Opinion No. 75-66

December 3, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Dr. Glen Gares State Personnel Director State Personnel Office 130 South Capitol Santa Fe, New Mexico 87503

QUESTIONS

FACTS

Opinion of the Attorney General No. 74-3, dated January 15, 1974, concluded that ". . . neither a Union Shop provision nor an Agency Shop provision would be illegal in this state if same were placed in a collective bargaining agreement with institutions of higher learning." This opinion is based primarily on Section 59-13-1 B, NMSA, 1953 Comp., in which the legislature ". . . specifically contemplated and approved agreements requiring membership in a labor organization as a condition of employment." Opinion of the Attorney General No. 74-3, **supra.**

On the strength of the foregoing opinion, our office advised the State Personnel Director by letter dated May 13, 1974, that the New Mexico Department of Hospitals and Institutions could legally enter into collective bargaining agreements which provided for a "Modified Agency Shop and dues check-off system."

QUESTIONS

1. Does Opinion of the Attorney General No. 74-3 **supra,** apply to collective bargaining agreements subject to approval of the State Personnel Board?

2. Does Section 59-13-1 B, **supra,** apply to public sector collective bargaining agreements?

CONCLUSIONS

1. No.

2. It is unnecessary to answer this question at this time.

OPINION

*{*177}* **ANALYSIS**

Opinion of the Attorney General No. 74-3, **supra,** applies specifically to institutions of higher learning in this state. We note that State positions in educational institutions are

not covered by the State Personnel Act. Section 5-4-31 (F) NMSA, 1953 Comp. Therefore, collective bargaining agreements with institutions of higher learning are not subject to the State Personnel Act or rules of the State Personnel Board.

Section 5-4-36, **supra,** requires the State Personnel Board to provide by rule, among other things, for:

* * *

H. dismissal or demotion procedure for employees in the service, . . .

Pursuant to its statutory authority, the State Personnel Board promulgated Rule 602 which provides for dismissal and demotion procedures for employees in the service. Dismissal or demotion is generally based on cause. Failure to join a labor organization as a condition of employment, however, is not a ground for dismissal or demotion pursuant to Rule 602.

The New Mexico Legislature has not enacted a public sector collective bargaining law. In the absence of such a law, public agencies may enter into collective bargaining agreements with labor organizations, but there are limitations. In **International Bro. of E. Wkrs. v. Town of Farmington,** 75 N.M. 393, 405 P.2d 233 (1965), the New Mexico Supreme Court held that a municipality could enter into a collective bargaining agreement with a labor organization which represented its public employees. Our Supreme Court stated, however, 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 . . . (75 N.M. at p. 396).

The collective bargaining agreement in the aforementioned case was executed at a time when neither the state had a statute nor the city an ordinance which provided for a civil service or merit system covering those matters normally the subject of collective bargaining. The Supreme Court upheld the collective bargaining agreement only because it did not conflict with any rule or regulation of an applicable civil service or merit system.

The State Personnel Board promulgated "Regulations for the Conduct of Employee-Employer Relations" dated May 9, 1972. The scope of collective bargaining is addressed in paragraph VIII, which provides, in part, that collective bargaining agreements:

A. must not be in violation of any statute, regulation or rule of the board.

B. must not contain a union *{*178}* or agency clause nor require membership of any employee, nor require any employee to pay any fee or dues in lieu of membership . . .

In our opinion, any form of union security which requires that an employee covered by the State Personnel Act be subject to dismissal for failure to join a labor organization as a condition of employment is inconsistent with Rule 602 of the State Personnel Board and is not a proper subject of a collective bargaining agreement for the reasons stated in **International Bro. of E. Wkrs. v. Town of Farmington, supra.** Furthermore, any form of union security must be carefully scrutinized to insure that it does not conflict with paragraph VIII (A), (B), of the State Personnel Board "Regulations for the Conduct of Employee - Employer Relations." A union security clause (of a collective bargaining agreement) which conflicts with paragraph VIII (A), (B) of the above-mentioned regulation is equally invalid and is prohibited.

We conclude therefore that Opinion of the Attorney General No. 74-3, **supra,** cannot and does not apply either to employees covered by the State Personnel Act or to collective bargaining agreements subject to approval of the State Personnel Board. In view of the above discussion, our written advice contained in the aforementioned letter dated May 13, 1974, is overruled to the extent that it conflicts with this opinion.

In light of our conclusion with respect to your first question, a discussion of your second question is unnecessary. It is therefore not appropriate for us to consider at this time whether Section 59-13-1 B, **supra,** applies generally to public sector collective bargaining agreements.

By: Ralph W. Muxlow II

Assistant Attorney General