August 17, 2007 "Fair Share" Payments by State Employees

The Honorable Luciano "Lucky" Varela
New Mexico State Representative
1709 Callejon Zenaida
Santa Fe, NM 87501

Re: Opinion Request - "Fair Share" Payments by State Employees

Dear Representative Varela:

You requested our advice on whether a classified state employee may be terminated for refusing to make a "fair share" contribution as required by a collective bargaining agreement. Your question requires us to consider the collective bargaining agreement executed between the state and certain unions in the context of the Public Employee Bargaining Act and the State Personnel Act ("SPA"). Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us at this time, we conclude that the State Personnel Act and associated regulations control the lawfulness of a termination of a state employee and that a classified employee may be terminated for failure to make a fair share contribution if the State Personnel Board ("SPB") determines the termination is supported by "just cause" under the SPA.

As a preliminary matter, the term "fair share" refers to a payment made in lieu of union dues by an employee eligible to join a union who elects not to do so. Fair share is one of several union security agreements and is called variously a "membership fee," "representation fee" or "agency fee." At one end of the spectrum, a "union shop" requires that every employee join the union as a condition of employment. **Black's Law Dictionary**, 1065 (6th ed. 1991). At the opposite end, an "open shop" requires no such membership. See id. at 753. In between, an "agency shop" does not require employees to join the union, but does require them to pay a fair share (i.e., a portion) of union dues — on the theory that nonmembers benefit equally from collective bargaining. See id. at 41. It is the agency shop option that is at issue in your question.

The SPA, NMSA 1978, Sections 10-9-1 through -25, was enacted in order "to establish for New Mexico a system of personnel administration based solely on qualification and ability..." NMSA 1978, § 10-9-2 (1963). Further, it was meant "to encourage residents to remain in the state rather than moving out of state because of unsatisfactory employment opportunities in New Mexico." NMSA 1978, § 10-9-13.1 (1983). Central to the SPA's protection is the provision that "classified" employees (i.e., employees covered under its system) may be discharged, suspended or reprimanded only for "just cause." The law reads: "If the board finds that the action taken by the agency was without just cause, the board may modify the disciplinary action or order the agency to reinstate the appealing employee." NMSA 1978, § 10-9-18(F) (1999). "Just cause" is defined, generally, as "any behavior relating to the employee's work that is inconsistent

with the employee's obligation to the agency." 1.7.11.10(A) NMAC. Further, just cause includes but is not limited to:

> inefficiency; incompetency; misconduct; negligence; insubordination; performance which continues to be unsatisfactory after the employee has been given a reasonable opportunity to correct it; absence without leave; any reasons prescribed in 1.7.8 NMAC [concerning drug and alcohol abuse]; failure to comply with any provisions of these Rules; falsifying official records and/or documents such as employment applications, or conviction of a felony or misdemeanor...

1.7.11.10(B) NMAC. Thus, just cause relates, essentially, to malfeasance, misfeasance or incompetence.

In 2003, the legislature enacted the Public Employee Bargaining Act ("PEBA"), NMSA 1978, Sections 10-7E-1 through -26, which gives public employees the right to organize and bargain collectively. See NMSA 1978, § 10-7E-2 (2003). PEBA provides that "[p]ublic employees...may form, join or assist a labor organization for the purpose of collective bargaining...[but] shall have the right to refuse any such activities." NMSA 1978, § 10-7E-5 (2003). PEBA defines "fair share" as:

> the payment to a labor organization which is the exclusive representative for an appropriate bargaining unit by an employee of that bargaining unit who is not a member of that labor organization equal to a certain percentage of membership dues...including but not limited to all expenditures incurred by the labor organization in negotiating the contract applicable to all employees in the appropriate bargaining unit, servicing such contract and representing all such employees in grievances and disciplinary actions...

NMSA 1978, § 10-7E-4(J) (1983). PEBA permits fair share, but does not require it:

> A rule promulgated by the board or a local board shall not require, directly or indirectly, as a condition of continuous employment, a public employee covered by the Public Employee Bargaining Act to pay money to a labor organization that is certified as an exclusive representative. The issue of fair share shall be left a permissive subject of bargaining by the public employer and the exclusive representative of each bargaining unit.

NMSA 1978, § 10-7E-9(G) (1983). Thus, read as a whole, the fair share section of PEBA (a) prohibits the Public Employee Labor Relations Board ("PELRB") or local boards from requiring fair share; (b) permits parties to a collective bargaining agreement ("CBA") to adopt fair share by contract; and (c) implies that, if adopted, compliance with fair share may be made "a condition of continuous employment."

Nonetheless, anticipating conflicts between PEBA and other laws, the legislature wrote a section in PEBA that SPA supersedes PEBA. It reads: "In the event of conflict with other laws, the provisions of the Public Employee Bargaining Act shall supersede other

previously enacted legislation and regulations; provided that the Public Employee Bargaining Act shall not supersede the provisions of ...the Personnel Act..." NMSA 1978, § 10-7E-3 (1983) (emphasis added).

Following passage of PEBA, the American Federation of State, County and Municipal Employees ("AFSCME") and the Communication Workers of America ("CWA"), both entered into CBAs with the state.1 The two CBAs include identical fair share provisions, each stating that an employee who fails to pay fair share "shall be terminated." See AFSCME CBA, art. X; CWA CBA, art. III. Further, prior to termination, the union must notify the employee of the arrearage and tender to the State Personnel Office ("SPO") a request for termination. See id. The state, in turn, must issue a notice of contemplated action for dismissal and must proceed with termination according to State Personnel Board regulations. See id.

With respect to your question, the above-mentioned provisions, read together, make clear that a conflict may arise when an employee covered by the SPA and CBA declines to pay fair share: The CBA provides that the employee *must* be fired, while SPA provides that the employee *must not* be fired except for just cause. This conflict raises two questions: May the employee at issue be discharged for noncompliance with fair share without regard to just cause? If not and if just cause must be considered — is failure to pay fair share just cause for dismissal?

It appears that the legislature has granted the SPB the authority to handle this matter and decide on the propriety of the allegations of termination. This is because discharge of a classified employee must be weighed against the standard of just cause even if the employee is covered by a CBA. PEBA states unambiguously that, in the event of any conflict between the two laws, SPA supersedes PEBA. See NMSA 1978, § 10-7E-3 (1983). PEBA's permissive treatment of fair share, and even its suggestion that fair share may be made a "condition of employment" found in Section 10-7E-9(G) is not contrary to this proposition. When the legislature enacted those provisions of PEBA and provided that SPA superseded them, it certainly knew of SPA's requirement that discharge must be based on just cause. See Bettini v. City of Las Cruces, 82 N.M. 633, 635, 485 P.2d 967 (1971).

Moreover, the consideration of the propriety of discharge may not be delegated away by contract or by any other means. See Local 2238 of the American Federation of State, County and Municipal Employees, AFL-CIO v. Stratton, 108 N.M. 163, 169, 769 P.2d 76 (1989) ("the Board [SPB] is constrained from delegating to individual state agencies and public employee unions the authority to enact rules or agreements on those matters expressly placed within the purview of the Board's rule-making authority, i.e., wages, hiring, termination of employment, and other areas..."). In essence, this means that SPB may not delegate away those matters inherently within its discretion — such as termination of employees — by deference to a CBA. It is well established that, generally, the state may not bargain away matters inherently within its purview. See, e.g., Spray v. City of Albuquerque, 94 N.M. 199, 201, 608 P.2d 511 (1980) (contracts

attempting to curtail or prohibit a municipality's legislative or administrative authority are uniformly invalid).

For these reasons, absent instruction from the courts, we conclude that discharge of a classified employee for refusal to pay fair share would be permissible only if, in light of SPA and SPB regulations, such refusal constituted "just cause" for dismissal.2 It would be up to the SPB to determine whether there is just cause under the specific facts and circumstances in the case.

We hope this response is helpful. If we may be of further assistance, please let us know. You requested a formal Attorney General's Opinion on the matter discussed above. Such an opinion would be a public document available to the general public. Although we are providing our legal advice in the form of a letter instead of an Attorney General Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

ZACHARY SHANDLER
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

[1] Other unions have CBAs with the state, but the number of employees covered by them is small relative to AFSCME and CWA. For the purpose of this question, we address only CBAs of AFSCME and CWA.

[2] It appears that a party appealing the SPB's decision to a district court on this issue would present a question of first impression in New Mexico.