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OPINION
OF
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Opinion No. 87-56

By: James O. Browning
Deputy Attorney General

To: Ross Sweat
Director
Division of Vocational Rehabilitation
604 San Mateo
Santa Fe, New Mexico 87503

QUESTION:

1. Is there currently a binding collective bargaining agreement between the Division of Vocational Rehabilitation ("DVR") and the American Federation of State, County and Municipal Employees ("AFSCME")?

2. Is DVR under any statutory or regulatory duty to continue to seek a successor agreement with AFSCME through negotiation, mediation or fact-finding?

CONCLUSION:

1. No.

2. No.

ANALYSIS:

Your letter and our discussions with Frank Seanez, DVR Staff Attorney, reveal the following facts. In 1984, DVR and AFSCME negotiated a collective bargaining agreement pursuant to the Rules for Labor-Management Relations ("RLMR"). The collective bargaining agreement that they negotiated included a termination date of June 30, 1986. The State Personnel Board ("Board") granted

extensions of the contract through the June 19, 1987 Board meeting. Neither DVR nor AFSCME requested an extension beyond June 19, 1987.

1. Assuming it were legal for state agencies in New Mexico to engage in collective bargaining, and assuming further that the RLMR governed any collective bargaining relationship, the collective bargaining agreement would have expired under the terms of Section 8C of the RLMR. Section 8C of the RLMR provides that:

> Collective bargaining agreements shall terminate on the date specified in the agreement unless:
>
> 1. the board has declared an impasse and extends the provision of the agreement in accordance with the provisions of Section 9(D); or
>
> 2. the parties are unable to provide the board with a successor agreement prior to the expiration of an existing agreement, in which case the existing agreement shall remain in effect until the next regularly scheduled meeting of the board.

Because neither condition is present, and the Board has not attempted to exercise any inherent discretion that it might have if the RLMR governed your contract to extend the contract on other grounds, your collective bargaining agreement has terminated and is not binding upon either DVR or AFSCME.

The Supreme Court of New Mexico has recognized an exception to the common-law rule that, in the absence of specific statutory authority to engage in collective bargaining, a state has no power to bargain collectively or to enter into a collective bargaining agreement. See IBEW, Local Union No. 611 v. Town of Farmington, 75 N.M. 393, 405 P.2d 233 (1965). But the Supreme Court also has made it clear that it is illegal for state agencies governed by the Personnel Act, Sections 10-9-1 to 10-9-25 NMSA 1978, in New Mexico to engage in collective bargaining. Town of Farmington, 75 N.M. at 396, 405 P.2d at 236 (1965). In Attorney General Opinion No. 87-41 (Aug. 10, 1987), at 24-25 this Office stated the law as set forth in Farmington, as follows:

> 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.").

* * *

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.

That it is illegal for state agencies in New Mexico to engage in collective bargaining provides additional grounds for concluding that your contract with AFSCME is void.

We further note that the RLMR do not lend legitimacy to any contractual agreement between DVR and AFSCME. As we set forth in Attorney General Opinion No. 87-41, at pages 25-38, the RLMR are illegal and therefore void.

2. The issue whether a state agency can enter into a collective bargaining agreement is distinct from the issue whether a state agency must engage in collective bargaining with its employees. In New Mexico there is no statute that compels state agencies to engage in collective bargaining. In the absence of a statutory duty to bargain, there is no obligation on DVR's part to engage in negotiations. 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 National 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); Hanover Twp. Fed. of Teachers v. Hanover Com. Sch. Corp., 457 F.2d 456, 461 n.13 (7th Cir. 1972).

Nor is there any regulatory duty to engage in collective bargaining. We note that Section 7A of the RLMR sets forth a duty to bargain on the part of a state agency and an organization that has been certified as an exclusive representative after winning a representation election, and Section 11(A)(5) of the RLMR declares that it is a "prohibited practice for an agency or its agents willfully to...refuse to bargain in good faith with the exclusive representative." As stated above, however, Attorney General

Opinion No. 87-41, at 25-38, sets forth fully the reasons why the RLMR are invalid and void, and its discussion is not repeated herein. Thus, DVR is not under any statutory or regulatory duty to continue to seek a successor agreement with AFSCME through negotiations, mediation, or fact-finding.

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