

July 12, 2011 Advisory Letter— School District Representation in Collective Bargaining

June 14, 2011

The Honorable Eleanor Chavez
New Mexico State Representative
1307 Del Mastro SW
Albuquerque, NM 87121

Re: Opinion Request – School District Representation in Collective Bargaining

Dear Representative Chavez:

You have requested our advice regarding whether public school districts may hire consultants or lawyers to represent the district during collective bargaining negotiations. Specifically, you have asked: (1) do the actions of the school district comply with the New Mexico Public Employee Bargaining Act (“PEBA”), NMSA 1978, ch. 10, art. 7E (2003, as amended through 2005); (2) do the actions of the school districts comply with the New Mexico Procurement Code, NMSA 1978, Sections 13-1-28 to -199 and (3) do the actions of the legal entities comply with an attorney’s code of ethics. Based on our examination of the relevant constitutional, statutory and case law authorities, and the information available to us at this time, we conclude that a public school district may contract with consultants or lawyers to represent the district during collective bargaining negotiations, provided the district complies with the Procurement Code.[1]

According to your letter, Rio Rancho Public School District has “contracted with Management Associates, Inc., Bob Brown Consulting, Scheuer, Yost and Patterson, and Rodey, Dickason, Sloan, Akin, and Robb, P.A. to represent the District during the collective bargaining process.” Your concern is that the “Public Employee Bargaining Act does not contain a provision allowing for public employers to contract with third parties to represent a public employer in the negotiating process.” The PEBA is silent on whether a public school district may contract with third parties to represent the district. See NMSA 1978, Section 10-7E-6 (2003).[2] However, the PEBA does not prohibit this type of contract. The PEBA reads that a public school district “may retain all rights not specifically limited by ...the Public Employee Bargaining Act.” Id. § 10-7E-6.

The legislature has granted a public school board, as the governing body of a public school district, certain powers. Since a board may “sue and be sued” and “acquire, lease and dispose of property” and “issue general obligation bonds of the school district”, the board may need to seek expertise from lawyers or management consultants in handling these matters. NMSA 1978, § 22-5-4(D),(E),(G) (2005). The legislature has expressly granted public school boards the authority to “contract for the expenditure of money” as long as it is done “according to the provisions of the Procurement Code.” Id. § 22-5-4(J).

The Procurement Code applies to “every expenditure by ... local public bodies for the procurement of items of tangible personal property, services and construction....” NMSA 1978, § 13-1-30(A) (1994). Professional services are defined as “the services of ...management ... analysts...lawyers...and other persons or businesses providing similar professional services....” NMSA 1978, § 13-1-76 (1997). Therefore, the legislature has granted a public school board, as the governing body of a public school district, authority to contract with consultants and lawyers. This authority could cover a variety of matters, including, but not limited to, representation in collective bargaining negotiations.

The Procurement Code imposes certain safeguard requirements on the contracting process. “The purposes of the Procurement Code are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity.” NMSA 1978, § 13-1-29(C)(1984). The Code sets up a series of mechanisms for public bodies procure services from companies in a transparent process. For example, “Section 13-1-103 requires that all Invitations to Bid (ITB’s) issued by agencies include the specifications for ... services requested....” N.M. Att’y Gen. Op. 08-05 (2008). “Section 13-1-112 requires that all Requests for Proposals (RFP’s) include the specifications of the goods or services requested....” *Id.* Section 13-1-125 requires that a public body must issue a Request for Proposals when the contract amount exceeds \$50,000. Section 13-1-129 provides that a public body may contract for services without using competitive sealed bids under limited circumstances involving federal supply contract prices or a price agreement. Section 13-1-150 imposes certain limitations on the contract terms. Finally, Section 13-1-172 provides for a process for companies to appeal adverse procurement decisions.[3]

Therefore, we conclude a public school district may hire consultants or lawyers to represent the district during collective bargaining negotiations provided that the contracts are procured under the requirements of the Procurement Code. Although PEBA does not prohibit a school district from employing a consultant or lawyer to represent it in collective bargaining negotiations, the school district may not employ a consultant, lawyer or other agent to engage in a prohibited practice, interfere with the rights of public employees or otherwise act contrary to the school district’s obligations as an employer under the PEBA.

Your request to us was for a formal Attorney General’s Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General’s 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

[1] Since we conclude that these types of contracts are permissible under the law, we do not need to address your question of whether the above-stated law firms have complied with attorney's code of ethics.

[2] The PEBA states that public employees may seek "collective bargaining through representatives chosen by public employees...." NMSA 1978, § 10-7E-5 (2003).

[3] This letter is intended to provide our legal advice and interpretation of the law in response to your request for an opinion under NMSA 1978, § 8-5-2(D) (1975). Under that provision, we do not conduct an investigation nor do we engage in fact-finding in the same manner as a court. If you have particular knowledge or evidence that public school districts are violating the Procurement Code by artificially dividing their procurement requirements so as to constitute a small purchase, NMSA 1978, § 13-1-125 (2007), by misusing the Code's provisions for price agreements to circumvent the requirement for an RFP, *id.* § 13-1-129 (1991), or otherwise, you can contact our office or the district attorney in the jurisdiction in which the violation allegedly occurred. See *id.* § 13-1-196 (1984) (authorizing a civil action for enforcement of the Procurement Code and imposing civil penalties).