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STATE CAPITOL
PHOENIX, ARIZONA

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DEPARTMENT OF LAW OPINION NO. 74-11 (R-24)

REQUESTED BY: THE HONORABLE SAM LENA
Arizona State Senator

- QUESTIONS:
1. Does a county have the power to enter into a binding agreement with a union representing its employees regarding such items of employment as recognition by the county of the union as the exclusive bargaining agent for its members, automatic check-off of union dues, right of union representatives to enter premises to conduct union business, grievance procedure, seniority in promotions and lay-off, wage shift and hazardous work pay differentials, additional wages based on longevity, determination of wages during employee training, cost of living increases, overtime wage schedule, vacation, sick leave and restrictions on contracting out?
 2. May the county enter into an agreement to meet and discuss wages, terms of employment and working conditions with a union?
 3. May the county enter into an employment agreement with a union when the county has provided for a county employee merit system pursuant to A.R.S. §§ 11-351 and 11-356, as amended?

- ANSWERS:
1. No.
 2. Yes.
 3. No.

The answer to each question necessarily involves an analysis of the role, if any, of collective bargaining in public employment.

Courts which confront problems involving the role of the collective bargaining process in a public employment situation often pause initially to conceptualize what it is they are talking about. The Arizona Supreme Court in Local 266 v. Salt River Project, 78 Ariz. 30, 275 P.2d 393 (1955), has long recognized there are distinctions between private enterprise's right to make binding employment contracts and a governmental entity's (acting in a governmental or political capacity) right to enter into binding employment contracts. Distinctions between private and public employers are also recognized in State Board of Regents v. United Packing House, 175 N.W.2d 110 (Iowa 1970). In that case, which involved a dispute over whether or not the Iowa Board of Regents had authority to collectively bargain, the Iowa Supreme Court said:

. . . There is a vast difference between implying authority in the Regents to meet with selected representatives of a group of employees to discuss wages, working conditions and grievances on behalf of those who have agreed to such representation and implying authority in the Regents to recognize the union as the exclusive employee representative for collective bargaining on behalf of all employees. 175 N.W.2d at 112.

This excerpt from the Iowa Court's opinion indicates that collective bargaining in public employment differs from collective bargaining in private employment. The fundamental difference is in the exclusiveness of the bargaining representative.

The initial question presented herein asks whether or not a public employees' union may be recognized by the county (or state) as the exclusive bargaining agent for its members. The question may be posited differently without change in substance as follows: "May the collective bargaining process as it is used in the private or industrial context be utilized by state and local governments in negotiations with public employees?" Regardless of how the question is stated, the answer is an emphatic "no".

Statutes dealing with labor relations generally do not apply to the United States or to any state or political subdivision thereof in their capacity as employers. 56 C.J.S. § 28(7). The National Labor Relations Act, 29 U.S.C.A., §§ 151, et seq., does not recognize the existence of the

right of collective bargaining in public employment, and expressly excepts from the definition of the term "employer" the United States and any state or political subdivision thereof. See Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 168 P.2d 741 (1946); Miami Water Works Local No. 654 v. City of Miami, 157 Fla. 445, 26 So.2d 194 (1946). The definition section of the National Labor Relations Act is 29 U.S.C.A., § 152. That section defines "employer" as follows:

* * * (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. (Emphasis added.)

All citizens, be they public employees or not, have the right to peaceably assemble and organize for any proper purpose and to present their views to any public body, such a right being embodied within the First Amendment of the United States Constitution. City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947); Norwalk Teachers' Association v. Board of Education, 138 Conn. 269, 83 A.2d 482 (1951); see American Federation of Labor v. American Sash & Door Company, 67 Ariz. 20, 189 P.2d 912 (1948). Although public employees may organize and designate representatives, the union status they achieve thereby does not arm them with the authority to compel a public administrative agency to bargain with the union representative through strikes or other collective action. See Communication Workers of America v. Arizona Board of Regents, 17 Ariz.App. 398, 498 P.2d 472 (1972).

The primary objection to allowing public employees' unions to use collective bargaining in the private or industrial context is that such a procedure would constitute an unlawful delegation of legislative authority. The employer-employee relationship in public employment is governed by statutory law and administrative regulation; it is not fixed, either in

whole or in part, by contract, as in the field of private industry. City of Los Angeles v. Los Angeles Building and Construction Trades Council, 94 Cal.App.2d 36, 210 P.2d 305, 310 (1949). In State Board of Regents v. United Packing House Etc., supra, the Iowa Supreme Court observed that:

. . . [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. . . . The power to fix the terms and conditions of public employment is a legislative function which, with proper guidelines from the legislature, can be delegated to its administrative agencies. 175 N.W.2d at 113-114.

The Iowa Court observed further that:

. . . The decisions generally hold that the manner in which public authorities must determine the wages, hours, and working conditions of public employees is governed entirely by the Constitution, statutes, municipal charters, civil service rules and regulations, and resolutions setting out the authority of the public employer. Public employees do not have collective bargaining rights in the same sense that private or industrial employees enjoy them. There must be some statutory provision authorizing collective bargaining. The reason is that the public employer cannot abdicate or bargain away continuing legislative discretion and is not authorized to enter into collective bargaining agreements without specific authority. The fact that statutory provisions grant the right of collective bargaining to employees in private industry does not confer such right on public employers and employees. [Citation omitted.] 175 N.W.2d at 115.

In Fellows v. LaTronica, 151 Colo. 300, 377 P.2d 547 (1962), a Pueblo city fireman sought an order to compel the city to arbitrate labor matters pursuant to the terms of a labor agreement between the city and the local fire fighters' union. The Supreme Court of Colorado held that there were

pertinent provisions of the Pueblo home rule charter which clearly indicated that it was the intention of the people of the city to insure that compensation and other matters connected with employment by the city were matters exclusively within the legislative function of the city; the city had no authority to enter into an agreement with a union covering the terms of employment of firemen. Discussing the unlawful delegation of legislative authority problem, the Colorado court said:

The reasoning of most of the reported cases is that the employer-employee relationship in government is a legislative matter which may not be delegated. Such contracts if permitted to stand would result in taking away from a municipality its legislative power to control its employees and vest such control in an unelected and uncontrolled private organization (a union). In the case of *Springfield v. Clouse*, supra, it was said:

"The whole matter of qualifications, tenure, compensation and working conditions for any public service, involves the exercise of legislative powers. Except to the extent that all the people have themselves settled any of these matters by writing them into the constitution, they must be determined by their chosen representatives who constitute the legislative body. It is a familiar principal of constitutional law that the legislature cannot delegate its legislative powers and any attempted delegation thereof is void. [Citing cases] If such powers cannot be delegated, they surely cannot be bargained or contracted away; and certainly not by any administrative or executive officers who cannot have any legislative powers. Although executive and administrative officers may be vested with a certain amount of discretion and may be authorized to act or make regulations in accordance with certain fixed standards, nevertheless the matter of making such standards involves the exercise of legislative powers. Thus qualifications, tenure, compensation and working conditions of public officers and employees are

wholly matters of lawmaking and cannot be the subject of bargaining or contract. Such bargaining could only be usurpation of legislative powers by executive officers; and, of course, no legislature could bind itself or its successor to make or continue any legislative act.* * *

We are in accord with the views above set forth. A proper exercise of the legislative function might well involve consultation and negotiation with spokesmen for public employees, but the ultimate responsibility rests with the legislative body and, under the record here presented, that responsibility cannot be contracted away. 377 P.2d at 550.

For other cases holding that a governmental body cannot bind itself by a collective bargaining agreement, in the absence of specific statutory authority, see City of Springfield v. Clouse, supra; International Union of Operating Engineers Local 321 v. Water Works Board, 276 Ala. 462, 163 So.2d 619 (1964); New Jersey Turnpike Authority v. American Federation of State, County and Municipal Employees, 83 N.J. Super. 389, 200 A.2d 134 (1964); Miami Water Works Local No. 654 v. City of Miami, supra; Wichita Public School Employees Union, Local No. 513 v. Smith, 194 Kan. 2, 397 P.2d 357 (1964); Mugford v. Mayor and City Council, 185 Md. 266, 44 A.2d 745 (1945); City of Alcoa v. International Brotherhood of Electrical Workers, 203 Tenn. 12, 308 S.W.2d 476 (1957).

Arizona does not constitutionally or statutorily provide its administrative agencies and public employees with the power to collectively bargain in the private or industrial sense of the term. In Communications Workers of America v. Arizona Board of Regents, supra, the Court of Appeals held that the Arizona Board of Regents cannot be compelled to recognize a union and to bargain with a union unless the Legislature so provides. The above referenced authorities clearly indicate that only the Legislature has the authority to mandate such a form of collective bargaining between its administrative agencies and public employees.

The second question presented asks whether or not a county may enter into an agreement to meet with representatives of a public employees' union and discuss wages, terms of employment and working conditions. From the discussion

on the preceding question, it is logical to conclude that the county may enter into such an agreement so long as the union representatives are not the exclusive representatives of all the employees of the union.

In State Board of Regents v. United Packing House, Etc., supra, the Iowa Supreme Court said:

A public employer's general power to carry out its assigned functions is sufficiently inclusive to permit consultation with all persons affected by those functions. * * * This consultation serves the public interest by permitting informed governmental action without abridging governmental freedom of action. 175 N.W.2d at 112-113.

Our opinion is that a county may enter an agreement to consult and confer with a public employees' union. However, the union may not be regarded as the exclusive representative of the union's members, nor can the agreement preclude other negotiations or agreements between the county and individual employees. In addition, the consult and confer agreement may not delegate any authority to such a union or representative regarding employment, but may only be considered as a vehicle to insure informed governmental action.

The final question presented asks if a county may enter into an employment agreement with a union when the county has provided for a county employee merit system pursuant to A.R.S. §§ 11-351, et seq. Our opinion is that a merit system is statutorily provided for, and therefore takes precedence over any other agreements not statutorily provided for.

Respectfully submitted,

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by F.S.

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