee unions argued that the words "among other things" at the beginning of Section 10-9-13 NMSA 1978 constitute a valid delegation of legislative power, authorizing the Board to promulgate rules allowing the state employees to bargain collectively with state agencies. There are four reasons this is not so.

First, Article III, section 1 of the State Constitution commits New Mexico to the doctrine of separation of powers. Second, Article IV, Section 1 of the Constitution vests the legislative powers in the legislature. It is fundamental that no one of the three branches can delegate effectively any of the powers which belong to it. **State v. Roy,** 40 N.M. 397, 60 P.2d 646 (1936). There is no exception to the doctrine of separation of powers that would allow another branch of our government to exercise legislative powers in the absence of legislative action.

It is well settled that the legislature possesses the power and ability to make law for labor relations. See Sections 10-11-1 to 10-11-140 NMSA 1978 (public employee retirement); Sections 50-4-1 to 50-4-30 NMSA 1978 (maximum hours, minimum wages); Sections 51-1-1 to 51-1-53 NMSA 1978 (employment security); Sections 50-3-1 to 50-3-2 NMSA 1978 (private sector labor relations). The legislature could approve state employee collective bargaining or expressly prohibit it. It has done neither. Thus, even if state agencies have the authority to engage in collective bargaining, that does not mean the Board can write into regulations a statute which the legislature has refused to enact.

b. The Legislature Did Not Delegate Authority to Establish the RLMR to the Board.

Second, even if the Legislature could delegate its power to make law in the area of public employee labor relations, before a court can find any legislative delegation of power, it must find legislative intent to abrogate power and commit to the discretion of an agency. **Safeway Stores, Inc. v. City of Las Cruces,** 82 N.M. 499, 500, 484 P.2d 341 (1971) ("There is nothing within the scope of the applicable statutory material which would indicate that the legislature intended to give local governing bodies discretion well beyond that exercised by the state liquor director or otherwise set forth as statutory guidelines."). In other words, even if the legislature can delegate its authority in this important matter, it cannot be argued seriously that it has done so with the words "among other things" found in Section 10-9-13 NMSA 1978. Although this section sets forth ten areas in which the Board may promulgate rules, conspicuously absent is reference to collective bargaining. As noted earlier, the New Mexico legislature repeatedly has refused to provide statutory authority for state agencies to engage in collective bargaining. If the legislature had wanted to delegate the authority to the Board to create rules for collective bargaining, it would not have rejected seventeen bills that would have sanctioned public sector collective bargaining. To argue that the phrase "among other things" in Section 10-9-13 NMSA 1978 shows intent to delegate all legislative power regarding state employee collective bargaining is unreasonable and incorrect. At most, the phrase "among other things" means issues not specifically mentioned but related to the areas under the Board's jurisdiction. It does not imply that the Board can branch into significant new policy areas that the legislature has not even mentioned.

Beyond the fundamental decision whether collective bargaining in the public sector will be permitted, lie several other important issues that the Board has decided: (1) whether a union could become the exclusive agent for all employees in the bargaining unit, even to the exclusion of the individual employees themselves, RLMR § 2G; (2) whether employees unsatisfied with their representative only may seek to oust that representative by filing a petition in one thirty-day period every three years, RLMR § 6H.11; (3) whether state agencies should have a duty to bargain, RLMR § 7A; (4) whether agencies may bargain away their management rights to evaluate, determine and resolve employee grievances, RLMR § 7D; (5) whether state employees may change their minds and rescind their checkoffs except during the fourteen-day period agreement, RLMR § 7F; (6) whether, after reaching impasse in negotiation, agencies

must submit to "factfinding" at their cost, and whether the Board may thereafter "adopt" the recommendations of the factfinder, RLMR § 9; (7) whether grievances may go to binding arbitration in complete derogation of agency management rights, again a agency cost, RLMR § 10; (8) whether there is to be any review of an arbitrator's factfindings, RLMR § 10G; and (9) whether a certain quasi-judicial procedure should be created to hear a determine allegations of "prohibited practices," RLMR § 12. It cannot reasonably be argued that the New Mexico Legislature intended to commit all these issues, and others, to the board with the words "among other things."

c. If the Legislature had Intended to Delegate Authority to Promulgate the RLMR it did so Improperly.

Third, while the legislature may exercise its authority to pass laws that require administration and rule making by an agency of the executive department, there are strict limits on the manner in which such laws may delegate that authority. **State v. Spears,** 57 N.M. 400, 259 P.2d 356 (1953). Even if the legislature could delegate its power to make law concerning public sector collective bargaining, and even if it intended to do so in the Personnel Act, it failed to do so properly, and the RLMR are therefore void and a nullity. "The Legislature can delegate legislative powers to administrative agencies but in so doing, boundaries of authority must be defined and followed. In New Mexico, action taken by a government agency must conform to some statutory standard." **Rivas v. Board of Cosmetologists,** 101 N.M. at 593; accord, **Montoya v. O'Toole,** 94 N.M. 303, 304, 610 P.2d 190 (1980); **City of Santa Fe v. Gamble-Skogmo, Inc.,** 73 N.M. 410, 389 P.2d 13 (1964); **State ex rel. Holmes v. State Bd. of Finance,** 69 N.M. 430, 367 P.2d 925 (1961). When delegation is done, it must be expressly done. The standards by which the agency is guided must be stated clearly. **State v. Hartman,** 69 N.M. 419, 426, 367 P.2d 918, 923 (1961); see **State ex rel. Sofeico v. Heffernan,** 41 N.M. 219, 67 P.2d 240 (1936). The Personnel Act does not mention collective bargaining, much less any standards to guide the Board in fashioning the RLMR. In sum, even if the words "among other things" in Section 10-9-13 NMSA 1978 could be construed to cover collective bargaining, they provide no standard whatsoever.

There are two specific areas where we cannot assume the legislature has delegated to the Board to engage in unguided decision making. One major issue inherent in the idea of public sector collective bargaining is whether a public agency's "duty to bargain" requires the agency to agree with the union on disputed issues. The possible answers range from no duty other than to "meet and confer," through good faith bargaining duties enforced by administrative proceedings but without any obligation to agree, to more coercive factfinding procedures, and finally to binding arbitration. The Board has chosen one of the more coercive routes -- factfinding followed by the possibility of Board adoption of factfinding recommendations. RLMR § 9C. It is our opinion that the legislature had not ceded its power in this area, completely without guidance, to binding decision by an unelected Board.

Furthermore, all employers must devise some system for handling employee grievances. In the absence of collective bargaining, they may be handled individually or through an ombudsman. Under collective bargaining, they may be handled by a step grievance procedure leading to a final decision by management, or by a labor-management committee, or by binding arbitration. The RLMR permit, though they do not require, binding arbitration. The decision to allow binding arbitration was made without any guidance from the New Mexico Legislature.

These issues involved the transfer of a significant measure of sovereignty and power on the part of the State and its agencies to unions, factfinders, arbitrators and the Board. They also involve the semi-permanent transfer of autonomy from individual state employees or non-union groups to unions. Sovereignty, power and autonomy are all limited and circumscribed by the RLMR without the legislature's having enacted a bill. We do not believe that the legislature intended to abrogate its authority in this manner.

d. The Board's Delegation of its Authority to the Agencies and Unions is Improper.

Finally, and fundamentally fatal to the RLMR, because the Personnel Act creates a merit system, it is inconsistent with collective bargaining under the Supreme Court's clear pronouncement in **Farmington.** The Board cannot give away power to agencies and unions that the legislature has entrusted to it. The RLMR unlawfully delegate the Board's authority over personnel matters that the legislature has placed with the Board.

3. The RLMR Make Important Policy Decisions that Cannot be Made Without Express Legislative Authority.

One extraordinarily significant policy question is whether New Mexico should allow, as the RLMR now provide, for "exclusive representation." The public policy problem presented is whether state agencies' management, on one hand, or state employees, on the other hand, must deal through only one representative in their contacts with one another over the terms and conditions of employment. The largest impact on agency management is that they can not longer deal with their employees directly over bargainable subjects. All contacts must be with the union. From the employees' standpoint, the largest impact is that they are deprived of the right to be represented by any other person or group, including themselves. This exclusion is even more important in New Mexico where public employee support for unions remains a minority position.[6]

The RLMR, by providing for exclusive representation, in a very real way grant a large measure of union security. The RLMR also make it difficult for employees to change their representation after initial certification. Indeed, the only way to change representation is by filing a petition "not more than 90 days and not less than 60 days prior to the terminal date of an agreement." RLMR § 6C.

In Attorney General Opinion No. 70-7 (Jan. 23, 1970), this office noted that the right to organize, the right to bargain collectively, and the right to demand exclusive recognition are separate and distinct questions. The Office noted that the only jurisdictions which

have allowed exclusive recognition when only a portion of the employees have chosen the representative have done so on the basis that there is state legislation permitting it. See **Norwalk Teachers' Ass'n v. Board of Education,** 138 Conn. 269, 83 A.2d 482 (1951) (holding that teachers can organize and seek collective bargaining, but that any agreement which was made with a representative must be confined to the members of the representative association). In the opinion of Attorney General James A. Maloney, absent New Mexico legislation granting by statute exclusive recognition, "we are of the opinion that it would be improper for a public employer to give exclusive recognition to a representative of only a portion of the employees. The union may represent only its members in collective bargaining with the Board." Opinion 70-7. Thus, even if the Board could promulgate the RLMR, they cannot provide for exclusive representation absent legislative authorization.

C. The Legislature has not ratified or acquiesced in the RLMR and they may and should be rescinded.

In **State ex rel. AFSCME v. Attorney General,** the public employee unions argued that the New Mexico legislature acquiesced and ratified the RLMR when it amended Section 10-9-13 NMSA 1978 in 1975 and Section 10-9-18 in 1980 without expressly disapproving of collective bargaining. Section 10-9-13 provides limited authority for the Board to promulgate particular rules and Section 10-9-18 sets forth employee appeals procedures. It is the unions' position that, because the Legislature did not disapprove collective bargaining when it amended these statutes, the Board now may infer that the Legislature sanctioned the RLMR and may give them the status of law. It is our opinion that this presumption of legislative acquiescence and ratification is not correct.

In support of their argument, the unions cited cases that discuss the doctrine of "legislative reenactment." This doctrine provides that an interpretation of a statute is deemed approved by a legislature if the statute in question is reenacted without changing the interpretation. The doctrine, though generally disfavored, is most commonly applied to judicial interpretations and only very rarely to administrative interpretations. Thus, any reliance on **Granito v. Grace,** 56 N.M. 652, 248 P.2d 210 (1952), and **In re Morrow's Will,** 41 N.M. 117, 64 P.2d 1300 (1937), also is misplaced. Unlike the RLMR which involve an alleged administrative interpretation, both these cases involve judicial interpretations of statutes.

The doctrine of legislative reenactment is rarely applied, because it is an unreliable determinant of legislative intent. In **Varos v. Union Oil Co.,** 101 N.M. 713, 715, 688 P.2d 31, 33 (Ct. App. 1984), the Court of Appeals recognized that "the fact that the legislature has not acted... does not necessarily indicate tacit approval. Legislative inaction may simply be due to legislative inertia." See also **Cook Inlet Native Ass'n v. Bowen,** 810 F.2d 1471, 1476 (9th Cir. 1987) (failure to disapprove agency regulation does not, by itself, demonstrate that Congress considered regulations consistent with legislative intent); **Abourezk v. Reagan,** 785 F.2d 1043, 1053 (D.C. Cir. 1986) (to override language in statute, acquiescence in interpretation must be strong); **Advanced Micro Devices v. CAB,** 742 F.2d 1520, 1541 (D.C. Cir. 1984) (congressional inaction is

often entitled to no weight); **Mayburg v. Secretary of Health & Human Services,** 740 F.2d 100, 104 (1st Cir. 1984) (failure of Congress to amend statute in response to administrative interpretation does not automatically show congressional acquiescence).

It is important to emphasize that the RLMR do not involve an agency's interpretation of a statute. The Board in this case did not promulgate the RLMR based on a particular interpretation of the Personnel Act. Rather, the RLMR were created because the Board assumed authority which it did not possess.

Application of the legislative reenactment doctrine to an administrative body's unlawful assumption of authority is inappropriate. New Mexico courts have ruled consistently that because administrative bodies are created by statute, and can act only on those matters that are within the scope of authority delegated to them, they cannot amend or enlarge their authority through rules and regulations. **Rivas v. Board of Cosmetologists,** 101 N.M. at 593; **Matter of Proposed Revocation,** 102 N.M. 63, 66, 691 P.2d 64, 67 (Ct. App. 1984). Thus, in **State v. Hartman,** 69 N.M. 419, 367 P.2d 918 (1961), although the Department of Finance and Administration had interpreted its enabling act to grant it certain power, and the power had been asserted for many years without legislative action, the Supreme Court refused to presume legislative ratification because of acquiescence: "The rule [of legislative acquiescence] is to be resorted to only where meaning is doubtful, **State ex rel. Capitol Addition Bldg. Commission v. Connelly,** 39 N.M. 312, 46 P.2d 1097, 100 A.L.R. 878, and when direct methods of interpretation have failed." 69 N.M. at 427, 367 P.2d at 924.

Any inference of ratification would be especially misplaced here in light of the legislature's repeated refusal to authorize state agency collective bargaining. At least seventeen bills have been introduced in the New Mexico legislature since 1963 to empower state agencies to enter into collective bargaining with employee representatives, and the legislature consistently has chosen not to provide such authority. In particular, three bills were rejected during the 1975 session in which Section 10-9-13 NMSA 1978 was amended. It is unreasonable to suggest that legislative action on a tangential matter provides a better indication of legislative intent than does the legislature's specific treatment of the issue. The Board should not be permitted to do what the Legislature expressly has rejected. Any presumption of legislative ratification of the RLMR would be inappropriate.

Because the Legislature has not delegated to the Board the authority to promulgate those rules, the separation of powers provisions of the New Mexico Constitution were violated. Additionally, the RLMR violate Section 10-9-7 NMSA 1978, which prohibits the promulgation of rules that have a financial impact. The RLMR are not authorized under New Mexico law.

ATTORNEY GENERAL

HAL STRATTON Attorney General

GENERAL FOOTNOTES

n1 ALABAMA: **Nichols v. Bolding,** 291 Ala. 50, 277 S.E.2d 868 (Ala. 1973); **Int'l U. of Oper. Eng., Local 321 v. Water Works Bd.,** 276 Ala. 462, 163 So.2d 619 (Ala. 1964);

ALASKA: **Alaska Public Employees Ass'n v. Municipality of Anchorager 555 P.2d 552, 553 (1976) ("The right of public employees in Alaska to bargain collectively was created by the Public Employment Relations Act.") (citation omitted);**

CALIFORNIA: **State v. Bro. of Railroad Trainmen,** 37 Cal.2d 412, 416, 232 P.2d 857, 861 (Cal. 1951); **AFSCME v. County of Los Angeles,** 49 Cal. App.2d 356, 122 Cal. Rptr. 591 (Cal App. 1975). See also **City of San Diego v. AFSCME, Local 127,** 8 Cal App.3d 308, 310-311, 87 Cal. Rptr. 258, 260 (Cal. App. 1970) (and cases cited therein);

DELAWARE: **State v. AFSCME, Local 1726,** 298 A.2d 362, 367 (Del. Ch. 1972) ("The prevailing rule at common law is that, absent such a statute, public employees are not entitled to collective bargaining and public employers are without power to enter into such agreements.")

FLORIDA: **Miami Water Works, Local No. 654 v. City of Miami,** 157 Fla. 445, 26 So.2d 194 (Fla. 1946); **Dade County v. Amal. Ass'n of S.E.R. & M.C.E.,** 157 So.2d 176 (Fla. App. 1963);

GEORGIA: **Chatham Ass'n of Educators v. Bd. of Public Educ.,** 231 Ga. 806, 204 S.E.2d 138 (Ga. 1974); **Int'l Longshoremen's Ass'n v. Georgia Ports Authority,** 217 Ga. 712, 124 S.E.2d 733 (Ga. 1962);

HAWAII: **Bd. of Educ. v. Hawaii P.E.R.B.,** 528 P.2d 809, 810 (Hawaii 1974) ("In enacting Act 171, Collective Bargaining in Public Employment, the Fifth state Legislature, in 1970, granted to the public employees a **totally new privilege and right: the right to collectively bargain with the public employer.** . . .") (emphasis added);

IDAHO: **Local U. 283, I.B.E.W. v. Robison,** 91 Ida. 455, 423 P.2d 999 (Ida. 1967). See also **School District No. 351 Oneida County v. Oneida Educ. Ass'n,** 98 Ida. 486, 567 P.2d 830, 833 (Ida. 1977) ("The common law is in effect in Idaho unless otherwise expressly abrogated by statute.");

IOWA: **State Board of Regents v. United Packing House Wkrs,** 175 N.W.2d 110, 117 (Iowa 1970) ("[T]he Regents would have no authority to enter into a collective bargaining agreement in the sense recognized in private industry."). But see **Service Emp'ees Int'l U. v. Cedar Rapids Comm. Sch. Dist.,** 222 N.W.2d 403, 406, 407 (Iowa 1974) ("[P]ower to hire employees, fix their salaries and wages ... and to perform all other acts necessary and proper ... carries with it the power and authority to confer and consult with representatives of the employees in order to make its judgement as to wages and working conditions." Therefore, educational employees may "enter into one

written contract with the union binding **all members of the union agreeing to such representation** as long as the terms of the contract are within the statutory authority of the board and contains no terms of employment which could not be included in the standardized contract for employees." (emphasis added) (quoting Board of Regents);

KANSAS: **Wichita Public Schs Empl'ees U., Local No. 513 v. Smith,** 194 Kan. 2, 397 P.2d 357, 360 (Kan. 1964);

KENTUCKY: **Bd. of Trustees v. Pub. Emp'ees Council No. 51, AFSCME,** 571 S.W. 2d 616, 621 (Ky. 1978) (Board "has the authority to meet with representatives of... employees... to discuss wages, hours and working conditions," and "is authorized to contractually commit itself... insofar as **permitted by statute,**" but may not "enter into an agreement recognizing a union... as the exclusive representative of all employees.") (emphasis in original); **Fayette Cty. Educ. Ass'n v. Hardy,** 626 S.W.2d 217, 220 (Ky. App. 1980);

MAINE: **School Committee of Town of Easton v. Easton Teachers Ass'n,** 398 A.2d 1220, 1223 (Me. 1979) ("[T]he Legislature waited until 1965 to declare a public policy that recognized in any respect a right of public employees to join labor organization... and to be represented by such organizations in collective bargaining terms and conditions of employment."); **City of Biddeford v. Biddeford Teachers Ass'n,** 304 A.2d 387, 393 (Me. 1973);

MARYLAND: **Mugford v. City of Baltimore,** 185 Md. 266, 270-272, 44 A.2d 745, 746-747 (Md. 1945); **O.P.E.I.U. Local 2 v. Mass Transit Admin.,** 295 Md. 88, 453 A.2d 1191, 1195 (Md. App. 1982) ("[A]bsent express legislative authority, a government agency cannot enter into binding arbitration or a binding collective bargaining agreement...."");

MASSACHUSETTS: **Mass. Bay Transp. Auth. v. Lab. Rel. Comm.,** 356 Mass. 563, 254 N.E.2d 404, 407 (Mass. 1970);

MINNESOTA: **Minneapolis Fed. of Teachers, Local 59 v. Obermeyer,** 275 Minn. 347, 147 N.W.2d 358, 366-67 (Minn. 1966);

MISSOURI: **City of Springfield v. Clouse,** 356 Mo. 1239, 206 S.W.2d 539 (Mo. 1947); see also **Sumpter v. City of Moberly,** 645 S.W.2d 359 (Mo. banc 1982) (although city has statutory authority to enter into agreement with fire fighters' association, city retains authority to unilaterally change terms of agreement).

MONTANA: **Zderick v. Silver Bow County,** 154 Mont. 118, 460 P.2d 749 (Mont. 1969);

NEBRASKA: **Univ. Police Officers U. v. University of Nebraska,** 203 Neb. 4, 277 N.W.2d 529 (Neb. 1979); **I.B.E.W. v. City of Hastings,** 179 Neb. 455, 138 N.W.2d 822 (Neb. 1965);

NEW HAMPSHIRE: **AFSCME v. City of Keene, 108 N.H. 68, 227 A.2d 602, 603 (N.H. 1967) ("In 1955 ... our Legislature removed the doubt previously existing as to the power of municipalities to enter into a collective bargaining contract with a labor union."); City of Manchester v. Manchester Teachers Guild,** 100 N.H. 507, 511, 131 A.2d 59, 62 (N.H. 1957) (enactment of Legislature " **add[ed] to the powers** of towns and cities the power to 'recognize unions of employees and make and enter into collective bargaining contracts with such unions.'") (emphasis added);

NEW JERSEY: **Delaware River and Bay Auth. v. Int'l Org. of M, M and P.,** 45 N.J. 138, 211 A.2d 789 (N.J. 1965);

NORTH CAROLINA: **Winston-Salem-Forsyth County U., N.C. Ass'n of Ed. v. Phillips,** 381 F. Supp. 644 (M.D. N.C. 1974). See also Note, "Public Employee Bargaining in North Carolina: From Paternalism to Confusion, 59 N.Car. L. Rev. 214, 218 (180);

NORTH DAKOTA: **AFSCME, Council No. 95 v. Olson,** 338 N.W.2d 97, 100 (N. D. 1983);

OHIO: **State ex rel. Ohio Council 8, AFSCME v. Spellacy,** 17 Ohio St. 3d 112, 478 N.E.2d 229, 232 (Ohio 1985) ("[P]rior to the enactment of the Public Employees Collective Bargaining Act... [the public employee] had no authority to enter into collective bargaining agreements with [its] employees....");

PENNSYLVANIA: **Philadelphia Teachers' Ass'n v. Labrum,** 415 Pa. 212, 203 A.2d 34, 36 (Pa. 1964);

RHODE ISLAND: **City of Pawtucket v. Pawtucket Teacher's Alliance,** 87 R.I. 364, 141 A.2d 624, 629 (R.I. 1958);

SOUTH CAROLINA: Opinion of the Attorney General, June 6, 1979 ("This Office has consistently taken the position over the years that neither the State nor a political subdivision thereof has either the right or the obligation to enter into a collective bargaining agreement with public employees. This position finds support in the Charleston Circuit Court case of **Medical College of South Carolina v. Drug and Hospital Union, Local 1199,** et al., decided by the Honorable Clarence E. Singletary on July 9, 1969.");

SOUTH DAKOTA: **Levasseur v. Wheeldon,** 79 S.D. 442, 112 N.W.2d 894, 898 (S.D. 1962);

TENNESSEE: **Fulenwider v. Firefighter's Ass'n Local U. 1984,** 649 S.W.2d 268, 270 (Tenn. 1982); **City of Alcoa v. IBEW Local 760,** 203 Tenn. 12, 308 S.W.2d 476 (Tenn. 1957); **Weakley County Municipal Electric System v. Vick,** 43 Tenn. App. 524, 309 S.W.2d 792 (Tenn. App. 1957);

TEXAS: **C.I.O. v. Dallas,** 198 S.W.2d 143 (Tex. App. 1946); **San Antonio Firefighters Local U. No. 84 v. Bell,** 223 S.W. 506 (Tex. App. 1920) (Texas public policy is opposed to public sector unionism). See also Tex. Stat. Ann. art. 5154c (1987) (first enacted in 1947, this statute makes public sector collective bargaining illegal; statute subsequently has been amended to permit collective bargaining by police officers and fire fighters. Tex. Stat. Ann. art. 5154C-1);

UTAH: **Pratt v. City Council of Riverton,** 639 P.2d 172, 174 (Utah 1981); **Westly v. Bd. of City Comm'ners,** 573 P.2d 1279, 1280 (Utah 1978).

VIRGINIA: **Commonwealth v. County Bd. of Arlington,** 217 Va. 558, 232 S.E.2d 30, 44 (Va. 1977);

WYOMING: **Retail Clerks Local 187 v. Univ. of Wyoming,** 531 P.2d 884, 888 (Wyo. 1975).

n2 NEW YORK: **Civil Service Forum v. N.Y. City Trans. Authy,** 4 App. Div. 2d 117, 163 N.Y.S.2d 866, 150 N.E.2d 705 (1958) ("The Authority, unlike other agencies performing governmental functions, is required to run the transit system like a business...."). Compare **Railway Mail Ass'n v. Corsi,** 293 N.Y. 315, 56 N.E.2d 721, 724 (N.Y. 1944), aff'd 326 U.S. 88 (1945): ("The exclusion of some categories of employees from the application of the statute constitutes a legislative determination that the 'public policy of the state' as "declared' in the same article would not be promoted by 'encouraging the practice and procedure of collective bargaining' by government employees.");

WASHINGTON: **Christie v. Port of Olympia,** 27 Wash.2d 534, 179 P.2d 294, 297 (Wash. 1947) (It is clear that it was widely understood that Washington adhered to the general common law rule in this matter. At trial, Port Manager Gribble testified that the commissioners of the public ports stated "that they had received an opinion from their attorney that it was illegal for public ports even to sit in a labor relations meeting...." Similarly, union representative Andrews testified that the ports and the union operated under a clandestine relationship because " **they were a public[sic] owned body and could not have a written contract with us....** ") (emphasis by the court).

n3 ARIZONA: **Board of Education v. Scottsdale Education Assoc.,** 17 Ariz. App. 504, 498 P.2d 578, 583, Vacated on other grounds, 109 Ariz. 432, 509 P.2d 612 (Ariz. 1973);

ARKANSAS: **City of Fort Smith v. Arkansas State Council No. 38, AFSCME,** 245 Ark. 409, 433 S.W.2d 153, 156 (1968);

COLORADO: **Littleton Education Assoc. v. Arapahoe County School District. No. 6,** 553 P.2d 793, 796 (Colo. 1976);

CONNECTICUT: **Norwalk Teachers' Assoc. v. Board of Education,** 138 Conn. 269, 83 A.2d 482 (Conn. 1951);

INDIANA: **Gary Teachers' Union, local No. 4, AFT v. School City of Gary,** 152 Ind. App. 591, 284 N.E.2d 108 Ind. App. 1972);

LOUISIANA: **Beauboeuf v. Delgado College,** 303 F. Supp. 861, 866 (E. D. La. 1969), aff'd, 428 F.2d 470 (5th Cir. 1970); and

WEST VIRGINIA: **Local 598, Council 58, AFSCME v. City of Huntington,** 317 S.E.2d 167 (W.Va. 1984).

n4 We note that the leading textbook on public sector labor relations, H. Edwards, R. Clark & C. Craver, Labor Relations Law in the Public Sector 280 (3d ed. 1985), identifies thirty-nine states which have passed at least one statute relating to public sector collective bargaining (reference to statutory appendix omitted):

Twenty-nine states have enacted reasonably comprehensive statutes of general applicability: Alaska (all public employees), California (substantially all public employees; three statutes), Connecticut (all municipal employees, teachers, and state employees, three statutes), Delaware (all public employees; two statutes), Florida (all public employees), Hawaii (all public employees), Illinois (all public employees except police and fire; two statutes), Iowa (all public employees), Kansas (all public employees; local option as to coverage), Maine (all municipal and state employees; several statutes), Missouri (all public employees except policemen and teachers), Massachusetts (all public employees; two statutes) Michigan (all public employees except classified state employees), Minnesota (all public employees), Missouri (all public employees except policemen and teachers), Montana (all public employees), Nebraska (municipal and state employees), Nevada (all local government employees including teachers), New Hampshire (classified state employees and non-academic university employees), New Jersey (all public employees), New York (all public employees, North Dakota (all public employees), Ohio (all public employees), Oregon (all public employees), Pennsylvania (all public employees, including fire fighters and police officers; two statutes), Rhode Island (all public employees; five statutes), South Dakota (all public employees), Vermont (all public employees, three statutes), Washington (all state and local government employees, several statutes), Wisconsin (all state and municipal employees including teachers; two statutes).

Fifteen states have enacted separate statutes granting teachers the right to bargain collectively: Alaska, California, Connecticut, Delaware, Idaho, Indiana, Kansas, Maryland, Nebraska, North Dakota, Oklahoma, Rhode Island, Tennessee, Vermont, Washington.

Eleven states have enacted collective bargaining laws covering fire fighters and/or police officers: Alabama (fire fighters), Georgia (fire fighters), Idaho (fire fighters), Kentucky (both, but only covers Louisville and Jefferson County), New Hampshire

(police officers), Oklahoma (both), Pennsylvania (both), Rhode Island (both; two statutes), South Dakota (both), Texas (both) Wyoming (fire fighters).

Several states have also enacted collective bargaining legislation that is limited to transit authorities, port authorities, or other special districts.

In addition to the numerous state laws referred to above, a number of municipalities in states that do not have collective bargaining legislation have passed charter provisions or enacted ordinances granting their employees the right to bargain collectively. Phoenix, Arizona, Baltimore, Maryland, and Washington, D.C., are three prominent examples.

n5 Those bills are as follows: HB 49 (1963); HB 181 (1965); HB 117, SB 147 (1967); CS/SB 35 & SB 134 (1969); HB 149 (1970); CS/HB 230, SB 340, SB 199 (1971); SB 172 (1973); HB 91, HB 306, SB 199 (1975); SB 476 (1977); CS/HB 411, SB 33 (1985); SB 312 (1987).

n6 As of August 6, 1987, there were no bargaining units at the state level in which a majority of the employees had authorized payroll dues deductions, a standard measure of union strength. Communications Workers and Agency on Aging (13 employees in bargaining unit; 4 employees with payroll dues deductions); Communications Workers and HED-Administration (950; 124); AFSCME and Employment Security (446; 80); AFSCME and HED-Los Lunas (418; 159); AFSCME and Transportation (Tax & Revenue) (600; 108); Carpenters and Fort Bayard (HED) (331;61); New Mexico Correctional Workers Association and Corrections Department (1423; 560). Moreover, since 1971, there have been 33 union elections with state employees. The union has lost eight of the elections. GSD (Aug. 15, 1986) (300 in bargaining unit; 85 for/13 against); Human Rights Commission (Aug. 13, 1986) (10; 4 for/4 against, with 2 challenges); Econ. Dev. & Tour. (July 16, 1984) (52; 10/14 (4 void)); GSD (May 18, 1984) (270; 82/121(9)); Econ. Dev. & Tour. (May 1, 1984) (50; 16/16); Econ. Dev. & Tour. (March 13, 1984) (50; 17/17); Tingley Hospital (Sept. 15, 1975) (104; 25/72); Tingley Hospital (Aug. 21, 1972) (97; 29/53). Four have been unfavorable for other reasons. Human Rights Com. (June 28, 1984) (withdrew petition even with suff. show of support); H.E.D. (June 14, 1984) (insuf. show of support); Law Enforce. Acad. (May 17, 1984) (withdrew request for meeting to show support); PERA (May, 1984) (insuf. show of interest).

And in 10 of the elections that the unions have won, they have not done so by winning a majority vote of the bargaining unit. Nat'l Resource Dept. (Oct. 23, 1986) (103 in bargaining unit; 33 for /13 against); Cultural Affairs (April 11, 1986) (49; 14/13); Transportation (Dec. 9, 1985) (372; 159/73 (19)); HED (May 19, 1984) (920; 354-221 (16 Chal., 30 void); Reg. & Licensing (March 5, 1984) (106; 47/20(6)); Corrections Dept. Law Enforcement (Dec. 4, 1981) (596; 122 (AFSCME)/162 (NMCWA) (runoff between top two choices)); Corrections Dept. (non-law enforcement) (349; 25 (AFSCME) /85 (NMCWA)/47 (None); Corrections Dept. (law enforcement) (Nov. 5, 1981) (596, 143 (AFSCME) /151 (NMCWA)/20 (None); Motor Vehicles (March 23, 1976) (196; 64/48

(2)); Bureau of Revenue (Aug. 15, 1974) (131; 44/38). In seven elections, a majority of the bargaining unit wanted the union elected, Commission on Status of Women (5 in bargaining unit; 3 for/1 against); Dept. of Education (April 5, 1984) (205; 108/51 (14 void or chal.); Health U Soc. Ser. (June 12, 1975) (1550; 778/338); Emply. Security Com. (May 22, 1975) (549; 379/78); Highway Dept. (July 17, 1972) (1654; 842 (AFSCME)/370); Miner's Hospital (May 3, 1972) (41; 35/5); Fort Stanton Hosp. (Jan. 20, 1972) (97; 652/23), and in two other elections, a majority expressed a desire for some union, Highway Dept. (June 2, 1972) (1816; 576 (AFSCME)/328 (No Union)/324 (Op. eng.) /150 (Gov. Empl.)); Las Vegas Hospital (Jan. 24, 1972) (516;228 (Carpenters) /199 (Public Employees Assoc.) /19 (No Union)). We have insufficient information on the bargaining unit at Los Lunas Hospital on July 22, 1971 (132 for/62 against). But in only on election did the union win all votes cast in the election. Agency on Aging (Dec. 10, 1984) (11 in bargaining unit; 8 for /0 against).