

10-7E-17. Scope of bargaining.

A. Except for retirement programs provided pursuant to the Public Employees Retirement Act [Chapter 10, Article 11 NMSA 1978] or the Educational Retirement Act [Chapter 22, Article 11 NMSA 1978], public employers and exclusive representatives:

(1) shall bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties. However, neither the public employer nor the exclusive representative shall be required to agree to a proposal or to make a concession; and

(2) shall enter into written collective bargaining agreements covering employment relations. Entering into a collective bargaining agreement shall not obviate the duty to bargain in good faith during the term of the collective bargaining agreement regarding changes to wages, hours and all other terms and conditions of employment, unless it can be demonstrated that the parties clearly and unmistakably waived the right to bargain regarding those subjects. However, no party may be required, by this provision, to renegotiate the existing terms of collective bargaining agreements already in place.

B. In regard to the Public Employees Retirement Act and the Educational Retirement Act, a public employer in a written collective bargaining agreement may agree to assume any portion of a public employee's contribution obligation to retirement programs provided pursuant to the Public Employees Retirement Act or the Educational Retirement Act. Such agreements are subject to the limitations set forth in this section.

C. The obligation to bargain collectively imposed by the Public Employee Bargaining Act shall not be construed as authorizing a public employer and an exclusive representative to enter into an agreement that is in conflict with the provisions of any other statute of this state; provided, however, that a collective bargaining agreement that provides greater rights, remedies and procedures to public employees than contained in a state statute shall not be considered to be in conflict with that state statute. In the event of an actual conflict between the provisions of any other statute of this state and an agreement entered into by the public employer and the exclusive representative in collective bargaining, the statutes of this state shall prevail.

D. Payroll deduction of the exclusive representative's membership dues shall be a mandatory subject of bargaining if either party chooses to negotiate the issue. The amount of dues shall be certified in writing by an official of the labor organization and shall not include special assessments, penalties or fines of any type. The public employer shall honor payroll deductions until the authorization is revoked in writing by the public employee in accordance with the negotiated agreement and this subsection and for so long as the labor organization is certified as the exclusive representative. Public employees who have authorized the payroll deduction of dues to a labor organization may revoke that authorization by providing written notice to their labor organization during a window period not to exceed ten days per year for each employee. The public employer and the labor organization shall negotiate when the commencement of that period will begin annually for each employee. If no agreement is reached, the period shall be during the ten days following the anniversary date of each employee's employment. Within ten days of receipt of notice from a public employee of revocation of authorization for the payroll deduction of dues, the labor organization shall provide notice to the public employer of a public employee's revocation of that authorization. A public employee's notice of revocation for the payroll deduction of dues shall be effective on the thirtieth day

after the notice provided to the public employer by the labor organization. No authorized payroll deduction of dues held by a public employer or a labor organization on July 1, 2020 shall be rendered invalid by this provision and shall remain valid until replaced or revoked by the public employee. During the time that a board certification is in effect for a particular appropriate bargaining unit, the public employer shall not deduct dues for any other labor organization.

E. Public employers and a labor organization, or their employees or agents, are not liable for, and have a complete defense to, any claims or actions under the law of this state for requiring, deducting, receiving or retaining fair share dues or fees from public employees, and current or former public employees do not have standing to pursue these claims or actions if the fair share dues or fees were permitted at the time under the laws of this state then in force and paid, through payroll deduction or otherwise, on or before June 27, 2018. This subsection:

(1) applies to all claims and actions pending on July 1, 2020 and to claims and actions filed on or after July 1, 2020; and

(2) shall not be interpreted to infer that any relief made unavailable by this section would otherwise be available.

F. The scope of bargaining for the exclusive representative and the state shall include enhancements of employee rights and benefits existing pursuant to the Personnel Act [Chapter 10, Article 9 NMSA 1978].

G. The scope of bargaining for representatives of public schools as well as educational employees in state agencies shall include, as a mandatory subject of bargaining, the impact of professional and instructional decisions made by the employer.

H. An impasse resolution or an agreement provision by the state and an exclusive representative that requires the expenditure of funds shall be contingent upon the specific appropriation of funds by the legislature and the availability of funds. An impasse resolution or an agreement provision by a public employer other than the state or the public schools and an exclusive representative that requires the expenditure of funds shall be contingent upon the specific appropriation of funds by the appropriate governing body and the availability of funds. An agreement provision by a local school board and an exclusive representative that requires the expenditure of funds shall be contingent upon ratification by the appropriate governing body. An arbitration decision shall not require the reappropriation of funds.

I. An agreement shall include a grievance procedure to be used for the settlement of disputes pertaining to employment terms and conditions and related personnel matters. The grievance procedure shall provide for a final and binding determination. The final determination shall constitute an arbitration award within the meaning of the Uniform Arbitration Act [44-7A-1 to 44-7A-32 NMSA 1978]; such award shall be subject to judicial review pursuant to the standard set forth in the Uniform Arbitration Act. The costs of an arbitration proceeding conducted pursuant to this subsection shall be shared equally by the parties.

J. The following meetings shall be closed:

(1) meetings for the discussion of bargaining strategy preliminary to collective bargaining negotiations between the public employer and the exclusive representative of the public employees of the public employer;

(2) collective bargaining sessions; and

(3) consultations and impasse resolution procedures at which the public employer and the exclusive representative of the appropriate bargaining unit are present.

History: [Laws 2003, ch. 4, § 17](#); [2003, ch. 5, § 17](#); [2020, ch. 48, § 10](#).

ANNOTATIONS

The 2020 amendment, effective July 1, 2020, revised the scope of bargaining provisions, including allowing parties to bargain regarding a public employer assuming a portion of public employees' retirement contributions, clarifying that a collective bargaining agreement that provides greater rights, remedies and procedures than contained in a state statute shall not be considered to be in conflict with that state statute, dictating procedures regarding how and when dues deductions are determined, and providing that bargaining shall include enhancements of employee rights and benefits existing pursuant to the Personnel Act; in Subsection A, Paragraph A(2), after "written collective bargaining agreements covering employment relations", added the remainder of the paragraph; added a new Subsection B and redesignated former Subsections B and C as Subsections C and D, respectively; in Subsection C, after "any other statute of this state", added "provided, however, that a collective bargaining agreement that provides greater rights, remedies and procedures to public employees than contained in a state statute shall not be considered to be in conflict with that state statute", and after "In the event of", added "an actual"; in Subsection D, after "in accordance with the negotiated agreement", added "and this subsection", and added "Public employees who have authorized the payroll deduction of dues to a labor organization may revoke that authorization by providing written notice to their labor organization during a window period not to exceed ten days per year for each employee. The public employer and the labor organization shall negotiate when the commencement of that period will begin annually for each employee. If no agreement is reached, the period shall be during the ten days following the anniversary date of each employee's employment. Within ten days of receipt of notice from a public employee of revocation of authorization for the payroll deduction of dues, the labor organization shall provide notice to the public employer of a public employee's revocation of that authorization. A public employee's notice of revocation for the payroll deduction of dues shall be effective on the thirtieth day after the notice provided to the public employer by the labor organization. No authorized payroll deduction of dues held by a public employer or a labor organization on July 1, 2020 shall be rendered invalid by this provision and shall remain valid until replaced or revoked by the public employee"; and added new Subsections E and F and redesignated the remaining subsections accordingly.

A non-union member of a collective bargaining unit is subject to arbitration provisions of a collective bargaining agreement. — Where petitioner was a regular full-time non-probationary sworn police officer employed by the municipal police department and a member of the collective bargaining unit covered by the union's collective bargaining agreement; petitioner did not join the union, did not pay union dues, and never sought assistance from the union; the municipality recognized the union as the exclusive collective bargaining representative for regular full-time non-probationary sworn police officers; and petitioner initiated a grievance procedure to challenge petitioner's termination, petitioner was a public employee, working for a public employer and was subject to the Public Employee Bargaining Act, the collective bargaining agreement, and the requirements of the collective bargain agreement and the act that petitioner's grievance challenging petitioner's termination was subject to binding arbitration. *Luginbuhl v. City of Gallup*, [2013-NMCA-053](#), [302 P.3d 751](#).

A collective bargaining agreement was supported by adequate consideration. — Where petitioner was a police officer employed by the municipal police department, a member of the

collective bargaining unit, and subject to the union's collective bargaining agreement; petitioner did not join the union, did not pay union dues, and never sought assistance from the union; and petitioner enjoyed the benefits of the collective bargaining agreement, including increased compensation for serving as a member of the municipal emergency response team, vacation and holiday pay, a clothing allowance, and seniority rights, the collective bargaining agreement was supported by adequate consideration and the arbitration provision of the agreement was enforceable as to petitioner. *Luginbuhl v. City of Gallup*, 2013-NMCA-053, 302 P.3d 751.

A collective bargaining agreement was not vague. — Where petitioner was a police officer employed by the municipal police department and a member of the collective bargaining unit; the collective bargaining agreement provided a four-step grievance process that culminated in arbitration; the arbitration clause applied to written disputes regarding disciplinary action; the arbitration process was set forth in detail; and petitioner initiated a written dispute by engaging in the grievance process to challenge petitioner's termination, the arbitration clause was not vague or uncertain in its application to petitioner. *Luginbuhl v. City of Gallup*, 2013-NMCA-053, 302 P.3d 751.

The arbitration provision of a collective bargaining agreement provided an adequate remedy at law for disputes. — Where petitioner was a police officer employed by the municipal police department and a member of the collective bargaining unit; the collective bargaining agreement provided a four-step grievance process that culminated in arbitration; and petitioner had the statutory right to appeal any arbitration decision to the district court, arbitration provided an adequate and complete forum and remedy at law for disputes governed by the collective bargaining agreement, including petitioner's grievance challenging petitioner's termination. *Luginbuhl v. City of Gallup*, 2013-NMCA-053, 302 P.3d 751.

Failure to implement wage increase due to economic considerations. — Where a collective bargaining agreement provided for annual wage increases for the second and third fiscal years of the three year term of the agreement contingent upon city council approval pursuant to the city's labor management relations ordinance; the ordinance provided that in order for a collective bargaining agreement to be approved by the city council, the city council had to approve the economic components of the contract and adopt a resolution providing an appropriation to cover the cost of the contract; because of a revenue shortfall, the city council adopted a budget that did not include funding for wage increases for the third fiscal year as required by the agreement, and the city had sufficient funds to cover the wage increases, the city breached the agreement when it failed to implement the wage increases for the third fiscal year because the city council had appropriated the funding to cover the cost of wage increases for the third fiscal year when it initially approved the agreement pursuant to the ordinance. *Albuquerque Police Officers' Ass'n v. City of Albuquerque*, 2013-NMCA-110, cert. denied, 2013-NMCERT-011.

Management-rights clause. — A union's waiver of its right to mandatory bargaining under a management-rights clause, which gives management rights not limited by a collective bargaining agreement, will not be inferred unless it is clear and unmistakable that the union was aware of its rights and made the conscious choice to waive its rights. *County of Los Alamos v. Martinez*, 2011-NMCA-027, 150 N.M. 326, 258 P.3d 118.

Where the county and the firefighters union were parties to a collective bargaining agreement; the agreement contained a management-rights clause that gave the county certain specific operational and policy rights, as well as all rights not specifically limited by the contract; the county entered into contracts with individual firemen to provide for voluntary paramedic training which specified terms of employment during and after the training program; the paramedic training contracts were not covered by the collective bargaining agreement; and the paramedic training contracts were mandatory subjects of bargaining, the union did not clearly and unmistakably waive its right to

bargain for the paramedic training contracts. *County of Los Alamos v. Martinez*, 2011-NMCA-027, 150 N.M. 326, 258 P.3d 118.

"Zipper" clause. — A "zipper" clause, which provides that a collective bargaining agreement is the complete and only agreement between the parties on all subjects and that the parties waive the right to bargain with respect to any other matter not specifically referred to in the agreement, is to be given such effect as the bargaining posture, past practices and agreements of the parties indicate. *County of Los Alamos v. Martinez*, 2011-NMCA-027, 150 N.M. 326, 258 P.3d 118.

Where the county and the firefighters union were parties to a collective bargaining agreement; the agreement contained a "zipper" clause which provided that the agreement was the complete and only agreement between the parties, that all mandatory subjects of collective bargaining had been negotiate, and that each party waived the right to bargain collectively as to any subject not specifically covered by the agreement; the county entered into contracts with individual firemen to provide for voluntary paramedic training which specified terms of employment during and after the training program; the paramedic training contracts were not covered by the collective bargaining agreement; the paramedic training contracts were mandatory subjects of bargaining; and there was no evidence about the bargaining history, expectations of the parties, past practices, or surrounding circumstances of the parties' collective bargaining, the district court did not err in finding that the union did not waive its right to bargain for the paramedic training contracts based on the "zipper" clause. *County of Los Alamos v. Martinez*, 2011-NMCA-027, 150 N.M. 326, 258 P.3d 118.

An arbitration award that requires a public employer other than the state to expend funds is contingent upon the appropriation and availability of funds. *International Assn. of Firefighters v. City of Carlsbad*, 2009-NMCA-097, 147 N.M. 6, 216 P.3d 256, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

Arbitration decision contingent upon appropriation of funds. — Where a municipality and a union reached an impasse in their negotiations over wages; the parties entered into an agreement to resolve the impasse by arbitration and selected an arbitrator; the arbitrator entered an arbitration award pursuant to Section 10-7E-18 NMSA 1978 that awarded a wage increase to the union; and the municipality did not appropriate funds to pay the wage increase, the union could not enforce the arbitration award by an action in district court, because under Section 10-7E-17 NMSA 1978, the arbitration award was contingent upon the appropriation and availability of funds. *International Assn. of Firefighters v. City of Carlsbad*, 2009-NMCA-097, 147 N.M. 6, 216 P.3d 256, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

Arbitration decision did not require the reappropriation of funds. — Where the state and the unions entered into collective bargaining agreements that covered salary increases for union employees in fiscal year 2009; the state determined that the legislature had not appropriated sufficient funds to cover the full salary increases for union employees and implemented salary increases for all employees that differed from those required by the agreements; the arbitrator determined that the Legislature had appropriated sufficient funds to cover the salary increases required by the agreements and that the state's pay package violated the terms of the agreements; and the arbitrator directed the state to adjust the union employee's salary levels for fiscal year 2010 to reflect the level they would have been had the salary increases been provided as required by the agreements, the arbitrator's award did not violate Subsection E of Section 10-7E-17 NMSA 1978. *State v. AFSCME Council 18*, 2012-NMCA-114, 291 P.3d 600, cert. granted, 2012-NMCERT-011.

Lack of evergreen clause. — Where the municipality and labor unions reached an impasse in negotiations to replace existing collective bargaining agreements; the municipal labor management ordinance did not require that expiring collective bargaining agreements continue in full force and effect until replaced by subsequent agreements; and no municipal appropriation had occurred to

extend the agreements and the municipality did not have available funds to fund the economic components of the extension of the agreements, the Public Employee Bargaining Act did not apply to the economic components of the existing agreements because provisions of collective bargaining agreements that require an expenditure of funds are subject to Subsection E of Section 10-7E-17 NMSA 1978, which requires the specific appropriation and availability of funds and the Act did not require the extension of the existing agreements in conflict with Subsection E of Section 10-7E-17 NMSA 1978. *AFSCME Council 18 v. City of Albuquerque*, 2013-NMCA-012, 293 P.3d 943, cert. granted, 2013-NMCERT-001.

Collective bargaining procedures were exempt from the evergreen provision. — Where the municipality's labor-management relations ordinance, which was adopted in 1974, included impasse resolution procedures through mediation and arbitration, but did not require that expired collective bargaining agreements remain in effect until successor agreements were reached; when the collective bargaining agreements between the municipality and the unions expired and the parties were unable to agree upon successor agreements, the municipality refused to honor a provision of the expired agreements that required the municipality to compensate union members for union business conducted during municipality work time; and the unions argued that the municipality was required to comply with the evergreen provision of Subsection D of Section 10-7E-18 NMSA 1978 regardless of the grandfather status of the municipality's ordinance, the municipality's collective bargaining procedures were exempt, under Subsection A of Section 10-7E-26 NMSA 1978, from compliance with the evergreen provision. *AFSCME Council 18 v. City of Albuquerque*, 2013-NMCA-063, 304 P.3d 443, cert. quashed, 2013-NMCERT-009.

Appointment of interim board member by municipality did not violate the grandfather clause requirement. — Where a municipal ordinance required the president of the city council to appoint an interim member of the municipal labor-management relations board when the board met during the absence of a regular board member; the ordinance had been grandfathered under the Public Employee Bargaining Act; the president was an elected city councilor who was elected as president by city council members; and the president did not perform any executive functions, the president did not serve in either a "management" or a "labor" capacity and the procedure by which the president appointed an interim board member during the absence of a regular board member did not violate the act's grandfather clause requirement that a local ordinance create a system of collective bargaining. *City of Albuquerque v. Montoya*, 2012-NMSC-007, 274 P.3d 108, rev'g 2010-NMCA-100, 148 N.M. 930, 242 P.3d 497.

Appointment of interim board member by municipality. — The grandfather clause does not apply to the provision of a municipal labor-management relations ordinance which provides that if one of the appointed local board members is absent, the president of the city council shall appoint an interim board member from the public at large with due regard to the representative character of the local board because the ordinance did not permit employees to bargain collectively. *City of Albuquerque v. Montoya*, 2010-NMCA-100, 148 N.M. 930, 242 P.3d 497, cert. granted, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146, rev'd, 2012-NMSC-007, 274 P.3d 108.